NO. 26092

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KEITH QUEEN, Individually and as the Special Administrator of the Estate of Jo Ella Queen, Plaintiff-Appellant, v. JAMES ROBINSON; KONA COAST SKIN DIVER, LTD., INC. (erroneously named "Kona Coast Skin Diver, Ltd."); JOHN AND JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; and DOE ENTITIES 1-10, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 98-606)

MEMORANDUM OPINION
(By: Burns, C.J., Nakamura and Fujise, JJ.)

I.

Plaintiff-Appellant Keith Queen (Queen), individually and as Special Administrator of the Estate of Jo Ella Queen, appeals from the August 19, 2003 "Judgment on Jury Verdict" (Judgment) entered by the Circuit Court of the Third Circuit[1] (circuit court). On appeal, Queen challenges the circuit court's award of costs to Defendant-Appellee Kona Coast Skin Diver, Ltd., Inc. (Kona Coast). Based upon a close review of the issues raised and arguments made by the parties, the applicable law and the record in this case, we vacate the cost award contained in the Judgment and remand for proceedings consistent with this opinion.

[1] The Honorable Riki May Amano presided over the jury trial and the hearing on the Motion for Hearing on Bill of Costs held on July 24, 2002. The Honorable Terence T. Yoshioka entered the Judgment on Jury Verdict.

II.

On December 24, 1998, Queen filed a complaint for the wrongful death of Jo Ella Queen against Kona Coast and Defendant James Robinson (Robinson), sounding in contract and negligence. After discovery and adjudication of a number of motions for summary judgment filed by both sides, Kona Coast made an offer of settlement to Queen on February 18, 2002 (February 2002 Offer), pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 68. The February 2002 Offer consisted of "payment in the amount of $75,000, inclusive of any and all costs and/or applicable attorneys' fees, in exchange for [Queen's] dismissal of his entire action against KONA COAST SKIN DIVER, LTD., INC., with prejudice; and with mutual releases in favor of both parties of any and all further and/or other liability." The February 2002 Offer was not accepted.

Summary judgment having been granted as to all claims against Robinson, trial was had on Queen's claims against Kona Coast, resulting in the entry of a Judgment on Jury Verdict on April 29, 2002 in favor of Robinson and Kona Coast.

Kona Coast and Robinson moved for costs on June 27, 2002, and based their motion on HRCP Rule 54(d)(1) as prevailing parties and on HRCP Rule 68, as Queen rejected their February 2002 Offer. Kona Coast claimed costs in the amount of $103,037.74. Attached as exhibits to the motion were a copy of the February 2002 Offer, the April 29, 2002 Judgment on Jury

Verdict and the Declaration of William J. Turbeville, II, in which "Defendant's Bill of Costs" (Bill of Costs) was included. The Bill of Costs consisted of a listing of the various costs claimed, organized by category and identified by the name of the individual or goods. Although the declaration attested that "the amounts contained herein were necessarily incurred in the defense of the case and the services for which the fees have been charged were actually and necessarily performed and charged to the client," it contained no invoices for services rendered or receipts for the goods received nor did it specify the dates on which the services or goods were provided.

Queen filed a memorandum in opposition, on the grounds that Kona Coast had failed, in its moving papers, to provide a factual foundation for the circuit court to conclude that the costs were either incurred after the February 2002 Offer or were reasonable. Queen also maintained that the costs claimed by Kona Coast were unreasonable under Hawaii Revised Statutes (HRS) § 607-9 and relevant case law and went on to specifically challenge most of the costs by category.

Kona Coast's reply argued that Queen had failed to carry his burden of establishing Kona Coast's costs were unreasonable and provided no invoices or other documentation supporting its Bill of Costs. Besides arguing that certain costs were "incurred by them in the defense of the present matter," and that the costs of "Experts/Witness Travel Expenses," "Witness Fees" and "Trial Expenses" were incurred for the purpose of

trial, Kona Coast did not attempt to specify which of the claimed costs were incurred after the February 2002 Offer was made.

A hearing on the motion was held on July 24, 2002, when Kona Coast's attorney revealed, "in spite of what our moving papers say," that there was an earlier, July 18, 2001 offer of settlement (July 2001 Offer) made to Queen, in the amount of $7,500, that Queen rejected at a settlement conference held on July 22, 2001. Queen objected to Kona Coast's reliance on the July 2001 Offer because

> it was the defendant's obligation to make such an offer, if one was made, part of the record and it has not been made part of the record. First time that it's been mentioned in terms of the record is today. And I believe the defendant's [sic] have had every opportunity, just as we have had every opportunity, under the Rules of Civil -- Civil Procedure to bring within the domain of the record by way of affidavit or otherwise all of the facts necessary to support the relief that they're seeking. They haven't done that. And to come on the day of the hearing and to say, 'oh, oh, the facts that we've raised as the basis for our motion, um, don't include this essential fact,' uh, I don't think is proper. We would object to it on that -- on that basis. In addition, it doesn't afford us the opportunity to really argue the matter because it really wasn't before the court until this morning.
>
> Um, I believe there's case law that indicates that a very nominal offer made, even under rule 6 -- under Rule 68, um, if it's in the nature of being so nominal as to indicate that the case is without merit, and the case in -- in actuality had merit, even though the case is lost, the Rule 68 isn't proper. But, again, we have not had an opportunity to really address that issue and, as a factual matter, the issue isn't in front of the court.

Later, Queen clarified, "I'm not saying that one was never made" but that it was Kona Coast's burden to establish for the record that the July 2001 Offer had been made. The circuit court specifically asked Queen to make his arguments assuming the existence of two offers of settlement, to which Queen responded:

> I would -- I would challenge the earlier Rule 68 as being so nominal as to indicate that the case lacked any merit

> whatsoever. In other words, it would've been unreasonable for us to have accepted it. And I believe there's case law to that effect. If a party makes a very very low Rule 68 offer, one that reflects the case is absolutely without merit, when the case does in fact have merit, it should not be considered a valid Rule 68 offer.

The circuit court noted that, prior to the July 22, 2001 settlement conference, it had expressed to Queen that he had "a pretty tough road to haul [sic] in this case." Queen replied,

> I understand the spirit of what the judge is telling us.
>
> I think even if there was that discussion, it does not obviate the defendant's burden to lay the proper factual foundation for the court to find -- make a determination of reasonableness, which is essentially what our papers address, regarding the costs which are challenged. But, again, I think that's sufficiently briefed within our -- our papers and we really don't need to go over that again.

The circuit court orally granted Kona Coast's motion for costs, ruling,

> Well I would say that this case was very unusual based on just listening to the witnesses because as it turns out the people that were on the boat at the time had unusual backgrounds that allowed them, permitted them to give a variety of opinions relative to the legal issues before the jury, in addition to your experts.
>
> So I -- I believe that all of the experts -- I don't think there was a single expert that was irrelevant. So I think that we have to leave it that way, to both sides to bring -- to put their own cases to the jury.
>
> So having considered all of your arguments, and all of the factors in this case, and the pleadings, and the Court is going to grant the motion for bill of costs and award to the defense these sums [sic]: $103,037.74. I believe the breakdown presented by the defendants, especially -- especially referring to the declaration of Mr. Turbeville, adequately delineates the costs that the court, by law, may consider and order. So the court is granting these costs pursuant to rules 54 and 68.

On September 6, 2002, the circuit court issued an Order Awarding Defendants' Costs (Costs Award) in the amount of $103,037.74. On August 19, 2003, the Judgment was entered pursuant to HRCP Rule 58, in favor of Kona Coast and Robinson and

against Queen as to all of Queen's claims. Costs, as specified in the Costs Award, were awarded to Kona Coast. As to the claims against Robinson, the parties were ordered to bear their own fees and costs. On September 16, 2003, Queen noted his appeal "from the order of the Circuit Court of the Third Circuit, State of Hawai'i, entitled '*Order Awarding Defendants [sic] Costs*,' filed herein September 6, 2002."[2]

III.

Queen raises four points of error on appeal, all pertaining to the award of costs to Kona Coast. He argues that the circuit court erred by (1) allowing Kona Coast to rely on the July 2001 Offer when it did not rely on this offer in its written motion for costs and where the July 2001 Offer was not documented in the record; (2) awarding HRCP Rule 68 costs to Kona Coast where Kona Coast failed to provide evidence that the costs sought by Kona Coast were incurred after the HRCP Rule 68 offer was made; (3) awarding all of Kona Coast's costs where Kona Coast

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[2] Queen literally, albeit incorrectly, appeals from the Costs Award, which is neither "final" nor certified for interlocutory appeal. Hawaii Revised Statutes (HRS) § 641-1; Ass'n of Owners of Kukui Plaza v. Swinerton & Walberg Co., 68 Haw. 98, 105, 705 P.2d 28, 34 (1985) ("'[n]or does the statute permit appeals [from orders that are only] steps towards final judgment in which they will merge.'") (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). However, after two previous unsuccessful attempts, a final judgment -- the August 19, 2003 Judgment on Jury Verdict -- was entered and this Court has jurisdiction to review the prior, Costs Award. State v. Adam, 97 Hawai'i 475, 482, 40 P.3d 877, 884 (2002), Kahalewai v. Rodrigues, 4 Haw. App. 446, 450, 667 P.2d 839, 842 (1983). See also Munoz v. Small Business Admin., 644 F.2d 1361, 1364 (9th Cir. 1981) ("an appeal from the final judgment draws in question all earlier non-final orders and all rulings which produced the judgment") and 15A Charles Alan Wright & Arthur R. Miller, et al., Federal Practice and Procedure, § 3905.1 (Supp. 2005) ("once appeal is taken from a truly final judgment that ends the litigation, earlier rulings generally can be reviewed").

failed to provide a prima facie factual showing of reasonableness; and (4) implicitly finding that all of Kona Coast's costs were reasonable.

An award of costs is reviewed under the abuse of discretion standard. Wong v. Takeuchi, 88 Hawai'i 46, 52, 961 P.2d 611, 617 (1998). An abuse of discretion occurs when the lower court "exceed[s] the bounds of reason or disregard[s] rules or principles of law or practice to the substantial detriment of" a party. See generally, Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted).

We initially note that the circuit court awarded costs under HRCP Rules 54(d) and 68, but did not identify the costs awarded under each rule. While the ambit of each rule may overlap they are not coextensive. Costs under HRCP Rule 68 must be preceded by a qualifying offer of settlement -- one that fully and completely decides all the claims against the offeror -- the qualifying offer must be rejected or deemed rejected by the offeree and the qualifying offer must not be bettered by the judgment obtained by the offeree. HRCP Rule 68; Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 306, 972 P.2d 295, 309 (1999). Rule 68 costs are limited to those incurred after the date the settlement offer was made and must be properly awardable under HRS § 607-9 -- actually disbursed and deemed reasonable by the court -- and not expressly prohibited by statute or precedent. Canalez, 89 Hawai'i at 306, 972 P.2d at 309.

By contrast, costs under HRCP Rule 54(d) are awarded to the "prevailing party" and are generally limited to those costs listed in HRS § 607-9, as courts are admonished to exercise their discretion "sparingly" in awarding costs not so specified. Wong, 88 Hawai'i at 53-54, 962 P.2d at 618-619.

With this analytical framework, we turn to the issues presented here.

A.

Queen first argues that the circuit court erred by applying HRCP Rule 68's cost shifting mechanism to the July 2001 Offer because his due process rights were violated by the lack of notice, prior to the hearing, that Kona Coast intended to rely on this earlier settlement offer and because Kona Coast failed to "properly place[] it in the record."

A party seeking an order for relief from a court must do so by motion, stating the basis for relief with particularity. HRCP Rule 7(b)(1).

> In the absence of a showing of prejudice, the substance of a motion rather than its form will usually be considered. Motions worded very generally have been found sufficiently particular where the opposing party had notice of the specific basis for the motion. When a motion does not give adequate notice of the grounds relied upon, summary denial of the motion will usually follow.

2 James Wm. Moore, Moore's Federal Practice, § 7.03[4][a] (3rd ed. 2005) (footnotes omitted). In addition, HRS § 607-9 requires that the costs be "sworn to by an attorney or a party."

Kona Coast's Motion for Costs was based upon the February 2002 Offer. Kona Coast raised the July 2001 Offer as

the grounds for its motion for costs for the first time at the July 24, 2002 hearing. However, HRCP Rule 7(b)(1)[3] required that Kona Coast specify the basis for its motion in its written motion. Rules of the Circuit Courts of the State of Hawai'i Rule 7 echoes that requirement and adds, "[i]f a motion requires the consideration of facts not appearing of record, it shall be supported by affidavit." The July 2001 Offer was neither specified in Kona Coast's motion nor documented by affidavit or otherwise in the record.

Assuming, *arguendo,* Kona Coast's announcement at the hearing that he intended to rely on the July 2001 Offer was an offer to amend his motion, we turn to Queen's arguments challenging notice and proof.

As to notice, it appears that Queen may not have known, prior to the hearing, that Kona Coast would rely on the July 2001 Offer, but he was aware of the offer and did not dispute that the offer was made, only that Kona Coast had not presented evidence documenting the offer. Although he did object to Kona Coast's change of position at the hearing, Queen was given ample

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[3] Hawai'i Rules of Civil Procedure Rule 7(b)(1) states in part:

> An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

However, "[a]n oral argument on a motion previously made is not . . . the 'hearing' at which the necessity for reducing motions to writing may be obviated." Hammond-Knowlton v. Hartford-Connecticut Trust Co., 26 F. Supp. 292, 293 (D. Conn. 1939).

opportunity at the hearing to make his arguments regarding not only the proof of the offer, but whether it was a valid offer for HRCP Rule 68 purposes. Queen did not ask for a continuance or leave to submit additional memoranda, nor does he argue on appeal what he would have done had he been given notice in advance. Based on this record, we cannot say that Queen's ability to defend against this motion, as amended, was prejudiced.

Queen's argument that the circuit court erred in relying on the July 2001 Offer because Kona Coast failed in its "burden as the moving party to properly introduce into the record all facts necessary to support its motion" is another matter. As the colloquy between the circuit court and counsel revealed, the circuit court was aware of the July 2001 Offer by virtue of its participation in the July 22, 2001 settlement conference, not due to any evidence in the record. A rejected HRCP Rule 68 settlement offer is deemed withdrawn and the rule provides that "evidence thereof is not admissible except in a proceeding to determine costs." It follows that the offeror must actually present evidence of the offer to establish entitlement to costs under this rule. This requirement is not a mere formality, but allows both the trial court and the appellate court to review the offer and determine whether the offer qualifies as a valid HRCP Rule 68 settlement offer, that is, whether it fully and completely decided the claim or claims, as required by Crown Properties, Inc. v. Financial Sec. Life Ins. Co., 6 Haw. App. 105, 113, 712 P.2d 504, 510 (1985). It also establishes the date

of a qualifying offer as the starting point for the determination of eligible costs. As the July 2001 Offer was not proven on the record, any award based thereon must be vacated. On remand, if Kona Coast intends to rely on July 2001 Offer, it must provide documentation of the same to the court.

B.

Queen's next three points of error boil down to a challenge to Kona Coast's proof in support of the individual costs. Queen did not oppose Kona Coast's costs in the amount of $25,289.21,[4] and thus has not preserved any challenge to those costs. Bank of Hawaii v. Char, 40 Haw. 463, 467 (1954) ("an appellate court will consider only such questions as were raised and properly preserved in the lower court") (internal quotation marks and citation omitted). See also Wong, 88 Hawai'i at 53, 961 P.2d at 618 ("[u]nless there is a specific objection to an expense item, the court ordinarily should approve the item. The burden of proving correctness of items shifts to the party claiming them only after objections have been filed to specific items.") (internal quotation marks and citations omitted). Queen did oppose the following costs:

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[4] The costs not opposed by Queen were:

Court reporter fees:	$12,472.00
Filing fees:	$ 344.43
Subpoenas:	$ 629.83
Mediation Services:	$ 923.82
Medical records, Police report:	$ 37.70
Telephone Disposition:	$ 578.68
Travel Expenses for depositions:	$ 2,542.65
Expert fees not discussed in Queen's Memo in Opposition:	$ 7,760.10
Total:	$25,289.21

Transcripts:	$ 670.72
Expert Billing:	$65,029.07
Expert/Witness Travel Expenses:	$ 6,994.47
Witness Fees:	$ 2,792.82
Trial Expenses:	$ 2,261.45
Total:	$77,748.53

Queen argues that Kona Coast failed to provide a sufficient factual foundation (1) to reasonably determine that Kona Coast's requested costs were incurred after the Rule 68 offer and (2) to determine that all costs were reasonable pursuant to HRS § 607-9 and Hawai'i case law. In light of the record before us, we agree.

The circuit court awarded Kona Coast's costs totaling $103,037.74 pursuant to HRCP Rules 54(d) and 68 but did not specify what costs were awarded under which rule. See Forbes v. Hawaii Culinary Corp., 85 Hawai'i 501, 511, 946 P.2d 609, 619 (App. 1997) (in awarding attorneys fees under HRS §§ 607-14 and 666-14 trial court must specify amount awarded under each statute). Only those costs actually incurred after the date of a qualifying offer of settlement are eligible under Rule 68. Canalez, 89 Hawai'i at 306, 972 P.2d at 309. Queen specifically challenged Kona Coast's request for costs on the basis that the dates these costs were incurred were not proven. Kona Coast did not provide the circuit court with the dates these costs were incurred. It was incumbent upon Kona Coast to submit this proof. Id. at 307, 972 P.2d at 310. As Kona Coast did not provide evidence showing which of its costs were incurred after either settlement offer was made, the circuit court abused its

discretion to the extent it awarded costs under HRCP Rule 68 without this proof. On remand, to the extent Kona Coast wishes to rely on HRCP Rule 68 for an award of costs, it must provide proof that those costs were incurred after the date of a proven offer of settlement.

Pre-offer costs could, of course, be considered under HRCP Rule 54(d) as Kona Coast was the prevailing party, provided they qualified under HRS Chapter 607. On remand, Kona Coast must specify the rule that authorizes each cost and must aver or otherwise document a factual basis that would bring that cost under the specified rule and the authorizing statute.

IV.

CONCLUSION

The Judgment on Jury Verdict of the Circuit Court of the Third Circuit is vacated with respect to the award of costs. The case is remanded for further proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawai'i, March 31, 2006.

On the briefs:

Robert J. Crudele and
Brian J. De Lima,
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Richard A. Lesser,
for Defendants-Appellees.

James A. Burns
Chief Judge

Associate Judge

Associate Judge