

NOT FOR PUBLICATION

NO. 26530

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

MARY CHRISTINE L. WATERS, Plaintiff-Appellee
v.
RICHARD A. WATERS, JR., Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 00-1-265)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant Richard A. Waters, Jr. (Richard), appeals from the March 24, 2004 "Order Denying Defendant's Motion for Relief from Final Judgment or Order Based Upon Newly Discovered Evidence, Fraud and Misrepresentation by the Adverse Party Filed April 19, 2001" (March 24, 2004 Order Denying Motion) entered in the Family Court of the Third Circuit.^{1/}

Briefly, the relevant facts are as follows: Richard was born on September 19, 1935. Christine was born on June 27, 1943. Richard and Christine were married on April 7, 1966. On December 6, 2000, Christine prepared a one-page handwritten property division agreement, signed by Christine and Richard. On December 19, 2000, Christine filed a complaint for divorce against Richard. By that time, their only child was an emancipated adult.

^{1/} Judge William S. Chillingworth presided.

EMIL RIMANDO
JEROME A. BELLI
SIMI BELLI
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On December 20, 2000, Richard signed a detailed Agreement Incident to and in Contemplation of Divorce (AICOD) prepared by counsel for Christine. The terms of its property division were consistent with the December 6, 2000 handwritten agreement. On December 22, 2000, the AICOD was signed by Christine and was filed.

On December 29, 2000, after a hearing on December 27, 2000, the court filed a Divorce Decree which approved and incorporated the AICOD.

On April 19, 2001, Richard filed a Motion for Relief from Final Judgment or Order Based Upon Newly Discovered Evidence, Fraud and Misrepresentation by Adverse Party. The trial was held on September 29, 2003, November 17, 2003, and January 29, 2004. On March 24, 2004, the court filed its order denying Richard's April 19, 2001 motion.

On April 2, 2004, Richard filed a motion for reconsideration. The court did not decide this motion.

On April 22, 2004, Richard filed a notice of appeal. This case was assigned to this court on February 9, 2005.

We have appellate jurisdiction. The Hawai'i Rules of Appellate Procedure Rule 4(a) (2005) states, in relevant part, as follows:

(2) Premature Filing of Appeal. In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal.

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(3) Time to Appeal Affected by Post-Judgment Motions. If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, or seeks attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

The notice of appeal shall be deemed to appeal disposition of all post-judgment motions that are filed within 10 days after entry of judgment.

In this appeal, Richard asserts the following points:

1. The court erred in failing to apply the partnership model and Hawaii Revised Statutes (HRS) § 580-47 and to identify valid considerations for deviating from the partnership model.

2. The court erred in adopting findings and conclusions prepared by Christine's attorney instead of composing its own.

3. The court erred in applying the wrong criteria and the wrong burden of proof in denying Richard's motion for relief.

4. The court erred in failing to address Richard's motion to reconsider and Richard's response to Christine's memorandum opposing his motion.

5. The court erred in failing to set aside the property division in the divorce decree based on newly discovered evidence of Christine's misconduct.

6. The court erred in not setting aside the property settlement because it is unconscionable on its face.

We disagree with points 1, 2, 4, and 6 above. The AICOD is not unconscionable on its face.

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Point 3 also was an issue decided by the court after a trial. The court decided that Richard failed to meet his burden of proving fraud by clear and convincing evidence. In point 3, Richard contends that "a defendant does NOT have to prove fraud by clear and convincing evidence; instead the Court has a DUTY to ferret out fraud in the interest of justice." We disagree. The Hawai'i Supreme Court

has long recognized that a party claiming fraud must establish the following elements:

(1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them.

The party claiming fraud must establish these elements by clear and convincing evidence.

Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 386, 14 P.3d 1049, 1067 (2000) (citations omitted).

Point 5 also was an issue decided by the court after a trial. In its March 24, 2004 Order Denying Motion, the court "finds that the testimony of [Christine] is more credible than the testimony of [Richard]." Thus, there are no facts to support Richard's allegation of the existence of the required newly discovered evidence.

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

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IT IS HEREBY ORDERED that the March 24, 2004 "Order Denying Defendant's Motion for Relief from Final Judgment or Order Based Upon Newly Discovered Evidence, Fraud and Misrepresentation by the Adverse Party Filed April 19, 2001" is affirmed.

DATED: Honolulu, Hawai'i, January 24, 2006.

On the briefs:

Richard A. Waters,
plaintiff-appellant *pro se*.


Chief Judge

Douglas L. Halstead,
for Defendant-Appellee.


Associate Judge


Associate Judge