OPINION OF ACOBA, J., DISSENTING
IN PART AND CONCURRING IN PART

I respectfully disagree that the failure to meet the requirements of Hawai'i Rules of Civil Procedure (HRCP) Rule 56(e) should not result in vacation of circuit court orders granting motions for summary judgment but concur that when the circuit court fails to provide reasons for its award of attorney's fees, the appropriate course is to remand the issue for clarification by the court.

I.

We have long held on questions of summary judgment that we stand in the shoes of the circuit court and, consequently, apply the same standards as the circuit court. See, e.g., Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) ("We review an award of summary judgment under the same standard applied by the circuit court."). Thus we review the record de novo. See State Farm Mut. Auto. Ins. Co. v. Gepaya, 103 Hawai'i 142, 145, 80 P.3d 321, 324 (2003) (citing Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000)) ("We review the circuit court's grant or denial of summary judgment de novo."). Because we review the record de novo, none of the circuit court's findings or conclusions are binding on us. See Chun v. Bd. of Trustees of Employees' Ret. Sys., 92 Hawai'i 432, 438, 992 P.2d 127, 133 (2000) ("Under [the de novo] standard, we examine the facts and answer the question

without being required to give any weight to the trial court's answer to it.").

Consequently, our de novo review on appeal from a summary judgment order is unlike that of appellate review in Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 948 P.2d 1055 (1997),[1] or Okuhara v. Broida, 51 Haw. 253, 456 P.2d 228 (1969),[2] referred to by the majority. See majority opinion at 10-11. See Beamer v. Nishiki, 66 Haw. 572, 576, 670 P.2d 1264, 1270 (1983) ("Unlike other appellate matters, in reviewing summary judgment decisions an appellate court steps into the shoes of the trial court and applies the same legal standard as the trial court applied." (Emphasis added.)). In conducting de novo review, we evaluate a motion for summary judgment anew. See State ex rel. White v. Hoshijo, 102 Hawai'i 307, 315, 76 P.3d 550, 558 (2003) (defining de novo as "anew, afresh, a second time" and describing de novo review "as if the reviewing court is the front-line judicial authority and therefore, accords no deference to the lower courts' determinations" (citations and

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[1] In Kawamata Farms, 86 Hawai'i at 247-48, 948 P.2d at 1088-89, this court addressed, inter alia, whether the circuit court erred in imposing discovery sanctions by violating appellant's constitutional rights. Inasmuch as this issue was not raised on appeal via a summary judgment motion and this court was not applying de novo review, the Kawamata court's holding that the appellants waived said issue on appeal, by failing to raise it before the trial court, is inapplicable to the case at hand.

[2] Okuhara concerned the wrongful admission of extrinsic evidence not objected to at trial. See 51 Haw. at 254-55, 456 P.2d at 229-30. Thus, this court was not applying de novo review of a summary judgment decision and, accordingly, like Kawamata Farms, Okuhara is distinguishable.

brackets omitted)). Hence, the concept of plain error[3] stemming from a party's failure to comply with HRCP Rule 56(e), see majority opinion at 13-14, in the circuit court has little, if any, relevance to our review on appeal.

Although the majority cites 10B C. Wright, A. Miller, & M. Kane, Federal Practice & Procedure: Civil § 2738 (3d ed. 2004) [hereinafter Wright & Miller] for the proposition that the "majority" of federal courts believe a party who fails to object to inadmissible matter waives the right to object on appeal, that treatise indicates only that "in the absence of 'a gross miscarriage of justice,' the court may consider the defective affidavit." (Emphasis added.) Hence, Wright & Miller acknowledges that the lack of an objection does not automatically mean that the defective material must be credited or given effect. As Wright & Miller states, even where no "gross miscarriage of justice" would result, summary judgment may still be denied by the trial court because of the inadequacy of the supporting materials. See CMS Indus., Inc. v. L.P.S. Int'l Ltd., 643 F.2d 289, 295 (5th Cir. 1981) (stating "whatever may have been the sufficiency of [appellee's] objections, the district

[3] Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2005) states that "[p]oints not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." This court has held that "'an appellate court will only consider such questions as were raised and properly preserved in the lower courts. That rule applies . . . unless this court is of the opinion that any of the alleged errors or alleged abuses patently appear on the record as a manifest error injuriously affecting substantial rights of the appellants.'" In re Matsuoka, 45 Haw. 83, 88, 363 P.2d 964, 967 (1961)(quoting In re Ward, 39 Haw. 39, 46 (1951)).

court may on its own motion and without abuse of discretion, properly refuse to credit an affidavit clearly defective on its face" (emphasis added)).

At the very least, then, the trial courts retain discretion to reject inadmissible evidence even if such evidence was not contested. See Klingman v. Nat'l Indem. Co., 317 F.2d 850, 854 (9th Cir. 1963) ("On a motion for summary judgment, if no objection is made to an affidavit which is objectionable under [Federal Rules of Civil Procedure (FRCP)] Rule 56(e), the affidavit may be considered by the court in ruling on the motion." (Emphasis added.)); Mitchell v. Dooley Bros., Inc., 286 F.2d 40, 42 (1st Cir. 1960) (stating that "we do not believe it would have been error . . . for the [trial] court to have refused to consider letters" that were unauthenticated hearsay, "[b]ut [the trial court] having done so without apparent objection below, we will not concern ourselves with any possible impropriety"); Becker v. Koza, 53 F.R.D. 416, 419 (D. Neb. 1971) ("At most the failure to object to an affidavit which is objectionable under Rule 56(e) permits the court to consider the affidavit." (Emphases added.)).

In view of our de novo review, we also should retain such discretion to reject inadmissible evidence without resort to plain error analysis. As this court has said, "[i]t is a well-established principle that on a motion for summary judgment, the record must be adequate for decision of the legal issues presented. Otherwise summary judgment must be reversed and, in

the discretion of the appellate court, remanded for additional proceedings." Mizoguchi v. State Farm Mut. Auto. Ins. Co., 66 Haw. 373, 381-82, 663 P.2d 1071, 1076 (1983) (citations omitted) (emphasis added); see id. at 382, 663 P.2d at 1076-77 (remanding for "additional evidence of work loss to support the judgment below" because the "only factual reference to decedent's work loss [was] . . . not supported by any affidavit as required under HRCP Rule 56(e)").

Based upon an independent examination of the record, this court has reversed orders granting summary judgment because of HRCP Rule 56 violations. See In re Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 12, 868 P.2d 419, 430 (1994) (holding that summary judgment was "improper" where it was based on computations derived from schedules that were "plainly hearsay" (affidavit attached to schedules failed to comply with HRCP Rule 56(e) by not stating that the affiant had personal knowledge of the contents of the schedules)); Pac. Concrete Fed. Credit Union v. Kauanoe, 62 Haw. 334, 336-37, 614 P.2d 936, 938 (1980) (holding that the requirements of HRCP Rule 56(e) "are mandatory" and that "[b]ecause [a] ledger had not been attached to the affidavit [that relied upon the ledger], any information therefrom was inadmissible and should not have been considered by the circuit court"); Cane City Builders, Inc. v. City Bank of Honolulu, 50 Haw. 472, 474, 443 P.2d 145, 147 (1968) (concluding that a release that did not fulfill the requirements of HRCP Rule 56(e) "was not properly before the court on the motion for

summary judgment and[, therefore,] the trial judge erred in considering the release in granting the motion"). Hence, in our decisions we have taken a more solicitous role in insuring that adequate and sufficient evidence support summary judgments as opposed to a rigid rule that has been characterized as applying in the so called "majority" of federal courts. With all due respect, I think it is a mistake to ignore the experience of our own jurisdiction in the administration of HRCP Rule 56.

Consequently, this court should retain discretion to sua sponte vacate orders granting motions for summary judgment where HRCP Rule 56(e) has not been satisfied. By doing so, we properly administer HRCP Rule 56(e) in consonance with our role of examining summary judgment motions "anew." To the extent that we do, we safeguard the process by which cases can be justifiably disposed of without a trial. HRCP Rule 56(e) requirements are not mere technicalities. They are necessary prerequisites that substantiate the replacement of one's "day in court" with a summary disposition of the case. In my view, the value in maintaining the integrity of that process outweighs any purported efficiency,[4] see majority opinion at 11 (quoting Kawamata Farms,

[4] For example, in this case, Plaintiff's counsel at trial was different from counsel on appeal, so no advantage could be garnered from trial counsel's failure to properly follow Rule 56 requirements at trial for the purpose of reserving them for appeal. Additionally, although the majority refers to sandbagging, no evidence of that exists in the record. See majority opinion at 14 (quoting In re Teltronics Servs., Inc., 762 F.2d 185, 192 (2d Cir. 1985)). Indeed, none of our cases even hint that the contrivance posited by the second circuit court of appeals, i.e., that "[p]arties may . . . selectively oppos[e] the points they choose, and on appeal claim[] that the unopposed points were defectively presented and required no response," In re Teltronics Servs., Inc., 762 F.2d at 192, has any semblance to the real world (continued...)

86 Hawai'i at 248, 948 P.2d at 1089), obtained as a result of ignoring clear violations of Rule 56(e).

The rule adopted by the majority may in fact work injustice in cases where material facts will be established by virtue of a waiver. As alluded to earlier, the plain error rule affords no consolation in this regard because its application subjects a case to another layer of decision-making and considerations other than admissibility of evidence, increasing the risk that the injustice may not be corrected because of a disagreement in this court regarding the applicability or scope of the plain error doctrine itself.

The ICA followed long established precedent. See, e.g., G.E. Capital Hawai'i, Inc. v. Yonenaka, 96 Hawai'i 32, 42, 25 P.3d 807, 817 (App. 2001) (relying on In re Hawaiian Flour Mills, 76 Hawai'i 1, 11, 868 P.2d 419, 429 (1994) for the proposition that inadmissible hearsay statements may not be relied on in summary judgment, and on Nakato v. Macharg, 89 Hawai'i 79, 89, 969 P.2d 824, 834 (App. 1998), for the proposition that "an affidavit consisting of inadmissible hearsay cannot serve as a basis for . . . summary judgment"). In light of the reasons stated above, there is no sound basis for affirming the order granting summary judgment, especially in the face of AIG's own admission that it did not comply with HRCP

[4](...continued)
of summary judgment proceedings. Additionally, such a rule will have an untoward effect on the pro se party who many times is at a disadvantage in discerning the intricacies of a summary judgment motion.

Rule 56.[5]

II.

As to its second holding, the majority agrees that the question of "apportionment between assumpsit and non-assumpsit claims was clearly before the circuit court[,]" majority opinion at 15, the amount awarded of $20,000 in attorney's fees was a "substantial portion" of the $21,386.00 requested, id. at 16, and that the circuit court did not provide any "explanation" for its award, id. at 15. When a trial court has failed to provide reasons for an award of attorney's fees, appellate courts in this jurisdiction have followed the practice of remanding the case to the court to provide such reasons, a course fair to the parties and corroborative of the trial court's assigned role in such matters. See, e.g., Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 445, 32 P.3d 52, 89 (2001) (directing court on remand to determine "whether successful and unsuccessful claims involved a common core of facts or were based on related legal theories" in arriving at reasonable attorney's fees (internal quotation marks, citations and brackets omitted)); Fujimoto v. Au, 95 Hawai'i 116, 168-69, 19 P.3d 699, 751-52 (2001) (requiring circuit court, on remand, to reassess its award of attorneys' fees and costs in light of the lack of explanation given by the circuit court as to why said fees and costs were awarded); First

[5] In its answering brief, AIG declares it "will not dispute for purposes of this appeal Plaintiffs' contention that its deposition exhibits lacked proper authentication." AIG further states in its footnote no. 5 that "its deposition exhibits failed to meet the requirements of Haw. R. Civ. P. 56(e)."

Hawaiian Bank v. Timothy, 96 Hawai'i 348, 365, 31 P.3d 205, 222 (App. 2001) (remanding to the circuit court for redetermination of attorneys' fees due to difficulty of appellate court to "evaluate . . . the propriety of the circuit court's award"); Forbes v. Hawaii Culinary Corp., 85 Hawai'i 501, 503, 946 P.2d 609, 611 (App. 1997) (remanding award of attorneys' fees for designation of statutory provisions under which award was made and for rendering of findings of fact and conclusions of law in support of such decision). There is no reason to depart from this salutary rule.