

\*\*\* NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER \*\*\*

NO. 26394

IN THE SUPREME COURT OF THE STATE OF HAWAII

JUNIE BARNEDO and JUAN BARNEDO, Plaintiffs-Appellees,

vs.

ERLINDA DOMINGUEZ, dba THE LAW OFFICES OF ERLINDA DOMINGUEZ,  
Defendant-Appellant,

and

RON R. ASHLOCK; THOMAS KASTER; WILLIAM COPULOS; DAVID KUWAHARA;  
THOMAS WALSH; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS  
1-10; DOE PARTNERSHIPS 1-10; ROE "NON-PROFIT" CORPORATIONS  
1-10; and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.  
(NO. 26394; CIV. NO. 99-2847)

JUNIE BARNEDO and JUAN BARNEDO, Plaintiffs-Appellees,

vs.

ERLINDA DOMINGUEZ, dba THE LAW OFFICES OF ERLINDA DOMINGUEZ,  
Defendant-Appellant,

and

RON R. ASHLOCK; THOMAS KASTER; WILLIAM COPULOS; DAVID KUWAHARA;  
THOMAS WALSH; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS  
1-10; DOE PARTNERSHIPS 1-10; ROE "NON-PROFIT" CORPORATIONS  
1-10; and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.  
(NO. 26695; CIV. NO. 99-2847)

JUNIE BARNEDO and JUAN BARNEDO, Plaintiffs-Appellees,

vs.

ERLINDA DOMINGUEZ, dba THE LAW OFFICES OF ERLINDA DOMINGUEZ,  
Defendant-Appellant,

and

NORMA T. KARR  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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RON R. ASHLOCK; THOMAS KASTER; WILLIAM COPULOS; DAVID KUWAHARA;  
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1-10; DOE PARTNERSHIPS 1-10; ROE "NON-PROFIT" CORPORATIONS  
1-10; and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.  
(NO. 27035; CIV. NO. 99-2847)

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APPEALS FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 99-2847)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and  
Circuit Judge Lee in place of Acoba, J., recused)

In this legal malpractice action arising out of an underlying product liability suit and default judgment obtained in federal court, attorney and defendant-appellant Erlinda Dominguez appeals pro se from the Circuit Court of the First Circuit's February 9, 2004 amended final judgment<sup>1</sup> in favor of her former clients, plaintiffs-appellees Junie and Juan Barnedo [hereinafter, the Barnedos], awarding the Barnedos: (1) \$483,875.09 in damages; (2) \$479,637.16 in prejudgment interest (as of October 7, 2003); (3) \$112,468.77 in attorneys' fees; and (4) \$6,426.73 in costs. On appeal, Dominguez appears to contend that the circuit court: (1) erred when it denied her May 3, 2004 and November 8, 2004 postjudgment motions for relief from the

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<sup>1</sup> The Honorable Dexter Del Rosario presided over the first motion for summary judgment. The Honorable Victoria S. Marks presided over all other pretrial matters, including the second motion for summary judgment, and the trial. The Honorable Karen Blondin served as Arbitration Judge. The Honorable Gary W.B. Chang presided over the postjudgment motions.

judgment because the judgment was void for lack of subject matter jurisdiction due to defects in the Barnedos' Hawai'i Arbitration Rules (HAR) Rule 22<sup>2</sup> notice of appeal from the Court Annexed Arbitration Program (CAAP) award in Dominguez's favor; (2) erred in concluding that the Barnedos' complaint was not barred by the statute of limitations; (3) erred in denying her April 2, 2003 motion for judgment as a matter of law due to the Barnedos' failure to prove duty, causation, or damages; (4) erred or abused its discretion when it admitted the records from the federal action, including the Barnedos' trial exhibits 2, 30, 31, 35, 36, 37, and 50 over her objections because they lacked foundation, were irrelevant and unfairly prejudicial, and constituted hearsay; (5) erred when it issued repetitious, misleading, and incorrect jury instructions over her objections; (6) erred when it issued a misleading special verdict form to the jury over her objections; (7) abused its discretion in awarding attorneys' fees under Hawai'i Revised Statutes (HRS) § 607-14 (1993) because the instant action was not in the nature of assumpsit; (8) abused its discretion when it awarded prejudgment interest under HRS § 636-16 (1993) because the start date was arbitrary and

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<sup>2</sup> HAR Rule 22 provides in pertinent part:

(A) Within twenty (20) days after the award is served upon the parties, any party may file with the clerk of the court and serve on the other parties and the Arbitration Administrator a written Notice of Appeal and Request for Trial De Novo of the action.

unwarranted; and (9) abused its discretion when it denied Dominguez's October 15, 2004 motion for relief from the judgment due to the Barnedos' fraudulent declarations regarding the lack of an English translation of the pleadings in the Japanese declaratory judgment action.<sup>3</sup> The Barnedos, in addition to countering that the circuit court did not commit reversible error on any of the points raised by Dominguez, also argue that Dominguez's briefs violate Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b) and Section 5 of the Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers (GPCCHL) and ask this court to disregard certain arguments raised by Dominguez or impose sanctions as appropriate.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) In SC No. 26695, the circuit court erred when it concluded that it lacked jurisdiction to consider Dominguez's Hawai'i Rules of Civil Procedure (HRCPP) Rule 60(b) postjudgment motion for relief from the judgment on the merits. See Amantiad v. Odum, 90 Hawai'i 152, 158, 977 P.2d 160, 166 (1999) ("The

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<sup>3</sup> As set forth herein, one of the problems presented by this appeal is that it is difficult to discern precisely what Dominguez's points of error are. As such, the foregoing is this court's interpretation of her points of error.

existence of jurisdiction is a question of law that we review de novo under the right/wrong standard." (Citations omitted.); Life of the Land v. Ariyoshi, 57 Haw. 249, 252, 553 P.2d 464, 466 (1976) (stating that if an HRCP Rule 60(b) motion is filed while an appeal is pending, the trial court has jurisdiction to deny the motion on the merits without remand from the appellate court, but lacks jurisdiction to grant the motion). However, the error was harmless because the motion would have been properly denied on the merits in that the requirements of HAR Rule 22 are not jurisdictional, see HAR Rule 7 ("Cases filed in, or removed to, the Circuit Court shall remain under the jurisdiction of that court for all phases of the proceedings, including arbitration." (Emphasis added.)), and thus even if the BARNEDOS' notice of appeal failed to comply with the rule, DOMINGUEZ waived that error by failing to timely raise it. See HRCP Rule 61 (stating that no error is grounds for disturbing a judgment unless inconsistent with substantial justice); Hilo Fin. & Thrift Co., Ltd. v. De Costa, 34 Haw. 47, 48 (1936) (stating that procedural, as opposed to jurisdictional errors, are deemed waived if not timely asserted);

(2) The circuit court properly denied DOMINGUEZ's motions for summary judgment based on the statute of limitations. See Kau v. City & County of Honolulu, 104 Hawai'i 468, 473, 92

P.3d 477, 482 (2004) ("We review the circuit court's grant or denial of summary judgment de novo." (Citations omitted.)). First, there were genuine issues of material fact regarding when the BARNEDOS should have discovered the existence of their claims. See Higa v. Mirikitani, 55 Haw. 167, 172-73, 517 P.2d 1, 5-6 (1973) (stating that all legal malpractice actions, whether characterized as tort or contract actions, are governed by the six-year statute of limitations found in HRS § 657-1(1)), cited with approval in Blair v. Ing, 95 Hawai'i 247, 263 n.12, 21 P.3d 452, 468 n.12 (2001); Norris v. Six Flags Theme Parks, Inc., 102 Hawai'i 203, 206, 74 P.3d 26, 29 (2003) ("[T]he moment at which a statute of limitations is triggered is ordinarily a question of fact." (Citation omitted.)); Blair, 95 Hawai'i at 267; 21 P.3d at 472 ("[T]he trier of fact must determine the date by which [the plaintiffs] knew or should have known of their malpractice claim."); Buck v. Miles, 89 Hawai'i 244, 251, 971 P.2d 717, 724 (1999) ("[U]nder the discovery rule, the statute of limitations begins to run the moment the plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter." (Citations, internal quotation marks, and brackets omitted.)).

Second, Dominguez effectively abandoned the statute of limitations as a defense at trial in that she requested no

questions relating to the statute of limitations in the special verdict form, no jury instructions on the statute of limitations, and made no argument based on the statute of limitations during the trial.<sup>4</sup> Therefore, she should not be heard to appeal on such grounds now. See HRCF Rule 8(c) (stating that the statute of limitations is an affirmative defense); Mauian Hotel, Inc. v. Maui Pineapple Co., Ltd., 52 Haw. 563, 569, 481 P.2d 310, 314-15 (1971) ("It is general law that the statute of limitations is a personal defense and a person may waive the benefits of such statute." (Citations omitted.)); GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 526, 904 P.2d 530, 540 (App. 1995) (Acoba, J., concurring) (explaining that affirmative defenses not supported

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<sup>4</sup> The one exception to Dominguez's abandonment of the statute of limitations defense is her motion for judgment as a matter of law arguing that the Barnedos' theory based on Dominguez's failure to defend the Japanese action should not go to the jury because, under the discovery rule, it accrued in February 1991 in that (1) the Barnedos' own testimony demonstrated that they knew as of that time that Dominguez would "ignore" the Japanese action, and (2) the Barnedos should have known, based on the Japanese documents, that they would be deemed to have admitted the allegations in the Japanese complaint if they did not answer. However, even assuming that, despite their testimony that no English translation of the Japanese documents was attached, they should have known what those documents said about the consequences of failure to appear in the Japanese action, there was still a genuine issue of material fact, as to which Dominguez had the burden of proof, regarding when the Barnedos should have known of a causal connection between a default judgment against them in Japan and an inability to collect on their U.S. judgment (*i.e.*, when the Barnedos should have been charged with the knowledge that a Japanese court might refuse to enforce a foreign judgment that was in direct conflict with a valid final Japanese judgment). Because Dominguez cited no evidence on this point, much less evidence such that no reasonable juror could find against her, the circuit court did not err in denying judgment as a matter of law on this issue.

by evidence may be abandoned), aff'd, 80 Hawai'i 118, 905 P.2d 624 (1995);

(3) Dominguez fails to comply with HRAP Rule 28(b)<sup>5</sup> inasmuch as (a) some of Dominguez's points of error do not have a corresponding "Argument" section and/or do not state where in the

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<sup>5</sup> HRAP Rule 28(b) provides in relevant part:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;

(B) when the point involves a jury instruction, a quotation of the instruction, given, refused, or modified, together with the objection urged at the trial;

(C) when the point involves a finding or conclusion of the court or agency, a quotation of the finding or conclusion urged as error;

.....

Points 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. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

.....

(7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

(Emphases added.)



record she raised or objected to the error, (b) Dominguez's argument section raises a multitude of issues that she does not coherently argue and/or does not raise as separate points of error in her "Points of Error" section, and (c) throughout her opening briefs, Dominguez often fails to cite the appropriate standards of review or the relevant statutes. Therefore, we disregard her third, fourth, fifth, sixth, seventh, and eighth points of error. See HRAP Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded[.]"); HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."); State v. Moore, 82 Hawai'i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996) (disregarding a claim where a proponent fails to make any discernible argument in support thereof); Bitney v. Honolulu Police Dep't, 96 Hawai'i 243, 251, 30 P.3d 257, 265 (2001) (stating that generally "[i]ssues not properly raised on appeal will be deemed to be waived") (alteration in original) (quoting Hill v. Inouye, 90 Hawai'i 76, 82, 976 P.2d 390, 396 (1998));<sup>6</sup>

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<sup>6</sup> If this court were to sift the wheat from the chaff and construe Dominguez's scattershot arguments as raising meritorious points, such effort would cross the boundary between judging and advocating. See Alford v. City & County of Honolulu, 109 Hawai'i 14, 26, 122 P.3d 809, 821 (2005) (stating that generally "the appellate court cannot serve as both advocate and judge") (internal quotation marks and citation omitted).

(4) Throughout her briefs, Dominguez vents superfluous and inappropriate invective,<sup>7</sup> which clearly violates Section 5, GPCCHL;<sup>8</sup>

(5) The circuit court did not abuse its discretion in denying Dominguez's HRCF Rule 60(b) postjudgment motion for relief from the judgment for fraud on the court because the alleged fraud was discovered before the February 9, 2004 judgment was entered; Dominguez thus had the time and the means, both prior to entry of judgment in the trial court and prior to entry

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<sup>7</sup> For example, the following passage is from her opening brief in SC No. 26394:

THERE IS EVIL THAT LURKS UNDERNEATH APPELLEES' CLAIMS. COVERED WITH FALSE GRANDEUR, APPELLEES' CASE HAS NO ROOTS-IT REVEALED ITS TRUE INSIDES WHEN IT SPOUTED MORE VENOM. APPELLEES' CASE IS INHERENTLY VICIOUS BUT WITHOUT LIFE, A DEAD WEIGHT. APPELLEES' CASE MOLDED ITS ROLE IN LEGAL HISTORY- FICTITIOUS AND TYRANNICAL, HOLLOW BUT OPPRESSIVE. BUT APPELLEES UNDER-ESTIMATED THE POWER OF "WHAT IS TRUE"; APPELLEES MUST HAVE BELIEVED THEIR DEAD ROOTS WILL REMAIN HIDDEN AND UNDISCOVERED, CAUSING HAVOC, BUT THAT SPECIAL DAY OF RECKONING OF "JUSTICE BEYOND APPARENT JUSTICE" IS AT HAND.

(Formatting and emphases as in original.) (Footnote omitted.)

<sup>8</sup> Section 5 of the GPCCHL states in pertinent part:

Written materials submitted to the court should always be factual and concise and should accurately state the current law and fairly represent the parties' position without unfairly attacking the opposing party or opposing counsel.

Specifically, a lawyer who manifests professional courtesy and civility:

.....

(b) Does not degrade the intelligence, ethics, morals, integrity, or personal behavior of the opposing party, counsel or witness unless such matters are at issue in the proceedings.

of judgment on appeal in SC No. 26394, to verify whether the Barnedos had "lied" in their testimony, and to seek a remedy prior to entry of final judgment. See Beneficial Hawaii, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002) ("The circuit court's disposition of an HRCF Rule 60(b) motion is reviewed for abuse of discretion." (Citations omitted.)); Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 259, 948 P.2d 1055, 1100 (1997) ("Under the circumstances of this case, based on the egregious nature of DuPont's fraud, we construe the HRCF so as not to disallow a remedy under HRCF Rule 60(b)(3) when there is a post-judgment discovery of fraud supported by clear and convincing evidence." (Emphasis added.)); Standard Mgmt., Inc. v. Kekona, 98 Hawai'i 95, 100, 43 P.3d 232, 237 (App. 2001) (stating that where the HRCF Rule 60(b) movant "had ample opportunity to reveal [the alleged perjury] as such," he cannot maintain an independent action for litigation fraud); Hayashi v. Hayashi, 4 Haw. App. 286, 292, 666 P.2d 171, 175 (1983) (stating that an action for litigation fraud will not lie unless the plaintiff can show the absence of any other adequate remedy) (citing Winfield Assocs., Inc. v. Stonecipher, 429 F.2d 1087 (10th Cir. 1970)). Therefore,

IT IS HEREBY ORDERED that the circuit court's: (1)  
February 9, 2004 amended final judgment, appealed as SC No.

26394, is affirmed; (2) July 12, 2004 postjudgment order denying Dominguez's postjudgment motion to dismiss, appealed as SC No. 26695, is affirmed, but for the reasons stated herein; and (3) December 17, 2004 postjudgment orders (a) denying Dominguez's HRCF Rule 60(b) motion for relief from the February 9, 2004 judgment as void for lack of subject matter jurisdiction, and (b) denying Dominguez's motion for relief from the February 9, 2004 judgment for fraud on the court, appealed as SC No. 27035, are affirmed.

DATED: Honolulu, Hawai'i, September 29, 2006.

On the briefs:

Erlinda Dominguez,  
defendant-appellant,  
pro se

Francis T. O'Brien  
and Collin M. (Marty)  
Fritz for plaintiffs-  
appellees Junie Barnedo  
and Juan Barnedo

