CONCURRING AND DISSENTING OPINION BY ACOBA, J.

I concur with upholding the grant of summary judgment by the first circuit court (the court) on the ground that the basic propositions set out by the majority were first set out in Rodrigues v. State, 52 Haw. 156, 472 P.2d 509 (1970), and have been restated in subsequent cases. However, I respectfully dissent as to the majority's limitation on the "equities" that may be considered by trial courts under the express grant of discretion given by Hawai'i Revised Statutes (HRS) § 607-9 (1993). For that reason I would remand on the question of costs.

I.

First, the general tort principles set forth by the majority were established long ago in Rodrigues. In Rodrigues this court said, as to duty arising in a negligence case, that (1) "[d]uty . . . is a legal conclusion which depends upon 'the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection[,]'" id. at 170, 472 P.2d at 518 (quoting Prosser, Torts § 53 at 332 (3d ed. 1964)); compare majority opinion at 16, (2) "in determining the duty imposed on the defendant, if any, we must weigh the considerations of policy which favor the plaintiff's recovery against those which favor limiting the defendant's liability[,]" Rodrigues, 52 Haw. at 170, 472 P.2d at 519; compare majority opinion at 16, (3) "the question of whether the defendant is liable to the plaintiff in any particular case will

be solved most justly by the application of general tort principles[,]" Rodrigues, 52 Haw. at 174, 472 P.2d at 520; compare majority opinion at 16, (4) "a further limitation on the right of recovery, as in all negligence cases, is that the defendant's obligation to refrain from particular conduct is owed only to those who are foreseeably endangered by the conduct and only with respect to those risks or hazards whose likelihood made the conduct unreasonably dangerous[,]" id. at 174, 472 P.2d at 521; compare majority opinion at 17, 19-20, and (5) "the trial court must . . . decide whether, under the facts of [the] case, [the injury] to the plaintiff was a reasonably foreseeable consequence of the defendant's act[,]" Rodrigues, 52 Haw. at 174, 472 P.2d at 521, for "where the preliminary issue of whether the case presents questions on which reasonable men would disagree is for the court[,]" id. at 175 n.8, 472 P.2d at 521 n.8; compare majority opinion at 19-20. Hence, "the [majority's] foregoing formulation rests on the precepts in Rodrigues." Guth v. Freeland, 96 Hawai'i 147, 160, 28 P.3d 982, 995 (2001) (Acoba, J., concurring and dissenting).

II.

Second, I cannot agree with the majority's holding that Plaintiffs-Appellants Benjamin Pulawa, III (Benjamin) and Danelle Pulawa, individually and as Prochein Ami for Darcie Pulawa and Benjamin Pulawa, IV (collectively, Plaintiffs) "failed to meet their burden of overcoming the strong presumption that [Defendants-Appellees E.E. Black and GTE Hawaiian Tel] . . .

recover costs pursuant to [Hawai'i Rules of Civil Procedure (HRCP)] Rule 54(d) [(2006)]." Majority opinion at 42. I would remand the court's order on costs for reconsideration because (1) the majority adopts a new rule that courts may, but are not required to, consider indigency as a factor in awarding costs, a rule which did not exist before the court's order, (2) in that regard, a party is required to make a showing as to assets in order to prove indigency, and (3) the majority assigns a dispositive role to whether evidence was adduced concerning Plaintiffs' assets in this case -- a matter which apparently was not considered below by the parties or the court.

III.

HRCP Rule 54(d) states in relevant part:

> **(d) Costs; attorneys' fees.**
> (1) COSTS OTHER THAN ATTORNEYS' FEES. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State or a county, or an officer or agency of the State or a county, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 48 hours' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(Emphasis added.) (Boldfaced font in original.) In that regard, HRS § 607-9, entitled "Cost charges exclusive; disbursements," vests a court with discretion to do equity with regard to taxation of costs. HRS § 607-9 states:

> No other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or other proceeding, except as otherwise provided by law.
> All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies, and other incidental expenses, including copying costs,

> intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.

(Emphasis added.) Thus, when payment of costs are requested, a court retains discretion as to equitable factors. HRCP Rule 54 is subject to HRS § 607-9. On its face, HRS § 607-9 vests the court with discretion to award costs based on an examination of the "equities of the situation." Hence, the legislature, in enacting HRS § 607-9, mandated in its wisdom that the "situation[]" should govern. It did not specifically limit the nature or scope of the "equities" to be considered by the court. Therefore, limitations on the trial court's consideration "of the equities of the situation" would violate the express language in HRS § 607-9.

When an award of costs would be inequitable, then, there is no presumption that the costs will be granted as of course. In In re Paoli R.R. Yard PCB Litig., 221 F.3d 449, 463 (3d Cir. 2000), cited by the majority, the appellate court explained that,

> [r]eported cases have discussed a number of equitable factors . . . that a district court may consider in determining a costs award. . . . These factors include: (1) the unclean hands, or bad faith or dilatory tactics, of the prevailing party; (2) the good faith of the losing party and the closeness and difficulty of the issues they raised; (3) the relative disparity of wealth between the parties; and (4) the indigence or inability to pay a costs award by a losing party.

(Emphases added.) Factors such as those in Paoli should be viewed as examples of and not as limitations on equitable matters a court may consider.

IV.

The majority relies on Paoli for the proposition that a court may, but is not required to consider a party's indigency in determining whether costs be imposed. Majority opinion at 35. As earlier noted, Paoli lists other equitable factors to consider including, inter alia, "the relative disparity of wealth between parties." 221 F.3d at 463. Other courts have considered this as an equitable factor. See, e.g., Schaulis v. CTB/McGraw-Hill, Inc., 496 F. Supp. 666, 680 (N.D. Cal. 1980) (noting that, where there is a "wide disparity in economic resources" between parties, a party's indigence is a proper ground for denying costs); Key v. Chrysler Motors Corp., 998 P.2d 558, 579 (N.M. 2000) (recognizing disparity in wealth between parties as a factor in determining costs, but reversing trial court's disallowance of costs as an abuse of discretion inasmuch as losing party "failed to present any evidence regarding the disparity in size and resources between the two parties or evidence regarding a chilling effect on future litigation"); cf. Faraci v. Hickey-Freeman Co., 607 F.2d 1025, 1028 (2d Cir. 1979) (stating that, "because fee awards are at bottom an equitable matter, . . . courts should not hesitate to take the relative wealth of the parties into account"); Toliver v. County of Sullivan, 957 F.2d 47, 49 (2d Cir. 1992) (noting that, in awarding fees, "courts should not hesitate to take the relative wealth of the parties into account" (citation and internal quotation marks omitted)); Munson v. Friske, 754 F.2d 683, 697

(7th Cir. 1985) (stating that fee awards are equitable matters permitting the court "to consider the relative wealth of the parties" and the plaintiff's ability to pay). In Schaulis, the plaintiff was an individual litigant and the prevailing defendant was a large corporation. The Schaulis court recognized that "[t]here is no question that costs normally are awarded to the prevailing party in litigation. However, the district court, by the words of the rule itself, retains discretion in determining whether or not to award costs." 496 F. Supp at 680. The district court noted that there is a presumption that the prevailing party is entitled to costs even when the losing party acts "honestly and ethically." Id. However, that court further elaborated that, although "good faith litigation does not absolve a party from imposition of costs, . . . [i]ndigency is a proper ground for denying costs in cases where there is a wide disparity of economic resources between the parties." Id. (internal quotation marks and citations omitted). Hence, evaluation of an alleged disparity in financial means is an equitable factor that may be considered by the court as embodied in authority relied on by the majority.

V.

Another factor that courts have weighed is the chilling effect a disproportionate award of costs may have on a person's right to bring suit. In denying costs to the prevailing defendant, the Schaulis court stated that, "[t]his case has been vigorously litigated, and this Court concludes that it would

place an undue burden to tax costs against plaintiff. To do so in this context could only chill individual litigants of modest means seeking to vindicate their individual and class rights under the civil rights laws." Id.; see also Stanley v. Univ. of S. Cal., 178 F.3d 1069, 1079 (9th Cir. 1999) (concluding that "the district court abused its discretion, particularly based on the district court's failure to consider two factors: Stanley's indigency, and the chilling effect of imposing such high costs on future civil rights litigants"); United States ex rel. Pickens v. GLR Constructors, Inc., 196 F.R.D. 69, 77 (S.D. Ohio 2000) (denying assessment of costs because "there would be a significant 'chilling effect' on future relators if this Relator is assessed the . . . costs as asserted by Defendant because they may be persuaded from bringing complex and expensive [False Claims Act] actions, especially if future relators face the risk of paying substantial litigation costs to a prevailing defendant"); In re L.B., 651 So. 2d 1274, 1275 (Fla. Dist. Ct. App. 1995) (denying assessment of costs and explaining that "[n]ot only was it improper for the trial court to award the costs of an appeal prospectively, but such an award would have a chilling effect on a defendant's right to appeal, which this court will not condone"); cf. Abastillas v. Kekona, 87 Hawai'i 446, 449, 958 P.2d 1136, 1139 (1998) (stating that, "[w]e are mindful of the argument that allowing the assessment of attorneys' fees may have a chilling effect in deterring the filing of law suits based on innovative theories or to modify,

extend, or reverse existing law[]" (internal quotation marks, citations, and brackets omitted)); Kahana Sunset Owners Ass'n v. Maui County Council, 86 Hawai'i 132, 136 n.4, 948 P.2d 122, 126 n.4 (1997) (explaining that attorney's fees would not be awarded because it would have a "chilling effect" and deter citizens from filing suits under HRS § 92-12(c) (1993)[1]); FASA Corp. v. Playmates Toys, Inc., 1 F. Supp. 2d 859, 866 (N.D. Ill. 1998) (stating that "the chilling effect of awarding Playmates attorneys' fees would be too great and would impose an inequitable burden on FASA under the particular facts and equities presented by this case"); Fantasy, Inc. v. Fogerty, 94 F.3d 553, 560 (9th Cir. 1996) (noting that "the chilling effect of attorney's fees may be too great or impose an inequitable burden on an impecunious plaintiff"). Therefore, in light of the fact that this court has adopted the new rule that a party's indigency may be considered in assessing costs, the allied factors of the chilling effect an award of costs would have on a person's right to bring suit under circumstances similar to this case and the relative disparity of wealth between the parties should also be considered.

VI.

The majority asserts that Plaintiffs "never argued that . . . imposing costs against them would result in a chilling

[1] Hawai'i Revised Statutes (HRS) 92-12(c) states that with regard to suits concerning public agency meetings and records, the court "may order payment of reasonable attorney fees and costs to the prevailing party[.]"

effect on a person's right to bring suit[,] and . . . [never argued that] 'relative disparity of wealth between parties' is a factor to be considered in determining whether to award costs." Majority opinion at 41. On the contrary, as the authorities above indicate, this court has before and in this case determined that such factors are germane to a HRS § 607-9 analysis. HRS § 607-9 was raised by the parties and argued by them. Consideration of a constellation of factors, including the two detailed above, is mandated by the directive in HRS § 607-9 that courts consider the equities of the "situation." Hence, this court has established that the chilling effect of an award of fees is an equitable factor. See Abastillas, supra, and Kahana, supra. If relevant to an award of fees, such a factor should logically be considered when taxing costs against the losing party. In light of the language in HRS § 607-9, the court may consider any equitable factor relevant to the determination of costs. Such an evaluation obviously encompasses factors already sanctioned by this court. The same applies to the majority's reliance on Paoli, which lists relative disparity of wealth as a factor that may be considered. Thus, these two factors are well within the scope of any application of HRS § 607-9 by virtue of our established law and the majority's decision to adopt a new rule.

Artificial limitations on the scope of HRS § 607-9, then, would be violative of the plain language of HRS § 607-9. Given the discretionary language of HRS § 607-9, other equitable

factors in the adjudication of costs must be considered in the administration of the new rule adopted by this court.

VII.

Finally, remand is necessary in this case.

This case establishes that a party's inability to pay can be a factor in deciding to award costs. But, the majority sua sponte rules that Plaintiffs must produce "evidence about their assets." Majority opinion at 39. Plaintiffs' failure to address "assets" was never raised by any of the parties or the court. With all due respect, to decide on appeal that this failure disqualifies Plaintiffs from consideration of their purported indigency claim denies Plaintiffs due process in terms of fair notice and a fair hearing.

A.

I note, first, that the majority relies on Chapman v. AI Transp., 229 F.3d 1012, 1039 (11th Cir. 2000) (en banc) which ruled in part that "[i]f a . . . court[,] in determining the amount of costs to award[,] chooses to consider the non-prevailing party's financial status, it should require substantial documentation of a true inability to pay." Majority opinion at 36 (brackets in original). Insofar as that proposition is relied on it unfairly prejudices Plaintiffs. At the time of this case, our established precedent instructed non-prevailing parties that "some showing" of the inability to pay was necessary to overcome the presumption that a prevailing party be entitled to costs. See Wong v. Takeuchi, 88 Hawai'i 46, 52,

961 P.2d 611, 617 (1998) (providing that "[t]he presumption that the prevailing party is entitled to costs must be overcome by some showing that an award would be inequitable under the circumstances[]" (quoting 10 Moore's Fed. Prac. § 54.101(1)(a-b) (3d ed. 1998) (emphasis added)). In effect, to suggest that Chapman applies, imposes a new requirement of "substantial documentation" that retroactively raises the burden imposed on Plaintiff in the proceeding below.

B.

Second, the record does not reflect that the parties or the court considered that the assets of the plaintiffs should constitute the determinative role in the assessment of costs, as the majority holds. See Stewart v. Gates, 987 F.2d 1450, 1454 (9th Cir. 1993) (holding that fee awards are reviewed for abuse of discretion and stating that "[a]bsent some indication of how the district court's discretion was exercised, this court has no way of knowing whether that discretion was abused"). The Plaintiffs did attempt to show that they could not satisfy the assessment of costs against them because of limited financial means, particularly by establishing their current income, as well as Benjamin's inability to obtain gainful employment for the past eight years because of his injuries.[2] The majority also

[2] Relying on Wong v. Takeuchi, 88 Hawai'i 46, 52, 961 P.2d 611, 617 (1998), for the proposition that "[t]he presumption that the prevailing party is entitled to costs must be overcome by some showing that an award would be inequitable under the circumstances," Plaintiffs argued in the proceedings below that "[c]ompelling equitable circumstances weigh heavily in favor of disallowing an award of costs against [Plaintiff-Appellant Benjamin] Pulawa" including the fact that he remains unemployable, continues to rely on

(continued...)

recognizes that Plaintiffs adduced evidence indicating their inability to pay, including Benjamin's injuries, the fact that he remains unemployable, the nature of the benefits that Plaintiffs receive, and their income stream. Majority opinion at 39-40.

Yet, the majority singles out the lack of reference to assets as fatal to Plaintiffs' claim that an award of costs would be inequitable. Id. at 39. The majority concedes that Plaintiffs "may well be . . . unable to pay the assessed costs[,]" id. at 42, but nevertheless decides that Plaintiffs "failed to meet their burden of overcoming the strong presumption that [Defendants], as the prevailing parties, [will] recover costs pursuant to HRCP Rule 54(d)[,]" id.

There is no indication in the record that Plaintiffs were aware that their failure to list their assets or lack thereof was dispositive in this case, as the majority decides. The majority "decline[s] to adopt a rule that would place on circuit courts the burden of justifying a routine award of costs against losing parties." Majority opinion at 43. But a "routine award" is not involved here inasmuch as a substantial award of costs are involved -- $35,463.55 -- and the equitable factors discussed herein are implicated by the specific facts of the case.[3] The majority resolves the issue in favor of Defendants

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[2](...continued)
disability benefits for support, and has limited economic means that prevent him from obtaining doctor-recommended care and treatment.

[3] The majority's position in this regard appears inconsistent with analogous fee cases. See, e.g., Price v. AIG Hawai'i Ins. Co., 107 Hawai'i (continued...)

without Defendants having made such an argument, without any indication the court rendered its decision on that basis, and without allowing Plaintiffs an opportunity to show that in fact they lack the assets the majority would find dispositive.

C.

The question is not one of abuse of discretion. See majority opinion at 43. Inasmuch as this case establishes a new rule and the majority applies that rule by concluding for the first time on appeal that Plaintiffs' assets shall be a significant factor in determining inability to pay costs, the court's prior exercise of discretion is not implicated. Rather, it is fairness that dictates that Plaintiffs be given the opportunity by way of remand to show whether their assets are insufficient to satisfy such costs. See In re Petition of R.A., 66 P.3d 146, 151 (Colo. App. 2002) (ruling that "when an appellate court sets forth new standards for resolving an issue, basic fairness may require a remand to the trial court for further proceedings").

VIII.

Based on the record, any inadequacy in the listing of assets did not appear to enter into the court's ultimate order. In the interest of fairness, this issue should be remanded, permitting the court in the exercise of its equitable power to

[3](...continued)
106, 113, 111 P.3d 1, 8 (2005) (stating that judges must "specify the grounds for awards of attorneys' fees and the amounts awarded with respect to each ground" for "[w]ithout such an explanation, we must vacate and remand awards for redetermination and/or clarification").

reconsider its decision in light of the new rule adopted by this court, the requirement regarding assets, and the factors discussed herein relevant to HRS § 607-9.