*** FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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CHARLES BROOKS and DONNA BROOKS, Plaintiffs-Appellees,

vs.

DANA NANCE & CO. and FIDELITY NATIONAL FIELD SERVICES, INC., successor to CHICAGO TITLE CO., INC., Defendants-Appellants/Cross-Claimants-Appellants/Cross-Claim Defendants,

and

SEASONS MORTGAGE, INC., Defendant-Appellee/Cross-Claim Defendant-Appellee/Cross-Claimant,

and

ACS GOVERNMENT SERVICES, INC. fka COMPUTER DATA SYSTEMS, INC. aka CDSI, Defendant.

NO. 26736

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 01-1-0660)

JANUARY 12, 2007

MOON, C.J., LEVINSON, NAKAYAMA, AND DUFFY, JJ. AND ACOBA, J., DISSENTING

OPINION OF THE COURT BY LEVINSON, J.

The defendants-appellants/cross-claimants-appellants/cross-claim defendants Dana Nance & Company (Nance) and Fidelity National Field Services (Fidelity) [hereinafter, collectively, the Appellants], appeal from the July 20, 2004 order of the circuit court of the second circuit, the Honorable Joel E. August presiding, granting the defendant-appellee/cross-claim defendant-appellee/cross-claimant Seasons Mortgage, Inc.'s

(Seasons) petition for a determination of a good faith settlement with the plaintiffs-appellees Charles and Donna Brooks (collectively, the Brookses).

On appeal, the Appellants assert that the circuit court: (1) abused its discretion by determining, as required by Hawai'i Revised Statutes (HRS) § 663-15.5(b) (Supp. 2003),[1] that the settlement between Seasons and the Brookses was made in good faith; and (2) erred by dismissing the Appellants' cross-claim against Seasons despite the existence of a written indemnity agreement between Seasons and Fidelity.

For the reasons discussed infra in section III.A, we lack jurisdiction to directly address the Appellants' appeal, brought pursuant to HRS § 641-1 (1993),[2] of the dismissal of

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[1] HRS § 663-15.5, entitled "Release; joint tortfeasors; co-obligors; good faith settlement," provides in relevant part:

> (b) For purposes of subsection (a) [setting forth the rights of non-settling joint tortfeasors and co-obligors with regard to settlement agreements], any party shall petition the court for a hearing on the issue of good faith of a settlement entered into by the plaintiff . . . and one or more alleged tortfeasors . . . .
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> . . . .
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> (d) A determination by the court that a settlement was made in good faith shall:
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> (1) Bar any other joint tortfeasor . . . from any further claims against the settling tortfeasor . . . , except those based on a written indemnity agreement; and
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> (2) Result in a dismissal of all cross-claims filed against the settling joint tortfeasor . . . , except those based on a written indemnity agreement.
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> (e) A party aggrieved by a court determination on the issue of good faith may appeal the determination. . . .
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> . . . .

(Emphases added.)

[2] HRS § 641-1 provided in relevant part:

> (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit . . . courts . . .

(continued...)

their cross-claim, but we nevertheless analyze the merits and vitality of the cross-claim insofar as it informs our analysis, undertaken pursuant to HRS § 663-15.5(e), see supra note 1, of the circuit court's determination that the settlement was made in good faith. Furthermore, for the reasons discussed infra in section III.B and thereafter, we hold that the circuit court abused its discretion in determining that the settlement between Seasons and the Brookses was made in good faith and, accordingly, vacate the July 20, 2004 order concerning that determination and remand for further proceedings consistent with this opinion.

I. BACKGROUND

A. Factual Background

In May 1997, the United States Veterans Administration (VA), which held a mortgage on the Brookses' home on Maui, contracted with Computer Data Systems, Inc. (CDSI) to manage the mortgage, and, in September 1997, CDSI -- later ACS Government Solutions -- subcontracted with Seasons to service the mortgage payments. As part of the contract with CDSI, Seasons was obligated to preserve from neglect or abandonment properties subject to CDSI mortgages. Also in May 1997, Seasons contracted with Universal Mortgage Services, Inc. (Universal) -- which, through acquisition and rebranding, became Fidelity -- to perform

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[2](...continued)
to the supreme court . . . except as otherwise provided by law. . . .

. . . .

(c) An appeal shall be taken in the manner and within the time provided by the rules of court.

Effective July 1, 2006, the legislature amended HRS § 641-1 in a manner immaterial to the present appeal. See 2004 Haw. Sess. L. Act 202, §§ 66 and 85 at 943 and 948.

preservation and maintenance work on mortgaged properties in default or which had been abandoned. The agreement between Seasons and Universal contained the following indemnification clause:

> [Seasons] and Universal each agree to indemnify, defend and hold harmless the other party . . . from any and all loss . . . arising from the violation of any law or regulation by the party in its performance under this Agreement, compliance with the other party's instructions and requests, and the negligence on the part of a party . . . in the performance of this Agreement.
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> . . . . Neither Universal [nor] its inspectors . . . will be held accountable for any error . . . in completing the inspection unless such error . . . is made in bad faith by the inspector.

One of the properties managed by Seasons was the Brookses' home. Beginning in December 1997, payments on the mortgage fell into dispute, leading Seasons to instruct Fidelity to perform monthly inspections of the property. Seasons contends that, by July 1998, the Brookses had defaulted, and Fidelity subsequently informed Seasons that Fidelity's agent, Nance, had determined that the property had fallen vacant and was deteriorating. In response, Seasons instructed Fidelity to secure the property, and so, between November 1998 and early 1999, Nance changed the lock on the front door, boarded up a broken window and removed extensive debris from both inside and outside the home, including several apparently abandoned vehicles.

Meanwhile, on June 1, 1998, the division of the VA that managed the Brookses' mortgage had written to CDSI to acknowledge Nance's reports but, at the same time, to instruct CDSI that no "securing, board up [or] clean up" should take place, because the Honolulu office was in contact with the Brookses and generally

did not perform such actions until foreclosure was completed. There is evidence in the record reflecting that the VA also directed the same instruction to Seasons at the same time.

In late January 1999, several days after Fidelity oversaw the last removal work, Seasons instructed Fidelity to "return all items to their original locations and to stop any further work." Fidelity was evidently unable to locate and return much of the seized property, including the seized vehicles.

B. Procedural Background

On August 21, 2003, the Brookses filed a first amended complaint against the Appellants and Seasons alleging burglary, intentional infliction of emotional distress (IIED), unfair and deceptive trade practices, and conversion and seeking total damages of twenty-five million dollars.[3] They also alleged that the defendants had engaged in the actions at issue based on the Brookses' African-American ethnicity, "in violation of the Fair Housing Act of 1968, Title VIII, as amended, and the laws of the State of Hawai[']i and the United States." The circuit court subsequently: (1) dismissed the burglary and unfair and deceptive trade practices claims; (2) in regard to the conversion claim, dismissed "any reference therein to alleged violations of the Fair Housing Act of 1968, title VIII, and racial discrimination and/or related state or federal laws"; and (3) in regard to the IIED claim, struck "any allegations or references contained therein which concern or relate to alleged violations

[3] The first amended complaint also named CDSI as a defendant, but the company was later dismissed from the action as to all four counts.

of state or federal constitutional rights." On November 20, 2003, Fidelity filed a cross-claim against Seasons for contribution and indemnification. On December 8, 2003, Seasons responded with a cross-claim against the Appellants for contribution and indemnification for the actions undertaken on its behalf, apparently in part alleging bad faith on the Appellants' part in carrying out the inspections.[4]

Seasons entered into settlement negotiations with the Brookses, overseen by the Honorable E. John McConnell (Retired). In their April 15, 2004 settlement conference statement, the Brookses (1) asserted damages in excess of $1,800,000.00, including property losses totaling $126,000.00, $500,000.00 in claims of lost profits from lost business opportunities resulting from the seizures, and $200,000.00 in connection with the IIED claims and (2) demanded a minimum settlement of $500,000.00 plus $150,000.00 in attorney's fees. By April 22, 2004, the settlement demand had fallen to $200,000.00 and, after Seasons tendered a settlement offer of $100,000.00 on May 12, 2004 in return for a release of all claims against Seasons and for indemnification by the Brookses in favor of Seasons for all claims arising from the matter, the Brookses evidently accepted because, on June 21, 2004, Seasons filed a petition with the circuit court for a determination of a good faith settlement.

On June 29, 2004, the circuit court conducted a hearing on Seasons's petition. With regard to the good faith

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[4] By August 12, 2003, Seasons had become insolvent, and its representation had evidently been assumed by its insurance carrier, Montgomery Insurance Group.

determination, the court observed:

> I have looked at Troyer v. Adams[, 102 Hawai'i 399, 77 P.3d 83 (2003)], which talks about the totality of the circumstances which the court is supposed to look at to determine whether a settlement was made in good faith. . . . [T]his is up to the discretion of the court to make this determination, but they list a number of sample criteria. . . .
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> And, quite frankly, I think the realistic approximation of the total damages has been one of the great difficulties in this case, because there has been, I think, very little in terms of hard evidence as to what the special damages are, and I think that's difficult for everyone. . . .
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> Here, I don't think we have an issue of collusion or anything like that.
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> And some other evidence that the settlement is aimed at injuring the interests of a non-settling tortfeasor or motivated by wrongful purpose. I certainly don't see any evidence of that.
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> With regard to the amount, given how difficult it has been to come up with hard evidence of special damages . . . -- and given the last demand of the Brookses, which I think, under the circumstances, was . . . quite reasonable in light of what some of the possibilities are if a verdict is in their favor[--] I don't think that the amount that is being proposed here is improper or inadequate in any way.
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> . . . . I don't have a problem with the hundred thousand dollars being a reasonable amount in light of all the totality of the circumstances.
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> . . . .
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> So I'm basically finding that this settlement was made in good faith.

In reaching its conclusion, the circuit court considered the relative degree of fault borne by Seasons, remarking that

> I know that there is a dispute among the tortfeasors about the . . . question of who's at fault here, if anybody is. . . . [B]ut . . . the key issue here is . . . we have, so far as the court can see from the documents, . . . a mutual indemnity agreement. And to me, that is the key issue, because . . . you have got a section of the law which talks about preserving the rights of an indemnity agreement in [HRS §] 663-15.5[(d)(1), see supra note 1].
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> I don't think there is really any question here that there is an indemnity agreement between the two alleged joint tortfeasors. And when I looked at [HRS §] 663-15.5(d), it's very clear that . . . if I determine that this settlement is made in good faith

> . . . it does not bar any claims among the joint tortfeasors based on a written indemnity agreement, and it does not result in dismissal of cross-claims based on a written indemnity agreement.
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> . . . .
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> Now, I understand that an argument has been made here about the fact that . . . if the parties acted in bad faith, then you don't have to worry about the indemnity agreement. But the question about whether someone has acted in bad faith or not is really a jury question. . . .
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> . . . I don't know what the jury's going to decide. So I can't go ahead and make a ruling that . . . throws out the indemnity clause and makes that ineffective in light of the current circumstances.
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> . . . [O]nce the jury has made a decision, then the court ultimately is going to have to make a final decision about the effect of the indemnity clause, but I can't do that now.

(Emphasis added.) Seasons's counsel made it clear, however, that, without dismissal of the Appellants' cross-claims against Seasons, there would be no settlement. The court then struggled to balance the factors weighing in favor of a determination of good faith with what it recognized were reasonable arguments made by the Appellants' counsel, Michael Lam, that, pursuant to HRS § 663-15.5(d)(1), the Appellants' cross-claims could not be dismissed as part of the good faith settlement:

> The Court: Well, look. I can decide that it's unconditional at this point. Okay? But if the jury comes in and decides negligence, then you have got -- the court will then deal, I suppose, with -- if they bring in some kind of a motion for their attorney's fees and costs, the court will deal with that in light of the fact that the court is making a finding that this settlement was made in good faith, and the amount you paid out, and in light of the fact that there is a mutual indemnity clause. I'm not saying how I would rule, but I would take all that into account.
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> . . . .
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> Well, I think -- in light of the fact that the only claims that are still alive in this case are intentional torts, I think -- you know, the more the court has thought about that, the more appropriate it would be to make this unconditional. And depending on what findings are made by the jury, [the Appellants] may then be bringing motions before the court with regard to the issue of indemnity . . . after trial.
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> . . . .

Mr. Lam: All right, your Honor. So long as the order or the decision by the court's clear that our cross-claim still exists.
The Court: Well, I'm making it unconditional at this point.
Mr. Lam: So are you barring our cross-claims?
The Court: No.
Mr. Lam: Well, that's what I'm saying, is that you can --
The Court: Well, they are barred . . . subject to some motions made after the findings . . . unless there are findings which are made by the jury which would cause the court to reverse its decision later on. . . .

So I'm basically finding that this settlement was made in good faith, and . . . there are no . . . active cross-claims.

On July 20, 2004, the circuit court entered an order granting Seasons's petition, determining that the $100,000.00 settlement was made in good faith, and discharging and dismissing with prejudice the Appellants' cross-claim against Seasons. Evidently, soon thereafter, the Appellants settled with the Brookses for $125,000.00.

The Appellants filed two timely notices of appeal on July 28, 2004, one, filed pursuant to HRS § 663-15.5(e), see supra note 1, appealing the order determining that the settlement was made in good faith, and the other, filed pursuant to HRS § 641-1, see supra note 2, appealing the circuit court's dismissal of their cross-claims against Seasons.

II. STANDARDS OF REVIEW

A. Determination Of A Good Faith Settlement

> [T]he determination of whether a settlement is in good faith [is left] to the sound discretion of the trial court in light of the totality of the circumstances surrounding the settlement. . . . On appeal, the trial court's determination will be reviewed for abuse of discretion.

Troyer, 102 Hawai'i at 427, 77 P.3d at 111. An appellate court should consider the decision "in light of all of the relevant

circumstances extant at the time of settlement." Id. at 402, 77 P.3d at 86.

"An abuse of discretion occurs when the decisionmaker 'exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.'" In re Water Use Permit Applications, 94 Hawai'i 97, 183, 9 P.3d 409, 495 (2000) (quoting Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 387, 984 P.2d 1198, 1213 (1999)), quoted in State v. Wilmer, 97 Hawai'i 238, 243, 35 P.3d 755, 760 (2001); State v. Vliet, 95 Hawai'i 94, 108, 19 P.3d 42, 56 (2001).

B. Appellate Jurisdiction

> [I]t is axiomatic that we are "under an obligation to ensure that [we have] jurisdiction to hear and determine each case and to dismiss an appeal on [our] own motion where [we] conclude [we] lack[ ] jurisdiction." BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 73, 549 P.2d 1147, 1148 (1976). "When we perceive a jurisdictional defect in an appeal, we must, sua sponte, dismiss that appeal." Familian Northwest, Inc. v. Cent[.] Pac[.] Boiler & Piping, Ltd., 68 Haw. [368, 369], 714 P.2d 936, 937 (1986).

Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986) (some brackets added and some in original).

III. DISCUSSION

A. This Court Lacks Jurisdiction To Address The Dismissal Of The Appellants' Cross-Claims Brought Under HRS § 641-1.

As noted supra in section I.B, the Appellants filed their appeal of the circuit court's dismissal of their cross-claims pursuant to HRS § 641-1, see supra note 2. The July 20, 2004 final order, however, was not reduced to a separate judgment

as required by Hawai'i Rules of Civil Procedure (HRCP) Rule 58[5] and is, therefore, not appealable under HRS § 641-1. See Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994) (holding that "[a]n appeal may be taken from circuit court orders resolving claims against parties only after the orders have been reduced to a judgment and the judgment has been entered in favor and against the appropriate parties pursuant to HRCP [Rule] 58" and announcing that "[a]n appeal from an order that is not reduced to a judgment in favor of or against the party by the time the record is filed in the supreme court will be dismissed"). Therefore, we lack appellate jurisdiction to address any of the Appellants' points of error aside from the determination of good faith, which was brought pursuant to HRS § 663-15.5(e), see supra note 1.

We note that the plain language of HRCP Rule 58, see supra note 5, requires that the court enter judgment, which "shall be set forth on a separate document," (1) upon the verdict of a jury, (2) when a court "directs that a party recover only

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[5] HRCP Rule 58 provides:

> Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The filing of the judgment in the office of the clerk constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. Every judgment shall be set forth on a separate document.

money or costs or that all relief be denied," or (3) "when the court directs entry of judgment for other relief." Inasmuch as the circuit court, in making its determination of good faith, did not "deny" any relief at all (but rather allowed the settlement to proceed) nor, as it pertains to the good faith settlement, did it direct entry of judgment for other relief, but merely made a determination of the settlement's good faith character, none of the three categories in HRCP Rule 58 apply. The requirement, therefore, pursuant to HRCP Rule 58 and Jenkins, that the order or judgment "be set forth on a separate document" is inapplicable to the good faith determination process described in HRS § 663-15.5. Rather, the right of appeal[6] under HRS § 663-15.5(e) is distinct and independent under that statutory authority.[7]

Finally, insofar as a review of the good faith determination entails analysis of the indemnification clause and

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[6] The use of the word "may" in the language of HRS § 663-15.5(e), see supra note 1, clearly denotes that the choice of appealing the determination rests, as it should, with the parties to the lawsuit.

[7] Indeed, as we noted in Troyer, the legislature's purpose behind enacting HRS § 663-15.5 was, inter alia, "'to simplify the procedures and reduce the costs associated with claims involving joint tortfeasors by . . . [e]stablishing a good faith settlement procedure for joint tortfeasors . . . .'" 102 Hawai'i at 414, 77 P.3d at 98 (quoting Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599) (emphasis omitted). Part of that new good faith settlement procedure was the creation, through HRS § 663-15.5(e), of an independent right of appeal of a good faith determination separate from HRS § 641-1.

the strength and vitality of the Appellants' cross-claim against Seasons, this court has jurisdiction under HRS § 663-15.5(e) to do so.

B. Good Faith Settlements And The *Troyer* Test

In Troyer, this court confronted, as a matter of first impression, the question whether a settlement was made in good faith pursuant to the requirements of the newly enacted HRS § 663-15.5, and concluded

> that the legislature's goals of simplifying the procedures and reducing the costs associated with claims involving joint tortfeasors, while providing courts with the opportunity to prevent collusive settlements aimed at injuring non-settling tortfeasors' interests, are best served by leaving the determination of whether a settlement is in good faith to the sound discretion of the trial court in light of the totality of the circumstances surrounding the settlement.

102 Hawai'i at 427, 77 P.3d at 111. With respect to assessing the totality of the circumstances, we stated that

> the trial court may consider the following factors to the extent that they are known at the time of settlement: (1) the type of case and difficulty of proof at trial . . . ; (2) the realistic approximation of total damages that the plaintiff seeks; (3) the strength of the plaintiff's claim and the realistic likelihood of his or her success at trial; (4) the predicted expense of litigation; (5) the relative degree of fault of the settling tortfeasors; (6) the amount of consideration paid to settle the claims; (7) the insurance policy limits and solvency of the joint tortfeasors; (8) the relationship among the parties and whether it is conducive to collusion or wrongful conduct; and (9) any other evidence that the settlement is aimed at injuring the interests of a non-settling tortfeasor or motivated by other wrongful purpose. The foregoing list is not exclusive, and the court may consider any other factor that is relevant to whether a settlement has been given in good faith.

Id.

Troyer rejected the good-faith test articulated in Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 698 P.2d 159 (Cal.

1985), that would "require that trial courts conduct 'mini-trials' in order to determine the parties' likely proportionate liability," Troyer, 102 Hawai'i at 426, 77 P.3d at 110, in part because "the [Hawai'i] legislature expressly declared its intent to 'simplify the procedures and reduce the costs associated with claims involving joint tortfeasors,'" id. (quoting Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599 and noting that "[t]his legislative purpose would be difficult to accomplish" under the Tech-Bilt test).

Analyzing the structure and history of Act 300, which became HRS § 663-15.5,[8] and comparing it to the law that preceded it, we observed that, in passing Act 300, "our legislature abandoned a statutory scheme that afforded a non-settling joint tortfeasor greater protection," 102 Hawai'i at 426, 77 P.3d at 110. Rather, we concluded, the legislature was "more interested in encouraging settlements than making an attempt of doubtful effectiveness to prevent inequitable settlements" because the history and structure of HRS § 663-15.5 suggested that "the legislature[] . . . was more interested in encouraging settlements than ensuring the equitable apportionment of liability." Id.

Therefore, while, under the totality of the circumstances test, "'courts are free to police collusive settlements that unfairly saddle one tortfeasor with a disproportionate share of liability,'" by "'enabl[ing] the trial court to consider the potential proportionate liability of the parties in cases where such determinations are appropriate,'" the

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[8] See 2001 Haw. Sess. L. Act 300, §§ 1 and 7 at 875-77.

test "'does not require the court to consider it in every case.'" Troyer, 102 Hawai'i at 424, 77 P.3d at 108 (quoting Mahathiraj v. Columbia Gas of Ohio, Inc., 617 N.E.2d 737, 741-42 (Ohio Ct. App. 1992)).

C. The Parties' Arguments Regarding The Circuit Court's Good Faith Determination

The Appellants argue that the relative degree of fault between Seasons and the Appellants, the total damages sought by the Brookses, and the final consideration paid by Seasons demonstrate, in combination, that the circuit court abused its discretion in approving the settlement. They assert that, because the Appellants' actions giving rise to the Brookses' lawsuit were undertaken as a result of "strict instructions" from Seasons, Seasons would, in the end, be liable for any damages arising from its failure to convey to Fidelity the VA's instructions to refrain from entering the property. In addition, the Appellants note that the Brookses initially prayed for $25,000,000.00 in their first amended complaint and sought $650,000.00 in their April 15, 2004 settlement conference statement and, apparently relying on settlement documents, contend that, at trial, the Brookses would have asked the jury for "no less than a million dollars in damages," whereas, shortly after May 12, 2004, they accepted an offer to fully release Seasons from all claims in return for $100,000.00. They contend that the granting of Seasons's petition for settlement drove them, in turn, to settle with the Brookses for $125,000.00[9] and maintain that the fact that they had to settle for more than

[9] Seasons contends that the settlement was for $135,000.00.

Seasons supports their contention that Seasons's settlement with the Brookses was not in good faith because, despite having merely done Seasons's express bidding, in the end they "had to bear the majority of the amounts paid in settlement."

Construing its argument liberally, Seasons responds that the Brookses' remaining intentional tort claims, if based on a theory of racial discrimination, were groundless because no agent of Seasons ever knew that the Brookses were African-American and, by implication, that the Brookses, having failed to allege any other motive for the intentional acts of conversion and IIED, would necessarily lose at trial. Seasons apparently argues that, therefore, any dispute between the Appellants and Seasons over relative fault would be irrelevant.

Seasons also contends that, given the Brookses' chances at trial, $100,000.00 was a reasonable settlement sum. Seasons asserts that, in order to prevail at trial on both the conversion and the IIED claims, the Brookses would, inter alia, have to establish the value of the property converted as well as the value of the emotional damage they suffered as a result of Seasons's actions. Seasons asserts that, as of the time of settlement shortly before trial, the Brookses had not named any experts either (1) to value the property lost or damaged in the incident or (2) to assess their emotional distress claims.[10]

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[10] The Brookses, in their final list of witnesses filed on February 20, 2003, did name, inter alia, four individuals who arguably could testify to damages: three individuals who would testify "[a]s to the facts and circumstances of [the] case and [the Brookses'] lo[s]ses" and Mr. Brooks's psychiatrist, with whom he "discussed" the incident. As an aside, "while we have stated in the past that . . . supporting expert or medical testimony" is not a prerequisite to a claim of infliction of emotional distress, such evidence "may nevertheless be relevant to establishing the existence of

(continued...)

Seasons notes, furthermore, that, by April 22, 2004, the Brookses' settlement demands had dropped to $200,000.00 and that the Brookses themselves, in a report to their insurance company, estimated the value of their property at the time of its loss to be $116,000.00. Seasons contrasts that estimate with its settlement payment of $100,000.00, arguing that it was both significant, given that Seasons contested both liability and damages, and reasonable, given foreseeable litigation costs at trial and the fact that, by the time of settlement, Seasons was insolvent.

Finally, Seasons contends that, under Hawai'i law, there is no right of contribution or indemnity between joint intentional tortfeasors, citing Whirlpool Corp. v. CIT Group/Bus. Credit, Inc., 293 F. Supp. 2d 1144 (D. Haw. 2003),[11] and, accordingly, the only two remaining claims for relief in the lawsuit sounding in intentional torts, that the Appellants' cross-claim was groundless.

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[10](...continued)
'serious' emotional distress as a response to a tortious event." Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 361-62, 944 P.2d 1279, 1304-05 (1997) (emphasis in original); see also Campbell v. Animal Quarantine Station, 63 Haw. 557, 564, 632 P.2d 1066, 1071 (1981) (approving proposition that "medical testimony [is] not necessary to substantiate plaintiffs' claims of serious emotional distress").

[11] Seasons cites erroneously to an opinion by the same name, 258 F. Supp. 2d 1140 (D. Haw. 2003), announced six months earlier, but quotes from 293 F. Supp. 2d 1144.

D. The Circuit Court Abused Its Discretion In Determining That The Settlement Between Seasons And The Brookses Was In Good Faith.

1. The amount of the settlement was reasonable in light of the nature and strength of the Brookses' claims.

In order to establish Seasons's liability for conversion, the Brookses would have to prove, inter alia, that Seasons had "a constructive or actual intent to injure" the Brookses' interest in the property by entering the lot and removing the items. See Iddings v. Mee-Lee, 82 Hawai'i 1, 9, 919 P.2d 263, 271 (1996) ("the commission of an intentional tort includes a constructive or actual intent to injure") (quoting Pleasant v. Johnson, 325 S.E.2d 244, 249 (N.C. 1985)); Pac. Mill Co. v. Enter. Mill Co., 16 Haw. 282, 284, 286 (1904) (approving a jury instruction that "conversion is the exercise of dominion over an article with intent to repudiate the ownership of the true owner and in defiance of his rights").

An IIED claim requires the plaintiff to establish "[(]1) that the conduct allegedly causing the harm was intentional or reckless[; (]2) that the conduct was outrageous[;] and [(]3) that the conduct caused [(]4) extreme emotional distress to another." Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 95, 73 P.3d 46, 49 (2003) (adopting the elements of IIED prescribed by the Restatement (Second) of Torts). "'[I]ntent' is used throughout the Restatement . . . to denote that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." Restatement (Second), supra, § 8A.

In our view, the record reflects that the Brookses' case against Seasons for both conversion and IIED was reasonably strong, even absent proof of racial motivation. There is evidence in the record tending to establish that Seasons was aware of the VA's instructions, but that Seasons nevertheless ordered Fidelity to enter and secure the property, arguably demonstrating at least (1) recklessness with respect to the Brookses' resulting emotional state and (2) a constructive intent to take possession of the property in defiance of the Brookses' rights. Moreover, the items seized from the property, including several vehicles, apparently could not be located and returned to the Brookses once the error had been recognized. Nevertheless, both the value of the items seized and the effect the seizure had on the Brookses' future income were vigorously disputed, and the extent of the Brookses' damages was subject to considerable uncertainty.

Considering the totality of the circumstances, the $100,000.00 paid by Seasons to settle the Brookses' claims against it was not an insignificant sum and was consistent with the avoidance of foreseeable future litigation expenses. The amount that Seasons paid to settle the Brookses' claims against it was therefore reasonable.

2. Nevertheless, the circuit court abused its discretion by acceding to a settlement that allowed Seasons to accomplish indirectly that which it was expressly barred by law from accomplishing directly.

HRS § 663-15.5(d)(1) plainly states that "[a] determination by the court that a settlement was made in good faith shall . . . [b]ar any other joint tortfeasor . . . from any further claims against the settling tortfeasor . . . , except those based on a written indemnity agreement." (Emphasis added.) Seasons and the Appellants do not contest the validity of the mutual indemnity agreement between them; what is in dispute is the extent to which the agreement binds Seasons in the present matter. Therefore, by the plain language of the statute, any cross-claims brought under the indemnity agreement between them would survive a good faith settlement. To the extent that the Appellants' cross-claims had merit, therefore, Seasons, through its settlement, sought to employ the circuit court to eliminate those cross-claims expressly preserved under HRS § 663-15.5(d)(1).

Considered in the context of a good faith settlement determination, Seasons's arguments that the cross-claims lacked merit are unpersuasive. Holding aside the fact that Whirlpool is a federal decision and therefore not a precedent of this court, Seasons misapprehends key differences between the application of contribution and indemnity to joint intentional tortfeasors. In Whirlpool, the United States District Court for the District of Hawai'i determined that this court, when faced with statutory silence and a question of first impression, often mines the Restatement (Second) for guidance and, hence, relied on the

Restatement (Second) of Torts to forecast how this court might rule on the question of contribution among joint intentional tortfeasors. 293 F. Supp. 2d at 1147-50. The Whirlpool court correctly noted that Restatement (Second) of Torts § 886A(3) states that "[t]here is no right of contribution in favor of any tortfeasor who has intentionally caused the harm," 293 F. Supp. 2d at 1148, but, in our view, mistakenly included indemnity in that rule. See 293 F. Supp. 2d at 1151 (finding "that the general rule, as set forth in the Restatement, applies here to bar contribution and indemnity claims among joint intentional tortfeasors") (emphasis added).

The Whirlpool court failed to note that § 886A(4) states that "[w]hen one tortfeasor has a right of indemnity against another, neither of them has a right of contribution against the other," because, "[w]hen there is a right of indemnity, it controls." Restatement (Second), § 886A(4) and cmt. l. Indemnity is expressly addressed in § 886B, which states in relevant part that:

> (1) If two persons are liable in tort to a third person for the same harm and one of them discharges the liability of both, he is entitled to indemnity from the other if the other would be unjustly enriched at his expense by the discharge of the liability.
> (2) Instances in which indemnity is granted under this principle include the following:
> . . . .
> (b) The indemnitee acted pursuant to directions of the indemnitor and reasonably believed the directions to be lawful[; or]
>
> (c) The indemnitee was induced to act by a misrepresentation on the part of the indemnitor, upon which he justifiably relied.

Id. (Emphasis added.) Restatement (Second) § 886B does not distinguish between intentional and other forms of tort. Accordingly, the Restatement (Second) does not foreclose a right

of indemnity for intentional torts in the present matter. See also Restatement (Third) of Torts: Apportionment of Liability § 22 (1999 & Supp. 2006):

> (a) When two or more persons are or may be liable for the same harm and one of them discharges the liability of another in whole or in part by settlement . . . , the person discharging the liability is entitled to recover indemnity in the amount paid to the plaintiff, plus reasonable legal expenses, if:
>
> (1) the indemnitor has agreed by contract to indemnify the indemnitee . . . .

Id.

In addition, by its express terms, the indemnification agreement covers Seasons's negligent actions, see supra section I.A. Therefore, the Appellants' cross-claim against Seasons for indemnification would be invalidated only in the event of bad faith on the part of Fidelity or Nance in carrying out the inspections. The record appears to be devoid of any evidence to that effect.

In adopting and applying the totality of the circumstances test in Troyer, this court relied in part on two decisions of the Illinois Supreme Court, Dubina v. Mesirow Realty Dev., Inc., 756 N.E.2d 836 (Ill. 2001), and In re Guardianship of Babb, 642 N.E.2d 1195 (Ill. 1994). In both Dubina and Babb, the Illinois Supreme Court concluded that a settlement agreement that allowed a settling tortfeasor to accomplish indirectly what governing law expressly forbade was collusive and, hence, not in good faith. Dubina, 756 N.E.2d at 842-43 (noting that, in addition to allowing the settling joint tortfeasor to evade the letter of the law, the settlement did not encourage the Illinois act's purpose of "equitably distributing among all joint

tortfeasors the burden of compensating the injured plaintiff"); Babb, 642 N.E.2d at 1204-05 (noting that neither the objectives of equitable distribution nor encouraging settlements was furthered by the agreement); see also Int'l Action Sports, Inc. v. Sabellico, 573 So. 2d 928, 930 (Fla. Dist. Ct. App. 1991) (concluding that a settlement agreement was not in good faith in part because the agreement neither encouraged settlements nor equitably apportioned liability), cited in Troyer, 102 Hawai'i at 425, 77 P.3d at 109. We hereby adopt the reasoning of the Illinois Supreme Court and hold that a settlement, wherein a party seeks to accomplish indirectly that which it is expressly barred by applicable law from accomplishing directly, is not in good faith.

By the plain language of HRS § 663-15.5(d), see supra note 1, a good faith settlement agreement between Seasons and the Brookses would not have disturbed the Appellants' cross-claims against Seasons. Seasons, however, caused an integral condition of settlement to be that those cross-claims against it be dismissed, see supra section I.B., which thereby "allow[ed] the settling defendant[] to accomplish indirectly that which [it] could not do directly." Dubina, 766 N.E.2d at 842.

The record demonstrates that the circuit court strove to balance the competing policy interests at stake and the unresolved factual issues upon which the indemnity agreement's applicability would be ascertained. Nevertheless, by acknowledging that HRS § 663-15.5(d)(1) expressly preserved, under the written indemnity agreement, any cross-claims brought by the Appellants but, nevertheless, acquiescing in a settlement,

a central condition of which was the extinguishment of the cross-claims, the circuit court abused its discretion by "disregard[ing] rules or principles of law . . . to the substantial detriment of a party,'" see In re Water Use Permit Applications, 94 Hawai'i at 183, 9 P.3d at 495. Absent that offending provision, however, the agreement would otherwise have been a good faith settlement, and the circuit court would not have abused its discretion in so determining.

IV. CONCLUSION

In light of the foregoing, we vacate the circuit court's July 20, 2004 order determining that the settlement was made in good faith and remand this matter for further proceedings consistent with this opinion.

On the briefs:

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