DISSENTING OPINION BY ACOBA, J.

I respectfully disagree (1) that in this case this court has jurisdiction under Hawai'i Revised Statutes (HRS) § 663-15.5(e) (Supp. 2005) to "a review of the good faith determination [because it] entails analysis of the indemnification clause and the strength and vitality of the . . . cross-claim [of Defendants-Appellants/Cross-Claimants-Appellants/Cross-Claim Defendants Dana Nance & Company (Nance) and Fidelity National Field Services' (Fidelity National) (collectively, Appellants)] against [Defendant-Appellee/Cross-Claim Defendant-Appellee/Cross-Claimant Seasons Mortgage, Inc. (Seasons)]," majority opinion at 12-13, (2) that a review of the good faith argument of the circuit court of the second circuit (the court) is necessary in view of the existence of a "written indemnity agreement," id. at 2, and (3) that on appeal, an appropriate abuse of discretion review can be rendered, id. at 23-24.

The relevant provisions of HRS § 663-15.5 (Supp. 2005), entitled "Release; joint tortfeasors; co-obligors; good faith settlement," provide in part that:

> (a) A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith under subsection (b) to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, shall:
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> (1) Not discharge any other joint tortfeasor or co-obligor not released from liability unless its terms so provide;
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> (2) Reduce the civil claims against the other joint tortfeasor or co-obligor not released in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration

> paid for it, whichever is greater; and
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> (3) Discharge the party to whom it is given from all liability for any contribution to any other joint tortfeasor or co-obligor.
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> This subsection shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.
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> (b) For purposes of subsection (a), 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:
>
> (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. . . .

(Emphases added.)

I.

A.

The July 20, 2004 order as it embodies the court's good faith determination[1] under HRS § 663-15.5(e) is not appealable

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[1] The court's July 20, 2004 "Order Granting Defendant Seasons Mortgage Group, Inc.'s Petition for Determination of Good Faith Settlement" states in relevant part:

> IT IS HEREBY ORDERED, ADJUDGED and DECREED that, in accordance with [HRS] § 663-15.5 and Hawaii Rules of Civil Procedure [(HRCP)] 58 and 54(b), and after having determined that there is no just reason for delay in entry of judgment, the Petition of [Seasons] be, and the same hereby is, GRANTED and the Settlement between [Plaintiffs-Appellees Charles Brooks and Donna Brooks (Plaintiffs)] and [Seasons] is determined to have been made and given in good faith pursuant to HRS § 663-15.5. As such, [Seasons] and those persons and/or entities covered by the release in the Settlement Agreement are discharged and dismissed with prejudice from all claims filed by [Appellants], and from all claims which may be brought by any other joint tortfeasor or co-obligor having notice of this Petition for any of the damages, injuries or losses sustained by Plaintiffs in connection with or arising out of the matters which are the subject of the Settlement Agreement.

(Emphases added.)

because it fails to satisfy the requirements of HRCP Rule 58.[2] On its face HRS § 663-15.5(e) allows that an aggrieved party "may" appeal from a good faith determination of the circuit court. As noted by the majority, HRS § 641-1 (1993) applies to such an appeal. Majority opinion at 2-3 n.2. HRS § 641-1 states in relevant part:

> (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit . . . courts . . . to the supreme court . . . except as otherwise provided by law. . . .
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> . . . .
>
> (c) An appeal shall be taken in the manner and within the time provided by the rules of court.

HRS § 663-15.5(e) merely allows an appeal to be taken as to a good faith determination. However, HRS § 641-1(c) commands that "[a]n appeal shall be taken in the manner . . . provided by the rules of court." HRCP Rule 58 mandates that the July 20, 2004 order must be reduced to a separate judgment. See Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 120, 869 P.2d 1334, 1338, 1339 (1994) (stating that, "for all appeals from circuit courts filed after March 31, 1994, [this court] will enforce strict compliance with the separate document requirement of HRCP 58" and that "[a]n appeal from an order that is not reduced to a judgment in favor of or against the party by the

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[2] HRCP Rule 58, entitled "Entry of Judgment," states in pertinent part, as follows:

> The filing of the judgment in the office of the clerk constitutes the entry of 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.

time the record is filed in the supreme court will be dismissed" (footnote omitted)).[3]

B.

1.

Nonetheless, the majority maintains that under "the plain language of HRCP Rule 58," "the court enter[s] judgment . . . (1) upon the verdict of a jury, (2) when a court 'directs that a party recover only money or costs or that all relief be denied,' or (3) 'when the court directs entry of judgment for other relief[,]' . . . none of the three categories . . . apply," and, thus, that the order is appealable. Majority opinion at 12-13. But even the court acknowledged that compliance with HRCP Rule 58 was necessary for appeal of the good faith determination to take place.[4]

As set forth in note 1, the court's order states in relevant part that it was issued "in accordance with [HRS] § 663-

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[3] The purpose of the separate judgment rule under HRCP Rule 58 is to establish the finality of an order for appeal purposes:

> The purpose of the separate judgment provision of HRCP Rule 58 is to implement the finality rule of HRS § 641-1(a) (1993), which authorizes appeals from "final judgments, orders, or decrees" in circuit court civil cases. Jenkins, 76 Hawai'i at 118, 869 P.2d at 1337 ("We are mindful, however, that we may hear appeals from only final judgments, orders, or decrees except as otherwise provided by law. HRS § 641-1(a)."). "The separate judgment rule of HRCP Rule 58 is designed to simplify and make certain the matter of appealability" and "its sole purpose is to determine when the time for appeal commences." Id.

In re Tax Appeal of Alford, 109 Hawai'i 14, 21-22, 122 P.3d 809, 816-17 (2005) (brackets omitted).

[4] Despite the court's order a separate judgment pursuant to HRCP Rule 58 was not filed, however.

15.5 and [HRCP] 58 and 54(b), and [that] after having determined that there is no just reason for delay in entry of judgment, the Petition of [Seasons] be, and the same hereby is, GRANTED and the Settlement between Plaintiffs and [Seasons] is determined to have been made and given in good faith pursuant to HRS § 663-15.5." (Emphases added.) (Capitalization in original.) Under the plain language of HRCP Rule 58 and the order, the court obviously "direct[ed] entry of judgment for other relief," in that it "ordered adjudged and decreed" that judgment enter inasmuch as the court "determined there is no just reason for delay in entry of judgment."

The judgment as indicated by the order was entered "as to" the third basis for entry of judgment as prescribed in HRCP Rule 58, i.e., "relief" "other" than the other two bases of "upon the verdict of a jury" or upon a "direct[ion] that a party recover only money or costs or that all relief be denied." Such "other relief" under HRCP Rule 58 plainly encompasses, among other things, a determination of good faith under HRS § 663-15.5. The majority is wrong, then, in arguing that "HRCP Rule 58 . . . is inapplicable to the good faith determination process described in HRS § 663-15.5[,]" because "none of the three categories in HRCP Rule 58 apply." Majority opinion at 12. Plainly, HRCP Rule 58 applies under the language therein and our case law, as the court and parties recognized.

2.

The majority also declares that "the right of appeal under HRS § 663-15.5(e) is distinct and independent under that statutory authority." Id. (footnotes omitted). This is incorrect. First, on its face HRCP Rule 58 applies to "[e]ntry of [j]udgments." In tandem with Rule 58, the court's order, supra, states that the order was also issued pursuant to HRCP Rule 54(b). Rule 54(a) states in relevant part that the term "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies." (Emphasis added.) Accordingly, judgment may be entered "[w]hen more than one claim for relief is presented in an action, . . . or when multiple parties are involved[.]" HRCP Rule 54(b). In such an instance, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties[.]" Id. (emphasis added). Therefore, judgments by virtue of HRCP Rules 58 and 54 may be entered "as to . . . fewer than all of the claims or parties," as was done in this case.

Second, and hence, as the court and the parties recognized, the order was issued not only pursuant to HRCP Rule 58, but also in accordance with Rule 54(b), precisely because the order resolved the claim between Plaintiffs and Seasons (via the good faith settlement finding) but not claims between Plaintiffs and the other defendants. To reiterate, the court thus directed entry of a final judgment "as to one [(the claim between Plaintiffs and Seasons)] . . . but fewer than all of the claims

or parties" (the claims remaining among Plaintiffs and the other defendants) "upon an express determination that there is no just reason for delay in the entry of judgment." See order supra.

The good faith requirement involved only some but not all of the claims and parties. Thus under HRCP Rules 54 and 58 it was appealable upon the filing of a separate judgment, as the court indicated in its order. Hence, it was not necessary for the legislature to provide a "right of appeal under HRS § 663-15.5(e)" "distinct and independent," majority opinion at 12 (footnote omitted), of Rule 58 and Rule 54, as the majority implies. See Weinberg v. Mauch, 78 Hawai'i 40, 46 n.4, 890 P.2d 277, 283 n.4 (1995) (stating that "if the judgment resolves fewer than all claims against all parties, or reserves any claim for later action by the court, an appeal may be taken only if the judgment contains the language necessary for certification under HRCP 54(b)[,]" and that "an appeal from any judgment will be dismissed as premature if the judgment does not, on its face, either resolve all claims against all parties or contain the finding necessary for certification under HRCP 54(b)" (emphasis in original) (citation omitted)); Cook v. Surety Life Ins., Co., 79 Hawai'i 403, 407, 903 P.2d 708, 712 (App. 1995) (stating that, "[g]enerally, an appellate court may only consider an appeal from a final judgment, order or decree[,]" and that "[e]ssentially, [an appellate] court has jurisdiction to consider appeals from: (1) a judgment, order or decree which fully determines the rights of the parties and leaves no matter for further action, (2) an

order or decree certified as a final judgment under HRCP Rule 54(b), and (3) a collateral order[]" (citations omitted)).

II.

Accordingly, the plain language of HRS § 663-15.5 allows only, as stated supra, that a party may take an appeal at the point where a good faith determination is made, before trial is had upon remaining joint-tortfeasor claims, for obvious reasons of preventing delay and unnecessary trial of seemingly settled issues. This is the basis for statutorily allowing an appeal before the trial is completed -- to "simplify the procedures" and avoid unnecessary costs. Majority opinion at 12 n.7 (internal quotation marks and citations omitted).

The legislature did not dispense with the requirements of Rule 54 or Rule 58, and the majority cites nothing to that effect. Nowhere in the language or legislative history of HRS § 663-15.5 is there any abrogation of the rules of procedure that otherwise attend a judgment or an appeal therefrom, as embodied in HRCP Rule 54 and Rule 58. Indeed, the abrogation of a HRCP by the legislature, as the majority appears to imply, may also implicate a constitutional conflict between the courts and the legislature. Asato v. Furtado, 52 Haw. 284, 294 n.6, 474 P.2d 288, 296 n.6 (1970) ("[S]ince the adoption of the Constitution of the State of Hawaii, rules of practice and procedure adopted by this court supersede any conflicting provisions to be found in the [HRS] or other legislative enactments. See, for example, the

[HRCP] and the Hawaii Rules of Criminal Procedure, adopted and promulgated by this court.")

III.

To reiterate, HRCP Rule 58 applies to civil actions "in the circuit courts of the State" and requires that "every judgment shall be set forth on a separate document." An order disposing of a circuit court case is appealable when the order is reduced to a separate judgment. Jenkins, 76 Hawai'i at 199, 869 P.2d at 1338. As we have noted, "HRCP Rule 1 states that the HRCP 'govern the procedure in the circuit courts of the State in all suits of civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81.'" In re Tax Appeal of Alford, 109 Hawai'i at 21, 122 P.3d at 816. Also,

> [t]he "circuit courts of the State" are those courts established by HRS § 603-2 (1993). That statute provides that
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> > there shall be established in each of the four judicial circuits of the State a court with the powers and under the conditions hereinafter set forth, which shall be styled the circuit court of such circuit, as for instance, the circuit court of the third circuit.

Id. (brackets omitted). The second circuit court is a circuit court established by HRS § 603-2.

The July 20, 2004 order disposed of the case via the good faith settlement finding. The order was not reduced to a separate judgment. The HRCP requires that that be done. Because this case is "[a]n appeal from an order that [was] not reduced to a judgment in favor of or against the party by the time the record [was] filed in [this court, the appeal should] be dismissed." Jenkins, 76 Hawai'i at 120, 869 P.2d at 1339. The

appeal, then, was not "taken in the manner . . . provided by the rules[.]" HRS § 641-1.

This court has said that, "for all appeals from circuit courts filed after March 31, 1994, [this court has] enforce[d] strict compliance with the separate document requirement of HRCP 58." Jenkins, 76 Hawai'i at 119, 869 P.2d at 1338 (emphasis added). Hence, there is no jurisdiction to review the order and the instant appeal must be dismissed. See id. at 120, 869 P.2d at 1339 (an order that resolves claims in a circuit court civil case is not appealable unless the order is reduced to a separate judgment pursuant to HRCP 58). Whereas this court has strictly enforced the separate judgment requirement of HRCP Rule 58 on innumerable occasions, there is no principled basis for deviation in this instance. The inconsistent application of HRCP Rule 58 in this case, in the context of numerous decisions and orders dismissing appeals for failure to comply with the rule, calls into question the efficacy of Jenkins and the equal treatment of litigants.

IV.

Assuming, arguendo, that there is jurisdiction, a good faith review is unnecessary because HRS § 663-15.5 expressly precludes such review in the face of claims "based on a written indemnity agreement." The term "except" means "with the exclusion or exception of[.]" Webster's Third New Int'l Dictionary 791 (1961). Under HRS § 663-15.5, a good faith determination "[b]ar[s] any other joint tortfeasor . . . from any

further claims against the settling tortfeasor" and "[r]esult[s] in a dismissal of all cross-claims filed against the settling joint tortfeasor," "except those based on a written indemnity agreement." HRS § 661-15.5(d)(1) & (2). The effect of a good faith determination is irrelevant to a disposition of this appeal because claims arising from a "written indemnity agreement" are excluded from the purview of such a determination. It is undisputed that "HRS § 663-15.5(d)(1) expressly preserved, under the written indemnity agreement, any cross-claims brought by the Appellants." Majority opinion at 23. Therefore, that provision controlled and any discussion of the good faith determination is superfluous.

V.

The majority nevertheless proceeds to evaluate the good faith determination of the court even though it ultimately "vacate[s] the . . . July 20, 2004 order determining that the settlement was made in good faith and remand[s the] matter[.]" Id. at 24.

I do not fault the court for the manner in which it made its determination. As the court stated, "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[.]" Predictably, given the nebulousness of the totality of the circumstances standard from Troyer, there

is precious little with respect to the salient factors of the case that are identified as supporting the conclusion that the settlement amount was reasonable. The court noted that "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[.]" Hence, we have little on appeal on which to decide whether in the exercise of the court's discretion, there was abuse or not. This is a consequence of the totality of circumstances standard under which

> parties and counsel will be unsure of the type of information necessary to establish a good faith claim. Trial courts will be uncertain of what evaluative factors should be dispositive. The undifferentiated approach inherent in the majority test would fail to ensure a focused record for appellate review. The ultimate result of such an approach will engender disparate results among the cases.

Troyer, 102 Hawai'i at 436, 77 P.3d at 120 (Acoba, J., dissenting) (emphasis added); see also Marion L. Reyes-Burke, Keeping the (Good) Faith: Hawaii's Good Faith Settlement after HRS section 15.5 and Troyer v. Adams, 26 U. Haw. L. Rev. 275, 299 (2003) [hereinafter, Keeping the (Good) Faith] (stating that the lack of guidance provided by the Troyer majority's approach to good faith determinations "may lead to uncertainty: (1) parties and counsel will be unsure of the type of information necessary to establish a good faith claim; (2) trial courts will be uncertain of what evaluative factors should be dispositive; (3) the undifferentiated approach inherent in the majority's test would fail to ensure a focused record for appellate review; and

(4) the result of such an approach will engender disparate results among the cases").

To fill the gap, the majority posits that the settlement "was . . . reasonable" because (1) "the $100,000.00 paid by Seasons to settle [Plaintiffs'] claims . . . was not an insignificant sum[,]" and (2) "was consistent with the avoidance of foreseeable future litigation expenses." Majority opinion at 19. As to the first proposition, the court did find that it did not think that "the amount that is being proposed . . . is improper or inadequate in any way[,]" and, thus, arguably this might support the majority's statement that the settlement amount "was not an insignificant sum[,]" id. at 19.

However, "not an insignificant sum" is but a conclusion that must be drawn from salient determinative facts or factors. Such facts or factors, however, are not required to be articulated. Thus the "totality of the circumstances" test is not so much a guide, but rather a guise by which settlements can be sustained, without an assessment of the fairness sought to be guaranteed to all parties by the legislature. See Troyer, 102 Hawai'i at 437, 77 P.3d at 121 (Acoba, J., dissenting) (explaining that the good faith settlement procedure for joint tortfeasors and co-obligors under HRS § 663-15.5 seeks to "'adequately protect[] the rights of all parties involved'" (quoting Sen. Stand. Comm. Rep. No. 828, in 2001 Senate Journal, at 1253) (emphasis in original)); see also Keeping the (Good) Faith, 26 U. Haw. L. Rev. at 299-300 ("The non-settling

tortfeasor . . . also faces an even more difficult standard of review to overcome" because "[t]he Troyer majority applied the abuse of discretion standard of review to good faith determinations under HRS section 663-15.5. This high standard imposes the burden of establishing abuse of discretion by a strong showing on the appellant. Thus, under HRS section 663-15.5, the likelihood that a non-settling tortfeasor will successfully challenge a settlement's good faith determination is low.").

The majority's second proposition -- that the settlement sum is reasonable because it is "consistent with" "avoid[ing] . . . future litigation expenses," majority opinion at 19, is something created on appeal since it was not articulated at all by the court as a basis for its oral or written decision. In that respect, an abuse of discretion standard similarly cannot be appropriately applied.

VI.

As our legislature had declared, the "'procedures proposed by [Act 300, codified as HRS § 663-15.5,] are based on a system that has been in existence in California for over ten years." Troyer, 102 Hawai'i at 434, 77 P.3d at 118 (Acoba, J., dissenting) (quoting Hse. Stand. Comm. Rep. No. 1230, in 2001 House Journal, at 1599) (emphasis in original). Thus, "inasmuch as the arguments cited by the majority [in Troyer had] been presented and rejected in the California case law, there [was] no rational basis for inferring that the legislature's position

would have been otherwise[,]" id. (Acoba, J., dissenting), as the majority did in adopting the totality of the circumstances approach. Based on the language of the statute and its legislative history, the Hawai'i Legislature "intended that Hawai'i follow California law and thus adopt the governing factors listed in Tech-Bilt, Inc. v. Woodward-Clyde & Assoc., [698 P.2d 159 (1985).]" Id. (Acoba, J., dissenting).

But under Troyer, the court in the instant case was not required to enunciate the key "determination of proportionate liability among the joint tortfeasors . . . crucial to ensuring that the right of all parties are protected" under Tech-Bilt. Troyer, 102 Hawai'i at 437, 77 P.3d at 121 (Acoba, J., dissenting). As was observed in Tech-Bilt, "a 'primary concern' was that 'in the great majority of cases . . . equity and fairness call for an apportionment of loss between the wrongdoers in proportion to their relative culpability." Id. at 436, 77 P.3d at 120 (Acoba, J., dissenting) (quoting Tech-Bilt, 698 P.2d at 163) (brackets omitted). Further, Tech-Bilt noted that "requiring a proportionate liability assessment would also encourage settlement because 'the settling defendant is induced to offer more in order to bring the settlement within the bounds of fairness, [thus] the plaintiff's incentive to settle may be greater.'" Id. (Acoba, J., dissenting) (quoting Tech-Bilt, 698 P.2d at 167).

The infirmity of the majority's test is that it "does not compel the [circuit] courts to engage in the inquiry

necessary to determine whether the amount contributed by the settling defendant is fairly related to its proportional liability." Id. at 438, 77 P.3d at 122 (Acoba, J., dissenting); see also Keeping the (Good) Faith, 26 U. Haw. L. Rev. at 306 ("At present HRS section 663-15.5 and Troyer disregard the critical question 'which party caused the injury?' Rather, the current law asks the trier of fact to ignore legal causation (i.e., who legally caused the injury) and simply to determine 'how much [money] liability does the non-settling tortfeasor owe the plaintiff?' Troyer disregards the reality that the settling tortfeasor's payment for his release (i.e., settlement) established his status as a 'joint tortfeasor' as a matter of law; Troyer likely does not even allow the jury to apportion fault to this settling joint tortfeasor."). Because the evaluation of whether the settlement was in good faith is not tied to proportionate fault, the standard fails to require the parties or the circuit courts to focus on a realistic assessment of the case. The failure to mandate an analysis of the proportionate allocation of risk leads to a disproportionate distribution of the cost burdens in tort cases and in the long run is detrimental to the efficacy of the tort system.

VII.

Finally, by concluding that "[t]he amount that Seasons paid to settle [Plaintiffs'] claim against it was therefore reasonable[,]" majority opinion at 19, but nevertheless vacating and remanding the court's good faith determination, the majority

has colored and improperly influenced the subsequent proceedings on remand -- whether by settlement or by trial -- despite its vacation and remand of the court's good faith order. The effect of the majority's pronouncement as to the amount of $100,000 is to render the case more difficult to settle, as the parties seek to divine what action this court may take in the future in light of the majority's affirmation of fault, damages, and reasonableness, or as a result thereof, to unfairly prejudice Seasons' positions in whatever settlement negotiations, or trial may follow. Accordingly, I respectfully dissent.