*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26945

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HANALEI GARDEN FARMS, INC.,
Plaintiff-Appellee/Cross-Appellant,

vs.

TOM PACE aka THOMAS W. PACE,
Defendant-Appellant/Cross-Appellee,

and

CARDINAL INVESTMENT COMPANY,
a Florida corporation, Defendant.

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NORMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

APPEAL FROM THE FIFTH CIRCUIT COURT
(CIV. NO. 00-01-0034)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Defendant-Appellant/Cross-Appellee Thomas W. Pace ("Defendant") appeals and Plaintiff-Appellee/Cross-Appellant Hanalei Garden Farms, Inc. ("Plaintiff") cross-appeals from the fifth circuit court's[1] October 13, 2004 judgment in favor of Plaintiff for the recovery of $119,923.24.

The underlying dispute in this case involves Defendant's breach of a contract in which Defendant agreed to purchase buffalo from Plaintiff. The parties also dispute the amount Defendant orally agreed to pay Plaintiff for three generators. Plaintiff filed a complaint against Defendant alleging damages of $160,000 (including $15,000 for the generators). Defendant did not file an answer, and the circuit

[1] The Honorable George M. Masuoka presided.

court subsequently entered a default and then a default judgment against him. Defendant moved to set aside the default judgment, and the circuit court granted this motion subject to his paying Plaintiff's expenses incurred in opposing his motion.

Defendant argued as defenses and in his counterclaim that the parties orally modified the contract and that he owed a balance of $105,000, asserting a breach of warranty claim against Plaintiff. Following a four-day jury trial, Defendant was found liable to Plaintiff for $105,000. The circuit court also granted in part and denied in part Plaintiff's motion for prejudgment interest and granted Defendant's motion for costs under Hawai'i Rules of Civil Procedure ("HRCP") Rule 68.[2] The circuit court denied Plaintiff and Defendant's motions for attorneys' fees reasoning that both were prevailing parties, and it denied Defendant's motion to sanction Plaintiff.

On appeal, Defendant argues that: (1) the circuit court erred by conditioning the order to set aside the November 2000 default judgment on Defendant paying Plaintiff's attorneys' fees and costs incurred in opposing his motion to set aside the November 2000 default judgment; (2) the circuit court abused its discretion when it failed to award him attorneys' fees when the jury agreed with him that he owed Plaintiff $105,000, rendering him the prevailing party; (3) the circuit court abused its discretion by awarding Plaintiff prejudgment interest under

[2] HRCP Rule 68 (1999) states in pertinent part, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer."

Hawai'i Revised Statutes ("HRS") § 636-16[3] where the jury did not find that Defendant breached the contract; and (4) the circuit court abused its discretion by denying his motion to sanction Plaintiff under HRS § 607-14.5[4] and HRCP Rule 11[5] inasmuch as

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[3] HRS § 636-16 (1993) provides: "In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases . . . arising by breach of contract . . . may be the date when the breach first occurred."

[4] HRS § 607-14.5 (1993) states:

> (a) In any civil action . . . where a party seeks money damages . . . against another party, and the case is subsequently decided, the court may, as it deems just, assess against either party, whether or not the party was a prevailing party, and enter as part of its order, for which execution may issue, a reasonable sum for attorneys' fees and costs, in an amount to be determined by the court upon a specific finding that all or a portion of the party's claim or defense was frivolous as provided in subsection (b).
>
> (b) In determining the award of attorneys' fees and costs and the amounts to be awarded, the court must find in writing that all or a portion of the claims or defenses made by the party are frivolous and are not reasonably supported by the facts and the law in the civil action. In determining whether claims or defenses are frivolous, the court may consider whether the party alleging that the claims or defenses are frivolous had submitted to the party asserting the claims or defenses a request for their withdrawal as provided in subsection (c). . . .
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> (c) A party alleging that claims or defenses are frivolous may submit to the party asserting the claims or defenses a request for withdrawal of the frivolous claims or defenses, in writing, identifying those claims or defenses and the reasons they are believed to be frivolous . . . .

(Emphases added.)

[5] HRCP Rule 11 (2000) states in pertinent part:

> (b) Representations to court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
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> (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
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> (2) the claims, defenses, and other legal contentions therein are

(continued...)

Plaintiff engaged in frivolous litigation practices.

On cross-appeal, Plaintiff argues that: (1) the circuit court abused its discretion by setting aside the November 2000 default judgment inasmuch as (a) Defendant did not meet the three requirements set out in BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 549 P.2d 1147 (1976), and (b) Defendant's motion to set aside the November 2000 default judgment was untimely; (2) Defendant waived the affirmative defense of contract modification when he did not raise this defense in his answer and the circuit court erred by (a) permitting him to present evidence in support of this defense and (b) instructing the jury on contract modification; (3) the circuit court abused its discretion by

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[5](...continued)
warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. . . .

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(Emphases added.)

denying its motion for attorneys' fees where it (a) was awarded a final judgment of $119,923.24 and (b) prevailed on Defendant's counterclaim for breach of warranties; (4) the circuit court abused its discretion by refusing to award it costs under HRCP Rule 54(d);[6] (5) the circuit court abused its discretion by awarding Defendant costs from the date of his HRCP Rule 68 offer of judgment because Plaintiff's final award was greater than Defendant's offer; and (6) the circuit court abused its discretion by limiting the prejudgment award against Defendant from the date the complaint was filed to the order setting aside the November 2000 default judgment where HRS § 636-16 does not permit stopping the prejudgment interest prior to the date of the final judgment.

Based upon the following analysis, we vacate the final judgment and (1) remand the circuit court's order setting aside the November 2000 default judgment with instructions to tailor the award of attorneys' fees to Defendant's sanctionable conduct, (2) remand for entry of a new judgment awarding Defendant reasonable attorneys' fees, and (3) reverse the circuit court's order granting Defendant costs under HRCP Rule 68.

I. BACKGROUND

A. Factual History

On May 23, 1998, Plaintiff, through its president William Mowry ("Mowry"), and Defendant entered into a written

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[6] HRCP Rule 54(d) states in relevant part, "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."

contract for Plaintiff to sell Defendant buffalo. Defendant agreed to purchase at least $96,000 worth of buffalo that were priced according to sex and age. The contract also provided that any modification of the contract must be in writing and signed by each party. Defendant paid Plaintiff $96,000 prior to receiving any buffalo.

The parties also orally agreed that Defendant would purchase three used generators from Plaintiff. According to Defendant, he agreed to pay $1,500 for the three generators, but Plaintiff later sent him an invoice for $15,000.

Plaintiff shipped Defendant buffalo in August 1999 and February 2000. According to Defendant, because the August 1999 shipment did not include $96,000 worth of buffalo, the parties orally modified the contract. Defendant testified, "[I]n that shipment, [Defendant] had only used $52,200 worth, something like that, of the payment [he] had made so far and there was still $40,000 to go. . . . Mowry had said take -- go ahead and take all these bulls and I will make it up to you with some females. And so I ended up with the old cows." Mowry also testified that Defendant had a credit for more buffalo after the first shipment.

On February 1, 2000, Plaintiff delivered sixty buffalo to Defendant. Defendant believed this was a result of Mowry's promise to "make it up to him" after the insufficient first delivery. However, that night, when Defendant visited Mowry's house expecting a celebratory dinner, Mowry alleged that Defendant received more buffalo (including more valuable pregnant buffalo) than he had paid for. The parties renegotiated the

price of the buffalo that evening and orally agreed that Defendant would pay Plaintiff $140,000 (in four payments of $35,000, due every two weeks). Defendant made the first $35,000 payment that night, owing Plaintiff a balance of $105,000.

Over the next few weeks, Defendant sent Mowry several faxes about the oral agreement, offering to pay Plaintiff the balance of $105,000 if he received a receipt. However, Mowry claimed that Defendant owed about $163,000 for the buffalo and three generators -- relying on the written contract prices per buffalo and raising the price for allegedly pregnant buffalo. Defendant did not make any further payments to Plaintiff for the buffalo and generators.

B. Procedural History

1. Plaintiff brought suit against Defendant

On February 22, 2000, Plaintiff filed a complaint against Defendant, alleging that Defendant breached the May 1998 contract and the oral agreement to purchase three generators. Plaintiff sought $147,500, plus prejudgment interest, costs, and attorneys' fees.

Sheriff Edwin O. Akana, Jr. ("Sheriff Akana") attempted to serve Defendant at Hokukano Ranch on July 27, 2000. Although Sheriff Akana believed that he actually served Defendant and represented that he served the complaint personally on Defendant in his return and acknowledgment of service form,[7] he noted that the person he served claimed to be Defendant's brother.

[7] The acknowledgment of service was not signed, dated, or time stamped.

Defendant did not answer the complaint, and on August 21, 2000, the clerk of the fifth circuit court filed an entry of default ("August 2000 default"). Plaintiff mailed a copy of the entry of default to Defendant addressed to his Hokukano Ranch post office address on August 22, 2000.

On August 29, 2000, Defendant, pro se, filed a motion to set aside the August 2000 default, arguing that he had not been properly served by Plaintiff. Defendant's brother, William Pace ("Defendant's brother"), denied Sheriff Akana's version of July 27, 2000. Defendant's brother declared in his affidavit that on July 27, 2000, he informed Sheriff Akana that Defendant was not in Hawai'i. However,

> [t]he Sheriff told us that we could take the papers or they would leave them on the fence post and that it didn't mean the papers were served to [Defendant] either way. The Sheriff asked me how he could get in touch with [Defendant], I told him [Defendant] was in Arizona, on the Havasupai Indian Reservation. . . . I apologized for not being able to help him and that I could not receive the papers because they were not for me. He advised me to just leave them on the fence post, and I did.

On October 12, 2000, Plaintiff filed an amended return and acknowledgment of service form, supported with an affidavit by Sheriff Akana that declared he served Defendant via substitute service through Defendant's brother.[8] On October 13, 2000, the

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[8] Sheriff Akana swore in his affidavit that he mistakenly served Defendant's brother as follows:

> 2. In the course of my duties as deputy sheriff, I undertook to serve the [c]omplaint and [s]ummons in Civil No. 00-1-34 on [Defendant] at Hokukano Ranch on July 27, 2000. I went to a gate by a house at Hokukano Ranch. There was a vehicle in the yard, which I believed to be [Defendant's] vehicle. A man came out of the house, whom I thought to be [Defendant]. A woman was with him who fit the description of [Defendant's] girlfriend.
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> 3. The man approached me, and I told him I had some papers for (continued...)

circuit court denied Defendant's motion to set aside the August 2000 default on procedural grounds.

On September 18, 2000, Plaintiff moved for default judgment against Defendant under HRCP Rule 55(b)(2).[9] Following

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[8](...continued)
[Defendant]. The man asked to see the papers, and I handed him the [c]omplaint and [s]ummons. He said he was not [Defendant], but I thought he was [Defendant] at the time. I later learned that the man was [Defendant's brother].

4. When [Defendant's brother] tried to give the [c]omplaint and [s]ummons back to me, I did not take them but told him he was served; and I walked away. [Defendant's brother] said he would not accept the papers, and he put them on a fence post.

5. I drove away but came back a short time later. When I came back, the papers were no longer on the fence post or otherwise visible nearby.

(Emphasis added.)

[9] HRCP Rule 55 (2000) provides in relevant part:

(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) Judgment. Judgment by default may be entered as follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if the defendant has been defaulted for failure to appear and is not an infant or incompetent person.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian, or other such representative who has appeared therein, and upon whom service may be made under Rule 17. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of

(continued...)

a hearing (in which Defendant was represented by counsel), the circuit court granted the motion on November 8, 2000 ("November 2000 default judgment").[10]

2. Defendant moved to set aside the November 2000 default judgment

On November 30, 2000, Defendant moved to set aside the November 2000 default judgment, pursuant to HRCP Rules 55[11] and 60,[12] arguing again that the complaint against him was neither

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[9](...continued)
any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

[10] The November 2000 default judgment awarded Plaintiff $147,500 in principal, $10,505.56 in prejudgment interest through August 31, 2000, $4,947.651 in attorneys' fees and costs, and additional prejudgment interest of $30.30 for each day from August 31, 2000 to the date of entry of judgment.

[11] HRCP Rule 55(c) states, "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

[12] HRCP Rule 60 (2000) provided, in relevant part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and
> (continued...)

personally served on him nor served on him via substitute service. Further, Defendant alleged that serving him at Hokukano Ranch did not comply with HRCP Rule 4(d)(1)[13] because his dwelling house and usual place of abode was not Hokukano Ranch, but was in Cape Province, South Africa.

At the December 19, 2000 hearing on the motion, Defendant argued that he was not validly served through substitute service at Hokukano Ranch because he merely "visits the ranch from time to time to conduct business there." Although the circuit court believed that Defendant's usual abode was in South Africa, it ordered an evidentiary hearing to determine whether Hokukano Ranch was Defendant's "usual place of abode" within the meaning of HRCP 4(d)(1). In support of his motion to set aside the November 2000 default judgment, Defendant submitted his passport indicating that he had not returned to South Africa since 1996, but he declared in an affidavit that his sole dwelling house is in South Africa. Defendant argued in his motion that he "maintains his leeward Big Island dwelling house

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[12](...continued)
bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(Emphases added.)

[13] HRCP Rule 4(d)(1) requires that service shall be made as follows:

(1) Upon an individual other than an infant or incompetent person, (a) by delivering a copy of the summons and of the complaint to him personally or in case he cannot be found by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(Emphasis added.)

or usual place of abode at his parents' home in Captain Cook."

At the March 27, 2001 hearing in which the court heard evidence regarding whether the Hokukano Ranch was Defendant's dwelling or place of abode, Defendant testified that he did not live at Hokukano Ranch in 2000 and maintained that his usual place of abode was in Cape Province, South Africa. Plaintiff argued that serving Defendant's brother constituted substitute service pursuant to HRCP Rule 4(d)(1) because Defendant resided at Hokukano Ranch.

On August 30, 2001, the circuit court ruled that pursuant to HRCP Rules 55(c) and 60(b)(1), and subject to conditions, "relief from the [November 2000] default judgment is warranted on the grounds of excusable neglect and because of questions of fact as to whether service of the complaint occurred at [Defendant's] place of abode on the Island of Hawai'i." However, the circuit court also found that Defendant falsely declared in his affidavit that he permanently resides in Cape Province, South Africa and held him accountable for three other affidavits that corroborated his assertion. "For [the] delay and obstruction of the proceedings occasioned by [these] false representations made to the [c]ourt," the court sanctioned Defendant, pursuant to HRCP Rules 11 and 60(b) and HRS § 603-21.9(6),[14] by conditioning the order to set aside the November

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[14] HRS § 603-21.9(6) (1993) states,

> The several circuit courts shall have power
> . . . .
> (6) To make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such (continued...)

2000 default judgment on Defendant compensating Plaintiff for its "expenses incurred in opposing Defendant's motion and exposing the deception attempted by Defendant" ($17,952.33). Defendant thereafter paid Plaintiff $17,952.33.

3. Defendant filed a counterclaim and Plaintiff amended its complaint

On May 15, 2001, Defendant filed an answer to Plaintiff's complaint and a counterclaim against Plaintiff in which he asserted breach of warranty claims.

On January 18, 2002, Plaintiff filed an amended complaint alleging that the parties had orally agreed that Defendant would pay more for pregnant buffalo than "contemplated in the [written contract]." The amended complaint also alleged that Defendant was the alter ego of Cardinal Investment Company, a Florida corporation, and named Cardinal Investment Company as a defendant. Plaintiff prayed for $163,485.06, or more under quantum meruit and implied contract, plus prejudgment interest, attorneys' fees, and costs against Defendant and Cardinal Investment Company.

On May 21, 2003, Defendant filed an HRCP Rule 68 offer of judgment for $110,000, including attorneys' fees and costs to date. Plaintiff rejected the offer.

4. The jury found that Defendant owed Plaintiff $105,000

The four-day jury trial commenced on July 28, 2003.

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[14](...continued)
other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them.

Plaintiff argued that Defendant owed $164,440 for the buffalo, generators ($15,000) and miscellaneous costs. Defendant contended that pursuant to a modified oral agreement with Plaintiff, he owed Plaintiff a total of $105,000.

Over Plaintiff's objection, the trial court allowed Defendant to introduce evidence that the parties had orally modified the May 1998 contract on February 1, 2000. Plaintiff asserted that Defendant did not plead contract modification as an affirmative defense in the answer to the complaint, but the circuit court permitted this evidence and subsequently ruled that Plaintiff "waived the no oral modification" claim. Plaintiff also objected to a jury instruction about the modification of an integrated contract (instruction 3.7)[15] for the same reason.

On July 30, 2003, the circuit court granted Plaintiff's oral motion to dismiss Defendant's counterclaim for breach of warranties.

On July 31, 2003, the jury determined that Plaintiff

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[15] Jury instruction 3.7 explained:

> A signed agreement which excludes modification except by a signed writing cannot be otherwise modified. However, the requirement of a writing modifying an agreement which excludes modification except by a signed writing may be waived by the party's actions or by an oral agreement to modify the written agreement if the parties agreed [orally] to modify the written agreement and the party enforcing the oral modification has fully or partially performed the oral modification.
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> To prevail on a claim of part performance, the party seeking enforcement of the oral agreement to modify must prove all of the following elements by clear and convincing evidence: One, the party seeking enforcement partially or fully performed his obligations under the alleged agreement to modify; and, two, in making such performance, the party seeking enforcement substantially relied on the promises made to him in the alleged agreement to modify; and, three, to allow the other party to avoid performing its obligations under the alleged agreement to modify would constitute an injustice upon the party seeking enforcement.

was entitled to recover $105,000 from Defendant, $1,500 of which was owed for the generators. The jury also determined that Defendant was not the alter ego of Cardinal Investment Company.

5. Post-trial motions for attorneys' fees, costs, and prejudgment interest

On August 19, 2003, Defendant moved for attorney's fees ($80,849.74) and costs ($3,740.70 in taxable costs and $936.64 in non-taxable costs) under HRCP Rule 68, the May 1998 contract, HRS § 607-14.5, and HRCP Rule 11 against Plaintiff. Plaintiff also sought attorneys' fees ($118,712) and costs ($8,180.65) under HRS § 607-14, asserting that it was the prevailing party on its complaint.

The circuit court ruled that under the circumstances -- where (1) Plaintiff prevailed on Defendant's counterclaim and Defendant prevailed on the amount that the jury awarded Plaintiff, and (2) Defendant's HRCP Rule 68 offer of judgment was more than the jury's verdict, and if Plaintiff had accepted it, attorneys' fees and costs would have been saved -- neither party was entitled to attorneys' fees. At the same time, the court granted Defendant's motion for costs incurred starting from May 21, 2003, the date he made the HRCP Rule 68 offer of judgment to Plaintiff.

Plaintiff also moved for prejudgment interest of $38,231.51 (commencing on the date Defendant breached the contract) with an additional $28.75 awarded per day starting September 23, 2003 until final judgment was entered. The circuit court granted Plaintiff's motion in part, awarding it prejudgment interest for the period that Defendant contested the service of

the complaint (February 22, 2000 until September 19, 2001). Plaintiff moved for prejudgment interest a second time, for the period of the jury verdict until the entry of final judgment, but the circuit court denied Plaintiff's motion on August 16, 2004.

The circuit court entered judgment on October 13, 2004 in favor of Plaintiff and against Defendant. Defendant and Plaintiff filed their notices of appeal on November 12, 2004.

III. STANDARDS OF REVIEW

A. Motion to Set Aside The November 2000 Default Judgment

A trial court's grant of a motion to set aside a default judgment is reviewed for abuse of discretion. See Reardon Family Trust v. Wisenbaker, 101 Hawai'i 237, 254, 65 P.3d 1029, 1046 (2003).

> [T]he trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Abuse of discretion occurs when 'the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'

Ranches v. City and County of Honolulu, 115 Hawai'i 462, 468, 168 P.3d 592, 598 (2007) (citations omitted).

B. Sanctions

"All aspects of a HRCP Rule 11 determination should be reviewed under the abuse of discretion standard." Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 331, 104 P.3d 912, 918 (2004) (quoting Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 300, 972 P.2d 295, 303 (1999)) (internal quotation marks and citations omitted).

Further, "regardless whether sanctions are imposed pursuant to . . . [statute, circuit court rule,] or the trial

court's inherent powers, such awards are reviewed for an abuse of discretion." Id. (quoting Bank of Hawai'i v. Kunimoto, 91 Hawai'i 372, 387, 984 P.2d 1198, 1213 (1999))(alteration and ellipses in original).

C. Waiving An Affirmative Defense

Whether an affirmative defense has been waived due to a party's failure to plead the defense is a question of law reviewed de novo. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001).

D. Award of Attorneys' Fees and Costs

"The trial court's grant or denial of attorneys' fees and costs is reviewed under the abuse of discretion standard." Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 105, 176 P.3d 91, 104 (2008) (citing Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai'i 251, 266, 151 P.3d 732, 747 (2007)) (brackets omitted).

E. Award of Prejudgment Interest

The trial court's award of prejudgment interest is reviewed for abuse of discretion. See Tri-S Corp. v. W. World Ins. Co., 110 Hawai'i 473, 489, 135 P.3d 82, 98 (2006).

IV. DISCUSSION

A. The Circuit Court Did Not Abuse Its Discretion By Setting Aside the November 2000 Default Judgment Inasmuch As (1) The BDM, Inc. Three-Part Test Was Met and (2) It Was Not Barred On Procedural Grounds.

In its first point of error, Plaintiff argues that the circuit court abused its discretion by setting aside the November 2000 default judgment where "[Defendant's] inexcusable neglect,

his failure to contest damages at the default proof hearing, and his fraudulent misrepresentations, each obliged the court to reaffirm its [November 2000] default judgment." Plaintiff contends that Defendant did not satisfy the three requirements for setting aside the November 2000 default judgment that this court laid out in BDM, Inc. In the alternative, Plaintiff argues that Defendant's argument of insufficiency of service of process was untimely under HRCP Rules 12 and 60.

This court has ruled that "defaults and default judgments are not favored and that any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." Reardon Family Trust, 101 Hawai'i at 254, 65 P.3d at 1046 (quoting Lambert v. Lua, 92 Hawai'i 228, 235, 990 P.2d 126, 133 (App. 1999) (quotation marks omitted)); see also Oahu Plumbing & Sheet Metal, Inc. v. Kona Constr., Inc., 60 Haw. 372, 380, 590 P.2d 570, 576 (1979) (noting that in motions to set aside, there is a "preference for giving parties an opportunity to litigate claims or defenses on the merits"). Cf. W.H. Shipman, Ltd. v. Hawaiian Holiday Macadamia Nut Co., Inc., 8 Haw. App. 354, 361, 802 P.2d 1203, 1207 (1990) (noting that "[d]ismissal and default judgment are authorized only in extreme circumstances" under HRCP Rule 37 (internal quotation marks and citations omitted)). In light of this preference in favor of setting aside default judgments, and for the reasons that follow, we conclude that the circuit court did not abuse its discretion by setting aside the November 2000 default judgment against Defendant.

1. Defendant met the three requirements set out in BDM, Inc.

This court has established the following requirements for setting aside a default judgment: "(1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act." BDM, Inc., 57 Haw. at 76, 549 P.2d at 1150 (citations omitted). Because Defendant satisfied the three BDM, Inc. requirements, the circuit court properly granted his motion to set aside the November 2000 default judgment.

a. Plaintiff would not be prejudiced by the reopening of the case

Although Plaintiff states that "it was unfairly prejudicial to [Plaintiff] to set aside the [November 2000] default judgment," it does not advance any argument supporting this claim. As Defendant points out, when he moved to set aside the November 2000 default judgment, "the evidence necessary to decide the case on the merits was still readily available: the buffalo were still available for inspection; written contracts could still be examined; third parties and agents who were involved in the transaction were still available to testify." Moreover, "[t]he mere fact that the nondefaulting party will be required to prove his case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening." BDM, Inc., 57 Haw. at 76, 549 P.2d at 1150 (citation omitted). Thus, the circuit court did not err when it determined that setting aside the November 2000

default judgment did not prejudice Plaintiff.

b. Defendant has meritorious defenses

Next, Plaintiff argues that Defendant failed to establish his meritorious defense before the circuit court inasmuch as Defendant only disputed the amount of damages. However, Defendant's dispute as to the amount of his debt to Plaintiff based on the terms and performance of the contract is a meritorious defense.[16] Because the amount of damages was at issue, the case could not be resolved by summary judgment.

c. The default did not occur because of inexcusable neglect or wilful act

Plaintiff contends that Defendant did not meet the third requirement that default was not entered as a result of inexcusable neglect or a wilful act pursuant to Pogia v. Ramos, 10 Haw. App. 411, 417, 876 P.2d 1342, 1346 (1994), and Dillingham Inv. Corp. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 236, 797 P.2d 1316, 1321 (1990). Plaintiff alleges that Defendant's default "was a direct result of his fraudulent strategy to contest service of [Plaintiff's] complaint and cause delay" and that he "was fully aware of the complaint" filed against him but chose not to answer it.

In Pogia, the defendant was personally served but

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[16] Plaintiff argues that "the possible margin of error in the amount awarded by the [November 2000] default judgment to [Plaintiff] could not justify the subsequent cost to [Plaintiff] of going to trial to reprove and refine the damages calculations." However, the cost to Plaintiff of going to trial is not a factor in determining whether Defendant raised a meritorious defense.

Plaintiff also contends that Defendant had an opportunity, pursuant to HRCP Rule 55(b)(2), to raise these defenses at the October 19, 2000 hearing and failed to exercise that opportunity. This is also not a factor in determining whether Defendant raised a meritorious defense.

failed to file an answer because "she was having problems with her marriage, . . . she did not understand what the legal papers meant, and . . . after she signed the papers that the sheriff asked her to sign, she believed that was all she had to do." Pogia, 10 Haw. App. at 412-14, 876 P.2d at 1343-44. The trial court entered a default judgment against the defendant and rejected the defendant's subsequent motion to set the default judgment aside. Id. at 413-14, 876 P.2d at 1344. The Intermediate Court of Appeals ("ICA") affirmed the circuit court, ruling that the defendant's reasons as to why she failed to answer the complaint did not constitute excusable neglect. Id. at 414-18, 876 P.2d at 1344-46. Similarly, in Dillingham Inv. Corp., the trial court denied the defendants' motion to set aside the judgment where defendants received the complaint but failed to answer because they did not realize what was at issue in the complaint. Dillingham Inv. Corp., 8 Haw. App. at 231-32, 235-36, 797 P.2d 318-19, 1320-21. The defendants admitted that they "should have, out of caution, investigated the matter further," and the ICA concluded that because the defendants "wilfully" failed to answer the complaint, they did not meet the third prong of the BDM, Inc. test. Id. at 326, 797 P.2d at 1321.

The facts in the present case are clearly distinguishable from Pogia and Dillingham Inv. Corp. First, contrary to Plaintiff's allegations, there is no evidence that Defendant was "fully aware of the complaint" or that his default "was a direct result of his fraudulent strategy to contest service of [Plaintiff's] complaint and cause delay." Defendant

has maintained that he was first aware of the complaint on August 24, 2000 and the circuit court acted within its discretion by determining that Defendant defaulted "on the grounds of excusable neglect."[17] See Bank of Hawai'i, 91 Hawai'i at 390-91, 984 P.2d at 1216-17 (observing that the credibility of witnesses is within the province of the circuit court). Further, whereas in Pogia and Dillingham Inv. Corp., the defendants attempted to set aside the judgment nine and eighteen months respectively following the judgment, Pogia, 10 Haw. App. at 413, 876 P.2d at 1344, Dillingham Inv. Corp., 8 Haw. App. at 232, 797 P.2d at 1319, Defendant moved to set aside his August 2000 default on August 29, 2000, five days after he allegedly learned of the complaint and less than two weeks after his answer was due. Therefore, we conclude that the circuit court did not abuse its discretion by setting aside the November 2000 default judgment.

2. HRCP Rules 12 and 60 did not preclude Defendant from setting aside November 2000 default judgment

Alternatively, Plaintiff contends that HRCP Rules12(g)[18] and (h)[19] (2000) permit defendants "one and only one

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[17] In his affidavit, Defendant declared that he "was never served with a copy of the summons and complaint herein by any method or means, and the first time that [he] actually learned of the filing of any law-suit was when [he] received a faxed copy of Plaintiff's [r]equest for [e]ntry of [d]efault on August 24, 2000, whereupon [he] attempted to respond in good faith."

[18] HRCP Rule 12(g) provides:

> A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except

(continued...)

opportunity, whether by motion or pleading, to assert insufficiency of service of process as a defense" and that Defendant exercised that opportunity prior to his motion to set aside the November 2000 default judgment. However, Plaintiff misconstrues HRCP Rules 12(g) and (h), which deems a defense waived if it is omitted from a motion or answer.[20] Here, Defendant objected to the sufficiency of service in his first pleading to the circuit court (motion to set aside the August 2000 default), and therefore, did not waive the defense and was permitted to raise it again in his motion to set aside the November 2000 default judgment.

Plaintiff also contends that Defendant's motion to set

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[18](...continued)
a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

HRCP Rule 12(h)(2) states,

> A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

[19] HRCP Rule 12(h)(1), entitled "Waiver or preservation of certain defenses," states that a defense of insufficiency of process

> is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

[20] See Bacerra v. MacMillan, 111 Hawai'i 117, 119 n.2, 138 P.3d 749 751 n.2 (2006) (observing that the appellant failed to argue personal jurisdiction and that this defense was thus waived under HRCP Rule 12(h)(1)); Roxas v. Marcos, 89 Hawai'i 91, 135, 969 P.2d 1209, 1253 (1998) (ruling that because defendant's motion to dismiss did not include the defense of lack of personal jurisdiction, it was waived pursuant to HRCP Rule 12(g) and (h)).

aside the November 2000 default judgment pursuant to HRCP Rule 55 and 60(b) was untimely because an HRCP Rule 60(b) motion is "not a substitute for a timely appeal." (Quoting Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (App. 2000) (quoting Stafford v. Dickison, 46 Haw. 52, 57 n.4, 374 P.2d 665, 669 n.4 (1962))). HRCP Rule 60(b) motions are inappropriate as "an untimely attempt at a second bite of the apple" that expresses the same points, and/or made after a reasonable time has lapsed. Citicorp Mortgage, 94 Hawai'i at 433, 16 P.3d at 838. See Aiona v. Wing Sing Wo Co., 45 Haw. 427, 431-32, 368 P.2d 879, 881-82 (1962)(ruling that an HRCP Rule 60 motion made more than three years after the remand was not within a reasonable time).

However, the circuit court rejected Defendant's motion to set aside his default on procedural grounds and did not reach his substantive arguments. The circuit court first addressed Defendant's argument of insufficiency of service in Defendant's motion to set aside the November 2000 default judgment. Therefore, Defendant's HRCP Rule 60(b) motion was not an "untimely attempt at a second bite of the apple." For the same reason, Plaintiff's argument that the circuit court's refusal to set aside the August 2000 default precluded it from setting aside the November 2000 default judgment because there is a greater burden to set aside a default judgment than a default, also fails. See United States v. Real Prop., All Furnishings Known As Bridwell's Grocery & Video, 195 F.3d 819, 820 (6th Cir. 1999) ("The burden for setting aside a default judgment is greater than

for setting aside an entry of default, and this court has held that 'a stricter standard of review applies for setting aside a default once it has ripened into a judgment.'").

B. The Circuit Court Abused Its Discretion By Conditioning Its Order to Set Aside the November 2000 Default Judgment On Defendant's Payment of Plaintiff's Attorneys' Fees and Other Expenses Incurred in Opposing Defendant's Motion To Set Aside the November 2000 Default Judgment Inasmuch as the Sanction Was Not Tailored to Defendant's Misrepresentation.

In Defendant's first point of error, he contends that the circuit court abused its discretion by "condition[ing] relief from [the November 2000 default judgment] on payment of $17,932.33 to [Plaintiff] when the record demonstrates that he had not been served." Defendant argues that the primary issue in his motion to set aside the November 2000 default judgment was whether he was properly served and not whether his primary residence was in South Africa. Moreover, he "asserts that the confusion and additional attorney's fees incurred as a result of the pre-answer delay" was "more the result of a sheriff filing an incorrect proof of service than . . . by [Defendant] mistakenly believing that his primary residence was in South Africa." As previously stated, the circuit court sanctioned Defendant pursuant to HRCP Rules 11 and 60(b) and the inherent power of the court under HRS § 603-21.9(6) because of his fraudulent statements. Inasmuch as the circuit court abused its discretion by sanctioning Defendant under HRCP Rule 11, HRCP Rule 60(b) and HRS § 603-21.9(6), we remand the case to circuit court to tailor the award of Plaintiff's incurred expenses to Defendant's sanctionable conduct.

1. HRCP Rule 11 sanction

Even assuming arguendo that South Africa is Defendant's "only home" and sole residence, Defendant's statement that his usual place of abode is in South Africa is clearly untrue. Thus, the circuit court did not err in determining that Defendant made a false statement and finding him liable for sanctions under HRCP Rule 11.

However, in determining whether the circuit court abused its discretion by awarding Plaintiff attorney fees incurred in opposing Defendant's motion to set aside the November 2000 default judgment, we must also consider Defendant's argument that the additional attorney's fees "were far more the result of a sheriff filing an incorrect proof of service than they were by [Defendant] mistakenly believing that his primary residence was in South Africa." HRCP Rule 11 limits the sanction of attorneys' fees to the "reasonable attorneys' fees and other expenses incurred as a direct result of the violation" for the purpose of "deter[ring] repetition of such conduct or comparable conduct by others similar situation." (Emphases added.) See Canalez, 89 Hawai'i at 302-03, 972 P.2d at 305-06 (declining to sustain the trial court's sanctions imposed under HRCP Rule 11 because it could not conclude that the awarded attorney's fees and expenses were "directly and unavoidably" caused by the appellant's HRCP Rule 11 violation). The advisory committee notes for the HRCP Rule 11 federal counterpart, Federal Rules of Civil Procedure ("FRCP") Rule 11, explained that FRCP Rule 11 sanctions of expenses and attorney's fees are limited to "services directly

and unavoidably caused by the violation of [Rule 11]."[21] FRCP Rule 11 advisory committee's note (1993 Amendment). See Stallard v. Consol. Maui, Inc., 103 Hawai'i 468, 475, 83 P.3d 731, 738 (2004) ("As the [FRCP] are substantially similar to the HRCP, we look to federal case law for guidance."); Gold v. Harrison, 88 Hawai'i 94, 104, 962 P.2d 353, 363 (1998) (interpreting HRCP Rule 11 and stating that "[i]n instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance" (internal quotations and citations omitted)).

In the instant case, the circuit court initially believed that Defendant's "usual place of abode or his residence" was in South Africa. Subsequently, in his January 26, 2001 memorandum, Defendant argued that his abode was in South Africa (in his affidavit) and in Captain Cook (in his memorandum), but he also attached a copy of his passport indicating that he had not returned to South Africa since 1996. Accordingly, the hearing on his motion primarily focused on whether Hokukano Ranch was his usual abode and not whether he had an abode in South Africa.[22] Defendant's South Africa abode misrepresentation

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[21] To illustrate this limitation, the FRCP Rule 11 advisory committee's note states that if

> a wholly unsupportable count were included in a multi-count complaint or counterclaim for the purpose of needlessly increasing the cost of litigation to an impecunious adversary, any award of expenses should be limited to those directly caused by inclusion of the improper count, and not those resulting from the filing of the complaint or answer itself.

FRCP Rule 11 advisory committee's note (emphasis added).

[22] Moreover, Plaintiff's memorandum opposing Defendant's motion to set aside the November 2000 default judgment argued that Defendant's usual

(continued...)

delayed the proceedings, but the record does not suggest that all of Plaintiff's attorney's fees and costs incurred in responding to Defendant's motion to set aside the November 2000 default judgment were "a direct result" of Defendant's South Africa misrepresentation. Accordingly, we cannot sustain the circuit court's imposition of sanctions under HRCP Rule 11.

2. The circuit court's inherent power under HRS § 603-21.9(6)

The circuit court also relied on HRCP Rules 55 and 60 and HRS § 603-21.9(6) in conditioning the order setting aside of November 2000 default judgment on Defendant's payment. HRS § 603-21.9(6) permits circuit courts "[t]o make and award such judgments, decrees, orders, and mandates, . . . to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them." We have explained that "circuit courts . . . have broad discretion to sanction litigants pursuant to their 'inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them." Bank of Hawai'i, 91 Hawai'i at 393, 984 P.2d at 1219 (quoting Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 247-48, 948 P.2d 1055, 1088-89 (1997)). See Enos v. Pacific Transfer & Warehouse, Inc., 79 Hawai'i 452, 457, 903 P.2d 1273, 1278 (1995) ("The courts also have inherent power to curb abuses and promote a fair process, including the power to impose

[22](...continued)
place of abode was Hokukano Ranch, and did not even address whether Defendant lived in South Africa.

sanctions in the form of attorneys' fees for abusive litigation practices." (quotation marks, brackets, and citations omitted)). The United States Supreme Court ("Supreme Court") has explained that this power "is necessary to the integrity of the courts, for "tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) (citations omitted). Pursuant to its inherent powers, upon a finding of bad faith, the trial court has the discretion to dismiss a lawsuit -- an admittedly "severe sanction" -- or assess attorney's fees, a "less severe sanction."[23] Id. at 45; Enos, 79 Hawai'i at 458, 903 P.2d at 1279; Pokrass v. All Sec. Inc., 1 Ohio App.3d 47, 48, 439 N.E.2d 422 (1980) ("It is within the discretion of the trial court to determine what terms are just as a condition to relieving a party from a final judgment."). Pursuant to its inherent powers, the court may also order a party to pay for attorneys' fees even where the expenses were not a

[23] However, "[b]ecause of the very potency of a court's inherent power, it should be exercised with restraint and discretion." Enos, 79 Hawai'i at 458, 903 P.2d at 1279 (quoting United States v. Int'l Bhd. of Teamsters, 948 F.2d 1338, 1344 (2d Cir. 1991) (quoting Chambers, 501 U.S. at 44). We "declined to uphold awards under the bad-faith exception absent both clear evidence that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes and a high degree of specificity in the factual findings of the lower courts." Id. (quoting Teamsters, 948 F.2d at 1345); see also Gap, 106 Hawai'i at 334, 104 P.3d at 921 (holding that the circuit court erred by sanctioning the appellant where it did not make the specific finding that she acted in bad faith). We may affirm the circuit court's order when the circuit court considered that defendant acted in bad faith even though it did not explicitly state "bad faith" in the order. See Bank of Hawai'i, 91 Hawai'i at 390, 984 P.2d at 1216 (inferring that the circuit court made a specific finding of bad faith where it found that appellants' conduct constituted fraud upon the court and was, "at best, reckless, and, at worst, knowing and intentional").

direct result of the sanctionable conduct. See Chambers, 501 U.S. at 57 (rejecting appellant's claim that the trial court's sanction of attorney's fees under its inherent powers is limited to tailor the sanction to the particular wrong).

HRCP Rule 60 also authorized the circuit court to condition the relief on the payment of Plaintiff's expenses. HRCP Rule 60, which states that the trial court may relieve a party from a final judgment "on motion and upon such terms as are just," authorizes a trial court to condition its order setting aside the default judgment on the payment of sanctions. See Wokan v. Alladin Intern. Inc., 485 F.2d 1232, 1234 (3d Cir. 1973) ("[FRCP] Rule 60(b)[24] gives the district court explicit authority to impose terms upon the opening of a default judgment." (footnote added)); Thorpe v. Thorpe, 364 F.2d 692 (D.C. Cir. 1966) (ruling that pursuant to FRCP Rule 60, the trial court may impose reasonable conditions in granting a motion to vacate a default judgment, such as payment of costs incurred because of the default). The Ninth Circuit Court of Appeals has explained that

> [b]y conditioning the setting aside of a default, any prejudice suffered by the non-defaulting party as a result of the default and the subsequent reopening of the litigation can be rectified . . . . [T]he most common type of prejudice is the additional expense caused by the delay, the hearing on the . . . motion, and the introduction of new issues. Courts have eased these burdens by requiring the defaulting party to provide a bond to pay costs, to pay court costs, or to cover the expenses of the appeal. The use of imposing conditions can serve to 'promote the positive purposes of the default procedures without subjecting either litigant to their drastic consequences.'

[24] FRCP Rule 60 states in relevant part, "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons."

Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538, 1546 (9th Cir. 1988) (citations omitted).

"The condition most commonly imposed [in granting relief from a final judgment] is that the defendant reimburse the plaintiff for costs -- typically court costs and attorney's fees-incurred because of the default." Thorpe, 364 F.2d at 694; see also Coon v. Grenier, 867 F.2d 73, 79 (1st Cir. 1989) (conditioning the relief of the default judgment on the defaulting party paying the non-defaulting party's reasonable fees and costs incurred in securing the default and default judgment where there was no evidence that the defaulting party intentionally evaded service); Richardson v. Nassau County, 184 F.R.D. 497, 503-04 (E.D.N.Y. 1999) (conditioning the order setting aside the default judgment on the defaulting party paying the nondefaulting party's costs because the nondefaulting party's default motion and opposition to the defaulting party's motion to vacate the default judgment were "entirely reasonable and foreseeable"). The California Court of Appeals reasoned that

> [t]he payment of a monetary award might well be a reasonable condition designed to avoid unfairness in certain circumstances. For instance, if the lack of notice has resulted from the defendant's excusable neglect, mistake or inadvertence, then the defendant is not entirely innocent and should not be placed in a better position than he would have enjoyed had he received actual notice. Similarly, if the plaintiff indeed effected service properly, but for some reason, the defendant nonetheless did not receive actual notice . . . then the plaintiff is no less innocent than the defendant and it may be that both parties should be maintained in positions of relative parity.

Kodiak Films, Inc. v. Jensen, 230 Cal.App.3d 1260, 1264-65, 281 Cal.Rptr. 728, 730-31 (Cal. Ct. App. 1991) (emphasis in

original). However, as Thorne discussed, if the defendant cannot pay the prerequisite amount, the condition may violate the defendant's due process rights:

> If appellant's claim that he simply is unable to comply with the condition imposed is true, serious questions are raised, questions having an aura of denial of due process of law. See Societe Internationale, etc. v. Rogers, 357 U.S. 197, 209-210 . . . (1958), where the Supreme Court stated, in another context, that imposition of an 'impossible' condition of a litigant's right to a trial on the merits raises constitutional difficulties. If it is determined on remand that an unusual condition is justified, but that appellant is unable to raise the cash for the reasons he suggests, the court should consider the possibility of providing that in lieu of cash the appellant may tender, for purposes of this litigation, instruments representing his interests in any newly-acquired property.

Thorpe, 364 F.2d at 695 (remanding the circuit court's order to determine whether the condition, which required defendant to place the amount plaintiff requested in its complaint (an amount more than the default judgment awarded) in an escrow account, was justified under the circumstances).

Pursuant to HRCP Rule 60(b)(1) and HRS § 603-21.9, the circuit court was authorized to condition the order setting aside the November 2000 default judgment on Defendant's payment of Plaintiff's costs incurred in opposing Defendant's motion to set aside the November 2000 default judgment where the court determined that the default occurred because of excusable neglect. Because the court found that Defendant attempted to deceive the court, it was authorized to sanction Defendant for acting in bad faith. See Bank of Hawai'i, 91 Hawai'i at 390-91, 984 P.2d at 1216-17 (observing that the credibility of witnesses is within the province of the circuit court). However, we hold that requiring Defendant to pay all of the costs Plaintiff

incurred opposing his motion was unjust.[25] See Kodiak Films, 230 Cal.App.3d at 1264-65, 281 Cal.Rptr. at 730-31 (omitting monetary conditions imposed on the defendant in the order setting aside the default judgment because the trial court "necessarily" found that the defendant was not at fault for the lack of notice and default); East Coast Exp., Inc., v. Ruby, Inc., 162 F.R.D. 37, 40 (E.D. Pa. 1995) (ruling that conditioning an order setting aside a default on a sanction against the defaulting party is inappropriate where there is no evidence of bad faith and the relief is warranted). As stated supra, although Defendant's misrepresentation delayed the proceedings, the hearings and memoranda regarding this motion primarily focused on whether Hokukano Ranch was his usual abode and not whether he had an abode in South Africa. Thus, it was unreasonable to order Defendant to pay all of Plaintiff's expenses incurred in opposing Defendant's motion to set aside the November 2000 default judgment before setting aside the November 2000 default judgment. Accordingly, we remand the order setting aside the November 2000 default judgment with instructions to the circuit court to tailor the award of Plaintiff's attorneys' fees to Defendant's sanctionable conduct.

[25] Although Defendant's "opportunity to litigate the claims or defenses on the merits" was conditioned on his payment of nearly $18,000, Defendant has not alleged a due process violation. Moreover, because Defendant paid Plaintiff the amount Plaintiff incurred in opposing his motion to set aside the November 2000 default judgment, he was not actually deprived of his due process rights.

C. The Circuit Court Properly Determined That Plaintiff Waived Its Objection to Defendant's Contract Modification Defense Where It Had Notice Of This Defense But Failed To Timely Object.

In Plaintiff's second point of error, it claims that the circuit court erred in allowing Defendant to present evidence at trial regarding his affirmative defense of contract modification where Defendant failed to plead this defense in his answer, and thus, waived it under HRCP Rule 8(c).[26] See Touche Ross Ltd. v. Filipek, 7 Haw. App. 473, 487, 778 P.2d 721, 730 (1989) (ruling that defendant did not plead the affirmative defense of lack of good faith and fair dealing in his answer and therefore, the defense was waived). For the same reason, Plaintiff also asserts that the circuit court erred in instructing the jury on Defendant's affirmative defense of contract modification (jury instruction No. 3.7).

Defendant does not dispute that contract modification is an affirmative defense.[27] However, Defendant argues that

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[26] HRCP Rule 8(c) (2000) states,

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

[27] Plaintiff correctly observes that Hawai'i appellate courts have not determined that contract modification is an affirmative defense that is waived upon defendant's failure to plead the defense. However, federal courts and other jurisdictions have observed that contract modification is an

(continued...)

because Plaintiff had "ample notice" that oral contract modification was an issue in the case, the primary purpose of HRCP Rule 8(c) was fulfilled. In Hawai'i Broadcast. Co., Inc. v. Hawai'i Radio, Inc., 82 Hawai'i 106, 919 P.2d 1018 (App. 1996), the ICA held that defendants' failure to plead affirmative defenses was immaterial because the plaintiff had not timely objected to defendants' failure to plead it. Hawai'i Broadcast. Co., Inc., 82 Hawai'i at 112-13, 919 P.2d at 1024-25. The ICA stated,

> The primary purpose of requiring affirmative defenses to be pleaded is to give notice to the parties of such defenses." Id. at 112, 919 P.2d at 1024 (citing 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1492, at 12 (1990)). Under the liberal amendment practice of the civil procedure rules, "issues not raised by the pleadings that are tried by express or implied consent of the parties . . . shall be treated in all respects as if they had been raised in the pleadings. HRCP Rule 15(b).[28] Therefore, the "failure to plead

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[27](...continued)
affirmative defense. See Intec Systems, Inc. v. Lowrey, 230 S.W.3d 913, 918 (Tex. Ct. App. 2007) ("Contract modification is an affirmative defense."); Helm Corp. v. Iowa N. Ry. Co., 214 F.Supp. 2d 934, 976 (N.D. Iowa 2002); Regent Partners, Inc. v. Parr Dev. Co., 960 F. Supp. 607, 611 (E.D.N.Y. 1997); Metrocon Const. Co., Inc. v. Gregory Const. Co., Inc., 663 S.W.2d 460, 463 (Tex. Ct. App. 1983) ("We hold that a modification of the contract, in the context of this case, is a matter of confession and avoidance, i.e. an affirmative defense.").

[28] HRCP Rule 15(b) (2000), entitled, "Amendments to conform to the evidence," states:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the
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> (continued...)

> an affirmative defense is immaterial if evidence of the defense is introduced and not objected to for failure to plead it, and no surprise is claimed." Godoy v. Hawai'i County, 44 Haw. 312, 322, 354 P.2d 78, 83 (1960) (quoting 2 J. Moore, Moore's Federal Practice at 1696 n.30 (2d ed.)).

Id. at 112, 919 P.2d at 1024 (brackets in original omitted and footnote added). We have observed that "[t]he purpose of Rule 15(b) is to allow an amendment of the pleadings to 'bring the pleadings in line with the actual issues upon which the case was tried . . . and to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action and later proves to be erroneous." Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 433, 32 P.3d 52, 77 (2001) (quoting Cresencia v. Kim, 10 Haw. App. 461, 477, 878 P.2d 725, 734 (1994)) (brackets, internal quotation marks, and internal citations in original omitted). Here, Plaintiff was aware that contract modification was at issue and the matter was fully litigated. Therefore, Defendant's failure to plead this in his answer is immaterial.

Throughout the case, both parties argued that more than one contract (the May 1998 contract) was at issue. In addition to alleging a breach of the May 1998 contract in Plaintiff's amended complaint, Plaintiff also alleged that Defendant breached (1) an implied contract (when Defendant received 117 buffalo

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[28](...continued)
admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

worth $264,800), (2) an oral agreement (for a higher price for pregnant buffalo);[29] and (3) an oral agreement for generators (that Plaintiff owed $15,000).

In addition to Plaintiff's own allegations that the contract was modified, Defendant notified Plaintiff of his contract modification defense prior to trial. At Plaintiff's deposition on September 27, 2002, nine months prior to trial, Defendant's counsel questioned Mowry about whether the parties made an oral agreement for the February 2000 second shipment as follows:

> Q. And as you know from his deposition, [Defendant] said that after the animals were loaded, then you told him what the price would be?
> A. No. He knew what the price was from the contract. Knew it all along.
> Q. Was the contract ever altered in any way by you?
> A. No.
> Q. You didn't make any oral agreements --
> A. No.
> Q. -- that you are relying upon?
> A. No.

Mowry also disputed that the parties orally modified the contract on February 1, 2000:

> Q. Did you reach an agreement on February 1st at that meeting?
> A. No, we never did reach an agreement other than the fact that I wanted to be paid. And he, you know, never paid me.
> . . . .
> Q. Well, is it your testimony that you did not agree on any number or figure in that February 1st, 2000 meeting?
> A. I don't think we ever came to any firm agreement. He never agreed to what I had, and I never agreed to what he had. I don't think we ever really came to any firm understanding -- we came to a firm understanding as to what he should be paying.

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[29] Plaintiff claimed that "[Defendant] realized that their purchase of pregnant buffalo from [Plaintiff] was outside the terms of the [c]ontract, that [Defendant] had received services and buffalo in excess of the value that [Defendant] had agreed to pay to [Plaintiff], that [Plaintiff] expected payment for the extra value of pregnant buffalo, and that delivery of the same was not gratuitous." (Emphasis added.)

> Q So your testimony is there was no agreement. So how did you leave it then?
> A. That he still owed me money.

At Mowry's deposition, Defendant's counsel showed Mowry several exhibits of letters from Defendant to Plaintiff that supported Defendant's claim of a contract modification on February 1, 2000. In response, Mowry stated that upon receiving a fax from Defendant to Mowry (dated February 11, 2000) seeking a $2,000 discount from his due balance of $105,000 (Exhibit 5), he believed that Defendant "was a con artist and was just trying some more of his tricks." In response to Exhibit 7, a fax (dated February 14, 2000) from Defendant to Mowry that stated that the parties had agreed to a balance of $105,0000 on February 1, 2000, Plaintiff opined that it illustrated "a con artist at work."

Defendant's pleadings also notified Plaintiff of his contract modification defense. In Defendant's June 10, 2003 settlement conference statement, Defendant alleged that he agreed to pay Plaintiff $140,000 payable in four installments.[30]

Inasmuch as Plaintiff failed to timely object to Defendant's defense of contract modification, under HRCP Rule 15(b), Plaintiff waived its objection to Defendant's contract modification defense. Therefore, we affirm the circuit court's ruling permitting Defendant to present evidence and jury

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[30] Defendant explained that because Plaintiff breached the contract by failing to deliver the promised buffalo, "all of the animals given to him would be within the $96,000 payment he had previously made, and part of the [verbal] promise that 'I'll make it up to you.'" After Plaintiff shipped Defendant more buffalo, it verbally informed Defendant that it was charging him $135,000 in addition to the $96,000 he had already paid. However, Defendant "agreed to pay the additional sum of $140,000 payable in [four] installments."

instruction No. 3.7 regarding contract modification.

D. The Circuit Court Abused Its Discretion When It Failed to Award Defendant Attorneys' Fees Where Defendant Prevailed On the Main Issue Of The Amount of Debt Due To Plaintiff.

On appeal, Defendant and Plaintiff argue that the circuit court abused its discretion when it failed to deem either party the prevailing party for the purpose of awarding attorneys' fees.[31] Plaintiff and Defendant both argue they each are entitled to attorneys' fees as the sole "prevailing party."

Plaintiff asserts that it is entitled to attorneys' fees under HRS § 607-14 as the prevailing party on two main issues. Defendant asserts that he is entitled as the prevailing party under HRCP Rule 68, HRS § 607-14, and the May 1998 contract because the jury found he owed Plaintiff $105,000, which is the

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[31] The circuit court inconclusively ruled that both Plaintiff and Defendant were prevailing parties:

> With reference to who prevailed in this trial, there is the . . . Rule 68 offer of judgment, and that was done on May 21st, 2003. And the [c]ourt, under that circumstance, is -- from May 21st, 2003, will afford, will award the cost to [Defendant] from that time on.
>
> . . . .
>
> [B]asically, the defendant prevailed on the amount that the jury awarded to [Plaintiff]. And notwithstanding the fact that he was awarded something from the jury, the [c]ourt feels that there was that offer of judgment of $110,000, which is $5,000 more than the verdict, and which would have saved a lot of attorney's fees and costs. And there was an offer with reference to the settlement that was in excess of $110,000 which [Plaintiff] refused to accept. And that amount was $140,000. So the [c]ourt find [sic] that the plaintiff did not prevail on the complaint, but did prevail on the counterclaim. Under the circumstances, the [c]ourt will not award any attorney's fees to either [Plaintiff] or [Defendant].

It later ruled, "[T]o a certain extent, the [c]ourt finds that [Plaintiff] was the prevailing party to a certain extent; to a lesser extent, [Defendant] was a prevailing party."

amount he also argued. For the reasons discussed below, we (1) affirm the circuit court's order denying Plaintiff's motion to attorneys' fees and (2) reverse the circuit court's order denying Defendant's motion for attorney's fees.

1. HRS § 607-14 and the May 1998 contract

As previously stated, Plaintiff and Defendant argue they are each entitled to attorneys' fees under HRS § 607-14 and the May 1998 contract. Pursuant to the May 1998 contract, the prevailing party in this case is entitled to attorneys' fees and costs. The May 1998 contract states:

> Attorney's Fees: In the event that either party obtains the services of attorney to enforce any provision of this agreement, the prevailing party shall be entitled to his attorney's fees and any reasonable costs and expenses associated therewith.

However, the prevailing party's award of attorneys' fees is limited by HRS § 607-14. HRS § 607-14 provides in pertinent part,

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; . . . . The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.
>
> Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.
>
> . . . .
>
> The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the amount sued for if the defendant obtains judgment.

(Emphases added.) Accordingly, the prevailing party is entitled to reasonable attorneys' fees, in an amount up to twenty-five percent of the judgment.

2. Prevailing party test

This court has ruled that "where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees" under HRS § 607-17.[32] Food Pantry, Ltd., v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 620, 575 P.2d 869, 879 (1978) (footnote omitted) (declaring a prevailing party even though the trial court declined to award either party attorneys' fees where "there has not been a clear cut victory"). "The trial court is required to first identify the principle issues raised by the pleadings and proof in a particular case, and then determine, on balance, which party prevailed on the issues." Village Park Cmty. Ass'n v. Nishimura, 108 Hawai'i 487, 503, 122 P.3d 267, 283 (App. 2005) (quoting MFD Partners v. Murphy, 9 Haw. App. 509, 513-15, 850 P.2d 713, 715-16 (1992)).

Under this test, Plaintiff argues that it is the

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[32] HRS § 607-17 provided in pertinent part,

> Any other law to the contrary notwithstanding, where an action is instituted in the district or circuit court on a promissory note or other contract in writing which provides for an attorney's fee the following rates shall prevail and shall be awarded to the successful party, whether plaintiff or defendant:
>
> (1) Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed;
>
> (2) Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed;
>
> provided that the fee allowed in any of the above cases shall not exceed that which is deemed reasonable by the court.

In 1993, HRS §§ 607-14 and 607-17 were combined into one statute, HRS § 607-14. See Blair, 96 Hawai'i at 330 n.5, 31 P.3d at 184 n. 5.

prevailing party because it prevailed on the two central issues: (1) "whether [Defendant] owed [it] money from the sale of the buffalo, and (2) whether [it] had breached any warranties covering the sale of the buffalo to [Defendant]." Plaintiff also notes that the jury found Plaintiff liable for $105,000 and that the final judgment against Defendant was for $119,923.24. However, Defendant disputes Plaintiff's argument that his warranty cross claim was a "central issue," and asserts that it was a "largely un-litigated fallback position." Defendant contends that he is the prevailing party on the three primary areas of dispute in this trial: 1) whether there was an oral modification for $105,000; 2) whether the agreed price for the non-working generators was $500 or $5,000 each; and 3) whether Defendant is the alter ego for Cardinal Investment Company. Based on the pleadings and proof of this case, we conclude that Defendant prevailed on the main issue and therefore, is the prevailing party.

3. Disputed main issue: The amount of Defendant's debt to Plaintiff

Plaintiff and Defendant agree that Defendant's debt to Plaintiff is a primary issue, but they differ on the characterization of this issue. Plaintiff contends that the issue was "whether [Defendant] owed [Plaintiff] money from the sale of the buffalo," whereas Defendant asserts that "the primary issue was whether [Defendant] owed $105,000 or something more,

pursuant to the [February 1, 2000 oral] agreement."[33] Inasmuch as Defendant has maintained that he owes Plaintiff $105,000 for the buffalo and generators, the primary issue is not merely whether Defendant was in debt to Plaintiff, but whether Defendant owed Plaintiff more than $105,000.

Throughout the case, Plaintiff has argued that Defendant owed it $164,440 for the buffalo, generators, and miscellaneous expenses, while Defendant has asserted that he owed Plaintiff $105,000. Defendant admitted that he owed Plaintiff $105,000 in (1) his settlement conference statement (filed June 10, 2003), (2) opening statement, and (3) testimony (Defendant told Plaintiff that he "want[s] to give [Plaintiff] $105,000, just give me the receipt.").[34] Defendant's counsel argued in his

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[33] Throughout his opening brief, Defendant argues several "main" issues: First, "[T]he primary issue was whether [Defendant] owed $105,000 or something more, pursuant to the "[February 1, 2000 oral] agreement." Then, "[t]he main issue in this case was whether or not there was a modified contract - that defined a $105,000 price for the additional cattle." Finally, Defendant argued, "[t]here were three primary areas of dispute in this trial: 1) whether there was an oral modification for $105,000; 2) whether the agreed price for the non-working generators was $500 each or $1,500 each; and 3) whether [Defendant] was the alter ego for Cardinal Investment Company." However, all three of Defendant's descriptions of the disputes are subissues of the primary issue, how much he owed Plaintiff for the buffalo.

The jury determined that the parties agreed that Defendant would pay $1,500 for the generators. Therefore, Defendant was the prevailing party on the subissue of the price of the generators. The jury also determined that Defendant was not the alter ego of Cardinal Investment Company, rendering Cardinal Investment Company the prevailing party on that issue (against Plaintiff).

[34] Plaintiff points out that if Defendant did not dispute that he owed Plaintiff money, he should have stipulated "yes" to jury question one, which asked, "Is Plaintiff entitled to recover from [Defendant]?" However, this question is not a "disputed main issue" simply because the jury was asked this question. Rather, this was a foundational question not arising to the level of a subissue to the main issue. It is important to note that Plaintiff also argues that "[Defendant] consistently conceded during trial that he had

(continued...)

opening statement:

> [Defendant] has always agreed that he owes $105,000. He agreed to pay it. He doesn't think he owes it, but he agreed to pay it to buy peace. So we are saying from the beginning, from 1998 up until this very minute, yes, he owes $105,000, because he stood behind it, he said he would pay $105,000 and he will. So we are asking you to return a verdict for $105,000 maximum because that was the agreement. That is what they agreed to. There is no debate about that."

Even Plaintiff argues in its opening brief that Defendant "acknowledged receipt of the buffalo and his failure to pay for the same and . . . his only dispute was with the amount of damages."

Thus, because Defendant admitted that he owed Plaintiff $105,000, the primary issue was not whether Defendant was in debt to Plaintiff. Rather, the disagreement -- the "disputed main issue" at trial -- concerned the amount of Defendant's debt to Plaintiff for the buffalo and generators: $105,000 (Defendant's position) or more than $105,000 (Plaintiff's position).

4. No other main issues between Plaintiff and Defendant

Plaintiff argues on appeal that this case involved a second central issue, a claim Defendant argued in his counterclaim:[35] "[W]hether [Plaintiff] had breached any warranties covering the sale of the buffalo to [Defendant]." Plaintiff contends that Defendant "repeatedly introduced evidence concerning the age and condition of the buffalo throughout

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[34](...continued)
owed [Plaintiff] $105,000 ever since early February 2000."

[35] Defendant's counterclaim alleged that Plaintiff breached (1) its expressed warranties, (2) its implied warranties, and (3) the contract, "by failure to tender proper delivery of the buffalos in accordance with the contract."

trial."[36]

A "disputed main issue" does not arise merely because one party presents evidence in its support. In this case, Plaintiff and Defendant argued numerous subissues in their pleadings and presented various evidence over the four-day long trial.[37] The circuit court ruled against Defendant's counterclaim for breach of warranties as a judgment as a matter of law, and the jury resolved several subissues governing the liability of the parties. The parties' claims and defenses, and the court and jury's rulings and determinations were all ancillary subissues necessary to the resolution of the main disputed issue.[38]

Defendant's counterclaim that Plaintiff breached contract warranties by delivering buffalo in poor condition was

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[36] Specifically, Plaintiff points out that in Defendant's May 14, 2001 counterclaim, July 17, 2002 pretrial statement, depositions, January 29, 2003 witness list, and July 2, 2003 memorandum in opposition to Plaintiff's motion for summary judgment, Defendant suggested that the condition of buffalo was at issue. At trial, Defendant also asked witnesses about the condition of the buffalo that Defendant received.

[37] Plaintiff, for example, alleged six claims of breach of contract (buffalo and generators) and implied contract and quantum meruit (buffalo, pregnant buffalo, and Plaintiff's additional expenses). Defendant claimed in its counterclaim that Plaintiff breached express and implied warranties, and offered evidence regarding the age and health of buffalo sold to Defendant.

[38] Plaintiff's opening statement also clarified that the main issue between Plaintiff and Defendant is the amount that Defendant owed it for the buffalo and generators. Plaintiff argued:

> This is a $160,000 plus case. That is what it is. That is what we are here to deal with.
>
> And all we are really talking about is not how well the animals did or didn't do, but what was the deal, what the price, how many animals did you get and what were their dynamics. Because, I mean, male animals sell for less than female animals. And depending upon their ages there are other different price breaks, too. So that is what it's about.

not a disputed main issue. Rather, Defendant's allegations about the age and condition of the buffalo were critical to the credibility of his defense that the parties modified the contract price and that pursuant to the oral contract modification, he was liable for $105,000 -- not "$160,000 plus." As previously explained, Defendant testified that as a result of the insufficient first buffalo shipment, Mowry told him that the May 1998 contract (which specified that the buffalo were to be under four years of age) was "no longer in place." During the second shipment, Defendant had a credit "so large" from his $96,000 payment that he felt justified in taking three trailers of animals. Some of these animals were old but "Mowry had said to take -- go ahead and take all these bulls and I will make it up to you." During price renegotiations, Defendant rejected Plaintiff's argument that he "got so many bulls," in the second shipment, arguing that many of the buffalo he received were less valuable because they were sick and injured. Defendant's explanation that he was liable to Plaintiff for $105,000 was based on the number of animals he received as well as the poor condition of the buffalo.

Finally, Plaintiff's claim that Defendant "actively litigat[ed] the counterclaim" appears disingenuous. In Plaintiff's oral motion to dismiss Defendant's counterclaim that Plaintiff breached warranties, Plaintiff alleged that Defendant hardly presented evidence on this issue. Plaintiff argued: (1) "[t]here was no evidence of implied warranties"; (2) "[Defendant] agreed there would need to be no instructions on implied

warranties"; (3) "the evidence is certainly inclusive as to . . . which expressed warranty is it that [Defendant] is claiming has been breached"; (4) Defendant did not give any testimony "that the warranty was a material factor inducing [Defendant] to buy the animals"; and (5) "Defendant presented zero, absolutely no valuation testimony . . . .to establish" damages. Thus, Defendant's claim for breach of warranties was merely a defense to the main issue, and the circuit court erred by considering its resolution of this subissue when determining which party is the "prevailing party."

5. Defendant is the prevailing party

As determined above, the main disputed issue was whether Defendant owed Plaintiff $105,000 or more. Because the jury determined that Defendant owed Plaintiff $105,000, as Defendant argued, Defendant is the prevailing party of the case.

Plaintiff claims that the jury's award of $105,000 in his favor automatically renders him the prevailing party. Plaintiff relies on MFD Partners, in which the ICA rejected the defendant's argument that it was the prevailing party where "the trial court awarded [plaintiffs] only 'nominal damages.'" MFD Partners, 9 Haw. App. at 513-14, 850 P.2d at 715-16. The ICA ruled that "when a jury finds for the plaintiff as to liability, the plaintiff is the prevailing party and entitled to costs." MFD Partners, 9 Haw. App. at 513-14, 850 P.2d at 715-16. Nevertheless, the ICA deemed the plaintiff the prevailing party in MFD Partners based on the "disputed main issue" rule, and the two principal issues in MFD Partners involved whether the

defendant breached the contract and not the amount of damages. Id. at 513, 850 P.2d at 715. In the instant case, however, the main disputed issue was the amount of Defendant's liability. Because the jury found that Defendant owed Plaintiff $105,000, Defendant is the prevailing party.

6. Defendant's attorneys' fees

Under HRS § 607-14 and the May 1998 contract, Defendant, as the prevailing party, is entitled to attorneys' fees in the amount of up to twenty-five percent of the amount Plaintiff sued for. See HRS § 607-14 ("Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed."). Accordingly, we vacate the circuit court's order denying Defendant's motion for attorneys' fees and remand for entry of a new judgment providing for an award of Defendant's attorneys' fees. We further affirm the circuit court's order denying Plaintiff's motion for attorney's fees.

E. The Circuit Court Did Not Abuse Its Discretion By Refusing To Award Plaintiff Costs Under HRCP Rule 54(d)(1) Inasmuch as It Is Not the Prevailing Party.

Plaintiff argues on appeal that the circuit court erred when it denied its requests for costs under HRCP Rule 54(d)(1). HRCP Rule 54(d)(1) states that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." See Wong v. Takeuchi, 88 Hawai'i 46, 52, 961 P.2d 611, 617 (1998) ("Rule 54(d) creates a strong presumption that the prevailing party will recover costs . . . . the court may not

deny costs to the prevailing party without explanation, unless the circumstances justifying denial of costs are plain from the record." (Ellipses in original; block formatting and bracketing omitted.)). Inasmuch as Plaintiff is not the prevailing party in the case, see supra, the circuit court properly denied Plaintiff's request for costs.

F. The Circuit Court Abused Its Discretion By Awarding Defendant Costs Under HRCP Rule 68 Where Defendant's Offer Was Not More Favorable Than the Jury Verdict and Prejudgment Interest.

Plaintiff next argues on appeal that the circuit court erred by awarding Defendant costs he incurred ($1,613.76) from the date that his offer was made (May 21, 2003) under HRCP Rule 68. Because the circuit court failed to compare Defendant's offer with the jury verdict and prejudgment interest awarded to Plaintiff, we agree.

HRCP Rule 68 (Supp. 1999) requires the offeree to pay the offeror's costs incurred after the making of the HRCP Rule 68 offer if "the judgment finally obtained by the offeree is not more favorable than the offer." "Final judgment" is defined as "[a] court's last action that settles the rights of the parties and disposes of all issues in controversy, except for the award of costs (and sometimes, attorney's fees) and enforcement of the judgment." Black's Law Dictionary 859 (8th ed. 2004). Accordingly, when ruling on the HRCP Rule 68 motion, the circuit court must compare the HRCP Rule 68 offer with the amount awarded through litigation, including the jury's verdict and prejudgment interest. Cf. Forbes v. Hawai'i Culinary Corp., 85 Hawai'i 501,

511, 946 P.2d 609, 619 (App. 1997) (ruling that the amount of the judgment upon which attorneys' fees are calculated under HRS § 607-14 should include prejudgment interest). As the ICA ruled, "HFCR Rule 68 motions [essentially the same as HRCP Rule 68 motions] are properly brought only after a judgment has been 'finally obtained.' Otherwise, there would be no way to compare the proposed offer with the final judgment." Owens v. Owens, 104 Hawai'i 292, 307, 88 P.3d 664, 679 (App. 2004) (footnote omitted). Cf. Marek v. Chesny, 473 U.S. 1, 5 (1985) (explaining that FRCP Rule 68 "prompts both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits"). Because the judgment obtained by Plaintiff, $121,537 (prejudgment interest and jury's verdict), is more favorable than the offer, $110,000,[39] we reverse the circuit court's order granting Defendant costs under HRCP Rule 68.[40]

G. The Circuit Court Did Not Abuse Its Discretion By Awarding Plaintiff Prejudgment Interest For The Period Between The Filing Of The Complaint To the Order Setting Aside the November 2000 Default Judgment.

On appeal, Plaintiff and Defendant dispute the amount of prejudgment interest the circuit court awarded Plaintiff under HRS § 636-16. Plaintiff contends that "an award of prejudgment interest [from the breach of the complaint until the final

[39] Although the circuit court found that Defendant made a settlement offer to Plaintiff of $140,000, the record does not indicate that Defendant made this HRCP Rule 68 offer.

[40] Although Defendant argued before the circuit court that Plaintiff was liable for his costs on four bases, including the May 1998 contract, his answering brief solely argues for costs based on HRCP Rule 68.

judgment] was especially appropriate in this matter given the delay caused by [Defendant's] evasion of service, followed by his failure to answer and his fraudulent contest of the service of the [c]omplaint." However, Defendant asserts that the circuit court was "without legal authority" to award any prejudgment interest where the jury did not find that he breached the contract. Alternatively, Defendant argues that the circuit court abused its discretion by awarding Plaintiff prejudgment interest as a sanction, where he was already sanctioned in attorneys fees under HRS § 603-21.9(6), because he was not at fault for the delay of the proceedings. However, Defendant and Plaintiff's arguments are without merit.

The circuit court awarded Plaintiff prejudgment interest under HRS § 636-16, which permits the circuit court to "designate the commencement date to conform with the circumstances of the case." HRS § 636-16. As we set forth in AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 839 P.2d 10, reconsideration denied 74 Haw. 650, 843 P.2d 144 (1992), "The purpose of [HRS § 636-16] . . . is to allow the court to designate the commencement date of interest in order to correct injustice when a judgment is delayed for a long period of time for any reason, including litigation delays." AMFAC, Inc., 74 Haw. at 137, 839 P.2d at 36 (quoting Schmidt v. Bd. of Dirs. of Ass'n of Apartment Owners of Marco Polo Apartments, 73 Hawai'i 526, 534, 836 P.2d 479, 483 (1992)) (internal quotations, quotation marks, and brackets omitted; ellipses in original). The legislative history of HRS § 636-16 states:

> The purpose of this bill is to more clearly define the trial judge's discretion in awarding interest in civil cases.
>
> Your committee understands that at the present time interest is generally awarded commencing on the day the judgment is rendered. Where the issuance of a judgment is greatly delayed for any reason, such fixed commencement date can result in substantial injustice. Allowing the trial judge to designate the commencement date will permit more equitable results. Also, it is expected that party litigants will give serious regard to this discretion on the part of the trial judge so that those who may have had an unfair leverage by the arbitrariness of the prior rule will arrive at the realization that recalcitrance or unwarranted delays in cases which should be more speedily resolved will not enhance their position or assure them of a favorable reward.

Sen. Conf. Comm. Rep. No. 67, in 1979 Senate Journal, at 984; see also Schmidt, 73 Hawai'i at 534 n. 5, 836 P.2d at 484 n.5.

Based on the purpose and plain language of HRS § 636-16, and the circumstances of the case, the circuit court acted within its discretion when it awarded prejudgment interest for the period that it believed Defendant delayed the proceedings.[41] Here, Plaintiff sought prejudgment interest accrued for the period between Defendant's breach of contract (February 2, 2000) and the judgment (October 13, 2004). Nevertheless, the circuit court opined that "the trial period was not very extensive." Under these circumstances, it limited prejudgment interest to the interest accrued from February 22, 2000 until September 19, 2001. The circuit court is authorized to award interest against Defendant regardless of who was at fault for the delayed

[41] Although the order granting in part and denying in part Plaintiff's motion for an award of prejudgment interest awarded Plaintiff prejudgment interest "for the period from February 22, 2000 to November 19, 2001," the $16,537 award was calculated using the orally ordered September 19, 2001 date. Prejudgment interest ($16,537) multiplied the judgment ($105,000) by the annual interest rate (10%) and time period (575 days/365 days per year).

proceedings.[42] See Ditto v. McCurdy, 86 Hawai'i 84, 115 n. 22, 947 P.2d 983 n.22 (App. 1997) ("[T]he trial court is vested with the discretion to award prejudgment interest whether or not dilatory tactics are shown by either party, so long as the issuance of judgment was greatly delayed."). The prejudgment interest was not, as Defendant argues, a second sanction (for the South Africa misrepresentation) against him. Rather, it was awarded to Plaintiff because of the delay between the filing of the complaint and setting aside the November 2000 default judgment. Accordingly, the circuit court did not abuse its discretion by awarding Plaintiff prejudgment interest from the date of the complaint until the order setting aside the November 2000 default judgment.

For the same reasons, the circuit court did not abuse its discretion by declining to award prejudgment interest for the entire period requested by Plaintiff. Although HRS § 636-16 does not explicitly authorize the circuit court to provide an ending date for the prejudgment interest award, it does not require the court to award prejudgment interest until it files the final judgment. As we have stated, "where no fault is found on either side, the trial court may still award or deny prejudgment interest in its discretion, depending on the circumstances of the case." Tri-S Corp., 110 Hawai'i at 498, 135 P.3d at 107. There

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[42] Defendant also argues that it should not be assessed prejudgment interest for the four months prior to the order setting aside the November 2000 default judgment where the circuit court had possession of a draft order but failed to sign it. However, as stated supra, prejudgment interest is not awarded based on which party is at fault, but to compensate one party for the interest lost because of a delay of the proceedings.

is no indication that Defendant was at fault for the delay during (1) the breach of the contract[43] (February 2, 2000) until the filing of the complaint (February 22, 2000) or (2) the order setting aside the November 2000 default judgment until the final judgment.[44] Based on the circumstances of the case, we cannot conclude that the circuit court abused its discretion by limiting the Plaintiff's prejudgment interest to the period in which Defendant set aside the November 2000 default judgment.

H. The Circuit Court Did Not Abuse Its Discretion By Denying Defendant's Motion to Sanction Plaintiff Under HRS § 607-14.5 and HRCP Rule 11.

In Defendant's final point of error, he argues that the circuit court abused its discretion in refusing to award him attorneys' fees under HRS § 607-14.5 and HRCP Rule 11 where Plaintiff "engaged in frivolous conduct" and "presented inconsistent positions." (Citing Kawaihae v. Hawaiian Ins. Cos., 1 Haw. App. 355, 361, 619 P.2d 1086, 1091 (1980) (defining "frivolous claim" as "manifestly and palpably without merit, so

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[43] The jury did not explicitly find that Defendant breached the contract. However, because the jury held Defendant liable to Plaintiff, Defendant necessarily breached the contract.

[44] After the order setting aside the November 2000 default judgment was filed on August 30, 2001, Plaintiff filed an amended complaint on January 18, 2002. On July 23, 2002, the order setting the trial date for the week of July 28, 2003 was filed. Trial began on July 28, 2003 and ended with a jury verdict on July 31, 2003. Thereafter, the parties filed motions for costs, sanctions, prejudgment interest, and attorneys' fees. The trial court granted in part and denied in part Defendant's motion on October 23, 2003 and Plaintiff's motion on October 13, 2004. Defendant moved for reconsideration of the order denying in part his motion for attorneys' fees and sanctions on October 29, 2003, and the circuit court denied this motion on August 16, 2004. Plaintiff filed a motion for prejudgment interest since the jury verdict (filed June 15, 2004), but the circuit court denied this motion on August 16, 2004. The circuit court filed the judgment on October 13, 2004.

as to indicate bad faith on [the pleader's] part such that argument to the court was not required"). This argument is without merit.

Inasmuch as Defendant failed to comply with the procedural requirements of HRCP Rule 11, the circuit court was not authorized to award Defendant attorneys' fees under this rule. As stated supra, HRCP Rule 11(c)(1)(A) forbids a party from filing or presenting to the court a motion for sanctions for violating HRCP Rule 11 motion "unless, within 21 days after service of the motion [on the offending party], . . . the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected." HRCP Rule 11(c)(1)(A). Defendant's counsel did not serve Plaintiff with a letter or pleading alleging a violation of HRCP Rule 11, giving it an opportunity to remedy the violation before filing it with the court. Accordingly, the circuit court did not err when it denied Defendant's motion to sanction Plaintiff under HRCP Rule 11 because he failed to comply with the requirements of the rule.

Defendant also claims that he is entitled to attorneys' fees under HRS § 607-14.5 because, as he argued to the circuit court, (1) Mowry's deposition conflicted with a witness's testimony, (2) Plaintiff argued that evidence of modification should be barred but also admitted the contract was modified, and (3) Plaintiff increased the amount Defendant owed it.

As to Defendant's first argument for sanctions, that Plaintiff "present[ed] a fraudulent, frivolous and perjured testimony" about the price of the generators, inconsistent

testimonies from different witnesses does not by itself indicate criminal solicitation and/or perjury warranting sanctions. After the circuit court observed the conflicting testimonies, it concluded that Plaintiff did not act in bad faith. We should not disturb the court's determination of the credibility of the witnesses. See Bank of Hawai'i, 91 Hawai'i at 390-91, 984 P.2d at 1216-17 ("The credibility of witnesses and the weight to be given their testimony are within the province of the trial court and, generally, will not be disturbed on appeal.").

Defendant also claims that Plaintiff is subject to sanctions for its inconsistent arguments about contract modification and the amount of Defendant's debt. However, "[u]nder our liberalized rules of pleading and procedure[,] a party may state 'as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both.'" See Airgo, Inc. v. Horizon Cargo Transp. Inc., 66 Haw. 590, 670 P.2d 1277 (1983)(quoting HRCP Rule 8(e)(2)). We also note that "[t]here are a multitude of situations that arise during litigation at the trial level that may contribute to the legal and strategic decisions made by each party; the trial judge is in the best position to ascertain the motivations of the parties and the reasonableness of actions undertaken by counsel and the parties." Nelson v. Univ. of Hawai'i, 99 Hawai'i 262, 269, 54 P.3d 433, 440 (2002). In light of these principles, the circuit court did not err by determining that Plaintiff did not act in bad faith by presenting its inconsistent claims and testimonies.

Accordingly, the circuit court acted within its discretion by declining to sanction Plaintiff under HRS § 607-14.5.

IV. CONCLUSION

Based upon the foregoing analysis, we hold that: (1) the circuit court did not abuse its discretion by setting aside the November 2000 default judgment inasmuch as the BDM, Inc. test was met; (2) the circuit court abused its discretion by conditioning its order to set aside the November 2000 default judgment on Defendant's payment of Plaintiff's expenses pursuant to HRCP Rules 11, 55, and 60 and HRS § 607-14.5 inasmuch as it awarded Plaintiff attorney's fees and costs that were not incurred as a result of Defendant's misrepresentations; (3) the circuit court properly determined that Plaintiff waived its objection to Defendant's contract modification defense where it had notice of this defense but failed to timely object; (4) the circuit court abused its discretion by failing to award Defendant attorneys' fees where Defendant prevailed on the main issue of the amount of debt due to Plaintiff; (5) the circuit court did not abuse its discretion by refusing to award Plaintiff attorneys' fees and costs because it is not the prevailing party; (6) the circuit court abused its discretion by awarding Defendant costs under HRCP Rule 68 where Defendant's offer of judgment was not more favorable than jury verdict and prejudgment interest; (7) it was within the circuit court's discretion to award Plaintiff prejudgment interest from the filing of the complaint to the order setting aside the November 2000 default judgment;

and (8) the circuit court did not abuse its discretion by refusing to sanction Plaintiff under HRS § 607-14.5 and HRCP Rule 11.

Accordingly, we vacate the circuit court's October 13, 2004 final judgment and (1) remand the circuit court's order setting aside the November 2000 default judgment with instructions to tailor the award of attorneys' fees to Defendant's sanctionable conduct, (2) remand for entry of a new judgment awarding Defendant reasonable attorneys' fees, and (3) reverse the circuit court's order granting Defendant costs under HRCP Rule 68.

DATED: Honolulu, Hawai'i, May 30, 2008.

On the briefs:

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