

CONCURRING AND DISSENTING OPINION BY LEVINSON, J.,  
WITH WHOM NAKAYAMA, J., JOINS

I agree with much of the majority's analysis, particularly its conclusion that the first circuit court erred in granting the motion filed by the plaintiff-appellee-respondent Bank of Hawaii (the Bank) to extend its December 21, 1993 deficiency judgment against the defendant-appellant-petitioner Michael L. Shinn, because he was not afforded notice of the Bank's motion to extend before it was granted by the circuit court, in contravention of Hawai'i Revised Statutes (HRS) § 657-5 (Supp. 2001).<sup>1</sup> Majority opinion at 2-3, 8-16, 56. I part ways with the majority because it holds that the error did not require the circuit court to set aside the extension of the deficiency judgment pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b)(4) on the ground that the extension was void. Id. at 3-4, 17-57.

I. DISCUSSION

A. The ICA Erred In Concluding That The Circuit Court Did Not Abuse Its Discretion In Denying Shinn's Motion To Set Aside The Order Extending The Deficiency Judgment On The Ground That The Extension Was Void.

HRCP Rule 60(b)(4) provides in relevant part that, "[o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for the [reason that] . . . the judgment is void." "If a judgment is only void

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<sup>1</sup> HRS § 657-5 provides in relevant part that "[n]o extension [of a judgment or decree] shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree."

in part and the void portion can be separated from the balance, relief may be granted to that extent." McGrew v. McGrew, 82 P.3d 833, 841 (Idaho 2003) (interpreting the Idaho counterpart to HRCF Rule 60(b)(4)). The majority concludes that the extended deficiency judgment at issue in the present matter is not void insofar as, in the majority's view, the circuit court's violation of HRS § 657-5 was "harmless," majority opinion at 3-4, 17-57, because "the circumstances surrounding [Shinn's] case do not rise to the level of seriousness necessary to justify voiding the judgment," id. at 25. In this connection, the majority relies upon In re Genesys Data Technologies, Inc., 95 Hawai'i 33, 40, 18 P.3d 895, 902 (2001), wherein this court explained that the violation of a notice provision is so serious as to render a judgment void if the violation deprives a party of due process. Thus, the majority implicitly concludes that the circuit court's violation of HRS § 657-5 was harmless inasmuch as the violation did not offend Shinn's due process rights. See majority opinion at 25. Indeed, the remaining cases upon which the majority relies in its harmless-error analysis similarly address whether a party was deprived of due process of law or at least of an opportunity to be heard. See id. at 17-25 (citing Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 245, 953 P.2d 1315, 1343 (1998); Stafford v. Dickison, 46 Haw. 52, 58-61, 374 P.2d 665, 669 (1962); Blaney v. West, 209 F.3d 1027, 1031-32 (7th Cir. 2000); Ruiz Varela v. Sanchez Velez, 814 F.2d 821, 823 (1st Cir. 1987); Whale v. United States, 792 F.2d 951, 952 (9th

Cir. 1986)).<sup>2</sup> I agree with the majority insofar as it concludes that, under those cases and Genesys, Shinn's due process rights were not violated by the extension of the judgment without notice. See id. at 3-4, 17-26. But neither Genesys nor any of the other cases cited by the majority in its harmless-error analysis considered whether a court's judgment was void because the court exceeded its authority in entering the judgment. That is precisely the alternative question that Shinn has presented to us in the case at bar. Specifically, in addition to asserting that his due process rights were violated, Shinn argues that the deficiency judgment is void insofar as it was extended in contravention of HRS § 657-5, because the circuit court did not have authority under the statute to extend the judgment without notice. The question is thus whether a court's judgment is void when the court exceeds its authority in entering the judgment.

This court decided a similar question in Wong Kwai Tong v. Choy Yin, 31 Haw. 603 (Terr. 1930). In that case, a divorced ex-husband was ordered to pay his ex-wife alimony and to grant her the right to occupy the home where she was residing, pursuant to Revised Laws of Hawaii (RLH) § 2979 (1925). Id. at 604-05. The statute provided that the circuit court could order that the ex-husband provide the ex-wife with a "suitable allowance." Id. at 605-06. It did not, however, empower the court to order a

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<sup>2</sup> See also majority opinion at 37-38 (citing Nishitani v. Baker, 82 Hawai'i 281, 291-92, 921 P.2d 1182, 1192-93 (App. 1996); Isemoto Contracting Co. v. Andrade, 1 Haw. App. 202, 206-07, 616 P.2d 1022, 1026 (1980); Farm Credit Bank of Baltimore v. Ferrera-Goitia, 316 F.3d 62, 68 (1st Cir. 2003)).

division of the ex-husband's real estate or to vest title to a part thereof in the ex-wife. Id. at 606. The ex-husband did not appeal the divorce decree, but instead attacked the order collaterally. Id. at 606-09. The question before this court was whether the circuit court's order was void. Id. This court explained that, "even when a court has jurisdiction over the parties and the subject matter, . . . it may lack jurisdiction to make the particular decree which it attempts to make; and in such a case the particular decree made in excess of jurisdiction is void and may be attacked collaterally." Id. at 606. In other words, "[a]lthough a court may have jurisdiction over the parties and the subject matter, . . . if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void." Id. (quoting United States ex rel. Wilson v. Walker, 109 U.S. 258, 266 (1883)). With respect to the facts before it, this court observed that the circuit court's error was jurisdictional, as opposed to merely procedural, in nature. Id. This court held that, although the circuit court had jurisdiction over the parties and the general subject matter of the action, the circuit court acted in excess of its statutory jurisdiction by setting apart the ex-husband's interest in real property to the ex-wife because it had no power under RLH § 2979 to order a division of the ex-husband's real estate or to vest title to it in the ex-wife. Id. at 606, 609. The circuit court's order was therefore void. Id. at 606-09.

This court employed a comparable analysis in Cooper v. Smith, 70 Haw. 449, 450, 776 P.2d 1178, 1179 (1989), in which a husband and wife were divorced, but the divorce decree reserved the disposition of marital assets for a later time. Three years later, the ex-husband and ex-wife executed a settlement agreement, which the family court approved and incorporated into the divorce decree. Id. As amended, the decree provided that the ex-husband would pay the ex-wife alimony and that the ex-wife would have an option to purchase stock in the ex-husband's company from the ex-husband at an extremely favorable price if he failed to pay alimony in a timely fashion. Id. at 450-52, 776 P.2d at 1179-80. When the ex-husband failed timely to pay alimony, the ex-wife brought suit in circuit court to exercise her option to purchase his stock. Id. at 452, 776 P.2d at 1180. The ex-husband moved for summary judgment on the ground that the option provision was a penalty and thus unenforceable. Id. at 452-53, 776 P.2d at 1180. The circuit court agreed and voided the provision in the decree. Id. at 453, 776 P.2d at 1180. On appeal, this court addressed whether the provision was void. Id. at 450, 453-55, 776 P.2d at 1179-82. We observed that a judgment is "void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." Id. at 454, 776 P.2d at 1181 (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862, at 198-200 (1973)). We concluded that nothing in the record indicated that the decree was afflicted

with any of the enumerated infirmities. Id. We additionally determined that, although neither the parties nor the circuit court had discussed the implications of HRS § 580-56 (1985), the statute did not deprive the family court of its authority to incorporate the settlement agreement into the decree. Id. at 454 n.1, 776 P.2d at 1181 n.1. The statute stated that, "after 'the elapse of one year after entry of a decree or order reserving the final division of property . . . , a divorced spouse shall not be entitled . . . to any share of the former spouse's personal estate.'" Id. (quoting HRS § 580-56(d)) (first ellipsis in original and second ellipsis added). We noted that the statute deprived the family court of the power to divide the personal estate of the parties after the lapse of the statutorily prescribed period, but that the statute did not divest the family court of the authority to incorporate the parties' settlement agreement into the decree. Id. For those reasons, this court held that the circuit erred in concluding that the decree was void. Id. at 454, 776 P.2d at 1182.

Although this court observed in Cooper that the "'only'" infirmities that would render a judgment void arise from a defect relating to subject-matter jurisdiction, personal jurisdiction, or due process, id. at 454, 776 P.2d at 1181 (quoting 11 Wright & Miller, Federal Practice and Procedure § 2862, at 198-200), our analysis of whether HRS § 580-56(d) deprived the family court of the authority to modify the divorce decree suggests that a court's judgment may also be void when it is entered without authority, see id. at 454 n.1, 776 P.2d at 1181 n.1. That analysis is indeed consistent with Wong Kwai

Tong, in which this court explicitly held that a court's judgment is void when it exceeds its jurisdiction in entering a particular decree. See 31 Haw. at 606. It is also consistent with the federal courts' understanding of the circumstances under which a judgment is "void" for purposes of Federal Rules of Civil Procedure (FRCP) Rule 60(b)(4). Just as this court concluded in Wong Kwai Tong, the United States Courts of Appeal for the Fifth and Seventh Circuits have determined that "a judgment may be void for purposes of Rule 60(b)(4) if the court, although having jurisdiction over the parties and subject matter, entered a decree 'not within the powers granted to it by the law.'" United States v. Indoor Cultivation Equip. from High Tech Indoor Garden Supply, 55 F.3d 1311, 1316-17 (7th Cir. 1995) (quoting Walker, 109 U.S. at 266, and holding that a default judgment in a forfeiture proceeding was void pursuant to FRCP Rule 60(b)(4), because the district court had no authority to enter the judgment, insofar as the government failed to file a forfeiture complaint within sixty days after the defendant claimed the property, as required by 21 U.S.C. § 888(c), which specifically directed that the forfeiture not take place if the government failed to comply with that requirement); accord Carter v. Fenner, 136 F.3d 1000, 1005, 1007-09 (5th Cir. 1998) (following Indoor Cultivation Equip., 55 F.3d at 1316, and holding that a consent judgment between a municipality and a minor's tutor was void under FRCP Rule 60(b)(4), because the minor's tutor failed to obtain prior court approval before settling the minor's claim, as required by a Louisiana statute); cf. Wong Kwai Tong, 31 Haw. at 606 (quoting Walker, 109 U.S. at 266). FRCP Rule 60(b)(4) is

identical to HRCF Rule 60(b)(4). "[W]here a Hawaii rule of civil procedure is identical to the federal rule, the interpretation of that rule by the federal courts is highly persuasive.'" County of Kauai v. Baptiste, 115 Hawai'i 15, 33, 165 P.3d 916, 934 (2007) (quoting Pulawa v. GTE Hawaiian Tel, 112 Hawai'i 3, 20 n.15, 143 P.3d 1205, 1222 n.15 (2006)) (some brackets added and some omitted). Therefore, the federal appellate decisions interpreting the term "void," as it appears in FRCP Rule 60(b)(4), strongly suggest that a judgment is void pursuant to HRCF Rule 60(b)(4) where a court exceeded its authority to enter a particular judgment. See id.; Indoor Cultivation Equip., 55 F.3d at 1316; Carter, 136 F.3d at 1005. In light of the foregoing federal decisions as well as this court's decisions in Cooper and Wong Kwai Tong, I do not believe that a judgment is void "'only'" if the court that entered it lacked subject-matter or personal jurisdiction or if the court acted in a manner inconsistent with due process of law. See Cooper, 70 Haw. at 454, 776 P.2d at 1181 (quoting 11 Wright & Miller, Federal Practice and Procedure § 2862, at 198-200). Rather, even if a court had personal and subject-matter jurisdiction and even if it acted in a manner consistent with due process of law, a court's judgment is nevertheless void where the court exceeded its jurisdiction in entering the judgment. See id. at 454 n.1, 776 P.2d at 1181 n.1; Wong Kwai Tong, 31 Haw. at 606; Indoor Cultivation Equip., 55 F.3d at 1316; Carter, 136 F.3d at 1005.

The question becomes whether the circuit court's violation of HRS § 657-5 in ordering the extension of the Bank's

deficiency judgment without the required notice to Shinn was "jurisdictional" or merely "procedural" in nature. See Wong Kwai Tong, 31 Haw. at 606. While it is true that Wong Kwai Tong, Cooper, Indoor Electronics Equipment, and Carter are factually different from the matter before us in that they did not involve the violation of a notice requirement, see majority opinion at 27-38, our decisions interpreting HRCP Rule 56(c) illustrate that such a violation may, in some circumstances, give rise to a jurisdictional defect. The rule requires that a motion for summary judgment be served within a certain period before the time set for the hearing on the motion. HRCP Rule 56(c). We construed this requirement in Clarke v. Civil Service Commission, 50 Haw. 169, 434 P.2d 312 (1967). In that case, a state employee was informed by the director of institutions that he had been dismissed from his position. Id. at 169, 434 P.2d at 312. The employee appealed his dismissal to the civil service commission, which upheld the dismissal. Id. at 169, 434 P.2d at 312-13. The employee proceeded to appeal the commission's ruling to the circuit court, id. at 169-70, 434 P.2d at 313, and, at a pretrial conference, the circuit court instructed the parties to file memoranda on points of law, id. at 170, 434 P.2d at 313. After reviewing the memoranda, the circuit court decided to treat the commission's memorandum as a motion for summary judgment and thereupon dismissed the appeal. Id. On an appeal to this court, the employee maintained that the circuit court had committed reversible error when it granted summary judgment on its own motion without giving him an opportunity to be heard on the matter. Id. We explained that, if the circuit court had the

"power and authority" to grant summary judgment sua sponte, such power could only be exercised in compliance with the provisions of HRCF Rule 56. Id. at 171, 434 P.2d at 313. We observed that the rule required that the time for a hearing be fixed, that the adverse party be given notice of such setting, and that a hearing in fact be held on the matter. Id. In determining the consequence of violating these requirements, we drew inspiration from caselaw interpreting the federal counterpart to HRCF Rule 56 and explained that "[i]t is a well-settled proposition in federal courts that the notice and hearing requirements [of FRCP Rule 56] are far more than mere formalities and that, in the absence of such notice and hearing, the court is without jurisdiction to grant summary judgment." Id. In light of that proposition, we held that the circuit court erred in dismissing the appeal without notice and without a hearing on the matter, contrary to the provisions of HRCF Rule 56. Id. Such an error is harmful per se. See Jensen v. Pratt, 53 Haw. 201, 202, 491 P.2d 547, 548 (1971) (citing, inter alia, Clarke, 50 Haw. 169, 434 P.2d 312, in holding that the circuit court's dispensing with the opportunity to be heard orally on a motion for summary judgment, contrary to the requirement of HRCF Rule 56(c), so strongly affected the substantial rights of the parties as to constitute harmful error per se).

The majority maintains that this court's primary concern in Clarke was the fact that the employee had not had an opportunity to be heard on the merits of the motion for summary judgment. Majority opinion at 40. The majority concludes that the absence of a hearing was this court's chief consideration,

given that the employee's argument on appeal was that circuit court erred when it granted summary judgment on its own motion without giving him an opportunity to be heard on the matter. Id. (quoting Clarke, 50 Haw. at 170, 434 P.2d at 313). While the lack of a hearing may have been the employee's primary concern, this court was equally concerned with the absence of notice. See Clarke, 50 Haw. at 170-71, 434 P.2d at 313. It was for that reason that we observed (1) that HRCF Rule 56 required the adverse party to be given notice of the hearing, (2) that, in the absence of "notice and hearing," the court was without jurisdiction to grant summary judgment, and (3) that the circuit court therefore erred in dismissing the appeal "without notice and without a hearing." Id. at 171, 434 P.2d at 313. Accordingly, I do not believe that we were primarily concerned with the absence of a hearing in Clarke. The majority's cramped reading of our holding in Clarke attempts to sidestep the issue. See majority opinion at 39-41. Indeed, while the majority does articulate our holding that the circuit court erred in dismissing the appeal without notice and without a hearing in contravention of HRCF Rule 56, id. at 39, it does not address the jurisdictional principle upon which that holding was premised: "It is well-settled in federal courts that the notice and hearing requirements [of FRCP Rule 56] are far more than mere formalities and that, in the absence of such notice and hearing, the court is without jurisdiction to grant summary judgment." Clarke, 50 Haw. at 171, 434 P.2d at 313; majority opinion at 39-41. It seems to me that, after Clarke, it is also "well-settled" in the Hawai'i courts that the notice and hearing requirements of HRCF Rule 56

are far more than mere formalities and that, in the absence of such notice and hearing, our courts are without jurisdiction to grant summary judgment. See Clarke, 50 Haw. at 171, 434 P.2d at 313; see also Querubin v. Thronas, 107 Hawai'i 48, 57, 109 P.3d 689, 698 (2005) (quoting Clarke, 50 Haw. at 170-71, 434 P.2d at 313).

Following Clarke, we decided Shelton Engineering Contractors, Ltd. v. Hawaiian Pacific Industries, 51 Haw. 242 246, 456 P.2d 222, 225 (1969), in which a party was served with a motion for summary judgment five days before the date set for hearing, when HRCP Rule 56(c) required ten days' prior notice.<sup>3</sup> This court explained that, although the movant did not literally comply with the notice requirement of the rule, he had "complied substantially." Id. We held that, because the non-moving party had not shown that he had been harmed by not having a full ten days' notice, we would not disturb the entry of summary judgment on the ground that HRCP Rule 56(c) had been violated. Id. And in Jensen, we further clarified the Shelton rule, explaining that the "proper standard of review under [HRCP] Rule 56(c) is to treat periods of notice of less than ten days as non-prejudicial, in the absence of a showing of actual harm." 53 Haw. at 202, 491 P.2d at 548.

Most recently, in Querubin v. Thronas, 107 Hawai'i 48, 109 P.3d 689 (2005), we surveyed the foregoing cases in

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<sup>3</sup> HRCP Rule 56(c) was subsequently amended in 1996 to require that the motion be served within fifteen days of the time set for hearing. Order Amending the Hawai'i Rules of Civil Procedure (Sept. 11, 1996). And, in 1997, the rule was further amended to require that the motion be served within eighteen days of the time set for hearing. Order Amending Rules 6(d) and 56(c) of the Hawai'i Rules of Civil Procedure (May 15, 1997).

addressing whether the circuit court erred in granting summary judgment in favor a defendant without giving the plaintiffs notice or an oral hearing. The plaintiffs were injured in an automobile accident, which allegedly resulted from the defendant's negligent maintenance of a hedge on his property. Id. at 51, 109 P.3d at 692. When the plaintiffs filed a lawsuit against the defendant, the defendant in turn filed a third-party complaint against the County of Kaua'i, asserting that the portion of the hedge that allegedly caused the accident was located on land owned by the county. Id. at 52, 109 P.3d at 693. The county moved for summary judgment as to the third-party complaint on the basis that the hedge was not a contributing factor in the plaintiffs' automobile accident. Id. at 53, 109 P.3d at 694. The defendant filed a joinder in the county's motion for summary judgment based on his belief that the presence or maintenance of the hedge was not a contributing factor in the plaintiff's accident. Id. at 54, 109 P.3d at 694. The plaintiffs filed a statement of no position regarding the county's motion for summary judgment. Id. The circuit court granted the motion and thereafter entered an order granting the defendant's motion for summary judgment via joinder. Id. The circuit court reasoned that, by filing a statement of no position with respect to the county's motion for summary judgment, the plaintiffs had conceded that the hedge was not a contributing factor in the accident. Id. On appeal, we surveyed the Hawai'i cases interpreting HRCF Rule 56's hearing and notice requirements, including Clarke and Jensen. Id. at 57-59, 109 P.3d at 698-700. In discussing Clarke, we quoted the case's jurisdictional principle, but we added one word to the

proposition as follows: "'It is a well-settled proposition in federal courts that the notice and hearing requirements are far more than mere formalities and that, in the absence of such notice and hearing, the [circuit] court is without jurisdiction to grant summary judgment.'" Id. at 57, 109 P.3d at 698 (quoting Clarke, 50 Haw. at 170-71, 434 P.2d at 313) (brackets in original). We proceeded to discuss Jensen's harmless-error approach, as well as some of the ICA's HRCR Rule 56 cases. Id. at 57-59, 109 P.3d at 699-700. In addressing the facts at hand, we explained that the plaintiffs had no notice that the defendant was seeking summary judgment against them because he had not moved for summary judgment. Id. at 59, 109 P.3d at 700. We held that, because the plaintiffs were unaware that the defendant's joinder in the county's motion for summary judgment could result in the entry of summary judgment against them on their complaint against the defendant, the plaintiffs were obviously and actually prejudiced by the lack of notice. Id. We also held that the circuit court's failure to afford the plaintiffs an oral hearing on a motion for summary judgment was harmful per se. Id. at 60, 109 P.3d at 701.

The majority asserts that, because we did not apply Clarke's jurisdictional principle in Querubin, where no notice was given, violations of a notice requirement, whether complete or partial, are therefore subject to harmless error analysis and are not jurisdictional in nature. Majority opinion at 45. In my view, our analysis in Querubin illustrates that, if HRCR Rule 56's notice requirement is violated and no notice of the hearing has been given, then the violation may give rise to reversible error upon a showing of harm. We did not, however,

overrule Clarke's jurisdictional principle sub silentio. Indeed, we quoted the principle in surveying our HRCR Rule 56 notice caselaw, Querubin, 107 Hawai'i at 57, 109 P.3d at 698 (quoting Clarke, 50 Haw. at 170-71, 434 P.2d at 313), and cited Clarke in holding that the circuit court erred in sua sponte entering an order granting summary judgment in favor of the defendant without providing the plaintiffs with notice or an oral hearing, id. at 60, 109 P.3d at 701 (citing, inter alia, Clarke, 50 Haw. at 170-70, 434 P.2d at 313). Thus, I do not believe that we jettisoned Clarke's jurisdictional principle in Querubin. If anything, we clarified that, under Clarke, in the absence of the notice and hearing requirements of HRCR Rule 56, "the [circuit] court is without jurisdiction to grant summary judgment." Id. at 57, 109 P.3d at 698 (quoting Clarke, 50 Haw. at 170-71, 434 P.2d at 313) (brackets in original).

To summarize, where a circuit court acts in violation of HRCR Rule 56(c)'s notice requirement, but there has been at least some notice of the hearing, the aggrieved party must show that he has been prejudiced by the violation. See Shelton, 51 Haw. at 246, 456 P.2d at 225; see also Kau v. City & County of Honolulu, 6 Haw. App. 370, 371-73, 722 P.2d 1043, 1045-46 (1986). But, if a circuit court acts in contravention of the rule's notice requirement and there has been no notice of the hearing, then prejudice need not be shown because the violation is jurisdictional in nature and thus harmful per se. See Clarke, 50

Haw. at 171, 434 P.2d at 313; Jensen, 53 Haw. at 202, 491 P.2d at 548.<sup>4</sup>

Like HRCF Rule 56(c), HRS § 657-5 contains a notice provision. In interpreting the statute, "this court's 'foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.'" See Kaho'ohanohano v. Dep't of Human Servs., 117 Hawai'i 262, 288, 178 P.3d 538, 564 (2008) (quoting Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Hawai'i 248, 251, 131 P.3d 1230, 1233 (2006)). The statute provides in relevant part that "[n]o extension [of a judgment] shall be granted without notice." HRS § 657-5. Its use of the word "shall" strongly implies that notice is mandatory. See Tri-S Corp. v. W. World Ins. Co., 110 Hawai'i 473, 490, 135 P.3d 82, 99 (2006) ("The term 'shall' is ordinarily used in a mandatory sense.") (quoting Taomae v. Lingle, 108 Hawai'i 245, 251, 118 P.3d 1188, 1194 (2005)). Thus, the statute requires that a judgment creditor put the judgment debtor on notice of a motion to extend the judgment before the motion is granted. See HRS § 657-5; see also majority opinion at 16. In the present matter, when the Bank filed a motion to extend the deficiency judgment, it did not afford Shinn any sort of notice of the motion. It thus failed to comply altogether with the statute's notice requirement. There is simply no evidence in the record

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<sup>4</sup> This court employs a similar framework in analyzing the notice required by a charging instrument in the criminal context. If a defendant is not charged with all of the essential elements of an offense, the court is deprived of subject matter jurisdiction and the omission is prejudicial per se. State v. Cummings, 101 Hawai'i 139, 142-43, 63 P.3d 1109, 1112-13 (2003). By contrast, if the charging instrument simply omits a word rather than an essential element, a defendant who challenges the omission for the first time on appeal must demonstrate substantial prejudice. Id.

that Shinn was afforded any notice before the circuit court granted the motion. Hence, the circuit court exceeded its jurisdiction under HRS § 657-5 when it granted the motion and ordered the extension of the judgment. See Clarke, 50 Haw. at 171, 434 P.2d at 313;<sup>5</sup> Jensen, 53 Haw. at 202, 491 P.2d at 548; cf. Carter, 136 F.3d at 1007-09.<sup>6</sup> That jurisdictional defect is harmful per se, see Clarke, 50 Haw. at 171, 434 P.2d at 313; Jensen, 53 Haw. at 202, 491 P.2d at 548, and renders the extension of the judgment void for purposes of HRCF Rule 60(b)(4), see Cooper, 70 Haw. at 454 n.1, 776 P.2d at 1181 n.1; Wong Kwai Tong, 31 Haw. at 606; Indoor Cultivation Equip., 55 F.3d at 1316; Carter, 136 F.3d at 1005; McGrew, 82 P.3d

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<sup>5</sup> The majority maintains that Clarke is distinguishable from the case at bar on the ground that, in Clarke, the plaintiff did not receive notice or an opportunity to raise defenses in the original proceeding. Majority opinion at 41. In the present matter, while it is true that Shinn did have an opportunity to raise defenses in the proceedings that resulted in the entry of the deficiency judgment, it is also true that he had no notice of the Bank's motion to extend the deficiency judgment and had no opportunity to oppose the Bank's motion before it was granted by the circuit court.

<sup>6</sup> The majority asserts that Carter is distinguishable from the present case. Majority opinion at 36-37 n.25. In Carter, as previously stated, the Fifth Circuit held that a consent judgment between a municipality and a minor's tutor was void under FRCP Rule 60(b)(4), because the minor's tutor failed to obtain prior court approval before settling the minor's claim, as required by a Louisiana statute. 136 F.3d at 1007-09. The majority contends that Carter is distinguishable from the present matter, in part because the validity of the consent judgment in that case was determined by Fifth Circuit precedent on the issue. Majority opinion at 36-37 n.25. As the majority observes, before deciding Carter, the Fifth Circuit had previously held in Johnson v. Ford Motor Co. that "[c]ompromises entered into absent [the protections of the Louisiana statute] are of no legal effect." Carter, 136 F.3d at 1006 (quoting Johnson, 707 F.2d 189, 194 (5th Cir. 1983)) (emphasis omitted), quoted in majority opinion at 36-37 n.25. The majority maintains that we have no such precedent respecting the notice requirement set forth in HRS § 657-5. Majority opinion at 37 n.25. While it is true that we have not held that an extension of a judgment in contravention of the statute's notice requirement renders the extension a legal nullity, see id.; cf. Carter, 136 F.3d at 1006, we did hold in Clarke that the failure to observe the notice and hearing requirements set forth in HRCF Rule 56(c) deprived the circuit court of the jurisdiction to grant summary judgment, 50 Haw. at 171, 434 P.2d at 313. That is the precedent that I find instructive in the present matter.

at 841. A court necessarily abuses its discretion when it fails to set aside a void judgment. See Indoor Cultivation Equip., 55 F.3d at 1317; Carter, 136 F.3d at 1005. I would therefore hold that the circuit court abused its discretion in denying Shinn's HRCP Rule 60(b)(4) motion inasmuch as the motion sought to set aside the order extending the judgment. See Buscher v. Boning, 114 Hawai'i 202, 211, 159 P.3d 814, 823 (2007).

B. The Circuit Court May Rule On The Bank's Motion On Remand Now That Shinn Has Notice Of The Motion.

Although the circuit court abused its discretion in refusing to set aside the order extending the judgment on the ground that Shinn was not afforded notice of the Bank's motion to extend the deficiency judgment prior to its extension, as required by HRS § 657-5, it is undisputed that Shinn presently has actual notice of the Bank's motion to extend. Therefore, the statute's notice requirement has now been satisfied. Its two remaining requirements have been satisfied as well. First, HRS § 657-5 states that "[n]o extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered." Thus, in order for the circuit court to grant an extension of a judgment, the extension must be "sought" within ten years of the date of the judgment. The statute does not require that the circuit court actually grant the extension before the expiration of the ten-year period. In the present matter, the original deficiency judgment was entered on December 21, 1993. On December 10, 2003, the Bank "sought" to extend the judgment when it filed its motion. Thus, the motion was "sought" within the ten-year period

prescribed by HRS § 657-5. Second, the statute provides that "[a] court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree." In this case, because the judgment was entered on December 21, 1993, an extension, which was "sought" within ten years of its entry, may be granted prior to December 21, 2013. Accordingly, the three conditions set forth in HRS § 657-5 have now been satisfied. Hence, I do not believe that any of the statute's provisions would preclude the circuit court from granting the Bank's motion to extend the deficiency judgment on remand.

The majority asserts that my conclusion that HRS § 657-5's requirements, including its notice requirement, have now been satisfied, such that the statute would not presently prevent the circuit court from granting the Bank's motion on remand, is incongruent with my earlier determination that the circuit court's grant of the Bank's motion before the statute's notice requirement had been satisfied was, at that point, a jurisdictional defect and thus harmful per se, see supra section I.A. Majority opinion at 49-50. While Shinn did ultimately receive notice of the proceeding to extend the deficiency judgment, he only received the notice after the Bank's motion had already been granted. The statute's notice requirement mandated that Shinn receive notice before the motion was granted. See supra section I.A. The jurisdictional defect, and thus the harmful error, arose because he did not receive any notice of the proceeding before the motion was granted. See id. When Shinn received notice in relation to the circuit court's grant of the Bank's motion is the primary consideration under HRS § 657-5, which states that "[n]o extension [of a judgment or decree] shall

be granted without notice." Under that provision, Shinn had to receive notice of the motion before the circuit court could grant the Bank's motion. The fact that he currently has notice and that HRS § 657-5's requirements have been met does not mean that the circuit court's grant of the Bank's motion before he had notice was harmless error. As such, I perceive no inconsistency between the notions (1) that the circuit did not have jurisdiction to grant the Bank's motion before Shinn was afforded notice of the motion as required by HRS § 657-5 and (2) that the circuit court would have jurisdiction to grant the motion on remand, because Shinn has now been afforded such notice.

Because he now has notice of the motion, I do not believe it necessary for the Bank to file a new motion on remand. The majority insists that such a motion would be required because it believes that, if the circuit court lacked jurisdiction to extend the judgment, then this case must be dismissed. Majority opinion at 51-53. The majority cites a number of cases in which courts lacked subject-matter jurisdiction. See id. (citing Hawaii Home Infusion Assocs. v. Befitel, 114 Hawai'i 87, 93, 157 P.3d 526, 532 (2007); Korean Buddhist Dae Won Sa Temple of Hawaii v. Concerned Citizens of Palolo, 107 Hawai'i 371, 384, 114 P.3d 113, 126 (2005); Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003)). The cases upon which I rely do not, however, concern defects in subject-matter jurisdiction. Rather, they deal with situations in which courts lacked the authority, not to hear a matter altogether, but to enter a judgment, decree, or order under particular circumstances. E.g., Wong Kwai Tong, 31 Haw. at 606; see also supra section I.A. In Clarke, for example, we held that the circuit court lacked jurisdiction under HRCP

Rule 56(c) to grant summary judgment sua sponte against the employee without notice or hearing. 50 Haw. at 171, 434 P.2d at 313. Yet we did not dismiss the case for lack of subject-matter jurisdiction. See id. There was no indication that the circuit court lacked subject-matter jurisdiction to hear the employee's appeal or to entertain a motion for summary judgment; it simply lacked jurisdiction to grant summary judgment without notice or hearing. See id. Instead of dismissing the action, we reversed the circuit court's judgment and remanded the case to the circuit court. Id. Similarly, in the present matter, while there is no dispute that the circuit court had subject-matter jurisdiction to hear this case and to entertain a motion to extend the deficiency judgment, the court did, in my view, lack jurisdiction under HRS § 657-5 to grant an extension of the deficiency judgment without notice. See supra section I.A. On that basis, I would reverse the ICA's judgment in part and remand this matter to the circuit court. I see no reason why the circuit court's lack of jurisdiction to enter judgment in the absence of notice would require us either to dismiss the present action or to dismiss the Bank's motion to extend the judgment. Because the motion is not subject to dismissal, I do not believe that the Bank would have to file a new motion to extend the judgment on remand.

II. CONCLUSION

In light of the foregoing, I would reverse the ICA's judgment to the extent that it affirmed the circuit court's order denying Shinn's HRCF Rule 60(b)(4) motion to set aside the deficiency judgment insofar as the judgment was extended in contravention of HRS § 657-5. I would therefore remand this matter to the circuit court for proceedings consistent with this opinion. I otherwise agree with the majority's disposition of this case. See majority opinion at 8 n.8, 56-57.

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*Pamela A. Nakagawa*