NO. 23020

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

FIRST HAWAIIAN BANK, a Hawaii corporation,
Plaintiff-Appellee, v. LANCE T. HAYASHI,
Defendant-Appellant.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL NO. 93-2168)

MEMORANDUM OPINION
(By: Watanabe, Acting Chief Judge, Lim and Foley, JJ.)

Defendant-Appellant Lance T. Hayashi (Hayashi) appeals the September 21, 1999 final judgment, upon a jury verdict of the circuit court of the first circuit, the Honorable Karen N. Blondin, judge presiding, as well as the court's November 8, 1999 order denying his motion for a new trial.

The judgment, a deficiency judgment on an automobile loan made by Defendant-Appellee First Hawaiian Bank (FHB) to Hayashi, was for the total amount of $56,732.96, encompassing $23,915.77 in principal, $17,486.89 in interest, $15,124.40 in attorneys' fees and $205.90 in costs.

The judgment was made upon all claims contained in FHB's verified complaint and upon "the claim of violation of the Uniform Commercial Code [(UCC)] as contained in paragraph 5 of [Hayashi's] Counterclaim[.]"

Hayashi contends on appeal that the circuit court erred in (1) denying his motion to continue trial, (2) denying his motion for a new trial, (3) denying his motion for judgment notwithstanding the verdict, (4) striking some of his trial witnesses and (5) denying his motion to amend the pleadings. We disagree and affirm.

I. Background.

This is Hayashi's second appeal in this case. Our memorandum opinion disposing of his first appeal, First Hawaiian Bank v. Hayashi, No. 18211 (Haw. App. April 18, 1997) (mem.) (hereinafter cited as, "MemOp"), outlined the factual and procedural background leading up to that first appeal:

> On November 2, 1998, [Hayashi] entered into a Credit Sale Contract (contract) with Ala Moana Porsche Audi VW for the purchase and financing of a used 1988 [Porsche] (vehicle). The total purchase price of the vehicle amounted to $35,612.00. [Hayashi] financed $28,084.36 at an annual percentage rate of 15.96%. Ala Moana Porsche Audi VW subsequently assigned its rights under the contract to [FHB].
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> On November 15, 1990, after losing his job as a plumber at the Ala Moana Hotel, [Hayashi] presented himself to [FHB] officials "seeking an extension of time within which to make payment on his loan and/or to make alternative payment arrangements." After speaking with a Mr. Dane Shimabukuro, who allegedly told [Hayashi] that "it would be in [his] best interest to voluntarily surrender [the vehicle]" and that [FHB] "would sell [the vehicle] for the best price they could get

and credit [him] against the loan[,]" [Hayashi] voluntarily surrendered the vehicle to [FHB] on November 15, 1990.

On November 16, 1990, Kevin J. Costa (Costa), an operations officer of [FHB], sent a letter to [Hayashi] notifying [him] that [FHB] repossessed the vehicle "due to [Hayashi's] failure to keep . . . payments current for the loan[.]" Costa informed [Hayashi] that [he] could "recover the vehicle" if he "pa[id] [FHB] the Total Amount Due before [FHB] [sold] the vehicle."

On February 27, 1991, after making "appropriate repairs . . . to enhance [the vehicle's] value[,]" [FHB] sold the vehicle at the Hawaii Auto Auction for the bid price of $11,500.00.

On March 5, 1991, Gary Kawamoto, an assistant vice president of [FHB], sent a letter to [Hayashi] informing [him] that "[t]he deficiency balance of $17,881.96 plus interest . . . is now due and payable in full." On June 7, 1991, Wayne Arakaki, a consumer loan officer, sent another letter to [Hayashi] informing him that he then owed [FHB] "[t]he deficiency balance of $18,593.34 plus interest[.]"

On May 28, 1993 [FHB] filed its complaint against [Hayashi] averring that "[Hayashi] has ignored all demands for payment and has failed, neglected and refused to pay the same and that the entire sum [of $23,915.77 was] now due and owing." On July 27, 1993, [Hayashi] filed an amended answer to the complaint and a counterclaim against [FHB].

On January 3, 1994, [FHB] filed its motion for summary judgment which the court granted "in all respects" on April 5, 1994. On April 15, 1994, [Hayashi] filed a motion for reconsideration, or in the alternative, to alter or amend the order granting [FHB's] motion for summary judgment.

> On June 7, 1994, the court denied [Hayashi's] April 15, 1994 motion and entered final judgment in favor of [FHB] "with respect to the complaint and [Hayashi's] counterclaim" awarding [FHB] the principal sum of $23,915.77, accrued interest of $2,481.53 from May 12, 1993 up to and including April 5, 1994, and attorney's fees and costs of $3,687.50 and $164.00, respectively.
>
> On July 6, 1994, [Hayashi] appealed.

MemOp at 2-4 (ellipses and some brackets in the original; footnote omitted).

In the litigation below before his first appeal, Hayashi proceeded *pro se* at first, then was represented by the law firm of Love Yamamoto & Motooka. While Hayashi's first appeal was pending, Love Yamamoto & Motooka withdrew as Hayashi's attorneys due to his lack of funds to pay for legal representation. Hayashi was later represented in his first appeal by attorney Byron K. H. Hu (attorney Hu).

In our disposition of Hayashi's first appeal, we held that

> 1) [Hayashi] was in default of his loan with [FHB], 2) [FHB] established its deficiency balance, 3) [FHB] properly notified [Hayashi] of his default and of a sale which would be "private," 4) [FHB] properly accelerated [Hayashi's] entire loan balance, 5) [Hayashi] had no right to cure his default, and 6) [Hayashi's] continuance request [for time to conduct further discovery] is moot.

MemOp at 1. We also held, however, that "summary judgment was improperly granted because a genuine issue of material fact

existed as to whether [FHB] disposed of [Hayashi's] repossessed vehicle in a 'commercially reasonable' manner." We further held that "summary judgment was improperly granted on [Hayashi's] counterclaim except to the extent that our holding resolves the issue of proper notification of default in [FHB's] favor." We therefore remanded the case "for proceedings consistent with this opinion." MemOp at 1-2, 16.

With respect to the first unresolved issue on remand, we observed that "'in an action by a creditor to recover on a deficiency judgment, the burden is on the creditor to prove that its disposition of repossessed collateral was conducted in a commercially reasonable manner.' [GECC Financial Corp. v.] Jaffarian, 79 Hawai'i [516,] 523, 904 P.2d [530,] 537 [(App. 1995)]." MemOp at 12.

We also explained that "'[t]he requirements of commercial reasonableness and notification are fundamental rights of the debtor and may not be varied or waived. However, the parties are allowed, under [Hawai'i Revised Statutes (HRS)] § 490:9-501(3)(b), to determine by agreement the appropriate standards that will fulfill these requirements as long as the standards are not manifestly unreasonable.' Liberty Bank v. Honolulu Providoring, Inc., 65 Haw. 273, 650 P.2d, [sic] 576, 579 (1982) (footnote omitted)." MemOp at 13. In this respect, we decided that

> [a]ssuming there was an "agreement" between [Hayashi] and [FHB], there is no evidence of the "standards" agreed to and how such "standards" fulfilled the requirements of "commercial reasonableness."
>
> Here, [FHB] pointed out that under the heading "OUR RIGHTS IF YOU DEFAULT," the contract stated that [FHB] may sell the vehicle "to a wholesaler or retailer or any other person by any reasonable method." (Emphasis added.) [Hayashi], in his reply brief, agreed with [FHB's] contention that the sale of the vehicle must be "by any reasonable method." However, the "method" of sale is not set forth in the contract.

MemOp at 13.

We went on to hold that "'[w]hether a particular sale is commercially reasonable will depend on the circumstances of the particular case, a determination which most courts have held is a question of material fact inappropriate for summary judgment resolution.' Jaffarian, 79 Hawai'i at 524, 904 P.2d at 538 (footnote omitted)." MemOp at 14. In this regard, we noted that

> Manin's [an FHB officer] affidavit merely stated the following:
>
> > 7. Pursuant to the terms and conditions of the Contract and as outlined in the redemption letter dated November 16, 1990, the vehicle was sold on February 27, 1991.
> >
> > 8. The vehicle was sold at the Hawaii Auto Auction, a private sales auction for licensed wholesalers and retailers of automobiles.
> >
> > 9. The Hawaii Auto Auction is a customary method used by creditors

> for the sale or other disposition of repossessed automobiles.
>
> . . . .
>
> 11. [FHB] accepted bids for the sale of the vehicle and it was sold at the highest bid price of $11,500.00.

[Hayashi] claimed that [FHB] did not dispose of the vehicle in a "commercially reasonable" manner and that he could have sold the vehicle for a "much higher price." [Hayashi] attached to his opposition affidavit an excerpt from the Kelly Bluebook Auto Market Report for November-December 1990 which indicates that the range of values for a 1988 Porsche 944 was between $15,900.00 and $25,500.00.

. . . .

Apart from the above statements in Manin's affidavit, [FHB] did not present evidence describing the procedure employed in the sale of the vehicle such as the manner and extent of notice given potential buyers, the manner in which the sale was conducted, the "nature and extent of advertising," or the "number of prospective buyers." [FHB] also did not provide information as to the current market price of the vehicle at the time of the sale. [Jaffarian, 79 Hawai'i] at 524 n.7, 904 P.2d at 538 n.7. (listing factors and circumstances considered in determining whether the standard of "commercial reasonableness" has been met). Furthermore, Manin's affidavit "failed to demonstrate how, as an employee of a financial institution, [Manin] had personal knowledge of and was competent to testify about the accepted trade practices of the automobile industry." (Emphases added.) See id. at 525, 904 P.2d at 539.

On the basis of Manin's affidavit, we are unable to determine conclusively that the sale of the vehicle was conducted by a

reasonable method. Thus, summary judgment was improperly granted.

MemOp at 13-15 (some brackets in the original).

With respect to Hayashi's counterclaim, we held:

> In his counterclaim against [FHB], [Hayashi] alleged unfair and deceptive trade practices pursuant to HRS Chapter 480, violations of the Uniform Commercial Code (UCC), reckless indifference, gross negligence, entire want of care, tortious breach of the contract, and violation of the covenant of good faith and fair dealing.
>
> With respect to the UCC, [Hayashi's] counterclaim alleged that [FHB's] "conduct and actions connected to the handling of the loan and disposition of the [vehicle] in question was in violation of the [UCC]." As reflected in [Hayashi's] memorandum in opposition to the motion for summary judgment, this allegation appears to challenge "the adequacy of notice and whether the car was sold in a commercially reasonable manner."
>
> In its motion for summary judgment, [FHB] did not specifically address any of the other claims in [Hayashi's] counterclaim. No arguments were presented on the counterclaim at the hearing on the motion for summary judgment. The court did not indicate the basis on which it granted summary judgment to [FHB] on any of [Hayashi's] claims in his counterclaim.
>
> The record, thus, is insufficient for a determination of whether summary judgment was "appropriate" on [Hayashi's] counterclaim. See [Hawai'i Rules of Civil Procedure] HRCP Rule 56(e). Therefore, except to the extent that, as we hold, notification of default was proper under the UCC, summary judgment on [Hayashi's] counterclaim was improperly granted.

MemOp at 15-16 (some brackets in the original; footnote omitted).

The allegations we identified in Hayashi's counterclaim, involving "reckless indifference, gross negligence, entire want of care, tortious breach of the contract, and violation of the covenant of good faith and fair dealing[,]" MemOp at 15, were not so much discrete causes of action as they were allegations underlying Hayashi's claim for punitive damages. See Hayashi's Counterclaim Against Plaintiff filed July 27, 1993, at 5. They, along with his cause of action under HRS ch. 480 (unfair and deceptive trade practices), remain to this day unelaborated, unexplained and unintelligible.

Hayashi's cause of action under the UCC was limited to the issues of whether he was given adequate notice of the sale and whether it was conducted in a commercially reasonably manner.[1] MemOp at 15. As he argued in his memorandum in

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[1/] In light of our factual holding in the first appeal, that "[Hayashi] was in default of his loan with [FHB]," MemOp at 1, Hawai'i Revised Statutes (HRS) § 490:9-501(2) (1993) of the UCC applied: "After default, the debtor has the rights and remedies provided in this Part, those provided in the security agreement and those provided in section 490:9-207." Hayashi has not invoked in his defense any specific provisions of his security agreement with FHB. HRS § 490:9-207 (1993) dealt with preservation of collateral. In the posture of the case on remand, the only applicable section of HRS ch. 490, Art. 9, Pt. 5 (1993) ("Default") was HRS § 490:9-504(3), in pertinent part:

> Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended

(continued...)

opposition to FHB's motion for summary judgment,

> [FHB] moves for Summary Judgment on [Hayashi's] counterclaim on the grounds that [FHB] has complied with all UCC requirements and [Hayashi] is only speculating as to whether [FHB] has violated the UCC. These conclusory statements fall far short of establishing a right to summary judgment. This memorandum, affidavits attached hereto, and all evidence taken in a light most favorable to [Hayashi] show that there are at least questions of fact regarding the adequacy of notice and whether the car was sold in a commercially reasonable manner. This Court should not grant [FHB's] Motion for Summary Judgment on [Hayashi's] counterclaim.

[Hayashi's] Memorandum in Opposition to Motion for Summary Judgment by Plaintiff, filed January 3, 1994, Or in the Alternative, Request for [HRCP] Rule 56(f) Continuance, filed January 28, 1994, at 8. In light of our factual holding in the first appeal that "[FHB] properly notified [Hayashi] of his default and of a sale which would be 'private,'" MemOp at 1, it appears our remand of the case on Hayashi's counterclaim was nothing more than a reiteration of our remand on the single issue of whether the vehicle was sold in a commercially reasonable manner. We now conclude that our remand in the first appeal, on both the verified complaint and Hayashi's counterclaim, was limited to that issue and that issue alone.

[1/](...continued)

> disposition is to be made shall be sent by the secured party to the debtor, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

(Emphases added.)

Our other factual holdings in the first appeal, that appear to foreclose any reopening or rescission of FHB's default determination, its repossession of the vehicle, or its right to sell the vehicle to satisfy its affirmed deficiency balance, confirm our conclusion.

Hence, the court below had no authority to adjudicate any issue other than whether the vehicle was disposed of in a commercially reasonable manner. See, e.g., Foster v. Civil Service Comm'n, 627 N.E.2d 285, 290 (Ill. App. Ct. 1993) ("When a reviewing court remands a matter with specific instructions, the trial court is powerless to undertake any proceedings beyond those specified therein." (Citations omitted.)); Warren v. Dep't of Admin., 590 So.2d 514, 515 (Fla. Dist. Ct. App. 1991) ("Remand for a specific act does not reopen the entire case; the lower tribunal only has the authority to carry out the appellate court's mandate." (Citations omitted.)). And it appears the circuit court understood our mandate on remand as such, because it rendered its final judgment on FHB's verified complaint and upon "the claim of violation of the Uniform Commercial Code as contained in paragraph 5 of [Hayashi's] Counterclaim[.]"

On remand, attorney Hu continued to advise Hayashi for a period of time. Attorney Glenn H. Kobayashi (attorney Kobayashi) followed, until he resigned from the bar. Hence, Hayashi was apparently again formally proceeding *pro se*. At some

point, however, attorney Hu stepped in temporarily to represent Hayashi and to help him find new counsel. Then, about two months before the jury trial set for July 12, 1999, attorney Joseph Mitchell Lovell (attorney Lovell) made his first appearance as counsel for Hayashi. By the time Hayashi filed his motion for a new trial, he had retained, yet again, new counsel, who continue to represent him in this appeal.

At the jury trial on remand, FHB called Hayashi as its first witness, primarily to elicit confirming admissions from him as to the events leading up to the sale of his vehicle. FHB's approach worked for the most part, but in the course of direct examination, Hayashi doggedly attempted to attack the legitimacy of the underlying default and repossession. When asked about his voluntary return of the car to FHB, Hayashi explained:

> Based on what [FHB] had told me is why I turned the car over. I didn't go there to turn the car over. That is not why I went there.
>
> . . . .
>
> But the reason was I guess being in a vulnerable state of mind, after, you know, losing a job, for one thing, but also that I was getting another job coming up is the reason why I went in there. And I didn't go in there to go screw [FHB]. I didn't go in there to try and hide from this loan or try and say I don't want to pay. I went in there to work with these guys. And --

Thereupon, FHB's attorney interrupted to request a responsive witness, whereupon the court instructed Hayashi accordingly. Throughout direct examination, Hayashi, who was proving to be a

most elusive witness, continued to use unresponsive answers to contest the validity of the underlying default and repossession. Among other things, he denied FHB ever advised him that he was in default of the loan. He denied any knowledge of signing the condition report that was filled out when he turned his car in to FHB.

During cross-examination by his attorney, Hayashi resumed his attack on the underlying validity of the repossession sale, despite objection from FHB's counsel:

> A. [FHB] had -- had not advised me of any default prior to me going in, and neither was I noticed by [FHB] by any letter or anything stating that I was. There was no demand notice, nothing. I initiated myself going in to [FHB] because I wanted to work with [them] and not try to run away and not pay my bill."
>
> Q. Okay. But other --
>
> FHB's COUNSEL: Your Honor, if I may interpose an objection. The issues of default and notification have already been resolved by the Intermediate Court of Appeals. I believe we do have a motion in limine specifically on that point, Your Honor.

On redirect examination, Hayashi continued in the same vein, denying any recollection that he had collected his personal property from the vehicle after turning it into FHB or that he had signed a personal property receipt.

FHB questioned Gerald Lau (Lau) next. Lau had been a branch manager for a full-service financing company before joining FHB as a consumer loan representative in the automobile financing department. FHB later deployed him as a "liquidation

officer," one who "liquidates vehicles that have either been repossessed by [FHB] or voluntarily surrendered by [FHB's] customers."

Lau was the FHB liquidation officer who coordinated and oversaw the sale after repossession of Hayashi's vehicle. He testified that lending industry standard practice, employed by FHB, "Bank of Hawai'i, City Bank, Ford Motor Credit, GMAC[,]" among others, was to utilize a private auction for licensed car dealers to liquidate repossessed vehicles. The auction service FHB and the other named lenders utilized was Hawai'i Auto Auction (HAA).

Lau described the process FHB went through in liquidating a vehicle. First, a condition report was completed and needed repairs were done. HAA then took possession of the vehicle, detailed it and otherwise made it ready for auction. Before auction, the FHB liquidation officer inspected the vehicle and established an upset price, usually utilizing the Kelly Blue Book to arrive at a base wholesale price, then applying Kelly Blue Book price additions for vehicle options and price deductions for factors such as mileage or a lack of standard features. The Kelly Blue Book was the FHB liquidation officer's primary source for determining an upset price. Other sources might also be utilized, such as newspaper advertisements.

HHA held its dealer auctions every Wednesday. Every available vehicle was included on an inventory list sent out to

all registered dealers in Hawai‘i. The FHB liquidation officer would be present at each auction, "to see that the auction tried to get the fairest price for the vehicle." Although only licensed car dealers could bid at the HAA auctions, it was not unusual that an individual who was not a licensed dealer would contact HAA and purchase a vehicle.

Lau was asked on cross-examination why FHB did not "just put an ad in the newspaper for an upset price or the Blue Book price and try to get -- sell the car that way?" He answered, "We used to do that, a public auction through the general public. But what happened in those instances, the prices we received for the vehicle, the bids we got from the general public were often times lower than what we could get from the dealers." When asked, again on cross, why FHB did not simply set the upset price and hold out for it, Lau cited the danger of depreciation attendant upon a long wait.

In the case of Hayashi's vehicle, Lau found the Kelly Blue Book wholesale base price to be $14,950.00. He then added $250.00 for its power windows option and $450.00 for its sunroof option, but he deducted $2,300.00 for its high mileage of 54,749 miles, ultimately arriving at an upset price of $13,350.00. Hayashi's vehicle was run through two HAA auctions, but the highest bid it attracted was $8,000.00. Because this bid was much lower than FHB's upset price, FHB declined to sell the vehicle. Later, however, HAA received an offer of $11,500.00 for

the car from an individual named David Guerrero (Guerrero). Lau sought and received approval from his supervisor to sell the vehicle to Guerrero, and did.

FHB also called Karl Koch (Koch), an expert witness. Koch had been, for six years, the general manager for ADT Automotive, a national vehicle remarketing company whose primary business was running vehicle auctions for sellers such as "manufacturers, banks, credit unions, auto dealers, and even the U.S. government." ADT Automotive had approximately 200 accounts in Hawai‘i, including General Motors, General Motors Acceptance, Bank of Hawai‘i and "multiple credit unions." Its Hawai‘i auction company was Aloha Auto Auction. Koch also related that he had extensive experience in the opposite end of the business: "Prior to going to work for ADT, I was 27 years in the automobile business [nationwide] where I worked as a buyer, wholeseller or general manager for -- my function was to buy [at auction] and recondition and sell cars for whoever at the time."

Koch went on to opine that the FHB liquidation process Lau had described earlier paralleled that of other auction houses in Hawai‘i and across the nation, and was the common and usual process utilized by lenders in selling repossessed cars. He also testified that it is "not uncommon" during that process for a sale to be made to an individual. When asked why lenders use auction houses to sell their vehicles, Koch responded, "Well, obviously the reason they do it is to maximize their return on

their vehicles, uh, and the expediency with which they can do it, and the fact that we do handle or are required to be able to handle technically all of their paperwork, title, funds, et cetera, and have knowledge of the reconditioning and market or transport, whatever the case may be."

Koch was then given a Kelly Blue Book, along with information about Hayashi's vehicle, whereupon he opined, sight unseen, that $11,500.00 was a reasonable price for the vehicle. Koch explained the difference between the sale price and the Kelly Blue Book price by pointing to the more limited market for sports cars in Hawai‘i as compared to the mainland. Apparently, Hawai‘i lacks the "wide open spaces" that would boost demand for a vehicle like the Porsche. This State also trails in the supply of parts and trained technicians for servicing such vehicles. Koch also observed that high mileage on a Hawai‘i car depreciates it more than comparable mileage on a mainland car.

Hayashi was the only witness to testify in his defense. In this phase of his testimony, Hayashi, over repeated objection by FHB's attorney, essentially fleshed out his basic position at trial: that he was unaware he was in default on his car loan and had gone to FHB to work out a payment arrangement in light of his recent unemployment, but that FHB misled him into turning in his vehicle with fraudulent misrepresentations about selling the repossessed vehicle for the highest possible price and about

working with him in paying off any deficiency remaining after the sale:

> Well, I wanted to work with [FHB]. I had lost my job and I, you know, my credit was in good shape. And I was starting a new job with the government in a week of two. And based on what Mr. Shimabukuro was telling me was that, you know, it would be better for me to give them the car.
>
> I wouldn't be charged the repossession fees. I would -- they would get the best price they could and credit me with a surplus if there's a surplus. And if there was a deficiency, say like twenty thousand, and they sell it for seventeen and there was like a three thousand dollar deficiency, they'd work with me and, you know, keep my credit clear, and when I get back on my feet I can make payments.

Hayashi related that when he received notice of the amount of the deficiency remaining after the sale of his vehicle, "I felt ripped off. I felt cheated. I felt -- I felt tooken [sic] advantage of." Hayashi claimed, again over objection by FHB's counsel, that the damage to his financial credibility that resulted from FHB's fraudulent misrepresentation cost him the opportunity to obtain a contractor's license and hence, "maybe eighty thousand [dollars] a year[.]"

The court instructed the jury during the morning of July 27, 1999. That same morning, the jury returned its verdict, that the vehicle had indeed been sold in a commercially reasonable manner.

Throughout the proceedings below, from the filing of the verified complaint to the first appeal, and then on remand

through the commencement of jury trial, Hayashi did no formal discovery, save for one January 18, 1994 request for production of documents. He took no depositions. He sent no interrogatories. He requested no admissions.

This pretrial passivity stemmed, perhaps, from fiscal considerations. In requesting a continuance of the hearing on the motion for summary judgment that led to the first appeal, Hayashi stated:

> [Hayashi] has served [FHB] with a Request for Production of Documents, seeking [FHB's] files relevant to this matter; the response to this request is due on or about February 20, 1994.
>
> Based on our review of the files, decisions on further discovery will be made; at this time it is anticipated that depositions of [FHB] personnel, records depositions of the auto auction company, and other discovery may be indicated.
>
> [Hayashi] does not have much money; therefore, counsel has been attempting to conduct this litigation in a very economical cost-effective manner; this involves making choices as to the most effective discovery. [Hayashi] cannot afford a "shotgun" approach to discovery.
>
> The anticipated discovery will involve facts pertaining to the reasonableness of [FHB's] actions in obtaining and disposing of the subject automobile; information pertaining to the identity of the provider and the method of sale; information relevant to the manner and method of notice given; and information pertinent to the terms and conditions imposed under the credit sales agreement.
>
> The above information raises at least the potential of uncovering evidence that would enble [Hayashi] to defeat summary judgment;

> the information to be obtained through further discovery is directly relevant to [Hayashi's] contract and UCC defenses as well as [Hayashi's] affirmative claims. Further discovery will also undoubtedly uncover further facts relating to the questions of fact discussed above, and will likely reveal further facts.

[Hayashi's] Memorandum in Opposition to Motion for Summary Judgment by Plaintiff, filed January 3, 1994, Or in the Alternative, Request for [HRCP] Rule 56(f) Continuance, filed January 28, 1994, at 9.

II. Issues Presented.

Hayashi contends on appeal that the circuit court erred in (1) denying his motion to continue trial, (2) denying his motion for a new trial, (3) denying his motion for judgment notwithstanding the verdict, (4) striking some of his trial witnesses and (5) denying his motion to amend the pleadings.

III. Discussion.

A. Hayashi's Motion to Continue Trial.

On remand, the court held a September 14, 1998 status conference, with Hayashi, his attorney Kobayashi, and an FHB attorney in attendance. There, the court set jury trial for July 12, 1999. On June 10, 1999, barely a month before trial, Hayashi filed a motion to continue the trial. At a hearing held on June 30, 1999, the motions court[2] denied Hayashi's motion.

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[2] The Honorable Kevin S.C. Chang, presiding.

or not stipulated to by respective counsel Hayashi contends the court erred in denying his motion to continue the trial. In his opening brief, Hayashi first argues that his retention of counsel (attorney Lovell) just two months before the trial date justified the continuance. He complains that he should not have been penalized because one of his carousel of counsel (attorney Kobayashi) resigned from the bar, necessitating a change of attorneys just before the trial. Hayashi also argues that the continuance was made necessary by attorney Lovell's realization that more discovery was needed.

"The denial of a motion for continuance is within the sound discretion of the court and will not be disturbed on appeal absent a showing of abuse." Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 267, 799 P.2d 60, 67 (1990) (citation omitted). An "abuse of discretion occurs if 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." State v. Jackson, 81 Hawai'i 39, 47, 912 P.2d 71, 79 (1996) (internal quotation marks and citations omitted). Rule 7(e) of the Rules of the Circuit Courts of the State of Hawai'i (RCCH) (1999) provides, in relevant part, that "[a] motion for continuance of any assigned trial date, whether , shall be granted only upon a showing of good cause[.]"

We do not believe the court abused its discretion in denying Hayashi's motion to continue the trial, because we see no

good cause for granting a continuance to a party who has continually changed attorneys -- five during the course of this litigation, by our count -- and who happened to be caught short in that regard two months before a trial date that had been set (in conference with the party and respective counsel) for almost ten months. Nor are we convinced that attorney Lovell had insufficient time to familiarize himself with what we had rendered, on remand, a relatively simple, single-issue case. Cf. Tradewinds, 8 Haw. App. at 267, 799 P.2d at 67.

By the same token, we are not surprised that attorney Lovell found that he needed more time for discovery. That is to be expected in the case of a party, represented by one attorney or another throughout more than six years of litigation, who nevertheless chooses out of fiscal considerations to skimp on formal discovery -- but that is not good cause.

In his reply brief, Hayashi faults FHB for causing his discovery woes, and on that basis further argues that the court should have acceded to his request for a continuance of the trial. He points to the fact that FHB failed to respond to his January 1994 request for production of documents until December 1997. We point out, that still left more than one-and-a-half years before the trial. He alleges that FHB "failed to provide all of the documents, waiting instead until the eve of trial to produce the only document which tied its expert, Mark Snyder (Snyder), to [HAA], the purported auction house." We observe

that FHB had identified Snyder as its expert witness in its November 21, 1997 pretrial statement and had noticed his deposition (later canceled) on April 29, 1999. Hayashi himself, in his December 29, 1997 responsive pretrial statement, named as witnesses "[a]ny and all experts named by other parties." Thus we question why, two months before the jury trial of a six-year litigation over the conduct of an auto auction and sale, Hayashi had not yet discovered that Snyder, in Hayashi's words, "was actually the principal of the auction house[?]" We remain unconvinced. The court did not abuse its discretion in denying Hayashi's motion to continue the trial.

B. Hayashi's Motion for a New Trial.

After the adverse verdict rendered by the jury on July 27, 1999 and after the judgment thereon was filed on September 21, 1999, Hayashi filed a motion for new trial on October 1, 1999, "pursuant to Rule 59, [Hawai‘i Rules of Civil Procedure (HRCP)] on the basis of newly discovered evidence which satisfies the three part test for granting a new trial, as stated in Kawamata Farms [] v. United Agri Products, 86 [Hawai‘i] 214, 259, 948 P.2d [1055], 1100 (1997)." On October 29, 1999, the court heard and denied the motion, filing its order on November 8, 1999.

In Kawamata Farms, the Hawai‘i Supreme Court observed that

HRCP Rule 59(a) provides that

> [a] new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State[.]

> Furthermore, both the grant and the denial of a motion for new trial is within the trial court's discretion, and we will not reverse that decision absent a clear abuse of discretion.

Id. at 259, 948 P.2d at 1100 (citation, internal quotation marks and some brackets omitted; remaining brackets in the original). The supreme court further explained that

> [t]he authorities are in agreement that a new trial based on newly discovered evidence can be granted provided the evidence meet the following requirements: (1) *it must be previously undiscovered even though due diligence was exercised*; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.

Id. (citations and internal block quote format omitted; italics in the original). Consistent with the emphasis in the foregoing passage, the supreme court held that "[b]ecause a movant must satisfy all three requirements . . . a circuit court will deny a motion for a new trial when the movant has failed to demonstrate due diligence in the discovery of the evidence." Id. (citations, brackets and internal quotation marks omitted).

On appeal, Hayashi identifies several documents he claims were newly discovered, that constitute the basis for his motion for a new trial. Despite his claims to the contrary, the record is neither clear nor conclusive as to whether FHB produced the evidence to Hayashi. That issue is, however, neither here nor there with respect to the issue *sub judice*. In his reply brief, Hayashi presents his most incisive exposition of the significance of the evidence:

> Nonetheless, the jury was asked to reach a decision without the benefit of any testimony from the actual auction house, and without the knowledge that: (1) [Snyder], [FHB's] initially named expert, was actually the principal of the auction house, (2) [Snyder] was not licensed at the time of the auction, (3) the auction house was not registered with the State of Hawaii at the time of the auction, and therefore (4) the auction, if it actually occurred, was held in contradiction to the laws of the State of Hawaii. The jury did not know this because the document which led to Hayashi's discovery of these facts was not produced until the eve of trial - with [FHB's] proposed exhibits - and then withdrawn. Therefore, Hayashi had no opportunity to investigate the document, or to provide any testimony or evidence which would have demonstrated these facts. Because this information is highly relevant to the question of whether the vehicle was sold in a commercially reasonable manner (given especially that the sale was "illegal"), the fact that it was not available to the jury was highly prejudicial. The verdict should not be allowed to stand.

The purportedly critical significance of the evidence begs the question why Hayashi did not, in the exercise of due diligence, discover the evidence in the roughly six years this case was pending trial. After all, public documents containing all of the

above information were readily available, some of which were in fact belatedly discovered and proffered by Hayashi but excluded by the court (see discussion of this issue, infra). Clearly, Hayashi did not exercise due diligence in the discovery of the evidence. Hence, the court did not abuse its discretion in denying his motion for a new trial.

C. Hayashi's Motion for Judgment Notwithstanding the Verdict.

On August 13, 1999, Hayashi filed a motion for judgment notwithstanding the verdict (JNOV). After a September 3, 1999 hearing on the motion, the court filed its order denying the motion on September 20, 1999.

"We review denials of motions for JNOV *de novo* to determine if the claims were supported by substantial evidence. A JNOV may be granted only when there can be but one reasonable conclusion as to the proper judgment." Mehau v. Reed, 76 Hawai'i 101, 112, 869 P.2d 1320, 1331 (1994) (citations omitted).

Hayashi brought his motion for JNOV "pursuant to HRCP [Rule] 50(b)[,]" arguing that FHB had "failed to meet its burden of rebutting the presumption that the fair market value of the collateral equaled the unpaid balance of the outstanding debt (see Liberty Bank v. Honolulu Providoring, Inc. 65 Haw. 273, 650 P.2d 576 (1982))." However, as FHB pointed out in its memorandum in opposition, the Honolulu Providoring presumption relied upon by Hayashi comes into play only if the finder of fact first finds

that the disposition of the collateral was not conducted in a commercially reasonable manner. Honolulu Providoring, 65 Haw. at 282, 650 P.2d at 583 ("If the secured creditor fails to comply with notification requirements or disposes of a collateral other than in a commercially reasonable manner, the secured creditor will have the burden of rebutting the presumption that the fair market value of the collateral equals the unpaid balance of the outstanding debt." (Emphasis supplied.)).

In the first appeal in this case, we decided that Hayashi was given proper notice of the sale. MemOp at 1. At trial on remand, the court instructed the jury, by agreement of the parties, as follows:

> If you find that [Hayashi's] car was not sold in a commercially reasonable manner, the law presumes that the fair market value of the car was equal to the amount of the deficiency balance.
>
> [FHB] has the burden of rebutting this presumption by proving that the fair market value of [Hayashi's] car at the time the car was sold, was less than the amount of the deficiency balance. If [FHB] satisfies this burden, then [FHB] is entitled to recover the difference between the deficiency balance and the fair market value of the car.

(Emphasis supplied.) Thereupon, the jury found that the sale was conducted in a commercially reasonable manner. Hence, the Honolulu Providoring presumption never came into play in this case, and Hayashi's motion for JNOV was entirely inapposite. The court was therefore correct in denying the motion.

On appeal, Hayashi makes a different argument in support of his motion for JNOV. He contends the court erred in denying his motion because FHB failed to adduce evidence sufficient to meet the "Jaffarian standards." In footnote seven to Jaffarian, we observed:

> Pursuant to section 9-504 of the Uniform Commercial Code (UCC), a secured party disposing of collateral after a default by a debtor is obligated to dispose of the collateral in a "commercially reasonable" manner.
>
> In determining whether the UCC standard of commercial reasonableness has been met in a particular case, courts have considered a number of factors and circumstances, including the following:
>
> 1) the nature of the collateral;
>
> 2) the price received for the item or items sold;
>
> 3) the number of bids solicited and received;
>
> 4) the fair market value of the collateral;
>
> 5) the reasonableness of the conduct of the sale, e.g., whether the collateral was present, the time and place of the sale, the nature and extent of advertising the number of prospective buyers, and whether the sale was public or private;
>
> 6) whether the item was sold on the wholesale or retail market;
>
> 7) whether the secured party itself repurchased the item;

> 8) the recognized market for the items sold;
>
> 9) the usual manner in which the items are sold in the recognized market;
>
> 10) the current prices in the recognized market at the time that the creditor conducted the sale; and
>
> 11) the reasonable commercial practices among dealers for the items sold.

Jaffarian, 79 Hawai‘i at 524 n.7, 904 P.2d at 538 n.7 (citations omitted). However, because Hayashi did not raise this issue below, he has waived it on appeal. In Kawamata Farms, supra, the Hawai‘i Supreme Court observed that "[t]he general rule is that an issue which was not raised in the lower court will not be considered on appeal[,]" and explained that

> "[t]here are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice.

Kawamata Farms, 86 Hawai‘i at 248, 948 P.2d at 1089 (citations, internal quotations marks and internal block quote format omitted).

Moreover, Hayashi brought his motion for JNOV pursuant to HRCP Rule 50(b) (1999), the rule entitled "Motion for Judgment Notwithstanding the Verdict[,]" that provides, in pertinent part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict.

As the Hawai‘i Supreme Court has confirmed, "[t]he language 'a party who has moved for a directed verdict . . .' clearly requires that a timely and proper motion for a directed verdict be made as a prerequisite to a motion for judgment N.O.V." State v. Midkiff, 55 Haw. 190, 192, 516 P.2d 1250, 1252 (1973).

FHB avers that because Hayashi failed to move for a directed verdict at the close of all evidence in compliance with HRCP Rule 50(b), he could not later move for a JNOV. The record confirms that Hayashi did not move for a directed verdict at the close of all evidence. He did, however, move for a directed verdict at the close of FHB's evidence and before he presented his defense. Still, this does not help him, because his motion for a directed verdict was limited to the issue of whether FHB had adequately rebutted the Honolulu Providoring presumption:

> I'd like at this time to make a motion for directed verdict on the issue of [FHB's] failure to meet the burden of the rebuttable presumption of the value of the collateral being less [sic]

> than the amount owed under the Liberty Bank [v. Honolulu Providoring] holding.

The rule contemplates that the court, having denied the motion for a directed verdict, "is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion[,]" and that a successful motion for JNOV causes judgment to be "entered in accordance with [the] motion for a directed verdict[.]" HRCP Rule 50(b) (emphases added). Because the jury found that the condition precedent to the application of the Honolulu Providoring rebuttable presumption -- that the sale was not conducted in a commercially reasonable manner -- had not been met, the "legal question raised by the motion" was moot, and JNOV could not have been "entered in accordance with {Hayashi's] motion for a directed verdict[.]" HRCP Rule 50(b).

Hayashi is, in any event, wrong on the substance of his motion for JNOV. In Jaffarian, we did not hold, or even suggest, that all, or any particular one, or any particular combination, of the factors and circumstances we listed in footnote seven were material elements of a commercially reasonable sale. We simply pointed out that "[i]n determining whether the UCC standard of commercial reasonableness has been met in a particular case, courts have considered a number of factors and circumstances," including those we then listed. Jaffarian, 79 Hawai'i at 524 n.7, 904 P.2d at 538 n.7 (citations omitted). Rather, our

holding in Jaffarian was that "whether a particular sale is commercially reasonable will depend on the circumstances of the particular case[.]" Id. at 524, 904 P.2d at 538 (citations and footnote seven omitted).

Our review of the evidence adduced at trial, detailed above, leads us to believe that FHB's claim of a commercially reasonable sale was "supported by substantial evidence." We do not agree with Hayashi that "there can be but one reasonable conclusion [that the sale was not conducted in a commercially reasonable manner]." Mehau, 76 Hawai'i at 112, 869 P.2d at 1331. Reviewing the evidence FHB presented to the jury, we conclude that the factors we previously found wanting in the affidavits before the court on summary judgment, MemOp at 14-15, were either fulfilled or rendered inapplicable and immaterial by the evidence adduced at trial, under "the circumstances of [this] particular case[.]" Jaffarian, 79 Hawai'i at 524, 904 P.2d at 538 (citations and footnote seven omitted).

D. The Order Granting FHB's Motion to Strike Hayashi's Witnesses.

At the pretrial status conference held by the court and attended by Hayashi and respective counsel, a trial date of July 12, 1999 was set. Accordingly, the discovery cutoff date was May 13, 1999, RCCH Rule 12(r) (1999) ("Discovery shall be cut off 60 days before the assigned trial date."), and Hayashi was required to name all of his witnesses not previously named by

April 13, 1999. RCCH Rule 12(l) (1999) (in pertinent part, "[t]hirty (30) days prior to the discovery cut off date defendant must name all theretofore unnamed witnesses.").

Hayashi had named a number of witnesses in his December 29, 1997 responsive pretrial statement, but he did not file a further or final naming of witnesses. Instead, Hayashi named seventeen new witnesses in his June 2, 1999 settlement conference statement. On June 21, 1999, FHB filed a motion to strike the seventeen witnesses named in Hayashi's settlement conference statement. After a June 30, 1999 hearing, the motions court[3] granted FHB's motion.

RCCH Rule 12(t) (1999) provides that "[f]ailure of a party or his attorney to comply with any section of this rule is deemed an undue interference with orderly procedures and unless good cause is shown, the court may, in its discretion, impose sanctions in accord with Rule 12.1(a)(6) of these rules." RCCH Rule 12.1(a)(6) (1999) sanctions include dismissal, default, payment of attorneys' fees and expenses, change in calendar status, and "any other sanction as may be appropriate." Hence, the question is whether the court abused its discretion in granting FHB's motion to strike the seventeen witnesses Hayashi named in his settlement conference statement. Glover v. Grace Pacific Corp., 86 Hawai'i 154, 164, 948 P.2d 575, 584-85 (App.

[3/] The Honorable Kevin S.C. Chang, judge presiding.

1997) (concluding that "the court's choice of sanctions under RCCH Rule 12 was not an abuse of its discretion").

The requirement of RCCH Rule 12(l), that "defendant must name all theretofore unnamed witnesses[,]" is mandatory, and failure to comply with that rule will expose the dilatory party to RCCH Rule 12(t) sanctions, unless good cause is shown for the party's failure. Cf. Glover, 86 Hawai'i at 163, 948 P.2d at 584 (the discovery cut off date set by RCCH Rule 12(r) is mandatory, and failure of a party to complete discovery by the cutoff date will draw RCCH Rule 12(t) sanctions from the court, "unless good cause is shown").

On appeal, Hayashi does not proffer any "good cause" for his untimely naming of witnesses. He is content to complain of the adverse effects he suffered at trial due to the striking of his witnesses. Perhaps this omission is due to the fact that the bulk of the witnesses newly named in Hayashi's settlement conference statement appear to be either business associates or co-workers of his, or custodians of readily available public records. He even named his mother. Clearly, good cause for his failure to name the witnesses in a timely manner cannot be based upon an inability to identify them earlier.

Absent a showing of good cause, and considering the potential prejudice to FHB in having to depose up to seventeen more witnesses within the month remaining before trial, we cannot

say that the court abused its discretion in striking Hayashi's witnesses.

E. Hayashi's Motion to Amend Pleadings.

On July 23, 1999, after completion of FHB's case and before presentation of his case, Hayashi filed a motion to amend the pleadings in order to "specifically allege fraud[,]" relying upon HRCP Rule 15(b) (1999). After a July 26, 1999 hearing, the court filed its July 28, 1999 order denying the motion.

We review a trial court's decision on a HRCP Rule 15(b) motion to amend the pleadings under the abuse of discretion standard. Hamm v. Merrick, 61 Haw. 470, 473, 605 P.2d 499, 502 (1980).

The part of HRCP Rule 15(b) relied upon by Hayashi in his motion to amend pleadings reads as follows:

> 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 admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Hayashi's only argument on appeal on this point is as follows:

> The evidence which was being presented, and which would have been presented, had [FHB] provided documents in a timely manner, demonstrated possible fraud. Hayashi's counsel unsuccessfully sought to amend the pleadings to add that allegation. On remand [from this second

> appeal], Hayashi should be allowed to pursue that claim.

This is no help. We considered and rejected, supra, Hayashi's claim that he was prejudiced by FHB's alleged withholding of discovery. We instead decided that Hayashi had not exercised due diligence in pursuing the discovery he now claims was so essential. For much the same reason, we concluded that the court did not err in striking Hayashi's newly named witnesses. Under the circumstances, we cannot say that "the presentation of the merits of the action [would have been] subserved" by amending the pleadings to include Hayashi's allegation of fraud. HRCP Rule 15(b). Accordingly, the court did not abuse its discretion in denying Hayashi's motion to amend the pleadings.[4]

[4/] We observe that, by the time Hayashi had filed his motion to amend the pleadings in order to "specifically allege fraud[,]" the court had already orally granted FHB's motion for judgment on the pleadings to dismiss Hayashi's cause of action for fraudulent misrepresentation and his associated prayers for emotional distress and punitive damages. Hayashi has not designated the court's August 5, 1999 written order granting FHB's motion for judgment on the pleadings as a point on this appeal.

IV. Conclusion.

We affirm the September 21, 1999 final judgment of the circuit court of the first circuit, and its November 8, 1999 order denying Hayashi's motion for a new trial.

DATED: Honolulu, Hawaii, June 12, 2001.

On the briefs:

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Acting Chief Judge

Associate Judge

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