NO. 23680

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ANTONIO D. GONZALEZ, Jr. and WENDALEN MARIE GONZELEZ,
Plaintiff-Appellants, v.
GEORGINA MONIZ CAMBRA and ANTHONY M. CAMBRA,
Defendant-Appellees

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 92-0690)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Plaintiffs Antonio Diaz Gonzalez, Jr. (Gonzalez Jr.) and Wendalen Marie Gonzalez (Wendalen) (together, the Gonzalezes) appeal the July 21, 2000 order of the circuit court of the first circuit that denied their May 19, 2000 motion for clarification (the Motion for Clarification) of the court's October 9, 1996 amended findings of fact and conclusions of law.[1] The Gonzalezes also appeal the court's July 21, 2000 order[2] that denied their May 16, 2000 motion for reconsideration (the Motion for Reconsideration) of an April 16, 1999 ruling issuing out of a hearing held on March 16, 1999. The March 16, 1999 hearing was held upon another motion for clarification of the court's October

[1] The Honorable Gail C. Nakatani entered the court's October 9, 1996 amended findings of fact and conclusions of law, upon a bench trial.

[2] The Honorable Richard W. Pollack entered both of the July 21, 2000 orders, upon non-hearing motions.

9, 1996 amended findings of fact and conclusions of law, filed by the Gonzalezes on February 22, 1999. We affirm.

I. Background.

This case involves a dispute between the Gonzalezes and Defendants-Appellees Georgina Moniz Cambra (Georgina) and Anthony M. Cambra (together, the Cambras), over an encroachment on real property. The following is taken from the court's October 9, 1996 amended findings of fact.[3]

Antonio Diaz Gonzalez, Sr. (Gonzalez Sr.), the father of Gonzalez Jr. and Georgina, owned two lots in Palolo Valley, upon which he built two dwellings. One house was located at 2017 10th Avenue (the Makai lot), and the other house was located at 2021 10th Avenue (the Mauka lot). As it turns out, the dwelling on the Mauka lot was constructed partly over the boundary line between the two lots. However, this was not a problem encroachment at the time of construction because Gonzalez Sr. owned both lots.

In 1969, Gonzalez Sr. conveyed both lots to his six children, as tenants in common. Gonzalez Jr. is Gonzalez Sr.'s only son, and Georgina is one of five daughters. That same year, the Cambras married and started residing in the house on the

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[3] No appeal was taken from the October 9, 1996 amended findings of fact and conclusions of law, and they are not specifically challenged in this appeal. This being so, the amended findings of fact are binding upon the parties. Poe v. Hawaii Labor Relations Bd., 97 Hawai'i 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (Citation omitted.)).

Mauka lot, with Gonzalez Sr. Also that year, the Gonzalezes married. A few years later, in 1973, the six siblings began discussions about what to do with the property, primarily at the urging of Gonzalez Jr. Gonzalez Jr. wanted the Makai lot rented and the Cambras to pay rent for the Mauka lot. Eventually, after Gonzalez Jr. had investigated and proposed several alternative solutions, the siblings agreed that the Cambras would buy out the remaining siblings and take title to the Mauka lot, while the Gonzalezes would buy out the remaining siblings and take title to the Makai lot.

A rock wall runs from the street to the back of the improved area around the dwellings on the Mauka and Makai lots. The wall terminates at the end of the improved area, and there is a grass yard behind both of the dwellings with no apparent demarcation of the property line. The physical layout of the dwellings is such that the rock wall appears to be the boundary between the two lots. The six siblings, at the time they entered into the agreement to convey the respective lots to the Gonzalezes and the Cambras, were under the impression that the properties would be devised along the rock wall.

In 1975, deeds were executed by the six siblings, conveying the Mauka lot to the Cambras and the Makai lot to the Gonazalezes. The parties to the transactions were unable to determine the actual physical layout of the properties being conveyed from the metes and bounds descriptions contained in the

respective deeds to the Mauka lot and the Makai lot. However, the parties expected, based upon express and implied representations by Gonzalez Jr. and Wendalen (who is a licensed real estate salesperson), that the deeds conveyed the lots with the rock wall as the boundary between them.

Shortly after the conveyances to the Gonzalezes and the Cambras, a survey found, contrary to the belief held by the siblings, that the deeds did not describe the rock wall as the boundary between the two lots. Instead, the survey found that the boundary began part of the way into the concrete foundation of the dwelling located on the Mauka lot and ran diagonally towards the dwelling and through part of the structure itself. A bathroom in the dwelling on the Mauka lot, and much of the plumbing which serves the Mauka lot, were determined to lie on the Makai lot. The encroachment comprised approximately 335 square feet.

Various proposals by the Gonzalezes for resolving the encroachment problem were rejected by the Cambras. The relationship between the Gonzalezes and the Cambras deteriorated after discovery of the encroachment. As a result of the encroachment, the Gonzalezes have been unable to sell the Makai lot.

The record reveals the following procedural background. On February 27, 1992, the Gonzalezes filed suit against the Cambras to correct the encroachment. A bench trial was held on

April 10, 1996, after a number of settlement conferences and trial continuances. The court filed its amended findings of fact (FsOF) and conclusions of law (CsOL) on October 9, 1996. The court made the following CsOL:

> 6. It is abundantly clear that the conveyance of the Mauka Lot to the Cambras and Makai Lot to the Gonzalezes subject to the encroachment was the result of mistake.
>
> 7. In accordance with Rule 65(d) of the Hawai[ʻ]i Rules of Civil Procedure [(HRCP)], the court hereby issues a mandatory injunction requiring the Cambras to remove the subject encroachment and restore the legal boundary line between the properties located at 2017 and 2021 10th Avenue, specifically to remove and relocate the upstairs bathroom and modify and remove the portion of the roof overhanging 2017.
>
> 8. Since the Gonzalezes and the Cambras were once joint owners of the properties and since the encroachment existed during their joint ownership of the properties, the court concludes that it would be fair and equitable to restore the legal boundary between the properties. Moreover, it is the court's objective to satisfy the long term goals of the parties in connection with their ownership of the properties; specifically, the Gonzalezes' desire to sell their property and the Cambra's desire to continue living on their property.
>
> 9. Had the boundary problem been known to the Gonzalezes and the Cambras prior to their respective individual purchases, they would have been jointly responsible for the cost of restoring the legal boundary. As such, the court further orders that the cost of removing, relocating and reconstruction of the upstairs bathroom, of restoring the legal boundary line and removing and modifying the portion of the roof overhang shall be borne equally between the Gonzalezes and the Cambras. The cost shall include but not be limited to any application to governmental agencies for approvals, surveys, architectural design, demolition and re-construction. Since attorney's services may be required, the costs may also include attorney's fees and costs.
>
> 10. The Cambras shall not be required to commence and/or undertake the restoration of the legal boundary, removal and relocation of the bathroom and modification of the overhang unless and until the Gonzalezes and the Cambras mutually agree to the cost and a payment arrangement/plan or, if the parties are unable to agree, unless and until the court enters orders regarding cost and a payment arrangement/plan.
>
> 11. As such, the court retains jurisdiction to determine the justification and reasonableness of cost and to enter such further orders pertaining to the cost, the sharing of cost incurred in connection with the removal of the encroachment and restoration and reconstruction of the property and payment arrangement/plan.
>
> 12. The mandates of Conclusions of Law, Paragraphs 7, 8, 9, 10 and 11 shall be carried out and completed within two years of August 1, 1996. If the mandates of Paragraphs 7, 8, 9, 10 and 11 are not completed by, August 1, 1998, the Court retains jurisdiction to impose an alternative solution, including but not limited to the forced sale of the land area in dispute from the Gonzalezes to the Cambras.

The court's December 13, 1996 final judgment decreed:

> 1. [The Gonzalezes] are awarded a mandatory injunction requiring [the Cambras] to remove the physical encroachment which is the subject of this action pursuant to the terms and conditions set out in Conclusions of Law Nos. 7, 8, 9 and 10 in the Court's Amended Findings of Fact and Conclusions of Law filed herein on October 9, 1996.
>
> 2. [The Gonzalezes'] claims of trespass, negligence and nuisance and for declaratory relief, ejectment and punitive damages set out in the Complaint filed herein on February 27, 1992 are hereby dismissed with prejudice.
>
> 3. The parties shall bear their own respective costs and attorneys' fees.
>
> 4. The above Court retains jurisdiction with respect to the implementation of and compliance of the parties with the aforesaid mandatory injunction pursuant to Conclusions of Law Nos. 11 and 12 of the Amended Findings of Fact and Conclusions of Law filed herein on October 9, 1996.

No appeal was taken from the court's final judgment or the underlying FsOF and CsOL.

Correction of the encroachment did not get underway for some time. Seemingly interminable disputes arose about how to go about correcting the encroachment. The parties stipulated to, and the court approved of, numerous extensions to extend the court-imposed deadline for removal of the encroachment.

During this process, an issue came up with respect to a retaining rock wall located to the rear of the Cambra residence. Approximately forty percent of this wall was located on the Gonzalez side of the property line, and sixty percent on the Cambra side. The Cambras claimed that replacing the wall was "one of the many necessary corollaries to the required correction of the property line[,]" and hence, the cost thereof should be shared equally pursuant to the general provision for equal cost sharing contained in the court's COL 9. The Cambras asserted that rerouting the encroaching sewer lines, which ran underneath

the wall, would undermine the footing of the wall and necessitate its repair. Also, the Cambras averred that the wall, already subject to water infiltration over and through it, would have to be replaced to prevent flooding of their residence, because correction of the encroachment would involve relocating a doorway and laundry appliances, along with the electrical outlets servicing them, from the side of their house to the rear of their house, where before there was only a monolithic hollow tile wall.

The Gonzalezes did not agree. On February 22, 1999, they filed a motion for clarification of the court's October 9, 1996 amended findings of fact and conclusions of law. In their motion, the Gonzalezes stated that they were not opposed to paying for half the cost of rebuilding forty percent of the wall, since that portion of the wall was on their side of the property line. But they opposed paying for half the cost of replacing the entire wall.

A hearing on the February 22, 1999 motion for clarification was held on March 16, 1999.[4] At this hearing, the Gonzalezes' attorney argued:

> There's a concern there about the electrical appliances being in an area where the water will be coming through that retaining wall, for instance. That seems to be a prime concern.
>
> [The architect retained by the parties] could certainly address that in the design drawing.
>
> There's also, I'm sure, a reasonable alternative in that the appliances themselves could be located to another part of the Cambra property that is not in the path of the leaking.
>
> So there are numerous other ways of addressing this rather than

[4] The Honorable Gail C. Nakatani, judge presiding.

having the entire cost fall on the shoulders of [the Gonzalezes].

The attorney for the Cambras argued:

> I suggest to the court that the Cambras as a gesture of good faith said we won't require -- we'll give up [a] bedroom so the bathroom that's over [the property line] can be [moved to] where the bedroom now stands. This eliminated the need to put the bathroom in back [of the house] which would have necessitated a lot of earth work in back [and] destroying that wall to create enough room for the bathroom and, you know, has saved everybody, both parties, a lot of money.
>
> I suggest that it's time for the Gonzalezes to stop quibbling over these little things. Half means half. . . .

The court decided:

> Was and has always been the intention of the court that all the expenses to effectuate the problem be borne by each of the parties equally.
>
> So, you know, it's difficult for me to say whether this problem is related or unrelated to the underlying issues. I mean we are trying to accomplish something here basically the removal of the encroachment. And it appears that this leakage problem relating to this wall is, I guess, an out growth of rectifying that problem it seems to me.
>
> And, so under these circumstances, the intent should always be that the parties shall bear the costs equally, all costs.
>
> The Court, the clarification the Court will make is that the parties will have to bear the costs of replacing the wall equally.

On April 16, 1999, the written order issuing out of the March 16, 1999 hearing was filed. The court's order held that, "whereas replacement or re-building of the retaining wall which is the subject of the [Gonzalez] Motion is an outgrowth of correction of the encroachment as ordered by the court, the parties shall share the cost of said replacement or re-building equally." No appeal was taken from the April 16, 1999 order.

A year and a month later, on May 16, 2000, Gonzalez Jr., on behalf of the Gonzalezes, by then proceeding *pro se*, filed the Motion for Reconsideration. The Motion for Reconsideration was made pursuant to HRCP Rule 60(b)(6) (2000). In his memorandum in support of the motion, Gonzalez Jr.

declared, "under penalty of perjury[,]" that

> certain new information and facts have come into being subsequent to completion of the removal of the encroachment which confirm the fact that the newly constructed five foot tall, thirty five foot long retaining wall serves no purpose other than to remedy a naturally occurring decades old pre-existing ground water leakage problem which clearly has absolutely nothing to do with the encroachment of a relatively small corner of the defendants Cambra's house over the property line.

(Emphasis in the original.) In essence, the Gonzalezes argued that, in remedying the encroachment, the Cambras moved the laundry appliances into a new, indoor laundry room facility; placed elevated, weather-proof electrical outlets on the back wall of the house; and elevated the doorway on the back wall of the house, all of which obviated the concern for water infiltration that purportedly actuated the court's conclusion that repair of the retaining wall was part and parcel of remedying the encroachment. The Cambras opposed the Motion for Reconsideration, arguing that it was procedurally barred.

On July 21, 2000, the court entered its order denying the Motion for Reconsideration, as a non-hearing motion. The court found "that [the Gonzalezes] have not satisfied the requirements of Rule 60(b) of the [HRCP] which would entitle [them] to reconsideration of the Court's Order filed herein on April 16, 1999."[5]

While all of this was going on, another hitch had

[5] The court lined out the "April 16, 1999" date, replaced it with a handwritten "May 16, 2000" date, and initialed the change. However, the record reflects that the original date was correct.

surfaced in the already protracted process of correcting the encroachment. On the Makai lot owned by the Gonzalezes stood a dwelling which was adjacent to the Cambra home. In April 1999, a kitchen fire damaged the dwelling. Subsequent investigation uncovered structural damage due to insect infestation. On May 18, 1999, the Gonzalezes were served with a notice of violation by the City and County of Honolulu Department of Planning and Permitting (the City and County). The dwelling was noticed for extensive damage by rot, termites and fire. The Gonzalezes were to either repair the structure or demolish it within ninety days of the date of the notice, or face enforcement action by the City and County.

The Gonzalezes apparently did not comply within ninety days. On October 6, 1999, the parties filed a stipulation regarding selection of bid and contractor and order. The parties reported therein that building plans for remedying the encroachment had been prepared and submitted to a number of licensed contractors for bidding. The parties further agreed therein that "the JNM Construction bid attached hereto as Exhibit A shall be accepted (both parts) to perform construction of the removal and relocation of said encroachment, and that all the costs of said contract shall be shared equally as previously ordered by the Court." The court[6] approved and signed the order

[6] The Honorable Gail C. Nakatani, judge presiding.

attached to the stipulation. The JNM Construction bid noted, however: "Construction of this project is subject in [(sic)] getting the adjacent right side of the house demolished and removed, due to its current dangerous situation." JNM Construction was referring to the derelict structure on the Gonzalez lot.

On May 19, 2000, Gonzalez Jr. filed the Motion for Clarification on behalf of the Gonzalezes. In his affidavit attached to the Motion for Clarification, Gonzalez Jr. asserted that,

> because demolition of [the Gonzalez] house was made a condition [by JNM Construction] of fulfilling the contract to remove the encroachment, it is abundantly clear that the cost of said demolition was incurred in connection with the removal of the encroachment and as such, falls under the Court's ruling that all expenses for the removal of the encroachment be shared by both parties[.]

The Cambras opposed the Motion for Clarification, arguing that,

> [s]aid demolition or repair of [the Gonzalez] property was required by law, and would have been required regardless of any work being performed in connection with correcting the encroachment of [the Cambra] home . . . upon the property boundary.

Treating the Motion for Clarification as a non-hearing motion, the court entered its July 21, 2000 order denying the Motion for Clarification. The court held that its injunction "expressly authorizes the sharing of costs to apply only to removal of the encroachment and not to other incidental costs incurred by [the Gonzalezes], such as for demolition of [the Gonzalez] home."

On August 21, 2000, the Gonzalezes filed two timely

notices of appeal. The first appealed the July 21, 2000 order denying the Motion for Clarification. The second appealed the July 21, 2000 order denying the Motion for Reconsideration.

II. Issues Presented and the Standard of Review.

The Gonzalezes continue *pro se* on appeal. From their amorphous appellate briefs, we can glean two primary points of error: (1) that the court abused its discretion in denying the Motion for Clarification, and (2) that the court abused its discretion in denying the Motion for Reconsideration.

A. The Motion for Clarification.

"The relief granted by a court in equity is discretionary and will not be overturned on review unless the circuit court abused its discretion by issuing a decision that clearly exceeds the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of the appellant." Pelosi v. Wailea Ranch Estates, 91 Hawai'i 478, 487, 985 P.2d 1045, 1054 (1999) (brackets, internal quotation marks and citation omitted). Accordingly, we review the court's denial of the Motion for Clarification for an abuse of discretion.

B. The Motion for Reconsideration.

"It is well-settled that the trial court has a very large measure of discretion in passing upon motions under [HRCP] Rule 60(b) and its order will not be set aside unless we are persuaded that under the circumstances of the particular case,

the court's refusal to set aside its order was an abuse of discretion." Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 428, 16 P.3d 827, 833 (App. 2000) (internal quotation marks and citation omitted). Accordingly, we also review the court's denial of the Motion for Reconsideration for an abuse of discretion.

III. Discussion.

A. The Motion for Clarification.

The Gonzalezes' argument on this issue is wholly tautologous:

> By accepting the [JNM Construction] bid, [the Cambras] as well as [the Gonzalezes] accepted all of the conditions contained therein. Demolition of [the Gonzalez] house was a condition contained therein. Under the [October 6, 1999] Stipulation Agreement, [the Cambras] agreed to share all costs equally. Therefore, they must share equally in the cost of demolition of [the Gonzalez] house. [The Gonzalezes] are entitled to be reimbursed for one-half the cost of the demolition of [the Gonzalez] house.

Opening Brief at 37. This argument, while superficially logical, is ultimately meretricious. In the October 6, 1999 stipulation, the parties agreed to accept the JNM Construction bid and to share equally in the costs of that contract. However, that contract and its cost quotes were for the work on the Cambra home necessary to remedy the encroachment, and not for demolition of the Gonzalez structure. So it cannot be said that the demolition condition was a contractual cost item that was to be shared equally under the stipulation and the court's COL 9, as the Gonzalezes' logic would have it.

The parties disagreed about whether the demolition was

an integral part of the encroachment remedy. Under the court's COL 10 and the reservation of jurisdiction in its COL 11, that disagreement was for the court to settle, sitting in equity. It decided that demolishing a structure on the Gonzalez lot that was separate and apart from the Cambra house, had previously been rendered derelict and dangerous by fire, rot and insect infestation, and as a consequence had been cited by the City and County for repair or removal, was in no wise related to remedy of the subject encroachment. We do not believe the court abused its discretion in so deciding.

B. The Motion for Reconsideration.

In their memorandum in support of the May 16, 2000 Motion for Reconsideration, the Gonzalezes argued that new information had come to light since entry of the court's April 16, 1999 order that the parties share equally the cost of replacing the retaining rock wall; namely, that the water infiltration problem that had purportedly actuated the order had been obviated by safety measures taken during renovation of the Cambra house itself, thus rendering replacement of the wall unnecessary in connection with the encroachment remedy. On appeal, the Gonzalezes augment this argument with an allegation that the Cambras perpetrated a fraud on the court by not disclosing the safety measures, purportedly to obtain and preserve the court-ordered, equal cost sharing of an improvement

on their property they knew was unrelated to the remedial work.

The Gonzalezes based the Motion for Reconsideration upon HRCP Rule 60(b)(6). The court denied the Motion for Reconsideration because "[the Gonzalezes] have not satisfied the requirements of Rule 60(b) of the [HRCP] which would entitle [them] to reconsideration of the Court's Order filed herein on April 16, 1999." HRCP Rule 60(b) (2000) states, in pertinent part:

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

Although styled as an HRCP Rule 60(b)(6) motion, the Motion for Reconsideration was based, instead, upon other clauses of HRCP Rule 60(b). The Gonzalezes' argument below -- that new information had come to light -- falls within the purview of HRCP Rule 60(b)(2). Cf. Child Support Enforcement Agency (CSEA) v. Doe, 98 Hawai'i 499, 504, 51 P.3d 366, 371 (2002) (motion based on "'newly discovered evidence' . . . . unequivocally sought relief pursuant to [Hawai'i Family Court Rules (HFCR)] Rule 60(b)(2)"). Their augmented argument -- that the Cambras and their attorney perpetrated a fraud on the court by not disclosing

that information -- falls squarely within the ambit of HRCP Rule 60(b)(3). Cf. CSEA, 98 Hawai‘i at 504, 51 P.3d at 371 (motion charging "fraud" arising out of lies allegedly told by adverse party's counsel "clearly falls within the purview of HFCR Rule 60(b)(3)").

However, "[t]o qualify for relief under HRCP [Rule] 60(b)(6), the motion must be based upon some reason other than those stated in clauses (1)-(5). In other words, [HRCP] Rule 60(b)(6) is unavailable when the relief sought is within the coverage of some other provision of [HRCP] Rule 60(b)." Hawai‘i Hous. Author. (HHA) v. Uyehara, 77 Hawai‘i 144, 148, 883 P.2d 65, 69 (1994) (ellipsis, internal quotation marks, citation and original brackets omitted). See also CSEA, 98 Hawai‘i at 504, 51 P.3d at 371; Citicorp Mortgage, 94 Hawai‘i at 437-38, 16 P.3d at 842-43; Calasa v. Greenwell, 2 Haw. App. 395, 397, 633 P.2d 553, 555 (1981) ("clause (6) and the first five clauses are mutually exclusive and relief cannot be had under clause (6) if it would have been available under the earlier clauses" (ellipsis, internal quotation marks and citations omitted)). "To hold otherwise would be to permit parties to circumvent a failure to timely appeal or move to set aside a judgment." CSEA, 98 Hawai‘i at 504, 51 P.3d at 371.

Here, the Motion for Reconsideration was substantively based on clauses (2) and (3) of HRCP Rule 60(b), and therefore could not have been supported by the catch-all provision of HRCP

Rule 60(b)(6). Accordingly, the court properly denied the HRCP Rule 60(b)(6) Motion for Reconsideration, as such. Compare the supreme court's holding in CSEA, supra:

> Because [appellant's] asserted grounds for relief unmistakably were based upon circumstances specified in one or more of clauses (1) through (5) of HFCR Rule 60(b), [appellant's] motion cannot, as a matter of law, be construed as a HFCR Rule 60(b)(6) motion.

CSEA, 98 Hawai'i at 504, 51 P.3d at 371 (citation omitted).

Furthermore, inasmuch as the substance of the Motion for Reconsideration placed it squarely under clauses (2) and (3) of HRCP Rule 60(b), the motion was untimely. In contrast to motions brought under HRCP Rule 60(b)(6), which may be filed "within a reasonable time," HRCP Rule 60(b), HRCP Rule 60(b) motions made under clauses (1), (2) and (3) must be made "not more than one year after the judgment, order, or proceeding was entered or taken." HRCP Rule 60(b). See also HHA, 77 Hawai'i at 149, 883 P.2d at 70 ("Every motion under [HRCP] Rule 60(b) must be made within a reasonable time, and if made for certain reasons enumerated in the rule must be made not more than one year after the judgment." (Internal block quote format and citation omitted.)).

The Motion for Reconsideration was filed a year and a month after the court's April 16, 1999 order, and was therefore untimely. Consequently, the court did not abuse its discretion when it ruled that the Motion for Reconsideration was procedurally barred. As the supreme court held in CSEA, supra:

> In this case, the specific grounds stated in [appellant's] motion, which was filed nearly two years after the underlying judgment, unambiguously sought the substantive relief described in clauses (2) and (3) of HFCR Rule 60(b). We, therefore, hold that [appellant's] motion is time-barred.

CSEA, 98 Hawai'i at 504-5, 51 P.3d at 371-72.

In an attempt to avoid the procedural bar to the Motion for Reconsideration, the Gonzalezes argue on appeal several possible exceptions.

First, the Gonzalezes assert that "[HRCP Rule 60(b)(6)] should be applicable in [the] Motion for Reconsideration because there is no time limit with regard to attacks on a void judgment." Opening Brief at 35 (record citation omitted). The Gonzalezes explain that their attorney failed to inform them of the March 16, 1999 hearing on their February 22, 1999 motion for clarification, and thus "violated [their] due process right, mainly the right to be heard in Court." Opening Brief at 36.

HRCP Rule 60(b)(4), and not HRCP Rule 60(b)(6), affords relief from a judgment on the basis that "the judgment is void[.]" An HRCP Rule 60(b)(4) motion may be brought "within a reasonable time," HRCP Rule 60(b), but

> a judgment is void only if the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process of law. However, in the sound interest of finality, the concept of void judgment must be narrowly restricted.

Citicorp Mortgage, 94 Hawai'i at 430, 16 P.3d at 835 (brackets, internal quotation marks, block quote format, and citations omitted). There can be no averment in this case -- involving

real property located in the first circuit and parties resident in the first circuit -- that the court lacked subject matter or personal jurisdiction. And in light of the fact that, at the March 16, 1999 hearing, counsel for the Gonzalezes argued their February 22, 1999 motion for clarification vigorously, fully and at length, making arguments quite similar to those the Gonzalezes advanced in the Motion for Reconsideration and now assert in this appeal, we do not see, on this record, that the court acted in a manner inconsistent with due process. The Gonzalezes fail to inform us, in any event, how their absence from the hearing prejudiced them, or what difference their presence would have made.

Also in connection with their counsel's alleged failure to inform them of the March 16, 1999 hearing, the Gonzalezes argue on appeal that "[a]lthough clause (1) of [HRCP] Rule 60(b) mentions neglect, when an attorney's neglect is gross and inexcusable courts have held that relief may be justified under [HRCP] Rule 60(b)(6)." Opening Brief at 33 (citation omitted). As we have observed,

> [a] quite typical kind of case is that in which a party comes in more than a year after judgment to assert that he is the victim of some blunder by his counsel. Claims of this kind seem to fit readily enough within such grounds as mistake, inadvertence, and excusable neglect, all stated in clause (1) [of HRCP Rule 60(b)], and the courts frequently have so reasoned and held that clause (6) [of HRCP Rule 60(b)] was inapplicable. But if the court is persuaded that the interests of justice so require, it is likely to find aggravating circumstances sufficient to permit it to say that the case is properly within clause (6).

City & County v. Bennett, 2 Haw. App. 180, 182, 627 P.2d 1136,

1138 (1981) (internal block quote format and citation omitted). The supreme court has elaborated:

> Although clause (1) of [HRCP] Rule 60(b) mentions neglect, when an attorney's neglect is gross and inexcusable courts have held that relief may be justified under [HRCP] Rule 60(b)(6). Thus, though the broad power granted by clause (6) is not for the purpose of relieving a party from free, calculated and deliberate choices he has made, a case could arise of such extreme aggravation with respect to the conduct of counsel that a trial court, in its discretion, would set aside a judgment in a civil case under [HRCP] Rule 60(b)(6).
>
> In the instant case, the critical inquiry, therefore, is whether [counsel's] alleged failure to obtain [appellant's] express consent [to a settlement] constituted gross and inexcusable neglect such that it amounted to an "extraordinary circumstance" warranting relief under HRCP Rule 60(b)(6).

HHA, 77 Hawai'i at 149-50, 883 P.2d at 70-71 (original brackets, some internal quotation marks, and citations omitted). As we have discussed, the record here does not reveal "a case . . . of such extreme aggravation with respect to the [alleged] conduct of counsel that a trial court, in its discretion, would set aside a judgment . . . under [HRCP] Rule 60(b)(6)." HHA, 77 Hawai'i at 149, 883 P.2d at 70 (internal quotation marks and citation omitted). Nor do we discern in this record "gross and inexcusable neglect" of counsel "such that it amounted to an 'extraordinary circumstance' warranting relief under HRCP Rule 60(b)(6)." HHA, 77 Hawai'i at 150, 883 P.2d at 71.

The Gonzalezes also seem to assert that the Motion for Reconsideration was not procedurally barred and should have been granted, based upon HRCP Rule 60(b)(5). An HRCP Rule 60(b)(5) motion may be brought "within a reasonable time[.]" HRCP Rule 60(b). The argument, in its entirety, is as follows:

> HRCP Rule 60(b)(5) ". . . it is no longer equitable that the judgment

> should have prospective application[."] Once the reason upon which the Court relied in making its determination no longer existed, it naturally follows that it is "no longer equitable that the judgment should have prospective application[."]
> [The Cambras] argued that rebuilding the retaining wall was crucial to protect electrical appliances which were to be installed outside the house. Newly discovered evidence disclosed that the subject appliances were, in reality, installed inside the house. Once the threat of electrical hazard was removed, the essence of [the Cambras'] argument linking the retaining wall to the encroachment is lost.
> [The Gonzalezes] being made to pay for a new retaining wall which did not in any way physically encroach over the property boundary line amounts to an inequitable enrichment of [the Cambra] property. As a result, the Court has "enriched" [the Cambra] property at the expense of [the Gonzalezes]. The court's decision has placed [the Gonzalezes] under an unnecessary financial burden that will continue for many years to come. An injustice.

Opening Brief at 9. Obviously, what is presented here is not an issue of prospective application of the court's April 16, 1999 order for equal cost sharing. Remedy of the encroachment, including replacement of the retaining wall, had been completed and the costs equally shared pursuant to the order by the time the Motion for Reconsideration was filed. What the Gonzalezes seek with this argument is what they essentially sought in their Motion for Reconsideration and continue to seek generally in this appeal -- to relitigate an order they failed to appeal in the first instance. The attempt to characterize the HRCP Rule 60(b)(6) Motion for Reconsideration as an HRCP Rule 60(b)(5) motion is a transparent attempt to legitimize the use of HRCP Rule 60(b)(6) as "a substitute for a timely appeal from the original judgment." Stafford v. Dickison, 46 Haw. 52, 57 n.4, 374 P.2d 665, 669 n.4 (1962) (citations omitted). We cannot acquiesce in such a ploy. "To hold otherwise would be to permit parties to circumvent a failure to timely appeal or move to set

aside a judgment." CSEA, 98 Hawai'i at 504, 51 P.3d at 371 (citation omitted). See also Citicorp Mortgage, 94 Hawai'i at 437-38, 16 P.3d at 842-43. HRCP Rule 60(b)(5) simply cannot support the Motion for Reconsideration.

At any rate, even if the Gonzalezes could have based their Motion for Reconsideration upon HRCP Rule 60(b)(5), it would not change our conclusion that the court did not abuse its discretion in denying the Motion for Reconsideration. At the March 16, 1999 hearing, counsel for the Gonzalezes argued the alternative of moving the electrical appliances "to another part of the Cambra property that is not in the path of the leaking." Hence, the court was well aware of the design alternative in the first instance. Too, the intervening events apparently did not completely obviate the original concerns about water infiltration with respect to the new electrical outlets and door that were placed at the rear of the Cambra residence. And there is nothing in the record which indicates that the subsequent developments rendered nugatory the original concern over the encroaching sewer lines running under the retaining wall.

The Gonzalezes also argue on appeal that

> HRCP Rule 60(b)(6) adds further force to [the Gonzalezes'] arguments. It encompasses "any other reason justifying relief from the operation of the judgment." Which lends yet another dimension to [the Gonzalezes'] argument regarding "reasonable time" limitations.

Opening Brief at 9 (citation omitted). That is the extent of the argument on this particular point, whatever the point might be.

We can only respond that the threshold issue of the applicability of HRCP Rule 60(b)(6) is what is pertinent here, and not time limitations. Calasa, 2 Haw. App. at 397, 633 P.2d at 555 ("clause (6) and the first five clauses are mutually exclusive and relief cannot be had under clause (6) if it would have been available under the earlier clauses" (ellipsis, internal quotation marks and citations omitted)).

We conclude on this point of error, finally, that the court did not abuse its discretion in denying the Motion for Reconsideration.

IV. Conclusion.

The July 21, 2000 order of the court that denied the May 19, 2000 Motion for Clarification, and the July 21, 2000 order of the court that denied the May 16, 2000 Motion for Reconsideration, are affirmed.

DATED: Honolulu, Hawaii, January 30, 2003.

On the briefs:

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Chief Judge

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Associate Judge

Associate Judge