

NOT FOR PUBLICATION

NO. 24448

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

THE H.E. JOHNSON COMPANY, INC., Plaintiff-Appellant,
v. EMMA INTERNATIONAL, INC., Defendant-Appellee,
and JOHN DOES 1-50, MARY DOES 1-50, DOE
PARTNERSHIPS 1-50, DOE CORPORATIONS AND OTHER
ENTITIES 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIVIL NO. 92-0348)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Foley, JJ.)

Plaintiff-Appellant The H.E. Johnson Company, Inc. (Johnson) appeals from the Final Judgment (Final Judgment) filed on July 26, 2001, in the Circuit Court of the First Circuit (circuit court).¹ The Final Judgment was entered in favor of Defendant-Appellee Emma International, Inc. (Emma), and against Johnson, in the amount of \$59,174.71 plus 10% interest per year from the date of entry of the Final Judgment.

Johnson alleges the circuit court committed error when it (1) dismissed the complaint pursuant to Hawaii Rules of Civil Procedure (HRCP) Rule 41(b) and (2) awarded attorney's fees and

¹The Honorable Kevin S.C. Chang presided.

costs to Emma.² We disagree with Johnson's contentions and affirm.

I. BACKGROUND

A. Nature of Case

On June 28, 1989, Emma, the owner of a parcel of land in Palolo Valley, Honolulu, Hawai'i, entered into a contract with Johnson, the contractor, to construct a reservoir, waterline, and pump station modification on its parcel. The contract price to be paid by Emma to Johnson was \$6,313,287.00. The contract

²Johnson's opening brief fails to comply with Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 in that it does not contain the following required sections:

Rule 28. Briefs

. . . .
(b) *Opening brief.*

. . . .
(3) A concise statement of the case, setting forth the nature of the case, the course and disposition of proceedings in the court . . . appealed from, and the facts material to consideration of the questions and points presented, with record references supporting each statement of fact or mention of court . . . proceedings.

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court . . . ; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court[.]

. . . .
(8) Relevant parts of the . . . statutes . . . pertaining to the points of error set out verbatim, unless otherwise provided in the brief.

Furthermore, Johnson's opening brief does not contain accurate citations. Johnson cited Lim v. Harvis Constr. Inc. as published at 817 P.2d 342. The correct citation is Lim v. Harvis Construction Inc., 65 Haw. 71, 647 P.2d 290 (1982). Within the same paragraph, Johnson miscited another case, Shasteen v. Hilton Hawaiian Village Joint Venture as published at 982 P.2d 132. It is actually published at 899 P.2d 386. Counsel for Johnson is warned that future noncompliance with HRAP Rule 28 may result in sanctions against him.

stated that work "shall be completed within 425 calendar days of the commencement of the Contract Time as defined in the General Conditions of the Contract." Clause "L" of the contract stated:

L. Interpretation and Enforcement. . . . If any dispute between Owner and Contractor concerning the terms, provisions or conditions of this Agreement results in arbitration or litigation or if either party commences arbitration or litigation against the other to assert, protect or enforce any of the rights herein, the prevailing party therein shall be entitled to all costs, expenses and a reasonable attorneys' fee to be determined by the arbitrators or court before whom such action is brought and to be made a part of the judgment therein.

Aside from their tangential relation to the issues of dismissal and attorney's fees, the facts of the underlying litigation are not at issue on appeal.

B. Procedural History

On January 30, 1992, Johnson filed a Complaint alleging that Emma had breached its contractually required duty to pay Johnson. On March 5, 1992, Johnson filed a request for entry of default against Emma for failing to answer the Complaint. Emma filed its Answer to the Complaint on March 17, 1992. On April 28, 1992, Emma moved to set aside the default. On July 23, 1992, the circuit court filed its Findings of Fact, Conclusions of Law, and Order Granting Default Judgment as to All Claims and All Parties in favor of Johnson and a Judgment as to All Claims and All Parties. Emma appealed the default judgment on August 20, 1992.

NOT FOR PUBLICATION

On July 15, 1993, pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b), Emma moved for relief from the default judgment. On January 21, 1994, Johnson moved the Intermediate Court of Appeals (ICA) for remand to the circuit court so the circuit court could "enter an order granting relief from final default judgment pursuant to Hawai'i Rules of Civil Procedure Rule 60(b)." The ICA's order granting the remand was filed on February 7, 1994, and the appeal was dismissed on April 4, 1994. On March 22, 1994, the circuit court filed its order granting Emma's motion for relief from the default judgment; the circuit court vacated the July 23, 1992 order and ordered Emma to answer the Complaint within twenty days of the filing of the March 22 order. On April 11, 1994, Emma filed its answer and a counterclaim; Johnson filed its reply on May 6, 1994.

On April 12, 1996, Johnson filed its Pretrial Statement. On April 18, 1996, Emma filed a Motion to Dismiss for Want of Prosecution. On September 12, 1996, Johnson filed its opposition memorandum to Emma's motion to dismiss. In its answering brief, Emma indicates that it voluntarily withdrew this motion "[i]n light of the renewed activity of the lawsuit."

The record before us indicates that the only activity in 1997 and 1998 involved (1) Johnson's counsel's moving to withdraw and filing a notice of charging lien for attorney's fees

NOT FOR PUBLICATION

and costs, and (2) new counsel appearing for Johnson. There was no activity in 1999, and no activity in 2000 until Emma moved to dismiss the case in September 2000. In sum, Johnson failed to prosecute the case for four full years.

On September 1, 2000 Emma moved, for a second time, to dismiss the lawsuit, pursuant to HRCF Rule 41(b), for want of prosecution (Motion to Dismiss). In support of its motion, Emma attached a Declaration by its counsel, Evan R. Shirley. In his declaration, Shirley stated that Johnson filed the instant lawsuit after obtaining a default judgment in a separate lawsuit (Civil No. 91-4242) against Emma. Shirley stated that he had prepared HRCF Rule 60(b) motions to set aside the default judgments in each case. Both motions for relief from default judgment were granted in March of 1994. Settlement discussions occurred in 1996 and again in the summer and fall of 1997. Shirley stated that "[f]rom the Fall of 1997 until April 2000, I have not heard from Johnson or received communications from Johnson except in the form of pleadings relating to the withdrawal or appearance of its lawyers and the filing of a notice of charging lien."

On September 25, 2000, Johnson filed its opposition memorandum. After a hearing on October 3, 2000, the circuit

NOT FOR PUBLICATION

court granted Emma's Motion to Dismiss, and the order was filed on October 17, 2000.

On October 10, 2000, Emma filed three pleadings: (1) a motion for attorney's fees and costs (Motion for Fees); (2) billings exhibits in support of the motion, consisting of billing statements, breakdowns of the hours spent on the case, and costs incurred; and (3) "litigation exhibits" in support of the motion. Johnson filed its opposition memorandum on November 17, 2000. After a December 5, 2000 hearing, the circuit court granted Emma's motion and awarded Emma \$59,174.71 in attorney's fees and costs from Johnson; the order was filed on January 5, 2001.

The Final Judgment was filed on July 26, 2001. On August 1, 2001, Johnson filed its Notice of Appeal.

II. STANDARDS OF REVIEW

A. Abuse of Discretion

"A court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party." Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Hawai'i 482, 491, 993 P.2d 516, 525 (2000) (internal quotation marks and ellipsis omitted).

NOT FOR PUBLICATION

B. Involuntary Dismissal

"We have held that an order granting involuntary dismissal of a complaint upon the motion of a defendant under HRCP Rule 41(b) is subject to review on appeal for an abuse of discretion." Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 107, 899 P.2d 386, 390 (1995) (internal quotation marks and brackets omitted).

C. Attorney's Fees Award

"This court reviews the circuit court's denial and granting of attorney's fees under the abuse of discretion standard." TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 253, 990 P.2d 713, 723 (1999) (quoting Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 299, 972 P.2d 295, 302 (1999)).

III. DISCUSSION

A. Involuntary Dismissal

Johnson contends the circuit court abused its discretion when it granted Emma's Motion to Dismiss for want of prosecution, pursuant to HRCP Rule 41(b). In its points of error, Johnson does not contest the following findings of the circuit court in its October 17, 2000 order granting Emma's motion to dismiss:

NOT FOR PUBLICATION

A. Johnson filed the Complaint in January 1992.

B. Johnson failed to prosecute its case in a diligent and timely manner.

C. Johnson failed to comply with the rules of court and failed to schedule a trial.

D. This case presents far more than a failure to prosecute. The facts of this case demonstrate that Johnson engaged in willful and deliberate delay.

E. A four-year period of lethargy and inaction by a plaintiff is a sufficient period to establish failure to prosecute.

F. Emma International has suffered actual prejudice because of the failure of Johnson to prosecute its case in a diligent and timely manner.

"Findings of fact that are unchallenged on appeal are the operative facts of a case." Robert's Hawaii School Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999).

Hawaii Revised Statutes (HRS) § 635-3 (1993) authorizes the court to grant a dismissal for want of prosecution:

§635-3 Dismissal for want of prosecution. The court may dismiss any action for want of prosecution after due notice to the claimants whenever claimants have failed to bring such action to trial within a period established by rule of court. Prior to dismissal of any action for want of prosecution, a court shall have adopted, promulgated, and published a rule or rules of court providing circumstances in which a claimant may seek relief from the judgment or order and such other safeguards as may be necessary.

Hawai'i Rules of Civil Procedure (HRCP) Rule 41 specifies the circumstances surrounding a grant of dismissal:

Rule 41. Dismissal of actions.

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(b) *Involuntary dismissal: Effect thereof.* For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for

NOT FOR PUBLICATION

dismissal of an action or of any claim against it. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal is not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

(c) *Dismissal of counterclaim, cross-claim, or third-party claim.* The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served or, if there is none, before the introduction of evidence at the trial or hearing.

(d) *Costs of previously-dismissed action.* If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

In Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, supra, Shasteen (the lessee) sued after Hilton Hawaiian Village Joint Venture (the lessor) refused to grant Shasteen consent to assign its leasehold interest to a third party. The lower court granted Hilton Hawaiian Village's HRCF Rule 41(b) motion for dismissal with prejudice. 79 Hawai'i at 106, 899 P.2d at 389. The Hawai'i Supreme Court described the inquiry into whether the lower court had properly dismissed the suit under HRCF Rule 41(b):

The power of the court to prevent undue delays and to achieve the orderly disposition of cases must be weighed against the policy of law which favors dispositions of litigation on its merits. Further, a dismissal of a complaint is such a severe sanction, that it should be used only in extreme circumstances where there is clear record of delay or contumacious conduct and where lesser sanctions would not serve the interest of justice. And, a dismissal

NOT FOR PUBLICATION

is also warranted where there is evidence of actual prejudice suffered by the defendants.

79 Hawai'i at 107, 899 P.2d at 390 (internal quotation marks, footnote, brackets and ellipsis omitted).

The court held as follows:

Because we discern nothing in the record that would indicate (1) a deliberate attempt on the part of the Shasteen corporation to delay the prosecution of this case, or (2) that the Shasteen corporation acted in a manner that we would consider contumacious conduct, or (3) that the Hilton suffered actual prejudice, we hold that the circuit court abused its discretion in dismissing the case with prejudice.

79 Hawai'i at 109, 899 P.2d at 392.

The Hawai'i Supreme Court recently reaffirmed the Shasteen precedent in Rearden Family Trust v. Wisenbaker, 101 Hawai'i 237, 65 P.3d 1029 (2003), in which it held that the lower court abused its discretion in denying plaintiff's motion to set aside a dismissal where plaintiff had complied with the court's order to complete settlement conferences. The court explained:

We must conclude the court abused its discretion in denying the motion to set aside. . . . Defendant apparently did make settlement proposals and did engage in such conferences at the behest of the court. See Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 109, 899 P.2d 386, 392 (1995) (holding that under the circumstances, the trial court abused its discretion in dismissing the case with prejudice as a RCCH [Rules of Circuit Courts] Rule 12.1 sanction for the plaintiff's failure to file a settlement conference statement, attend the settlement conference, appear with counsel, and otherwise prosecute its case); Compass Dev. [Inc. v. Blevins], 10 Haw. App. [388,] 401, 876 P.2d [1335,] 1341 [(1994)] (holding that while "the failure of a plaintiff to institute selection of a trial date under RCCH Rule 12(c) is a breach of its duty to proceed diligently[,]" "delay caused by a plaintiff's failure to file a document designating alternative trial dates or requesting a 'trial setting

NOT FOR PUBLICATION

conference' did not warrant a severe sanction of dismissal.")

101 Hawai'i at 254-55, 65 P.3d at 1046-47.

"HRCF Rule 41(b) is the same as Federal Rules of Civil Procedure (Fed. R. Civ. P.) Rule 41(b). Therefore, the interpretation of Fed. R. Civ. P. Rule 41(b) by the United States (U.S.) Supreme Court under similar circumstances is persuasive to us." Compass Dev., Inc. v. Blevins, 10 Haw. App. 388, 394, 876 P.2d 1335, 1338 (1994). In Malone v. United States Postal Service, 833 F.2d 128 (9th Cir. 1987), the Ninth Circuit Court of Appeals reviewed the district court's grant of dismissal with prejudice, partly pursuant to Fed. R. Civ. P. 41(b), where plaintiff's counsel had failed to comply with a pretrial order. The Ninth Circuit explained that to determine whether a defendant has been prejudiced, the court must examine "whether the plaintiff's actions impair the defendant's ability to go to trial or threaten to interfere with the rightful decision of the case." 833 F.2d at 131. In holding that the prejudice to defendant was sufficient to justify an order of dismissal, the Ninth Circuit placed "particular reliance" on plaintiff's "groundless" excuse for her conduct. Id.

We apply the Shasteen analytical framework to the instant case. Here, the circuit court found that Johnson had

NOT FOR PUBLICATION

engaged in "willful and deliberate delay," Johnson had a "four-year period of lethargy and inaction," and Emma had suffered prejudice as a result of Johnson's failure to prosecute.

1. Deliberate Delay

Johnson contends that its delay was not "deliberate." In contrast, Emma's first motion to dismiss for want of prosecution, filed in April 1996, put Johnson on notice that its failure to proceed with prosecution thereafter could serve as the basis for a HRCP Rule 41(b) dismissal. The circuit court could have inferred that the delay was "deliberate," rather than inadvertent, from the fact that a four-year period of inactivity followed this motion. Moreover, Johnson does not provide any purported excuses for its dilatoriness. Malone, 833 F.2d at 131.

2. Actual Prejudice

In its Motion to Dismiss, Emma alleged actual prejudice accrued to it because, among other factors, (1) property values in Honolulu had "plummeted" over the past decade, (2) over time, witnesses' memories tended to fade and evidence to disappear, and (3) Harold Johnson, principal of Johnson, had testified in his 1993 deposition that his company had lost all of the records for "this job" (the Palolo construction project). Given that the case involved a complex construction contract entered into in

1989, these facts would impair Emma's ability to go to trial. Malone, 833 F.2d at 131.

In light of the deliberate delay by Johnson and the actual prejudice alleged by Emma, the circuit court's interest in preventing undue delay and achieving orderly disposition outweighed the strong preference for disposition on the merits. Shasteen, 79 Hawai'i at 107, 899 P.2d at 390. Hence, the circuit court did not abuse its discretion in dismissing the case under HRCP Rule 41(b). Id.

B. Attorney's Fees Award

Johnson contends that (1) when Emma voluntarily dismissed its counterclaim, Emma also dismissed its right to attorney's fees because Emma had prayed for attorney's fees as part of its counterclaim; (2) Emma's Motion for Fees was untimely filed because it was filed prior to the entry of the Final Judgment and did not specify the judgment upon which the fee request was based; (3) the circuit court should have applied the 1985 version of HRS § 607-14 instead of the 1993 version because the 1993 version raised the cap on allowable attorney's fees³; and (4) Emma's Motion for Fees combined assumpsit and non-

³HRS § 607-14 was amended in 1993, 1994, and 1997. In the 1985 version, the amount of fees awarded was based upon a set schedule. In 1993 the amount of fees was changed to not more than 25% of the judgment; this part of the 1993 version is currently in effect.

assumpsit claims, and, despite specific objections by Johnson, the circuit court failed to adequately scrutinize Emma's billings.

1. Prevailing Party

In Wong v. Takeuchi, 88 Hawai'i 46, 961 P.2d 611 (1998), the Hawai'i Supreme Court explained how to determine who is the prevailing party in an action:

"Usually the litigant in whose favor judgment is rendered is the prevailing party. . . . Thus, a dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party." Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2667 (1983). There is no requirement that the judgment in favor of the prevailing party be a ruling on the merits of the claim.

Id. at 49, 961 P.2d at 614 (ellipsis in original). Here, Emma is the prevailing party because the Final Judgment was entered in its favor.

2. Applicable Attorney's Fees Statute and Retroactivity

The Wong court also stated that the lower court could not apply an amended version of HRS § 607-14 because applying it to a case where the substantive litigation had ended prior to the effective date of the amended version would cause an impermissible retroactivity problem. 88 Hawai'i at 50-51, 961 P.2d at 615-16. The Wong court explained:

HRS § 1-3 (1993) provides that "no law has any retrospective operation, unless otherwise expressed or obviously intended." Also, this court has noted the

NOT FOR PUBLICATION

"general rule in most jurisdictions that statutes or regulations which say nothing about retroactive application are not applied retroactively if such a construction will impair existing rights, create new obligations or impose additional duties with respect to past transactions." *Clark v. Cassidy*, 64 Haw. 74, 77 n.6, 636 P.2d 1344, 1346 n.6 (1981).

State of Hawai'i Org. of Police Officers v. Soc'y of Professional Journalists, 83 Hawai'i 378, 389, 927 P.2d 386, 397 (1906) Retroactive application of the statutory amendment would impose an additional burden on Wong as a result of a past transaction. Therefore, because the statute does not expressly or obviously manifest an intent to be applied retroactively, we hold that the amendment does not apply retroactively to litigation terminated prior to the effective date of the amendment.

Id. at 51, 961 P.2d at 616 (brackets omitted). In the instant case the circuit court properly applied the 1993 version of HRS § 607-14 because it was the version in effect at the time the Motion for Fees was filed on October 10, 2000. Hence, no retroactivity problem arises here.

Johnson filed the initial complaint in 1992. Emma's Motion for Fees was filed in 2000. Final Judgment in the circuit court was entered in 2001. The statute raising the cap on allowable attorney's fees went into effect on July 1, 1993. Wong, 88 Hawai'i at 50, 961 P.2d at 615. The circuit court correctly applied the statute in effect at the time of deciding the Motion for Fees.

3. Grant of Attorneys' Fees for Action in Assumpsit

Johnson contends that Emma's Motion for Fees combined assumpsit and non-assumpsit claims and the circuit court failed to adequately scrutinize Emma's billings.

In TSA Int'l Ltd. v. Shimizu Corp. (Shimizu), supra, the Hawai'i Supreme Court elucidated the rules regarding a grant of attorney's fees:

Generally, under the "American Rule," each party is responsible for paying for his or her own litigation expenses. A notable exception to the "American Rule," however, is the rule that attorneys' fees may be awarded to the prevailing party where such an award is provided for by statute, stipulation, or agreement.

92 Hawai'i at 263, 990 P.2d at 733.

The Shimizu court noted that HRS § 607-14 governed a grant of attorney's fees for assumpsit actions. Id. at 263-64, 990 P.2d at 733-34. Hawaii Revised Statutes § 607-14 (Supp. 2002) provides in relevant part:

§607-14 Attorneys' fees in actions in the nature of assumpsit, etc. In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

NOT FOR PUBLICATION

Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.

Where the note or other contract in writing provides for a rate less than twenty-five per cent, not more than the specified rate shall be allowed.

Where the note or other contract in writing provides for the recovery of attorneys' fees incurred in connection with a prior debt, those attorneys' fees shall not be allowed in the immediate action unless there was a writing authorizing those attorneys' fees before the prior debt was incurred. "Prior debt" for the purposes of this section is the principal amount of a debt not included in the immediate action.

The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the amount sued for if the defendant obtains judgment.

Based upon the language of HRS § 607-14, the Shimizu court explained that:

Shimizu, as the prevailing party, is entitled to collect attorneys' fees from TSA for work expended in this case insofar as this case is in the nature of assumpsit.

This court has previously stated that assumpsit is a common law form of action which allows for the recovery of damages for *non-performance of a contract*, either express or implied, written or verbal, as well as quasi contractual obligations. In deciding whether to award fees under HRS § 607-14, the court must determine the nature of the lawsuit where both assumpsit and non-assumpsit claims are asserted in an action. Furthermore, in awarding attorneys' fees in a case involving both assumpsit and non-assumpsit claims, a court must base its award of fees, if practicable, on an apportionment of the fees claimed between assumpsit and non-assumpsit claims.

Id. at 264, 990 P.2d at 734 (internal quotation marks omitted; emphasis in original).

The grant of attorney's fees in relation to the granting of judgment is governed by HRCF Rule 54:

NOT FOR PUBLICATION

Rule 54. Judgments; costs; attorneys' fees.

(a) *Definition; form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment upon multiple claims or involving multiple parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(d) *Costs; attorneys' fees.*

(1) Costs other than attorneys' fees. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State or a county, or an officer or agency of the State or a county, shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on 48 hours' notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

(2) Attorneys' fees.

(A) Claims for attorneys' fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of such fees as an element of damages to be proved at trial.

NOT FOR PUBLICATION

(B) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than 14 days after entry of an appealable order or judgment; must specify the judgment and the statute, rule, or other grounds entitling the moving party to the award; and must state the amount or provide a fair estimate of the amount sought. If directed by the court, the motion shall also disclose the terms of any agreement with respect to fees to be paid for the services for which claim is made.

(C) The provisions of subparagraphs (A) and (B) do not apply to claims for fees and expenses as sanctions for violations of rules.

In Harkins v. Ikeda, 57 Haw. 378, 557 P.2d 788 (1976), the Hawai'i Supreme Court stated that "[t]he allowance of costs to the prevailing party is not obligatory under the language of Rule 54(d) HRCF, see Wright & Miller, Federal Practice and Procedure, Civil § 2668, and the circuit court is vested with a sound discretion in allowing or disallowing all costs or only particular items." Id. at 386, 557 P.2d at 793-94.

Moreover, the Hawai'i Supreme Court in Wong held that

when costs are awardable to a prevailing party under HRCF Rule 54(d) and a particular taxable cost is allowed by statute or precedent, then actual disbursements for this purpose are presumptively reasonable. The adverse party has the burden of challenging the reasonableness of a particular cost request. In the absence of a challenge to a particular request, it is not an abuse of discretion for a court to award the cost requested as presumptively reasonable.

88 Hawai'i at 53-54, 961 P.2d at 618-19 (emphasis added.)

As prevailing party, Emma is entitled to collect attorney's fees to the extent that the claim was in the nature of assumpsit. Shimizu, 92 Hawai'i at 264, 990 P.2d at 734. In its

NOT FOR PUBLICATION

order granting Emma's Motion for Fees, the circuit court determined that the claim was wholly in the nature of assumpsit. The grant was expressly authorized in Clause "L" of the contract entered into by Johnson and Emma. The grant was statutorily authorized by and in compliance with HRS § 607-14.

Johnson has not met its burden of proving that the fees and costs awarded were not reasonable. Wong, 88 Hawai'i at 53-54, 961 P.2d at 618-19. Hence, we discern no abuse of discretion in the grant. Shimizu, 92 Hawai'i at 253, 990 P.2d at 723.

Other arguments and contentions made by Johnson that are not specifically addressed herein are wholly without merit.

IV. CONCLUSION

For the aforementioned reasons, the Final Judgment filed on July 26, 2001, in the Circuit Court of the First Circuit is hereby affirmed.

DATED: Honolulu, Hawai'i, August 26, 2003.

On the briefs:

William Tagupa
for plaintiff-appellant.

Chief Judge

Evan R. Shirley and
Gregory A. Ferren
for defendant-appellee.

Associate Judge

Associate Judge