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NO. 24577

IN THE SUPREME COURT OF THE STATE OF HAWAII

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KITTY KAMAKA, Plaintiff-Appellee,

vs.

GOODSILL, ANDERSON, QUINN & STIFEL, A Law Corporation,  
Defendant-Appellant,

and

JOHN DOES 1-10, Defendants.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIVIL NO. 97-4007)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ., and  
Intermediate Court of Appeals Judge Fujise, in place of Acoba,  
J., recused)

The defendant-appellant Goodsill, Anderson, Quinn & Stifel, a Law Corporation [hereinafter, "Goodsill"] appeals from the following collateral orders of the circuit court of the first circuit, the Honorable Virginia L. Crandall presiding: (1) the September 6, 2000 order granting plaintiff-appellee Kitty Kamaka's March 29, 2000 motion for sanctions against Goodsill [hereinafter, "the September 6, 2000 order granting Kamaka's second motion for sanctions"] and (2) the March 9, 2001 order granting Kamaka's March 29, 2000 motion for sanctions against Goodsill with clarification with respect to the September 28, 2000 affidavit of Jared Kawashima pursuant to the September 6, 2000 order granting the June 8, 2000 motion for clarification of

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the May 23, 2000 oral ruling granting Kamaka's motion for sanctions [hereinafter, "the March 9, 2001 order granting Kamaka's motion for sanctions"].<sup>1</sup>

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<sup>1</sup> On January 28, 2002, this court entered an order denying Kamaka's December 3, 2001 motion to dismiss for lack of appellate jurisdiction, stating in relevant part as follows:

[I]t appears that the order sanctioning [Goodsill] to pay [Kamaka] \$9,499.37 is a collateral order that is appealable as a final order under [Hawai'i Revised Statutes (HRS)] § 641-1(a) [(1993)] inasmuch as the sanction for disobeying the circuit court's rulings concerning discovery from Larry Song is a matter completely separate from the merits of [Kamaka's] complaint and the directive to pay the sanction by September 24, 2001 placed [Goodsill] in immediate jeopardy of being found in contempt of court for failure to make payment as directed. See Harada v. Ellis, 60 Haw. 467, 480, 591 P.2d 1060, 1070 (1979).

Dismissal of the appeal is not warranted on the grounds raised in the motion to dismiss appeal inasmuch as: (1) the sanction matter appealed does not concern the propriety of [Goodsill's] assertion of the attorney-client privilege and the assertion of the privilege is not related to the merits of [Kamaka's] complaint; (2) the appealability of the sanction order under Harada is based on the immediate enforceability of the sanction through contempt proceedings before entry of final judgment, not on whether the sanction is punitive or remedial or on whether contempt can be avoided; (3) [Goodsill's] appeal is not an appeal of the circuit court's ruling that discovery from Larry Song is not barred by the attorney-client privilege and is not an appeal of a discovery order involving the attorney-client privilege for which an immediate appeal is disallowed; and (4) we have recognized, but declined to follow the rule of the federal courts disallowing immediate appeals of sanctions for discovery abuse; see Harada[], 60 Haw[.] at 480 n.1, 591 P.2d at 1070 n.1. Therefore,

IT IS HEREBY ORDERED that the motion to dismiss appeal for lack of jurisdiction is denied.

It is noteworthy that in her answering brief on appeal to this court, Kamaka "respectfully requests that [this] court reconsider its decision regarding jurisdiction in light of the fact that the arguments advanced in her [m]otion to [d]ismiss effectively ask for overruling, modifying, or limiting Harada." Kamaka furthermore reiterates the contentions set forth in her motion to dismiss.

The phrase "law of the case" has been used, *inter alia*, to refer to "the usual practice of courts to refuse to disturb all prior rulings in a particular case, including rulings made by the judge himself." Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983).

'Law of the case does not, however, have the inexorable effect of res judicata and does not preclude the court from reconsidering an earlier ruling if the court feels that the ruling was probably erroneous and more harm would be done by adhering to the earlier rule than from the delay incident to a reconsideration and the

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On appeal, Goodsill asserts as follows: (1) that "the [circuit] court . . . abused its discretion when it sanctioned [Goodsill] because nothing stated by [Goodsill] in its February 16, 2000 Letter can be deemed to have violated Judge Nakatani's February 24, 2000 order"; (2) that "a [Hawai'i Rules of Civil Procedure (HRCP)] Rule 37 [(2000)<sup>2</sup>] sanction cannot be based

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<sup>1</sup>(...continued)

possible change in the rule of law to be applied.' 2 Moore, Federal Practice, [§ 12.14] p. 2266, n.11. Gallas v. Sanchez, 48 Haw. 370, 382, 405 P.2d 772, 779 (1965). In fact, it has been noted that, so long as a trial court retains jurisdiction, it "always has the power to reexamine, modify, vacate, correct and reverse its prior rulings and orders." In re Solomat Partners, L.P., 231 B.R. 149, 156 (B.A.P.2d Cir. 1999) (rejecting an argument that a judge was bound by law of the case established by his own prior oral order) (citing, inter alia, Ferrara & Hantman v. Alvarez, 124 F.3d 567, 583 (3d Cir. 1997); United States v. Adegbite, 877 F.2d 174, 178 (2d Cir. 1989)).

Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i, 92 Hawai'i 432, 441, 992 P.2d 127, 136 (2000) (emphases added).

Given that Kamaka simply asserts the same arguments in her answering brief as she did in her motion to dismiss, we do not reconsider our January 28, 2002 order denying Kamaka's motion to dismiss for lack of appellate jurisdiction, and we view the "law of the case" doctrine as applying to the present matter. Id. We therefore disregard Kamaka's jurisdictional arguments.

<sup>2</sup> HRCP Rule 37 provides in relevant part:

(b) *Failure to comply with order [compelling discovery].*

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just . . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

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simply on a vague and ambiguous finding that a party violated the 'intent and spirit' of a discovery order"; (3) that, "even if it were allowable to enter [HRCP] Rule 37 Sanctions based on a party's alleged violation of the 'intent and spirit' of a discovery order, it was an abuse of discretion to sanction [Goodsill] under the facts of this case," inasmuch as (a) Goodsill "cannot be sanctioned for maintaining the position that it did not waive the attorney-client privilege and that Song's disclosure of communications was to be made over [Goodsill's] objection[,]"; (b) Goodsill's "February 16, 2000 letter affirmed its obligation and intent to comply with Judge Nakatani's discovery order[,]"; and (c) Goodsill's "statement had nothing to do with Song's refusal to testify as to communications he considered covered by the attorney-client privilege"; and (4) that the circuit court's "award of fees and costs incurred by [Kamaka's] attorneys in connection with the July[] 1999 deposition of Larry Song should be vacated because it sanctions [Goodsill] for conduct that Judge Nakatani specifically found was not wrongful."

Kamaka counters as follows: (1) that this court should "overrul[e], modify[,], or limit[] Harada v. Ellis, 60 Haw. 467, 480, 591 P.2d 1060, 1070 (1979),] and dismiss the present appeal[,]"; see supra note 1; (2) that "sanctions may be imposed for violation of the 'intent and spirit' of a court's discovery order"; and (3) that "the circuit court did not abuse its discretion in imposing sanctions."

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Goodsill replies as follows: (1) that Kamaka "cannot point to an unequivocal discovery order that was violated by [Goodsill's] February 16, 2000 letter"; (2) that, "contrary to what [Kamaka] contends, Judge Nakatani did not require [Goodsill] to release its claim to the attorney-client privilege nor did she order [Goodsill] to 'direct' Song to speak" because (a) "Judge Nakatani expressly rejected [Kamaka's] request that [Goodsill] be ordered to 'direct' Song to testify[,]"; (b) "Judge Nakatani and Judge Crandall understood that [Goodsill] could not be ordered to waive the attorney-client privilege[,]"; and (c) "Judge Nakatani never contemplated, much less unequivocally ordered[, Goodsill] to take a certain position with respect to Song's testimony in the event it was asked to do so prior to the actual commencement of Song's deposition"; (3) that Goodsill's "February 16, 2000 letter was only written because [Kamaka] required that [Goodsill] state what it[]s position would be concerning the communications it considered privileged"; and (4) that "the February 16, 2000 letter did not 'impede' Song from testifying[.]"

For the reasons discussed infra in section III, we hold: (1) that the circuit court abused its discretion in entering September 6, 2000 order granting Kamaka's second motion for sanctions and (2) that the circuit court abused its discretion in entering the March 9, 2001 order granting Kamaka's motion for sanctions, which itself was based upon the September 6, 2000 order. Accordingly, we (1) vacate (a) the September 6, 2000 order granting Kamaka's second motion for sanctions and (b) the March 9, 2001 order granting Kamaka's motion for sanctions

and (2) remand this matter to the circuit court for further proceedings consistent with this opinion.

I. BACKGROUND

The present matter arises out of the termination of Kamaka's employment with Goodsill. On October 1, 1997, Kamaka filed a complaint against Goodsill alleging, inter alia, that Goodsill had discriminated against Kamaka in violation of Hawaii's Family Leave law, Hawai'i Revised Statutes (HRS) Chapter 398. On October 27, 1997, Goodsill filed an answer to Kamaka's complaint.

A. Motion To Compel And Song's Deposition

On December 23, 1998, after she had filed several unsatisfied discovery requests, Kamaka filed, inter alia, a motion to compel the testimony and production of documents relating communications by Larry Song, Esq. Song was a former partner with Goodsill who was also "retained by [Goodsill] to act as their attorney in connection with issues involving . . . Kamaka." On March 5, 1999, the circuit court, the Honorable Gail C. Nakatani presiding, entered an order "granting item no. 5 (re: Larry Song) of [Kamaka's] motion to compel[,] " specifically ordering, inter alia, "[t]hat [Goodsill] ha[d] not carried its burden of establishing that the communications between [itself] and . . . Song . . . [met] the test for establishing the attorney-client privilege." On June 9, 1999, Kamaka noticed Song's deposition.

On July 6, 1999, Kamaka's counsel deposed Song in Los Angeles, California, where Song had resided since his departure

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from employment with Goodsill. During the deposition, Song stated as follows:

I was asked to render my expertise, my legal advice, and my counseling to [Goodsill], by and through its key employees, the management committee, partners, lofty partners and very well respected partners of the firm. I was engaged to act as the firm's attorney, the firm being [Goodsill,] in approximately September 1995, and I continuously advised [Goodsill] as a client until sometime around December of 1995. Therefore, any inquiries regarding what was discussed during those meetings that I attended are protected by the attorney-client privilege and are absolutely sacred.

Moreover, Goodsill's counsel stated:

[GOODSILL'S COUNSEL:] Just so the record is clear, it is [Goodsill's] position that as of September 21st[, 1995,] Mr. Song was acting as legal counsel to [Goodsill], and for the purpose of providing legal advice to [Goodsill] regarding Ms. Kamaka[. T]herefore, it[']s [Goodsill's] position that all communications between [Goodsill] and Mr. Song during that time were in our privilege pursuant to [Rule] 503 of the Hawai[']i [R]ules of [E]vidence [(HRE)]. During that time[, ] Mr. Song's role as consultant to the firm was separate and apart from his role as Miss Kamaka's supervising partner, which he began on November 21st of 1995. After November 21st of '95, Mr. Song served in a dual capacity, both as consultant to the firm, as Ms. Kamaka's supervising partner, and we will rely upon Mr. Song to exercise the attorney-client privilege with respect to subsequent communications that are in an appropriate manner. [Goodsill] does not . . . waive the attorney-client privilege.

Kamaka's counsel subsequently engaged Goodsill's counsel in the following colloquy:

[KAMAKA'S COUNSEL:] Let me just make a statement for the record, and I think we are going to have to go off the record to call the court. The issue with respect to the attorney-client privilege was thoroughly briefed and decided by the [circuit] court in Hawai[']i by a court order that I had previously given to the parties involved. . . . I understand Mr. Song's position, and I understand that's the position he would need to take in view of his purported client's position; however, I intend to make a phone call and have a conference call not involving Mr. Song necessarily or his counsel, but the counsel for [Goodsill] in this case. When we go off the record, and we are going to be asking for sanctions because our purpose of coming to Los Angeles at this time was specifically the time to be after the court ruling with respect to that privilege issue, and we would not have made this trip had we known that

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[Goodsill was] going to violate that court[] order. So I do take this matter off the record right now and we will make that conference call.

[GOODSILL'S COUNSEL:] Just before I do, let's make the record clear we are not violating any court order, we are simply not waiving the attorney-client privilege and . . . you say that the matter was thoroughly briefed before. It was not thoroughly briefed. There was not a proper foundation, and the judge in her ruling said simply at that point we had not carried the burden of establishing the communication between Mr. Song and [Goodsill] meets the test.

Mr. Song's testimony now makes it clear that he was acting as consultant to the firm, and the testimony . . . [an]other . . . attorney [for Goodsill] since the judge's ruling[] also makes it clear that Mr. Song's role during the pertinent period was solely and exclusively as the attorney for the firm, and although subsequently he . . . went into the dual capacity after November the 21<sup>st</sup>, even during that time, certainly things that were told to him in his capacity as an attorney ought to be privileged. Law firms . . . when they are clients are entitled to be able to rely upon the attorney-client privilege. And all [Goodsill] has done is simply declined to waive the privilege. . . . I don't think the judge's ruling to date has, without the benefits of Mr. Song's testimony and without the benefit of the other . . . attorneys [for Goodsill], has done anything to require Mr. Song to testify . . . .

[KAMAKA'S COUNSEL:] The court order reads as follows: Item No. 5, to compel testimony relating to communications by Larry Song, [Esq.], is hereby granted. So what the court mentioned we will get from the judge.

[GOODSILL'S COUNSEL:] Well, keep in mind that that follows the sentence that [Goodsill] has not carried the burden.

[KAMAKA'S COUNSEL:] Well, the judge will decide. So let's make that call.

When the parties returned on the record, however, Song testified as follows:

[A]s was made perfectly clear on the record by [Goodsill's counsel], the clients in this case . . . ha[ve] not waived the attorney-client privilege. Therefore, I have no recourse, given my duty as an attorney to that firm, regarding matters that are clearly covered by the attorney-client privilege. I cannot testify as . . . to those matters.

B. Motion For Reconsideration Of Motion To Compel And First Motion For Sanctions

On November 1, 1999, Goodsill filed a motion for reconsideration of the March 5, 1999 order granting Kamaka's



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motion to compel. On November 5, 1999, Kamaka filed a memorandum in opposition to Goodsill's motion for reconsideration.

On November 9, 1999, Kamaka filed a motion for sanctions against Goodsill based on Song's refusal to testify on certain matters at the July 6, 1999 deposition. Kamaka attached to her motion the affidavit of her counsel, which stated in relevant part:

3. During the deposition, I asked the [circuit c]ourt to intervene in the dispute over [Goodsill's claim of attorney-client] privilege. The [circuit c]ourt called the case and heard arguments regarding Song's statement and [Goodsill's] continued assertion of the privilege. The lawyers repeated their arguments previously stated on the record. Judge Nakatani noted that there was no motion or record before the court, and the existing order was clear. Judge Nakatani ordered that [Goodsill's counsel] was not to "impede" the deposition and that Song was to answer all questions regarding his communications with [Goodsill] with respect to [Kamaka].

On November 10, 1999, Goodsill filed a reply memorandum in support of its motion for reconsideration of the March 5, 1999 order granting Kamaka's motion to compel.

On December 6, 1999, Goodsill filed a memorandum in opposition to Kamaka's November 9, 1999 motion for sanctions, arguing, inter alia, that it "had both the right and the obligation to state on the record that it was not voluntarily waiving the attorney[-]client privilege through Mr. Song's testimony[.]"

On December 14, 1999, the circuit court conducted a hearing regarding Kamaka's motion for sanctions. During the hearing, the circuit court stated as follows:

THE COURT: . . . [I]t does appear to me that to a great extent that this decision was . . . Song's decision . . . in discussion with his attorney. So . . . my inclination now . . . is . . . to issue an order basically

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advising [Goodsill] that if there is a redeposition of . . . Song, which I will allow at [Kamaka's] discretion and election, that the position of [Goodsill] is that . . . Song comply with this court's order.

[KAMAKA'S COUNSEL:] I agree. I think that's an appropriate order to give to [Goodsill].

After entertaining arguments by both parties, the circuit court issued the following oral ruling:

THE COURT: All right. Here's what the court's going to do. The court will grant the motion as follows.

The court will allow the redeposition of Larry Song and the court will order that [Goodsill's] . . . objection with respect to the [attorney-client] privilege is preserved and the firm at the redeposition may only take the position that Mr. Song comply with the court's ruling and order to answer all questions posed to him.

The court will allow [Kamaka], at [Kamaka's] election, to conduct Mr. Song's deposition either by phone, teleconferencing or in person, [or] redeposition in Los Angeles.

The court believes that . . . good faith arguments have been made by [Goodsill] in connection with their actions at the deposition of Mr. Song and it does appear that to some extent Mr. Song along with his attorney made the decision about not answering some of the questions, and so the fault is not all of [Goodsill's]. And so for these reasons, in all other respect[s] at this time the motion will be denied and the request for fees and sanctions, monetary sanctions will be denied. However, with the admonition that this deposition must go forward[;] if the court concludes that[, at the] deposition[,] [Goodsill] somehow impedes [Kamaka's] ability to conclude that deposition, then the court will grant leave to [Kamaka] to refile its request for sanctions.

All right.

[KAMAKA'S COUNSEL:] Your Honor, just for a point of clarification, is it correct to say that the court directs [Goodsill] to tell Mr. Song that he answer?

THE COURT: He's represented by counsel. I mean, [Goodsill] is not . . . Mr. Song's attorney, right? . . . [T]he position they must take is that their position is that Mr. Song comply with the court's order.

[KAMAKA'S COUNSEL:] And that their claim of privilege which is preserved will not stand in the way of his answering?

THE COURT: That's correct.

On January 3, 2000, the circuit court entered an order denying Goodsill's November 1, 1999 motion for reconsideration of the March 5, 1999 order granting Kamaka's motion to compel,

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ruling as follows:

The [circuit c]ourt concludes that [Goodsill] did not exercise due diligence in that [Goodsill] knew where Mr. Song was and never contacted Mr. Song to get the evidence [of the attorney-client privilege]. [Goodsill] merely operated on an assumption that Mr. Song would be uncooperative because of their estranged relationship. Indeed, the evidence reveals that Mr. Song would have made himself available if [Goodsill] paid for his attorney's fees; however, [Goodsill] declined his request. As such, Mr. Song's testimony and/or declaration was available prior to the Motion to Compel. The [circuit c]ourt concludes that these efforts did not amount to due diligence.

In any event, the absence of Mr. Song's testimony was only one factor, which this [c]ourt considered in ruling on the Motion to Compel. The [circuit c]ourt concludes that it did not erroneously rule on the remaining four reasons for rejecting [Goodsill's] arguments in opposition to the Motion to Compel[.]

Therefore, the motion is hereby DENIED.

By letter dated February 3, 2000, Song's counsel requested the following of Kamaka's counsel:

[T]o avoid a wasteful trip and more importantly to avoid wasting Mr. Song's time and mine, the parties should have the fight, if one remains, fully worked out before traveling [to Los Angeles]. At the very least, we would like the post-decision position of [Goodsill] which it intends to take at the next deposition session relative to the issue of information for which attorney-client privilege has, to date, been asserted. A letter from [Goodsill] will suffice.

By letter dated February 10, 2000, Kamaka's counsel relayed Song's counsel's request to Goodsill. Goodsill's counsel responded by letter dated February 16, 2000, stating as follows:

This letter responds to [Song's counsel's] letter of February 3 and [Kamaka's counsel's] letter of February 10, 2000 and attempts to set forth [Goodsill's] position regarding the attorney-client privilege between it and Mr. Song.

[Goodsill] has not waived the attorney-client privilege between it and Mr. Song and we believe the [circuit c]ourt understood and acknowledged that no waiver has occurred. [Goodsill] will abide by the [circuit c]ourt's order and will not take any position to hamper or prevent Mr. Song from complying with the [circuit c]ourt's order compelling disclosure of information over [Goodsill's] objection. It is up to Mr. Song and his counsel to decide the issue of whether the Hawai['i] [circuit c]ourt's Order reaches Mr. Song as a deponent subpoenaed under California

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law.

On February 24, 2000, the circuit court entered an order granting in part and denying in part Kamaka's motion for sanctions, which provides in relevant part:

The Motion is GRANTED as follows: The motion is based on [Kamaka's] assertion of the attorney-client privilege at Larry Song's deposition on July 6, 1999. The [circuit c]ourt had previously rejected [Goodsill's] assertion of such attorney-client privilege; [Goodsill's] exception has been preserved. The [circuit c]ourt orders that [Kamaka] may retake Larry Song's deposition in person, or via telephone or teleconference. At such further deposition, [Goodsill] may take only the position that Mr. Song comply with the court[']s ruling and order to answer all questions posed to him.

The remainder of the Motion is DENIED.

On February 28, 2000, Song's counsel sent a letter to both parties, which asserted in relevant part:

[I]n the face of the position set forth by [Goodsill] through [its counsel], by letter dated February 16, 2000, that "[Goodsill] has not waived the attorney-client privilege between it and Mr. Song[,]""[] it is our assessment that resumption of the deposition would be a waste of time, money and energy by everyone. In this regard, I note that [Goodsill's] position that it has not waived the attorney-client privilege between itself and Mr. Song[] forces Mr. Song to maintain and protect all privileged information, and precludes Mr. Song from testifying as to matters which are protected by the attorney-client privilege.[]

The effective result of Mr. Song's obligation to maintain the client's confidence, absent waiver, is that there would be very little information discoverable through the deposition of Mr. Song.

From our vantage point, it seems that the parties should achieve a workable and intelligible resolution regarding the attorney-client privilege issue in order to make resumption of Mr. Song's deposition meaningful. Alternatively, the [circuit] court . . . will have to speak to the issue with greater clarity and specificity.

Should the parties maintain interest in proceeding with Mr. Song's deposition, the foregoing notwithstanding, please call me for scheduling consideration far in advance.

C. Second Motion For Sanctions And Motion For Clarification

On March 29, 2000, Kamaka filed a second motion for sanctions against Goodsill. On May 15, 2000, Goodsill filed a

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memorandum in opposition to Kamaka's motion for sanctions. On May 17, 2000, Kamaka filed a reply memorandum in support of her motion for sanctions. On May 23, 2000, the circuit court, the Honorable Virginia Lea Crandall presiding, conducted a hearing regarding Kamaka's second motion for sanctions. After considering arguments by both parties, the circuit court orally ruled as follows:

THE COURT: Based on the [circuit c]ourt's review of the record, Judge Nakatani has already determined the issue that Mr. Song is to testify and that [Goodsill is] to take no actions with respect to that matter. Judge Nakatani preserved the privilege for purposes of the record but clearly ruled, in this [c]ourt's estimation, that Mr. Song was to testify.

The letters that transpired with respect to this last go-round of his deposition raised some concerns for the [circuit c]ourt with respect to, if not directly violating [Judge Nakatani's] Order, going against the intent and spirit of her Order by continuing to indicate that. With respect to preserving the privilege, Judge Nakatani has already preserved the privilege. The privilege is preserved. She ruled there is to be no other action other than to allow him to testify and certainly the letters, I think, were clearly within the spirit of that with respect to his testimony.

So at this time the [circuit c]ourt grants the motion as follows with respect to awarding [Kamaka her] fees and costs for bringing this motion and the prior trip to L.A. The [circuit c]ourt makes it clear that the privilege is preserved and that Mr. Song is directed to testify. If there is a question with respect to compelling Mr. Song to testify in California, what the [circuit c]ourt would suggest, if Mr. Song and his attorney are amenable to that, is that [Goodsill] pay for their expenses to fly to Hawai[']i, we conduct the deposition in Hawai[']i, and he would then be in the jurisdiction of this [c]ourt and the [circuit c]ourt could be available during the course of the deposition.

On June 8, 2000, Goodsill filed a motion for clarification of the circuit court's oral ruling granting Kamaka's second motion for sanctions, and alternatively moved for reconsideration of the order. On July 5, 2000, Kamaka filed a memorandum in opposition to Goodsill's motion for clarification.

**\*\*\* NOT FOR PUBLICATION \*\*\***

On July 13, 2000, the circuit court conducted a hearing regarding Goodsill's motion for clarification. On September 6, 2000, the circuit court entered an order granting Goodsill's motion for clarification, ruling in relevant part:

1. The [circuit c]ourt did not impose sanctions on . . . [Goodsill's counsel] personally;
2. This [c]ourt made no finding of bad faith on the part of [Goodsill] at the hearing on May 23, 2000;
3. Judge Nakatani's Order of February 24, 2000[] did not order [Goodsill] to waive its attorney-client privilege with Larry Song;
4. This [c]ourt, by its ruling on May 23, 2000, did not order [Goodsill] to waive its attorney-client privilege with Larry Song;
5. The [circuit c]ourt imposed sanctions on May 23, 2000, because [Goodsill's] statement in its letter of February 16, 2000, that "[Goodsill] has not waived the attorney-client privilege between it and Mr. Song and we believe that the [circuit c]ourt understood and acknowledged that no waiver has occurred[,] " violated the intent and spir[i]t of Judge Nakatani's Order of February 24, 2000.
6. This [c]ourt orders that [Goodsill] comply with Judge Nakatani's Order of February 24, 2000[,] that "[a]t such further deposition, [Goodsill] may take only the position that Mr. Song comply with the [circuit] court's ruling and order to answer all questions posed to him[.] "[
7. [Kamaka] is to submit a Declaration or Affidavit setting forth the attorneys' fees and costs requested as sanctions and [Goodsill] will have an opportunity to submit a response in writing. The [circuit c]ourt will issue a subsequent order specifying an award after due consideration.

That same date, the circuit court entered an order granting Kamaka's second motion for sanctions, which provided in relevant part: "IT IS HEREBY ORDERED that Kamaka's Motion for Sanctions against [Goodsill] is hereby granted and [Kamaka] is awarded fees and costs for bringing the Motion and for the prior trip to Los Angeles."

On September 28, 2000, Kamaka filed an affidavit of her counsel setting forth the attorneys' fees and costs requested as

**\*\*\* NOT FOR PUBLICATION \*\*\***

sanctions pursuant to the order granting Goodsill's motion for clarification. On October 6, 2000, Goodsill filed a memorandum in opposition to the affidavit of Kamaka's counsel. On March 9, 2001, the circuit court entered an order granting Kamaka's second motion for sanctions against Goodsill, with clarification with respect to the affidavit of Kamaka's counsel, ruling that Kamaka was

awarded fees and costs as sanctions against [Goodsill] as follows: a) One-half of attorney time spent preparing for and attending motion for sanctions (\$2,655.75); b) [Kamaka's counsel's] time spent preparing for Mr. Song's deposition from the period of July 2, 1999 through July 26, 1999 (28.3 hours x \$215 = \$6,084.50); c) airfare cost for deposition trip (\$499.20); and d) hotel accommodations \$259.92), for a grand total of \$9,499.37.

D. Motion To Enforce Sanctions, Motion For Stay Of Execution, And Notices Of Appeal

By letter dated April 25, 2001, Goodsill informed Kamaka that it "decline[d] to pay the amount awarded and expects to have the sanctions reversed before this matter is finally resolved." On July 17, 2001, Kamaka filed a motion to enforce the sanctions order and for contempt sanctions. On September 6, 2001, Goodsill filed a memorandum in opposition to Kamaka's motion to enforce the sanctions order and for contempt sanctions. On September 11, 2001, Kamaka filed a reply memorandum in support of her motion to enforce the sanctions order and for contempt sanctions. On September 14, 2001, the circuit court conducted a hearing on Kamaka's motion to enforce the sanctions order and for contempt sanctions. Following the parties' respective arguments, the circuit court orally ruled:

THE COURT: With respect to [Kamaka's] motion to enforce the sanctions order[], it's granted. As to the

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[circuit c]ourt orders, [Goodsill] is ordered to pay the sum of \$9,499.37 within ten days of today's date.

Based on the [circuit c]ourt's review of the correspondence . . . from Mr. Song's attorney, the [circuit c]ourt's prior order, which intent was to recognize that the [circuit c]ourt had not ordered [Goodsill] to waive the attorney client privilege, but the [circuit c]ourt previously ordered that it could not be asserted, but apparently that was confusing language for [Song's counsel].

So the [circuit c]ourt would clarify and order that with respect to the deposition of Mr. Song, the [circuit c]ourt orders that the attorney[-]client privilege may not be asserted, and that the [circuit c]ourt directs [Goodsill] to make the following statement to Mr. Song[:]

["Goodsill's] position, pursuant to [the] order of the [circuit c]ourt, is that you must answer all questions to you by [Kamaka's] counsel.["]

The other requests are denied without prejudice.

On September 24, 2001, Goodsill filed a notice of appeal from (1) the September 14, 2001 oral order granting Kamaka's motion to enforce sanctions and for contempt sanctions, (2) the March 9, 2001 order granting Kamaka's second motion for sanctions against Goodsill, with clarification with respect to the affidavit of Kamaka's counsel, (3) the September 6, 2000 order granting Kamaka's second motion for sanctions, and (4) the September 6, 2000 order granting Goodsill's motion for clarification. Goodsill cited, inter alia, the collateral order doctrine as allowing for its appeal. See supra note 1. It is noteworthy that Goodsill's notice of appeal was premature because the circuit court had not yet entered a written order memorializing its September 14, 2001 oral ruling.

On September 25, 2001, Goodsill filed a motion for stay of execution of the circuit court's September 14, 2001 oral order granting Kamaka's motion to enforce sanctions and for contempt sanctions pending appeal. On October 19, 2001, Kamaka filed a memorandum in opposition to Goodsill's motion for stay of



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execution of the circuit court's oral order. On October 29, 2001, the circuit court conducted a hearing regarding Goodsill's motion for stay of execution of the circuit court's oral order.

On November 1, 2001, the circuit court entered an order granting in part and denying in part Kamaka's motion to enforce the sanctions order and for contempt sanctions, ruling in relevant part:

IT IS ORDERED that . . . Kamaka's Motion for Sanctions to Enforce Sanctions Order and for Contempt Sanctions, filed July 17, 2001[,] is hereby GRANTED as follows:

1) [Goodsill] shall pay [Kamaka] the amount of \$9,499.37 by September 24, 2001;

2) The [circuit c]ourt confirms the [c]ourt's previous order that [Goodsill] shall not assert the attorney-client privilege with respect to Mr. Larry Song, and confirms the order of the [circuit] court to have Mr. Song's deposition proceed without interference. The [circuit c]ourt orders that [Goodsill] may not assert any such privilege, that [Goodsill] may only take the following position, and which [Goodsill] shall state to Mr. Song:

"[Goodsill's] position, pursuant to [the] order of the [circuit c]ourt, is that you must answer all questions posed to you by [Kamaka's] counsel."

3) Other requested sanctions are denied at this time, without prejudice.

On November 8, 2001, the circuit court entered an order granting Goodsill's motion for stay of execution of the circuit court's September 14, 2001 oral order, ruling as follows:

IT IS HEREBY ORDERED that [Goodsill's] motion is GRANTED as follows:

(1) This [c]ourt's September 14, 2001 order directing [Goodsill] to pay \$9,499.37 within ten days of that date (the "Order") is hereby stayed pending resolution of [Goodsill's] appeal of said Order;

(2) This stay is limited to the payment of the \$9,499.37;

(3) The supersedeas bond in the form of an irrevocable standby letter of credit ("LOC") is hereby approved; and

(4) The LOC is to be delivered to [Kamaka] following the entry of this order.

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On November 14, 2001, Goodsill timely filed a second notice of appeal, again citing the collateral order doctrine. With regard to the orders from which Goodsill stated that it was appealing, Goodsill substituted the November 1, 2001 order granting in part and denying in part Kamaka's motion to enforce the sanctions order and for contempt sanctions for the September 14, 2001 oral order granting Kamaka's motion to enforce sanctions and for contempt sanctions, but otherwise reiterated the same orders as set forth in the September 24, 2001 notice of appeal.

In that connection, insofar as Goodsill alleges error only as to (1) the September 6, 2000 order granting Kamaka's second motion for sanctions and (2) the March 9, 2001 order granting Kamaka's motion for sanctions, we do not address infra the November 1, 2001 order granting in part and denying in part Kamaka's motion to enforce the sanctions order and for contempt sanctions. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2002) ("Points not presented . . . will be disregarded . . ."). Moreover, because Goodsill does not advance any arguments as to the November 1, 2001 order, we deem any point of error as to the November 1, 2001 order waived.<sup>3</sup> See HRAP Rule 28(b)(7) (2002) ("Points not argued may be deemed waived.").

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<sup>3</sup> Although the November 14, 2001 notice of appeal stated that Goodsill was appealing the September 6, 2000 order granting Goodsill's motion for clarification, Goodsill also failed to specifically allege error as to that order in its points of error on appeal. Nevertheless, Goodsill argues in its opening brief, inter alia, that the reasoning set forth in the September 6, 2000 order granting Goodsill's motion for clarification was erroneous. As such, we discuss the September 6, 2000 order granting Goodsill's motion for clarification infra, although our disposition of the present matter does not alter the order.

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It is noteworthy that, on December 24, 2003, the circuit court entered final judgment on the merits of Kamaka's complaint in favor of Goodsill and against Kamaka.

II. STANDARD OF REVIEW

A circuit "court's imposition of a discovery abuse sanction is reviewable on appeal for abuse of discretion. A [circuit] 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." Aloha Unlimited, Inc. v. Coughlin, 79 Hawai'i 527, 532-33, 904 P.2d 541, 546-47 (App. 1995) (citation and internal quotation marks omitted).

Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 241, 948 P.2d 1055, 1082 (1997).

III. DISCUSSION

Goodsill contends that "the [circuit c]ourt's award of sanctions should be vacated for two independent reasons[,] " to wit: (1) that Goodsill "could not have violated Judge Nakatani's [o]rder [that, at the continued deposition, Goodsill take only the position that Song comply with the court's ruling and order and fully testify,] since . . . Song's deposition was not retaken"; and (2) that Goodsill's February 16, 2000 "letter was an affirmation, not a repudiation of [Goodsill's] intention to comply with Judge Nakatani's order." We agree.

Hawai'i Rules of Evidence (HRE) Rule 503 (1993) describes the "[l]awyer-client privilege" in relevant part as follows:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client . . . between the client or the client's representative and the

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lawyer or the lawyer's representative . . . .  
HRE Rule 503(b). Moreover, "[t]he privilege may be claimed by the client[,]" and "[t]he person who was the lawyer . . . at the time of the communication shall claim the privilege on behalf of the client unless expressly released by the client." HRE Rule 503(c). It is noteworthy that at no point during the present matter did the circuit court expressly apply any of the exceptions listed in HRE Rule 503(d) to Goodsill's claim of the attorney-client privilege.<sup>4</sup>

As discussed supra in section I.B, the February 24, 2000 order granting in part and denying in part Kamaka's motion for sanctions ruled, inter alia: (1) that the circuit court had,

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<sup>4</sup> HRE Rule 503(d) provides:

- (d) Exceptions. There is no privilege under this rule:
  - (1) Furtherance of Crime or Fraud. If the services of the lawyer were sought, obtained, or used to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
  - (2) Prevention of Crime or Fraud. As to a communication reflecting the client's intent to commit a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another;
  - (3) Claimants Through Same Deceased Client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
  - (4) Breach of Duty by Lawyer or Client. As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;
  - (5) Document Attested by Lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;
  - (6) Joint Clients. As to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients; or
  - (7) Lawyer's Professional Responsibility. As to a communication the disclosure of which is required or authorized by the Hawai'i rules of professional conduct for attorneys.

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prior to the July 6, 1999 deposition, "rejected [Goodsill's] assertion of [the] attorney-client privilege"; (2) that "[Goodsill's] exception [to the circuit court's rejection of the privilege had] been preserved"; and (3) that, at the retaking of Song's deposition, "[Goodsill could] take only the position that Mr. Song comply with the court[']s ruling and order to answer all questions posed to him." We note that, although the September 6, 2000 order granting Goodsill's motion for clarification states that the May 23, 2000 oral order granting Kamaka's second motion for sanctions was based upon the circuit court's conclusion that Goodsill's February 16, 2000 letter "violated the intent and spir[i]t of Judge Nakatani's Order of February 24, 2000," the relevant order was necessarily Judge Nakatani's December 14, 1999 oral ruling. In other words, Goodsill's February 16, 2000 letter could not have violated the circuit court's February 24, 2000 order because it had not yet been entered. Cf. CRSC, Inc. v. Sage Diamond Co., Inc., 95 Hawai'i 301, 305, 22 P.3d 97, 101 (App. 2001) (quoting Ellis v. Crockett, 51 Haw. 45, 59-60, 451 P.2d 814, 824 (1969), for the proposition that "H.R.C.P.[ ] Rule 58[, ] providing that the judgment is not effective until filed or entered[, ] is equally applicable to orders dismissing a case").

The circuit court's December 14, 1999 oral ruling is substantially similar to the February 24, 2000 written order, stating in relevant part: (1) that Goodsill's attorney-client privilege objection was preserved; (2) that, at Song's redeposition, Goodsill could "only take the position that . . . Song comply with the [circuit] court's ruling and order to answer

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all questions posed to him"; (3) "that [the] deposition must go forward"; and (4) that, "if the [circuit] court [ultimately] conclude[d] that[, at the] deposition[,] [Goodsill] somehow impede[d] [Kamaka's] ability to conclude [the] deposition, then the court [would] grant leave to [Kamaka] to refile its request for sanctions."

Judge Crandall explained in the September 6, 2000 order granting Goodsill's motion for clarification that her May 23, 2000 oral ruling imposing sanctions upon Goodsill was predicated upon the statement in Goodsill's February 16, 2000 letter "that '[Goodsill] ha[d] not waived the attorney-client privilege between it and Mr. Song and we believe that the [circuit c]ourt understood and acknowledged that no waiver has occurred[,]'" which Judge Crandall concluded was a "violat[ion of] the intent and spir[i]t of Judge Nakatani's Order of February 24, 2000." Goodsill's statement that it had not waived its attorney-client privilege must therefore have somehow conflicted with Judge Nakatani's February 24, 2000 rulings (1) that the circuit court had, prior to the July 6, 1999 deposition, "rejected [Goodsill's] assertion of [the] attorney-client privilege" or (2) that, "[a]t [Song's [re]deposition, [Goodsill] may take only the position that . . . Song comply with the court[']s ruling and order to answer all questions posed to him."

Nevertheless, the February 24, 2000 order did not require either that Goodsill refrain from asserting its attorney-client privilege or that Goodsill waive the privilege, but merely reiterated that the circuit court had, prior to the July 6, 1999

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deposition, "rejected [Goodsill's] assertion of [the] attorney-client privilege."<sup>5</sup> Moreover, Judge Nakatani's December 14, 1999 oral ruling, which, as we have said, was the only order actually in effect at the time of Goodsill's February 16, 2000 letter, merely affirmed that Goodsill's "claim of privilege [was] preserved [but would] not stand in the way of" Song's testimony. With regard to Judge Nakatani's determination that, at the redeposition, Goodsill could only take the position that Song comply with its ruling and to fully testify,<sup>6</sup> Goodsill could not have contravened that order because the deposition was never taken. Goodsill also asserted in the February 16, 2000 letter that it would "abide by the [circuit c]ourt's order and [would] not take any position to hamper or prevent . . . Song from

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<sup>5</sup> We acknowledge that the November 1, 2001 order granting in part and denying in part Kamaka's motion to enforce the sanctions order and for contempt sanctions "confirm[ed] the [c]ourt's previous order that [Goodsill] shall not assert the attorney-client privilege with respect to . . . Song . . . ." (Emphasis added.) Nevertheless, the November 1, 2001 order and its characterization of the March 9, 2001 order granting Kamaka's second motion for sanctions against Goodsill are clearly prospective with regard to their mandate that Goodsill not assert the privilege, as evidenced by the word, "shall." Thus, our determination that the February 24, 2000 order did not require that Goodsill refrain from asserting its attorney-client privilege is consistent with the November 1, 2001 order.

It is also noteworthy that the foregoing mandate ultimately did not amount to an order that Goodsill expressly waive its attorney-client privilege, as evidenced by the relative narrowness of the statement to Song demanded of Goodsill by the November 1, 2001 order: "[Goodsill's] position, pursuant to [the] order of the [circuit c]ourt, is that you must answer all questions posed to you by [Kamaka's] counsel." More specifically, Judge Crandall herself stated in the September 14, 2001 oral ruling granting in part and denying in part Kamaka's motion to enforce the sanctions order and for contempt sanctions that the September 6, 2000 order granting Goodsill's motion for clarification recognized "that the [circuit c]ourt had not ordered [Goodsill] to waive the attorney client privilege, but [acknowledged that] the [circuit c]ourt previously ordered that it could not be asserted[.]"

<sup>6</sup> Both the December 14, 1999 oral ruling and the February 24, 2000 written order mandated that Goodsill take the position set forth supra.

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complying with the court's order compelling disclosure of information over [Goodsill's] objection." In light of the foregoing, Judge Crandall's conclusion that Goodsill's February 16, 2000 letter had "violated the 'intent and spirit' of Judge Nakatani's order of February 24, 2000" was so broad an expansion of Judge Nakatani's order as to constitute an abuse of discretion. Kawamata Farms, 86 Hawai'i at 241, 948 P.2d at 1082.

Furthermore, neither Judge Nakatani's nor Judge Crandall's rulings mandated, nor could they properly mandate, that Goodsill waive its attorney-client privilege, as Judge Crandall herself explained in the September 6, 2000 order granting Goodsill's motion for clarification: (1) "Judge Nakatani's Order of February 24, 2000[] did not order [Goodsill] to waive its attorney-client privilege with Larry Song"; (2) the circuit court, "by its ruling on May 23, 2000, did not order [Goodsill] to waive its attorney-client privilege with Larry Song[.]" (Emphases added.) See also supra note 3. Kamaka herself concedes that "[t]he circuit court did not order [Goodsill] to affirmatively waive any attorney[-]client privilege."

We therefore hold (1) that the circuit court abused its discretion in entering September 6, 2000 order granting Kamaka's second motion for sanctions and (2) that the circuit court abused its discretion in entering the March 9, 2001 order granting Kamaka's motion for sanctions, which itself was based upon the September 6, 2000 order.



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IV. CONCLUSION

Based on the foregoing analysis, we (1) vacate (a) the September 6, 2000 order granting Kamaka's second motion for sanctions and (b) the March 9, 2001 order granting Kamaka's motion for sanctions and (2) remand this matter to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, August 31, 2005.

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