NO. 22514

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

JERRY FUKIDA, Plaintiff-Appellee, v. HON/HAWAII SERVICE AND REPAIR; BEVERLY ENDRIZAL; HON/HAWAII SERVICES, INC., a Hawaiʻi corporation; JOHN DOES 1-10; DOE CORPORATIONS 2-10; DOE PARTNERSHIPS 1-10; DOE GOVERNMENTAL ENTITIES 1-10, Defendants-Appellants

APPEAL FROM THE DISTRICT COURT
OF THE FIRST CIRCUIT, ʻEWA DIVISION
(Civ. No. 1RC 96-7232)

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

This lawsuit arose as a result of a disagreement over the amount of an automobile repair bill. Defendants-Appellants Hon/Hawaii Service and Repair (also referred to herein as HHSR), Beverly Endrizal (Endrizal), and Hon/Hawaii Services, Inc., a Hawaiʻi corporation (also referred to herein as HHSI), (collectively, Defendants) appeal from the April 5, 1999 Judgment of the District Court of the First Circuit, ʻEwa Division (the district court) awarding Plaintiff-Appellee Jerry Fukida (Fukida) the following damages against Defendants, jointly and severally: (1) $6,970 in general damages for Fukida's loss of the use of his 1986 Honda Civic hatchback automobile (Civic, vehicle, or car), which had been retained, pursuant to Hawaiʻi Revised Statutes

(HRS) § 507-18 (1993),[1] after Fukida refused to pay for the cost of repair work performed on his Civic; (2) $4,254.74 in attorney fees; and (3) $120.03 in court costs.[2]

Defendants argue that (1) the district court's award of loss of use damages to Fukida must be reversed because (a) the district court neither discussed nor applied the proper measure of damages, (b) the district court's findings were not supported by substantial evidence and were against the clear weight of the evidence, and (c) the amount of damages awarded was unreasonable and out of proportion to the Civic's value; (2) the district court erred by not making findings of fact and conclusions of law about Fukida's failure to mitigate his damages; (3) the district court erred by awarding Fukida attorney fees that exceeded the

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[1/] Hawai‘i Revised Statutes (HRS) § 507-18 (1993) provides as follows:

> **Lien on personalty for work done and materials furnished.** A person who makes, alters, or repairs any article of personal property at the request of the owner of the property, shall have a lien on the property for the reasonable charges for the work done and materials furnished, excluding storage charges, and may retain possession of the property until the charges are paid; provided that the registered owner of a motor vehicle registered pursuant to chapter 286 shall be considered the owner for the purposes of this section.

[2/] The April 5, 1999 Judgment of the District Court of the First Circuit (the district court) appears to be inconsistent with the district court's April 17, 1998 "Order Granting Judgment for Plaintiff[-Appellee Jerry Fukida (Fukida)]," which also awarded Fukida "replevin and return" of his 1986 Honda Civic hatchback automobile (Civic) "without any payment of any storage charges" to Defendant-Appellant Beverly Endrizal (Endrizal) or Defendant-Appellant Hon/Hawaii Service and Repair. However, it appears from the record that the Civic has already been returned to Fukida, since the loss of use damages awarded to Fukida were capped based on the date of the Civic's return. Therefore, the Order of Judgment appears to have been merged with the Judgment.

statutory cap imposed by HRS § 607-14 (1993); and (4) the district court erred by entering judgment against Defendants, jointly and severally, for the attorney fees awarded to Fukida.

We vacate the judgment in part and affirm the judgment in part.

BACKGROUND

A.

On May 2, 1996, Fukida took his ten-year-old Civic to an automobile repair shop located at 98-021 Kamehameha Highway in ʻAiea. According to the work order that Fukida signed when he dropped off the Civic, the repair shop was to perform a safety check of the Civic at a cost of $14.75 and, for a price of $18.75, also check if the Civic's transmission was "slipping," since the "car has hard time going from stops." At the top of the work order were the words "HON/HAWAII SERVICE & REPAIR." At the bottom of the work order was the following statement, which Fukida acknowledged by signing on the signature line that followed the statement:

> I authorize the above repair work to be done. I understand that no further parts or labor will be provided without further written or oral consent. It is understood that we are not responsible for loss or damage to vehicles or contents.

(Capitalization omitted.)

Fukida was subsequently advised that his Civic could not pass a safety inspection because it had "transmission

problems." What transpired after Fukida was so advised, however, was the subject of considerable dispute at trial.

B.

Fukida testified that he told the service writer at the repair shop ("her name was Valerie") that he did not want a new transmission, which he had been told would cost about $3,000, because "it's a ten[-]year[-]old car[.]" Instead, he requested installation of a rebuilt (remanufactured) transmission, which he was told would cost approximately $2,100 to $2,250. Fukida insisted that he told Valerie that before any work was done, he wanted to see the receipt for the rebuilt transmission so that he could confirm that the right transmission had been installed into the Civic. He also told Valerie that he would "be happy to come down and take a look at [the transmission] when . . . [they're] ready to go, 'cause I think it's very important." Fukida stated, however, that he did not hear from the repair shop until he received a phone call that his Civic was ready for pick up.

Fukida related that after he went to pick up the Civic, he drove it around and "the car was jerking." Returning the Civic to the repair shop, he was informed that a used transmission had been installed in the Civic. He was also assured that the used transmission would be replaced with a rebuilt transmission and a new shifter cable would be installed to address a newly discovered shifter cable problem, all within

the originally quoted price range of $2,100 to $2,250. Fukida testified that he reiterated his request to view the receipt or transmission prior to installation. However, he was shown neither prior to installation.

Fukida testified that when he went to pick up the Civic on June 3, 1997, he was presented with a repair bill for $2,478.95. Stunned at the price and upset that he had not been contacted prior to installation, Fukida refused to pay the bill and went to Endrizal and told her, "'You know, why don't you take your transmission back. I'll take my -- my car back with my old transmission, and I will try and find my own relief once again.'" According to Fukida, however, Endrizal responded, "'[N]o'. . . . 'you owe me twenty four hundred something'." Shortly thereafter, Fukida received from HHSR a work order dated June 18, 1996, informing him that as of June 15, 1996, he owed HHSR a total of $3,355.13, which amount was broken down as follows:

labor total	$ 377.34
charges for storing Civic (@ $20/day)	860.00
parts total	2,002.45
sales tax	135.00
paid in advance	19.66
total due	3,355.13

The work order also indicated the following breakdown of the charges for parts:

QTY	PART NUMBER	NAME OF PART	PRICE
6	ATF	HYDRAULIC FLUID	30.96
1	424B	COTTER PIN 1/16 X 1	.25
1	CA-1	REMAN. TRANS.	1785.00
1	54315SB3981	SHIFT CABLE	186.24

Fukida stated that he continued to receive periodic billings from HHSR by certified mail, return receipt requested, indicating what his storage bill was. As of March 18, 1997, for example, the total bill for storage fees alone was $5,843.71.

C.

Endrizal's version of the facts was that when Fukida first brought the Civic into the repair shop, he orally authorized a used transmission to be installed into his Civic. According to Endrizal:

> We put it in. We test drove it. It was not shifting right. We called him and says we don't like the way this used transmission is working 'cause it doesn't -- it only comes with a 90-day warranty. So, we said we can get -- try to get another one. So, we in -- we re-installed a second used transmission. And, we did not -- that one worse -- was even worse. So, we, at that time, called . . . Fukida and says, you know, it's -- these used transmissions are not gonna' work. We recommend let's just go with a remanufactured. It's a little bit more, but it comes with a twelve-months, 12,000 (twelve thousand) mile warranty. And, it's been remanufactured, so it's just like new. And, that's the one that's in the car now.

Endrizal denied that Fukida ever test-drove the Civic when it was installed with either used transmission. Endrizal also related that the used transmissions that had been installed in Fukida's Civic were returned and Fukida was never charged for the labor to install the used transmissions.

In a counterclaim filed by Endrizal on behalf of HHSR on August 22, 1996, Endrizal stated, in relevant part, as follows:

> 3. That upon notifying [Fukida], [Fukida] orally approved the replacement of a remanufactured transmission and shifter cable for a total price of $2,400.00 plus tax.

> 4. That based upon said oral instructions, [Fukida] [sic] ordered a transmission from a remanufacturing company on the mainland and installed same as requested by [Fukida].
>
> 5. That [Fukida] requested a warranty which [HHSR] provided. . . .
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> 6. That on or about June 3, 1996 after numerous calls to [Fukida] by [HHSR's] Service Writer, [Fukida] came to [HHSR] and personally received his bill and requested a payment plan.
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> 7. That upon being advised that [HHSR] did not accept payment plans, [Fukida] demanded the transmission be removed.
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> 8. That [Fukida] was handed an invoice on June 3, 1996 whereby he was advised there would be a storage fee of $20.00 per day.
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> 9. That [Fukida] continues to not pay the amount due of $2478.95 plus storage of 113 days from May 2, 1996 to August 23, 1996 in the amount of $2,260.00 which shall continue to accrue until the balance is paid in full.
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> 10. That pursuant to HRS, [HHSR] is entitled to reasonable charges to repair [Fukida's] vehicle and is further by law entitled to retain said vehicle until the charges are paid.

DEFENDANTS' BUSINESS HISTORY

Because the respective business histories of the individual Defendants played an important part in the district court's judgment in Fukida's favor, we briefly discuss the uncontroverted evidence as to the nature and business history of each Defendant.

Endrizal explained that she is currently the general manager and part-owner of HHSI, an independent Honda and Acura automobile repair facility. The business had its origin in 1990, when Endrizal obtained for herself a general excise tax license and a motor vehicle repair dealer's license and began doing business as Hon/Hawaii Auto Repairs. In January 1991, an

investor wanted to become involved in Endrizal's business, "but wanted it in a corporate situation." Consequently, on January 2, 1991, Endrizal and the investor incorporated the business under the name Hon/Hawaii Auto Repairs, Inc. and thereafter, obtained a corporate motor vehicle repair dealer's license.

According to Endrizal:

> [a]bout two or three years later, we started becoming a little more diversified and we were gonna' open up the second location in Aiea [ʻAiea], and we were also doing some other types of things, like extended warranty sales, and just some other automotive-related issues. So, we wanted to change the name to get away from the auto repair sound. So, we changed it. We were gonna' change it to Hon/Hawaii, Inc., and they wouldn't let us because it was too close to an address, Hon -- Honolulu, Hawaii [Hawaiʻi]. So we just changed it to Hon/Hawaii Services, Inc.

Endrizal related that after the name change,

> I had to go back to our computer people to change our software. And, we paid, I think, was about $500.00 (five hundred dollars) to change it from Hon/Hawaii Auto Repairs to [HHSI]. And, somehow, when the software came to us, it -- it -- I can't change it. It's on the invoice. So, the work order show [HHSR]. That's the way the software people protect the system from being stolen, I guess. So, I haven't -- I can't change it without paying another $500.00 (five hundred dollars). So, I just never changed it.
>
> But, we're basically -- it's -- it's basically Hon/Hawaii [Services, Inc.], doing business as Hon/Hawaii Auto Repairs. And, that's what our license shows.

According to Endrizal, since the name "HHSR" was printed only at the top of the internal work orders and not on invoices given to customers upon payment, and since changing the software would be costly, she never had the software redone.

On further examination, Endrizal acknowledged that there is no business named HHSR and that HHSR is, in reality, a type of trade name for HHSI. Endrizal admitted, and certified

records of the State of Hawai‘i, Department of Commerce and Consumer Affairs (DCCA) that were introduced into evidence confirmed, that HHSR is not registered as a corporation, partnership, or trade name, nor certified or registered as a motor vehicle repair dealer and/or a motor vehicle repair mechanic by the motor vehicle repair industry board. Endrizal also admitted, and DCCA records admitted into evidence confirmed, that she did not have an individual motor vehicle repair dealer's license. Endrizal further clarified, however, that HHSI possessed a motor vehicle repair dealer's license. A copy of the Motor Vehicle Repair Industry Board's Motor Vehicle Repair Dealer License No. 289, authorizing HHSI, "DBA HON/HAWAII REPAIR" to operate a repair facility at 98-021 Kamehameha Highway in ‘Aiea was admitted into evidence.

PROCEDURAL HISTORY

On August 13, 1996, Fukida commenced this action by filing a complaint in the district court against HHSR, Endrizal, John Does 1-10, Doe Corporations 1-10, Doe Partnerships 1-10, and Doe Governmental Entities 1-10 for (1) unfair and deceptive practice by a merchant in the business of auto repair, in violation of HRS §§ 480-2 and 480-13 (1993)[3]; (2) return of his Civic or in the alternative, for damages based on conversion of his Civic; (3) special damages for the cost of renting an

[3/] This count, which was required to be tried in the circuit court, was dropped by Fukida right before trial in the district court.

automobile while his Civic was illegally seized; and (4) attorney fees and costs for this litigation.

On August 22, 1996, Endrizal filed an answer to Fukida's complaint. At the very top left side of the answer, above the caption of the case, appeared the following "name and address":

> Hon/Hawaii Services, Inc.
> By Beverly Wolff Endrizal
> 98-021 Kamehameha Highway
> Honolulu [sic], Hawaii [Hawai'i] 96701

At the end of the answer was a signature line, above which Endrizal signed her name and below which appeared the following:

> Hon/Hawaii Service & Repair
> By: Beverly Endrizal
> Its: General Manager

It is not clear from the answer on whose behalf Endrizal was filing the answer for.[4] Several of the paragraphs refer to "Defendants" admitting or being without knowledge as to allegations in the complaint. Other paragraphs refer to "Defendant," "Defendant Beverly Endrizal," or "Defendant

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[4/] HRS § 605-2 (1993) provides, in pertinent part, as follows:

> **Attorneys; license required.** Except as provided by the rules of court, no person shall be allowed to practice in any court of the State unless that person has been duly licensed so to do by the supreme court; provided that nothing in this chapter shall prevent any person, plaintiff, defendant, or accused, from appearing in person before any court, and there prosecuting or defending that person's, plaintiff's, defendant's, or accused's own cause, without the aid of legal counsel[.]

In light of HRS § 605-2, Endrizal was authorized to represent herself in this litigation. However, without a license to practice law in Hawai'i, she was not authorized to represent a corporation or other business entity in litigation.

Hon/Hawaii." Furthermore, the answer's prayer requested that Endrizal be dismissed for lack of jurisdiction over her residency and that HHSR be dismissed and awarded its costs.

On August 22, 1996, Endrizal, in her capacity as general manager for HHSR, filed a Counterclaim against, as well as a "Request for Admission" from, Fukida. Both documents included the same "name and address block" that appeared on the answer (i.e., HHSI was listed as the party filing the request) but stated in its body that the request was being made by HHSR. The counterclaim sought from Fukida: $2,478.95 in money damages for labor and parts supplied in repairing Fukida's Civic, $2,260 in fees for storing Fukida's Civic, and additional storage fees of $20 per day until the Civic repair bill is paid in full.

From September 11, 1996 to September 24, 1996, Endrizal, as general manager of HHSR, filed several pleadings, including a motion for summary judgment. The corporate entity, HHSI, was not referred to in these pleadings.

On September 27, 1996, Fukida requested a thirty-day continuance of trial "due to a question of [the] status of [defendant] corporation." The request was granted. At a hearing on November 29, 1996,[5] attorney Gary Tsuji (Tsuji), appearing for HHSR, moved for a dismissal due to improper naming of Defendants and venue, and also moved for default on the

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[5/] The transcripts of the November 29, 1996 hearing on Fukida's motion were not included as part of the record on appeal.

counterclaim, since no answer had been filed. The minutes of the hearing indicate that both motions were denied by the district court, which found that the parties should be properly named so long as there is no severe prejudice against the parties. The minutes of the hearing also include the following notation:

> If there is no trial today there can be sufficient time to amend pleadings.
>
> By Order of the [c]ourt, case continued for TRIAL to 1/17/97 at 9:00 A.M.
>
> *
> NOTE: Plaintiff may amend caption of complaint and [D]efendant's attorney to file an appearance.

On January 10, 1997, Fukida filed an "Identification of Defendant Doe Corporation 1," naming HHSI as Defendant Doe Corporation 1. On January 16, 1997, a copy of the Complaint and Summons and the Identification of Defendant Doe Corporation 1 were served on Endrizal, as secretary of HHSI. The record on appeal indicates that HHSI never filed a separate answer to the Complaint and that all subsequent pleadings filed by Fukida were served on Tsuji, as attorney for HHSI, not HHSR. Additionally, all subsequent pleadings filed by Tsuji were filed as attorney for HHSI, not HHSR. The district court's April 17, 1998 "Order Granting Judgment for [Fukida]" includes a footnote explaining why HHSR was not represented by counsel: "Defendant [HHSR] was not specifically represented by anyone as the position of Defendants was that [HHSR] was merely a trade name of Defendant [HHSI]."

On June 5, 1998, attorney Michael L. Freed (Freed) filed a "Notice of Appearance of Counsel for [Endrizal]." On October 26, 1998, Fukida's attorney filed a certificate of service and on October 30, 1998, an amended certificate of service, certifying that various documents had been duly served on Tsuji, as attorney for HHSI, and Freed, as attorney for Endrizal and HHSR. Then, beginning on November 6, 2001, all documents filed by Freed were filed on behalf of HHSR, Endrizal, and HHSI. The record does not indicate, however, that Tsuji ever moved to withdraw as HHSI's attorney.

At the outset of the trial that began on January 17, 1997, Tsuji entered a special appearance for Endrizal and HHSI. Tsuji pointed out that HHSI had just been served with the summons in this case and HHSI's answer was not due until January 24, 1997. Tsuji then moved that the actions against Endrizal, HHSR, and HHSI be consolidated and tried on January 24, 1997. Objecting, Fukida's counsel said:

> [A]t the last trial date in, I believe, last November, [Tsuji] moved to have the corporation named as a defendant orally, and I objected because I didn't believe that the defendant was, lack of words, a party defendant. So, [Tsuji], himself asked to name the defendant. So, the service of the complaint is a mere formal matter.

Following further arguments, the presiding district court judge stated:

> On this, what looks like what Judge Ikeda ruled was that it says . . the [c]ourt finds that party should be properly named and set a court date of January 17th. Looks like on this, issues were raised previously that Hon/Hawaii Service & Repair is not the proper name, but Hon/Hawaii Service &

> Repair, Inc. was the proper name of the party. Actually, I don't think that a service of Hon/Hawaii Service & Repair, Inc. was even necessary on this. Looks like, from what the Court ordered, is that the party should be properly named or identified in the documents from here on out and set a court trial date of January 17th, which is today. . . . So, really, I think that all the parties have had an opportunity from November 29th to get ready for trial today. I think the mere fact that, you know, Counsel for the plaintiff has decided to go ahead and serve Hon/Hawaii Service & Repair, Inc., you know, doesn't change the ruling that Judge Ikeda made. That is, basically, just that they should be named. It didn't say anything in here about needing to be served because appearances were being made already. It's just that the name of the corporation was incorrect, so that we have the proper name of the corporation, which is the Hon/Hawaii Service & Repair, Inc. So, I don't see any reason why we cannot go forward with the trial today.

Prior to the commencement of the trial, Fukida's attorney explained that this case involved a conversion. The following colloquy then occurred as to the issues involved in the case:

> THE COURT: So, the car was taken to Hon -- you're saying the car was taken to Hon/Hawaii, Inc. for repair?
>
> [FUKIDA's ATTORNEY]: Yes.
>
> THE COURT: And then, you guys didn't get it back?
>
> [FUKIDA's ATTORNEY]: Right.
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> . . . . They claim a seizure pursuant to statute and we demanded the car back. They refused until we paid the bill.
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> THE COURT: All right. And, [Tsuji], the corporation's defense on -- I mean, no question they had the car? No question that it had the car?
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> [TSUJI]: Yes. Your Honor, the corp -- the car is presently at the corporation. Naturally, our position is that the repairs were validly authorized. They were completed, and [Fukida's] failure to pay.
>
> THE COURT: Failed to pick it up and so . . .
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> [TSUJI]: Failed to pay, Your Honor.
>
> THE COURT: . . . that's why -- failed to pay and have not paid for storage and that type of things?
>
> [TSUJI]: No, Your Honor.

THE COURT: Okay. And, the nature of the counterclaim for the corporation?

[TSUJI]: Basically, for the cost of repairs.

. . . . Plus storage fees accruing at the rate of $20.00 (twenty dollars) per day from the -- the date of failure to pay to present.

[FUKIDA's ATTORNEY]: Your Honor, at this time I'd have to object as to the counterclaim being on behalf of the corporation. I believe the pleading of the counterclaim itself is presented by [Endrizal] and by [HHSR]. There's been no amendment of that counterclaim to include [Fukida] - or [HHSI] as a party to that counterclaim. So, I do not believe [Tsuji] actually has any standing to present the counterclaim.

THE COURT: Well, you know, I -- I think on -- on this what -- as I read what Judge Ikeda had in there, because the counterclaim, if I'm not mistaken, let me make sure on this, yeah. The counterclaim had been presented in August of this year. And, so, when Judge Ikeda made his decision that, you know, it's just that the party had to be -- parties had to be properly named. That was applying, you know, to the complaint as well as the counterclaim. So, basically, the same ruling applies to the counterclaims as well that, you know, we're going forward with the counterclaims on the basis that, you know, the proper names are gonna' be -- or the proper parties are gonna' be named without having to do any type of re-servicing of the -- either the complaint or the counterclaim. You know, it's -- it's really dealing with the same people, same parties. So, I -- I am gonna' go ahead and allow it.

Okay, and [Endrizal], your position in this is that you shouldn't even be a party?

[ENDRIZAL]: Right. That I shouldn't even be a party, right.

THE COURT: Okay. All right. Are -- are you also saying that you didn't have any connection with this at all, or it's just that it's in an official capacity with the company?

[ENDRIZAL]: Yeah. It was in an official capacity of the company.

(Emphasis added.)

Three witnesses testified at trial: Endrizal; Rudolph L. Villamil (Villamil), a "certified professional car salesperson" for "Budget Car Sales, retail"; and Fukida.

Endrizal explained the history of the business and her version of what transpired with respect to Fukida's Civic.

Villamil testified that he had been involved in retail auto sales in Hawai‘i for the past twenty-two years and had been in upper management as a used car manager. He explained that as a used car salesman, he relies on the "Kelly [sic] Blue Book, which covers the western states, including Hawaii [Hawai‘i]," to value used cars. Villamil testified that the approximate retail Blue Book value of a two-door 1986 Honda hatchback with similar features as Fukida's Civic was $4,900. Villamil explained, however, that the Kelley Blue Book values are just guides for appraising a car and that he himself had made offers to buy trade-in cars at prices "lower than what the Kelly [sic] Blue Book would prescribe[.]" He also related that he would never offer the Blue Book value for a used car without seeing the car.

Fukida, after testifying to his version of the facts, described the "general damages" he had suffered as a result of the lien being placed on his Civic. Fukida stated that he had four people in his family and without one of his three cars, it was "really a hassle," especially when his daughter, who was attending college on the mainland, returned for the holidays. Because of the inconvenience, Fukida had wanted to rent a car; however, his lawyer had advised him that he should try and manage as best as he could under the circumstances. Asked why he did

not put up a bond so he could get his Civic back pursuant to HRS § 654-2 (1993),[6] Fukida answered that he believed this action would be concluded shortly and that it was unfair for him to put up a bond to gain the return of his Civic. Fukida was also allowed to testify that he had rented a subcompact Ford Escort while he was visiting the Big Island the previous year, and he had paid $32 per day for the rental.

On April 17, 1998, the district court filed an "Order Granting Judgment for [Fukida]" in which it awarded Fukida "replevin and return of the car to him without any payment of any storage charges to [Endrizal] or to [HHSR]," awarded Fukida "$10.00 per day for loss of use his [sic] vehicle from June 2, 1996 to the present date[,]" and dismissed the counterclaim of Endrizal, HHSR, and HHSI. In support of its Order, the district

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[6/] HRS § 654-2 (1993) provides:

> **Bond.** When the plaintiff desires the immediate delivery of the property, the plaintiff shall execute a bond to the defendant in possession of the property, and to all persons having an interest in the property, of such amount and with such sureties as are approved by the court, conditioned that the plaintiff will prosecute the plaintiff's action to judgment without delay, and deliver the property to the defendant in possession or any other person, if such delivery is adjudged, and pay all costs and damages that may be adjudged against the plaintiff. Upon the filing of the verified complaint or affidavit with the bond and a motion for immediate consideration of the matter, the court shall forthwith inquire into the matter, ex parte or otherwise, as in its discretion it determines. If thereupon the court finds that a prima facie claim for relief has been established, it shall issue an order . . . to take the property therein described and deliver the same to the plaintiff.

court made the following pertinent Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. [Fukida] is the owner of a 1986 Honda Civic.

2. [Fukida] took his vehicle for repairs to a vehicle repair shop located at 98-021 Kamehameha Hwy., Aiea [ʻAiea] Hi 96701. This shop was identified as [HHSR] on the repair invoices given to [Fukida] (Exhibits C1-[sic] C3 and 7). However, at no time was the business identified or referred to as [HHSI] in dealings with [Fukida].

3. [HHSR] is not registered with the Department of Commerce and Consumer Affairs as a trade name, corporation or partnership (Exhibit F). Nor is it identified anywhere as a trade name of [HHSI].

4. [HHSR] does not have and did not have an auto repair or motor vehicle repair license at the time the repairs were done on [Fukida's] vehicle between May 2, 1996 and June 2, 1996 (Exhibit G).

5. [Endrizal] did not have an auto repair or motor vehicle repair license at the time the repairs were performed on [Fukida's] vehicle between May 2, 1996 and June 2, 1996. [Endrizal] last had an auto repair license in her name on June 30, 1991 when the license expired (Exhibit H).

6. [HHSI] did have a valid motor vehicle repair license issued in its name during the time in question.

7. [Endrizal] testified that the invoices generated and used by [HHSI] do not contain the name of [HHSI] because the software program which [HHSI] purchased to generate the invoices contained an error which resulted in the name "[HHSR]" appearing on the invoices instead of the correct name of Hon/ Hawaii Services, Inc. [sic]. This problem was not corrected and had not been corrected as of the time of the trial in this matter because [Endrizal] regarded correcting the software problem as being too costly to do.

8. [Endrizal], in all the affidavits she submitted in this case prior to the start of the trial, had identified herself as the General Manager of [HHSR]. After the start of the trial on January 17, 1997 and prior to the start of the second day of trial, [Endrizal], in a February 13, 1997 affidavit, began to

identify herself, for the first time, as the General Manager of [HHSI].[2]

9. [Fukida] took his vehicle for repairs to the repair shop located at 98-021 Kamehameha Hwy., Aiea [ʻAiea] Hi 96701, which was identified to him as, and which he believed was, [HHSR]. [Fukida] took his car for a safety check. After being told that a safety check could not be performed because of problems with his transmission, [Fukida] authorized the repair shop to go forward with a transmission check to advise him of the repairs that would need to be done.

10. A transmission check was performed by the repair shop and [Fukida] was advised that he needed to replace his transmission. The transmission check was paid for by [Fukida].

11. [Fukida] authorized the replacement of his old transmission with a used transmission. However, after placing a used transmission into [Fukida's] car, the repair shop determined that the used transmission did not work well and the repair shop contacted [Fukida] for oral authorization to put in a rebuilt transmission.

12. [Fukida] contends that he authorized the use of a rebuilt transmission on the condition that he first be provided with a receipt for the transmission and that he be called down to the repair shop so that he could see for himself that the transmission that went into his car was the actual transmission he had paid for. [Fukida] contends that these conditions were not met and that he was told to come down to pick up his car after the transmission had already been installed and he could not verify that the correct transmission had been installed.

13. Defendants contend that they received oral authorization from [Fukida] to go forward with the installation of the rebuilt transmission and that no conditions were placed on the installation. Defendants further contend that [Fukida] was quoted an estimated price of $2100 to $2250. The actual invoice present [sic] to Plaintiff was $2478.95.

14. [Fukida] refused to pay the cost of the installation of the rebuilt transmission because the repair shop had not complied with the conditions that he had set. [Fukida] did pay for the cost of the transmission check which was $19.66.

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[2] The [c]ourt finds that [HHSR] is not a separate legal entity. But rather, [HHSR] is an unregistered trade name that is used by [Endrizal and HHSI] to conduct a motor vehicle repair business.

15. Because [Fukida] refused to pay for the cost of the transmission installation, [Defendants] elected to place a lien on the vehicle and to retain possession of the vehicle until the invoice and accumulating $20.00 per day storage charges were paid by [Fukida]. The date that [Defendants] first refused to release [Fukida's] vehicle was June 2, 1996.

16. [Fukida] filed his lawsuit against [Endrizal] and [HHSR] on August 13, 1996. On August 22, 1996, [Endrizal and HHSR] filed their counterclaim against [Fukida] seeking recovery of the repair costs and the storage fees. On January 10, 1997, [HHSI] was identified as Defendant Doe Corporation 1.

17. Based on the limited evidence presented, including but not limited to the testimony of [Villamil], and the fact that [HHSI] was charging $20.00 a day as storage charges for the storage of the vehicle, the [c]ourt finds that the sum of $10.00 per day is a reasonable amount for any loss of use that [Fukida] suffered as a result of the retention of the vehicle by [Defendants].

CONCLUSIONS OF LAW

1. Under HRS §507-18 "A person who makes, alters, or repairs any article of personal property at the request of the owner of the property, shall have a lien on the property for the reasonable charges for the work done and materials furnished, excluding storage charges, and may retain possession of the property until the charges are paid; . . . . "

2. However, under [c]hapter 437B, Regulation of Motor Vehicle Repairs, HRS §437B-20 provides that "No person required to register under this chapter shall have the benefit of any lien for labor or materials or the right to sue on a contract for motor vehicle repairs done by the person unless the person was registered at the time the person performed the contract."

3. The Hawaii [Hawai'i] Administrative Rules, §16-87-11, regarding Motor Vehicle Repair Dealers and Mechanics provides that:

> (h) No motor vehicle repair dealer's registration shall be transferable.
>
> (I) [sic] If a motor vehicle repair dealer uses a valid fictitious name or "d.b.a." the dealer shall register the name or "d.b.a." with the board.

4. Here, there is no question that repair work covered by [c]hapter 437B was performed on [Fukida's] vehicle. Although the repair work was performed by [HHSI], [Fukida] never contracted with nor requested that [HHSI] perform the repairs. The invoices presented to

[Fukida] and the credible evidence presented establish that at all times [Fukida] was dealing with an entity identified as [HHSR] or directly with [Endrizal]. Any agreement, oral or written, that [Fukida] had for the repair of his vehicle was with either [Endrizal] or [HHSR]. At no time was it ever represented to [Fukida] that he was contracting with [HHSI].[3]

Whether [Endrizal] or [HHSR] contracted the work out or always intended that [HHSI] would perform the work is irrelevant as [Fukida] had no agreement with [HHSI].

5. To the extent that the repair work was actually done by [HHSI], it was not done at the request of [Fukida]. Accordingly, [HHSI] cannot claim the benefit of the lien under HRS §507-18 as [Fukida] never requested that [HHSI] perform any work.

6. On the other hand, [Endrizal and HHSR] are also not entitled to the benefit of any lien under HRS §507-18 because neither [Endrizal nor HHSR] is registered as required under [c]hapter 437B. HRS §437B-20. Further neither [Endrizal nor HHSR] may sue on a contract for motor vehicle repairs because they were not registered as required under [c]hapter 437B.

7. Because none of [Defendants] were entitled to the benefit of any lien on the vehicle, [Defendants] were not entitled to retain possession of [Fukida's] vehicle nor were they entitled to assess any storage charges to [Fukida].

8. Also, because the Counterclaim Plaintiffs are not entitled to sue for work done as they were not registered as required under [c]hapter 437B, the installed transmission must remain in the vehicle.[4]

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[3] At trial [Endrizal] testified that the business was always operated as [HHSI] and that [HHSR] was a trade name. However, as noted above, if a trade name is going to be used, then the dealer must register that trade name with the Motor Vehicle Industry Repair Board. This was not done by [Endrizal] or [HHSI]. Moreover, even [Endrizal] identified herself on numerous affidavits and other documents submitted to the Court in this case as the "General Manager of [HHSR]."

[4] The [c]ourt also gives credence to [Fukida's] testimony that he had authorized the installation of the rebuilt transmission only on the condition that he be present to verify that the transmission he had purchased was the transmission that was actually installed. Having failed to satisfy this condition, [Defendants] were not entitled, on this basis as well, to any recovery for the installation of the rebuilt transmission.

Based on the foregoing findings of fact and conclusions of law, the district court determined as follows:

> Accordingly, it is ORDERED ADJUDGED AND DECREED that [Fukida] is awarded the return of his vehicle under his claim of replevin. [Fukida] is also awarded damages consisting of the loss of use of his vehicle from June 2, 1996 to the date that his vehicle is returned to him, and that loss of use shall be computed at a rate of $10.00 per day.
>
> Further, the Counterclaim of Defendants Endrizal and [HHSI] is dismissed as they have no basis for a claim against [Fukida].
>
> There is no statutory basis for an award of attorneys' fees under a claim for replevin. Also, although the Counterclaim has been dismissed, the [c]ourt does not find the Counterclaim to have been frivolous and no attorneys fees are awarded on this basis. However, the Counterclaim was in the nature of an assumpsit claim, and [Fukida] was the prevailing party. Therefore, pursuant to HRS §607-14, [Fukida] is entitled to an award of attorneys' fees up to 25% of the amount claimed in the Counterclaim. The amount claimed was $2478.95 (for the transmission) plus $20.00 per day (to the date the car is returned). Therefore, [Fukida] may submit an attorneys' fee affidavit itemizing the amount of attorneys' fees expended in this case and the [c]ourt will allow reasonable attorneys' fees not exceeding 25% of the amount claimed in the Counterclaim. [Fukida] is also awarded his ordinary court costs in this case. Any court costs beyond the filing fees for the complaint and the fees for service of the complaint may be set forth in the same attorneys' fees affidavit, which may be submitted simultaneously with the judgment in this case. Defendants will have 5 working days in which to submit any opposition to such requested court costs.

On April 5, 1999, the district court entered judgment in favor of Fukida and against HHSR, HHSI, and Endrizal, jointly and severally, awarding Fukida loss of use damages in the amount of $6,970,[7] attorney fees in the amount of $4,254.74, and costs in the amount of $120.03, for a total judgment amount of

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[7/] This amount was computed at $10 per day for 697 days from June 2, 1996 to April 29, 1998, the day, we assume from the record, that Fukida took possession of the Civic.

$11,344.77. Additionally, the Judgment dismissed with prejudice Defendants' counterclaim against Fukida.

This timely appeal followed.

DISCUSSION

A. *Loss of Use Damages*

Defendants contend that the district court erred in awarding Fukida loss of use damages totaling $6,970 against Defendants, jointly and severally. For the reasons set forth below, we agree.

1.

This was a replevin action brought by Fukida, seeking the return of a Civic that Fukida alleged had been wrongfully converted by Defendants. Replevin is "[a]n action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." Black's Law Dictionary 1299 (6th ed. 1990). A replevin action

> is based not upon any act of the plaintiff, but upon the illegal acts of the defendant. It is a possessory action the gist of which is the right of possession in the plaintiff. The primary relief sought therein is the return of the property in specie; damages are merely incidental.

66 Am. Jur. 2d Replevin § 3, at 838-39 (1973) (footnotes omitted). Generally, in order to maintain a replevin action, a "plaintiff must, at the time of the institution of the suit, be entitled to the immediate possession of the property claimed. He

[or she] must recover on the strength of his [or her] own right of possession, and not on the weakness of that of his [or her] adversary." Id. § 18, at 846 (footnote omitted). Thus, where goods have been held for a repairman's lien, a "[r]eplevin will not lie to recover [the] goods . . . unless payment therefor is tendered." Id. at 847.

In this case, Fukida sought replevin for his Civic, which was being held for a repairman's lien. However, he refused to pay for the repair bill. As long as the repairman's lien was properly placed on the Civic, therefore, replevin was not available to Fukida to recover the Civic, unless he first paid for the reasonable value of the repair services performed.

HRS § 507-18 (1993) sets forth the general parameters for a repairman's lien:

> **Lien on personalty for work done and materials furnished.** A person who makes, alters, or repairs any article of personal property at the request of the owner of the property, shall have a lien on the property for the reasonable charges for the work done and materials furnished, excluding storage charges, and may retain possession of the property until the charges are paid; provided that the registered owner of a motor vehicle registered pursuant to chapter 286 shall be considered the owner for the purposes of this section.

At the time Fukida brought his Civic to the repair shop in ʻAiea, however, HRS § 437B-20 (1993) provided:

> **Registration condition precedent to lien.** No person required to register under this chapter shall have the benefit of any lien for labor or materials or the right to sue on a contract for motor vehicle repairs done by the person unless the person was registered at the time the person performed the contract.

Additionally, Hawai'i Administrative Rules § 16-87-11(i), promulgated by the Motor Vehicle Repair Dealers and Mechanics Board, required that "[i]f a motor vehicle repair dealer uses a valid fictitious name or 'd.b.a.' the dealer shall register the name or 'd.b.a.' with the board."

The thrust of the district court's ruling below was that although HHSI, dba Hon/Hawaii Repair, was licensed to operate the 'Aiea repair shop, Endrizal and the unregistered trade name of "[HHSR]" were not so licensed. Since Fukida had dealt only with Endrizal and HHSR, and they were not licensed, Endrizal and HHSR could not validly impose a repairman's lien on the Civic. Additionally, since Fukida never contracted directly with HHSI, HHSI could not claim a valid repairman's lien on the Civic.

The district court's ruling, however, was inconsistent with its earlier determination that the complaint and counterclaim could be amended to name the proper defendants "without having to do any type of re-servicing of . . . either the complaint or the counterclaim." When Fukida initially filed his complaint, he named as defendants HHSR, which the district court concluded was an unregistered trade name for HHSI, and Endrizal. When Fukida's attorney became aware that HHSR was a trade name and had no legal existence, he was allowed to amend the caption of the complaint to include HHSI as the proper

corporate defendant. Furthermore, the district court, in allowing the amendment, appears to have considered the amendment to be one of substitution of the real party in interest. Indeed, in responding to Fukida's objection that HHSI should not be considered as having filed the counterclaim since the counterclaim had never been amended to include HHSI, the district court ruled that HHSI was the same party as HHSR and was the properly named party to the counterclaim.

Since HHSI possessed a corporate automobile repair dealer's license under HRS chapter 437B, it was authorized to impose a repairman's lien on the Civic for the reasonable charges for the work done and materials furnished, in performing any transmission work requested by Fukida. Therefore, Fukida was not entitled to replevin of his Civic until he paid the reasonable value of the transmission repair work.

2.

The record on appeal contains absolutely no evidence that Endrizal was acting in a personal capacity in any of her dealings with Fukida. Instead, the evidence overwhelmingly revealed that Endrizal was acting as the general manager for HHSI in all matters relevant to this lawsuit. The district court erred, therefore, in awarding damages, attorney fees, and costs against Endrizal personally.

3.

Professor McCormick, in Section 23, at page 463 of his Handbook on the Law of Damages (1935), explained that the general measure of damages in conversion of property cases is calculated, in relevant part, as follows:

> The normal measure of damages for the conversion of chattels, is the value of the property at the time and place of conversion, to which may be added interest on such value.
>
> . . . .
>
> If the property has been returned by the defendant to the plaintiff's possession, the amount of the recovery will be reduced to the extent of the value of the property when thus returned. A mere unaccepted offer to return does not reduce damages, but, in England and some of the states, the trial judge has a discretion under certain circumstances to require the plaintiff to accept a return.

In commenting on the foregoing principles, Professor McCormick stated, partly, as follows:

> When one person is the owner or rightful possessor of personal property, that is, of any tangible property other than land, and such chattel is seized wrongfully by another person, so as to work a substantial interference with the rightful possessor's dominion, the latter is given by the common law the right to treat this as a "conversion." This means that he may sue the wrongdoer, in an action of trover or in an action based on the same theory in code states, with the result that the wrongdoer will be compelled to pay for the chattel, somewhat as if he had brought it at the very time when he assumed to intermeddle with another's property. Accordingly, the normal measure of damages for conversion of chattels is the value of the property, and this value is ordinarily assessed as of the time when, and the place where, the defendant converted it. . . .
>
> . . . .
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> If the chattel has come back into the possession of the plaintiff from the hands of the defendant, it becomes unfair to charge the defendant with the full value of the chattel thus restored to its owner. It might have been simpler to require the plaintiff in this situation to state his claim as one for wrongful detention merely, but the traditional practice has been otherwise, and the plaintiff

> may, if he [or she] chooses, still sue for the original wrongful appropriation as a conversion, and put the defendant to the necessity of proving the return of the chattel to the plaintiff, "in mitigation of damages." The plaintiff recovers the value of the chattel when converted, minus its value when returned -- in other words, the depreciation in value -- and recovers also for the loss of the use of the chattel during the intervening period. The defendant, however, may not thus reduce the recovery by showing merely that before action brought he has tendered a return to the plaintiff who has refused to accept it, though this might have a bearing if exemplary damages were claimed. . . . Analogous questions arise when the property converted, though not returned to the plaintiff, is applied to the payment of the plaintiff's debts. If the defendant has deliberately taken or withheld the chattel from the plaintiff, without right, and with the purpose of later having it seized for the plaintiff's debt under a writ, and such seizure is later made and the chattel sold thereunder and the proceeds applied to the debt, then it seems that such a willful substitution of self-help for lawful process should be discouraged by refusing to permit the credit on the debt to be used to reduce the recovery for the conversion.

Id. at 463-69 (emphases added, footnotes omitted).

In this case, it is undisputed that when Fukida brought his Civic to the repair shop, it had a damaged transmission. When he got the Civic back, it had a rebuilt transmission and a new shifter cable and had consequently increased in value. Fukida acknowledged that he was aware that the cost of the transmission repair would cost between $2,100 and $2,250. Even if this were a proper replevin action, which we do not believe it was, we conclude that the district court erred in holding that Fukida was entitled to the return of his Civic with the newly installed transmission without having to pay HHSI for the reasonable cost of the transmission and the labor to install the transmission. It follows that Fukida was not entitled to loss of use damages.

B. *Mitigation*

Defendants contend that Fukida is not entitled to the amount of loss of use damages he was awarded because he failed to mitigate his damages by putting up a bond that would have enabled him to acquire immediate possession of his Civic from the repair shop, pending the completion of the litigation. Since we have already concluded that Fukida was not entitled to replevin of his Civic without paying for the reasonable value of HHSI's repair services and costs, we need not address this issue.

C. *Attorney Fees and Costs*

In light of our disposition of this appeal, we vacate the award of attorney fees to Fukida.

CONCLUSION

Based on the foregoing discussion, we vacate that part of the April 5, 1999 Judgment that awarded Fukida loss of use damages and attorney fees and costs against Defendants, jointly and severally. Since no appeal was taken from that part of the judgment that dismissed Defendants' counterclaim and allowed Fukida the replevin of his Civic without paying for the installed

transmission, the April 5, 1999 Judgment is affirmed in all other respects.

DATED: Honolulu, Hawai‘i, April 30, 2001.

On the briefs:

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