NO. 24449

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

KATJA REICHE, Plaintiff-Appellant/Cross-Appellee, v. CHARLES J. FERRERA, Defendant-Appellee/Cross-Appellant, and ERIC A. SEITZ, Defendant

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 97-4181)

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

Plaintiff-Appellant/Cross-Appellee Katja Reiche (Reiche) appeals from the July 3, 2001 Judgment that finalized (1) the January 12, 2000 "Order Granting in Part and Denying in Part Defendant Charles J. Ferrera's Motion for Summary Judgment Filed September 14, 1999" (January 12, 2000 Order), (2) the March 20, 2001 "Order Granting Defendant Charles J. Ferrera's Motion for Summary Judgment on All Remaining Causes of Action Filed February 2, 2001" (March 20, 2001 Order), and (3) the May 3, 2001 "Order Granting Defendant Charles J. Ferrera's Motion for Attorneys' Fees and Costs Filed April 3, 2001" (May 3, 2001 Order). We affirm.

Although summary judgment was awarded in his favor, Defendant-Appellee/Cross-Appellant Charles J. Ferrera (Ferrera) cross-appeals. Partial summary judgment was awarded to Ferrera in the January 12, 2000 Order. Summary judgment on the remaining

issues was granted to Ferrera in the March 20, 2001 Order. In his cross-appeal, Ferrera argues complete summary judgment should have been granted in his favor in the January 12, 2000 Order. We affirm.

I. BACKGROUND

A. Facts

Reiche was injured in an automobile accident on June 8, 1987. Taken by ambulance to Maui Memorial Hospital (MMH), Reiche informed the attending medical staff of her current medications (which included Nardil), was treated, and moved to a regular room for observation. That afternoon, she requested medication to relieve the pain of her injuries and received Demerol, a drug contraindicated for patients on Nardil. Thereafter, she suffered respiratory arrest, was rendered unconscious, but was quickly revived. She remained in the hospital overnight and was discharged the next morning.

In or around July of 1987, Reiche retained Ferrera, an attorney licensed to practice law in the State of Hawai‘i, to represent her in personal injury lawsuits against the State of Hawai‘i and the County of Maui for negligent highway maintenance, against Maui Land and Pineapple Company for negligently allowing a build up of juice and mud on the roadway, and against MMH, Charles Probst, M.D. (Dr. Probst), and William Eilert, M.D. (Dr. Eilert), for medical malpractice.

On or about August 3, 1988, Ferrera filed a claim with the Medical Claims Conciliation Panel (MCCP) against MMH, Dr. Probst, and Dr. Eilert, pursuant to Hawaii Revised Statutes (HRS) § 671-12(a) (1993).[1] On December 27, 1988, the MCCP ruled that there was no actionable negligence on the part of MMH or Drs. Probst and Eilert.

After receiving notice of the MCCP's decision, Ferrera filed a complaint, Reiche v. Maui Medical Hospital, in the Circuit Court of the Second Circuit, State of Hawai‘i, Civil No. 89-0272(3), on May 31, 1989, against all named defendants. A July 25, 1989 order entered by Judge Boyd P. Mossman dismissed the complaint for two reasons: (1) it violated Rule 8 of the Hawai‘i Rules of Civil Procedure (HRCP)[2] and (2) the complaint was filed before Reiche filed a rejection of the adverse ruling of

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[1] Hawaii Revised Statutes (HRS) § 671-12(a) (1993) requires that

> [e]ffective July 1, 1976, any person or the person's representative claiming that a medical tort has been committed shall submit a statement of the claim to the medical claim conciliation panel before a suit based on the claim may be commenced in any court of this State. Claims shall be submitted to the medical claim conciliation panel in writing. The claimant shall set forth facts upon which the claim is based and shall include the names of all parties against whom the claim is or may be made who are then known to the claimant.

[2] Rule 8(a) of the Hawai‘i Rules of Civil Procedure (HRCP) (Supp. 2002) states, in relevant part, as follows:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

HRCP Rule 8(a) (Supp. 1999) is essentially the same.

the MCCP. On July 7, 1989, Ferrera filed a rejection of the MCCP's decision and, on August 24, 1989, he filed a complaint, Reiche v. Maui Medical Hospital, in the Circuit Court of the Second Circuit, State of Hawai‘i, Civil No. 89-0408(1). A June 1, 1990 "Stipulation and Order Consolidating Civil No. 89-0272(3) and Civil No. 89-0408(1) and Maintaining All Previously Filed Crossclaims," consolidated the two lawsuits under Civil No. 89-0272(3).

Eventually, conflict arose between Reiche and Ferrera over his handling of her case, and this led to Ferrera notifying Reiche by letter, dated June 4, 1990, that he intended to withdraw as her counsel. Ferrera's "Motion to Withdraw as Counsel for Plaintiff" was filed on June 27, 1990, and granted by order entered by Judge Mossman on August 15, 1990.

On January 2, 1991, Reiche retained Eric A. Seitz (Seitz) as counsel. Subsequently, Reiche disagreed with Seitz over his assessment and handling of her claims. On August 23, 1991, Seitz filed a motion to withdraw as counsel for plaintiff. This motion was granted on September 25, 1991.

In July 1991, Reiche contacted attorneys George Parker (Parker) and Myles Breiner (Breiner) and requested their help. Parker, although he did not enter a formal appearance on behalf of Reiche, negotiated a settlement of Reiche's claims with all of the defendants except Dr. Eilert. Judge Mossman dismissed

Reiche's claims against Dr. Eilert by order entered on December 2, 1991.

B. Procedural History

Reiche alleges that sometime in November or December of 1991, Parker and Breiner advised her of possible legal malpractice claims against Ferrera and Seitz. As a result, Reiche contacted and retained A. Peter Howell (Howell). On October 10, 1997, Howell filed Reiche's complaint against Ferrera and Seitz alleging legal malpractice.

A hearing was held November 10, 1999, on Ferrera's September 14, 1999 motion for summary judgment (Ferrera's First Motion). In the January 12, 2000 Order, Judge Gail C. Nakatani denied Ferrera's First Motion with respect to the allegations that Ferrera: (1) failed to depose the emergency room nurse, Jean Boongard (Boongard), (2) failed "to retain a highway accident construction specialist[,]" and (3) failed to follow up with medical specialists. Judge Nakatani granted Ferrera's First Motion with respect to all other issues.

On December 21, 2000, a "Stipulation for Entry of Final Judgment, Waiver of Appeal and Order," and a Judgment finalized pursuant to HRCP Rule 54(b), were entered in favor of Seitz.

On February 2, 2001, Ferrera filed a second motion for summary judgment on all remaining causes of action (Ferrera's Second Motion). On March 20, 2001, after a hearing on

February 26, 2001, Judge Sabrina S. McKenna granted Ferrera's Second Motion. Judge McKenna concluded that Reiche was aware of an alleged act of negligence by August 15, 1990, and the relevant statute of limitations barred Reiche from asserting a claim.[3]

C. Reiche's Points on Appeal

Reiche contends that the court erred when it entered its March 20, 2001 Order granting Ferrera's Second Motion. Reiche argues as follows:

1. Reiche did not discover, nor should she have discovered, Ferrera's act(s) of negligence until her meeting with attorneys Breiner and Parker in November 1991.

2. Some of the exhibits offered by Ferrera in support of his motion were inadmissible under HRCP, Rule 56(e),[4] and

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[3] HRS § 657-1 (1993) states, in relevant part, as follows:

> The following actions shall be commenced within six years next after the cause of action accrued, and not after:
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> (1) Actions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court; excepting further that actions for the recovery of any debt founded upon any contract, obligation, or liability made pursuant to chapter 577A shall be governed by chapter 577A;
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> . . . .
>
> (4) Personal actions of any nature whatsoever not specifically covered by the laws of the State.

[4] HRCP Rule 56(e) (Supp. 2002) states, in relevant part, as follows.

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is

(continued...)

should not have been considered by the court in reaching its decision.

3. The Declaration of Arthur E. Ross attached to the November 2, 1999 "Plaintiff Katja Reiche's Memorandum in Opposition to Defendant Charles J. Ferrera's Motion for Summary Judgment Filed September 14, 1999," was evidence of Ferrera's negligence creating a genuine issue of material fact requiring a trial.

4. Ferrera was liable for the reasonably foreseeable negligence of subsequent counsel and forseeability is an issue for the trier of fact.

5. The award of fees to counsel for Ferrera should be reversed because there was no evidence of customary charges of the bar other than the declarations of counsel for Ferrera.

6. The fees claimed by the law firm that represented Ferrera on Ferrera's First Motion, Fujiyama, Duffy, & Fujiyama (the Duffy firm), should be denied or apportioned because Ferrera

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[4](...continued)
competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

HRCP Rule 56(e) (Supp. 1999) is essentially the same.

did not prevail on a majority of the issues in Ferrera's First Motion.

D. Ferrera's Response

Ferrera responds that:

(1) there is no evidence of negligence;

(2) there is no evidence that he was the proximate cause of any damages;

(3) he should not be held liable for the actions of subsequent counsel;

(4) summary judgment was properly granted on Ferrera's Second Motion because (a) Reiche was aware of her cause of action more than six years before filing suit, (b) the admissible evidence supported the trial court's ruling, and (c) the court's decision was based on both the "discovery" rule and the "occurrence" rule; and

(5) the court did not err in awarding attorneys' fees and costs and did not need testimony from outside counsel as to the reasonableness of the fees, and he is entitled to recover all reasonable attorneys' fees and costs despite the 25% limitation of HRS § 607-14 (Supp. 2001).[5]

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[5] HRS § 607-14 (Supp. 2001) states, in relevant part, the following:

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney

(continued...)

E. Ferrera's Cross-Appeal

Although he obtained complete relief when the court granted Ferrera's Second Motion, Ferrera seeks reversal of the denial of Ferrera's First Motion on the basis that when Ferrera's First Motion was heard, there were no genuine issues of material fact and, as a matter of law, Reiche's cause of action was not damaged by his representation and he was not liable for the actions and/or inactions of subsequent counsel.

Ferrera seeks reversal of the denial of Ferrera's First Motion to support his opposition to Reiche's argument that the

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[5](...continued)

representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

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

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

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

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

award of fees and costs to the Duffy firm should, at the very least, be apportioned because Ferrera only partly prevailed on Ferrera's First Motion.

II. STANDARDS OF REVIEW

A. Motion for Summary Judgment

We review a circuit court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. Roxas v. Marcos, 89 Hawai‘i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Id. (citations and internal quotation marks omitted). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

"We . . . view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai‘i 76, 80, 947 P.2d 944,

948 (1997) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

B. Attorney Fees

"[A]ttorney fees are chargeable against the opposing party when so authorized by statute, rule of court, agreement, stipulation, or precedent." Lee v. Aiu, 85 Hawai‘i 19, 32, 936 P.2d 655, 668 (1997). The question whether the circuit court is authorized to award attorney fees pursuant to HRS § 607-14 (Supp. 2001) ("Attorneys' fees in actions in the nature of assumpsit, etc.") is a question of law reviewable on appeal under the right/wrong standard. *See* Leslie v. Estate of Tavares, 93 Hawai‘i 1, 994 P.2d 1047 (2000); TSA Int'l, Ltd. v. Shimizu Corp., 92 Hawai‘i 243, 990 P.2d 713 (1999).

In cases where the relevant statute states that the court "shall" award an attorney "fee that the court determines to be reasonable[,]" this court reviews the amount awarded under the abuse of discretion standard. TSA Int'l, 92 Hawai‘i at 253, 990 P.2d at 723 (quoting Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai‘i 292, 299, 972 P.2d 295, 302 (1999) (citing Eastman v. McGowan, 86 Hawai‘i 21, 27, 946 P.2d 1317, 1323 (1997) (citation omitted).

III. DISCUSSION

A. Statute of Limitations

The court's decision to grant Ferrera's Second Motion was based upon its application of the relevant statute of limitations to the relevant facts. If the court was right, some of the other issues on appeal are moot.

"[T]he statute of limitations in a legal malpractice claim is governed by HRS § 657-1(1), the accrual of which is determined by application of the discovery rule." Blair v. Ing, 95 Hawai‘i 247, 267, 31 P.3d 452, 472 (2001) (Blair I).

HRS § 657-1 (1) (1993) requires "[a]ctions for the recovery of any debt founded upon any contract, obligation, or liability, excepting such as are brought upon the judgment or decree of a court[,]" "to be commenced within six years next after the cause of action accrued, and not after."

Under the discovery rule, "a cause of action does not 'accrue,' and the limitations period therefore does not begin to run, until the plaintiff knew or should have known of the defendant's negligence." Hays v. City and County of Honolulu, 81 Hawai‘i 391, 393, 917 P.2d 718, 720 (1996). Specifically, the plaintiff must have discovered or with reasonable diligence should have discovered: (1) the negligent act or omission, (2) the damage, and (3) the causal relationship between the negligent act or omission and the damage. *See* Yamaguchi v.

Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982).

Under HRS § 657-7.3 (1993),[6] legal knowledge of a defendant's negligence in not required. Buck v. Miles, 89 Hawai‘i 244, 249, 971 P.2d 717, 722 (1999). *See*, e.g., Hays, 81 Hawai‘i at 399, 917 P.2d at 726 ("plaintiff's lack of knowledge regarding a legal duty, the breach of which may have caused the plaintiff injury, will not justify application of the discovery rule. In other words, an essential part of an injured plaintiff's duty of diligence regarding the timely prosecution of his or her claim imposed by a statute of limitations is to seek legal advice regarding the presence and/or viability of a potential claim; a plaintiff's failure to seek legal advice from an attorney will not alone entitle the plaintiff to respite from a statute of limitations"). Under the discovery rule, a plaintiff need only have factual knowledge of the elements

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[6] HRS § 657-7.3 (1993) states, in relevant part, as follows:

> No action for injury or death against a chiropractor, clinical laboratory technologist or technician, dentist, naturopath, nurse, nursing home administrator, dispensing optician, optometrist, osteopath, physician or surgeon, physical therapist, podiatrist, psychologist, or veterinarian duly licensed or registered under the laws of the State, or a licensed hospital as the employer of any such person, based upon such person's alleged professional negligence, or for rendering professional services without consent, or for error or omission in such person's practice, shall be brought more than two years after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, but in any event not more than six years after the date of the alleged act or omission causing the injury or death. This six year time limitation shall be tolled for any period during which the person has failed to disclose any act, error, or omission upon which the action is based and which is known to the person.

necessary for an actionable claim. Buck, 89 Hawai‘i at 250, 971 P.2d at 723

The court granted Ferrera's Second Motion after determining that Reiche was aware of the alleged act of negligence, the damage, and the connection or "possible legal cause of that act." Viewing the facts in a light most favorable to Reiche, the court's decision is supported by the record. Reiche had "factual knowledge of the elements necessary for an actionable claim" prior to November 1991.

For example, Reiche repeatedly urged Ferrera to speak with Boongard before Boongard died because Boongard was the "major person who knew what happened in the [hospital emergency] room." In her January 22, 2001 deposition, Reiche stated that, as of June 1990, she "felt at risk."

In her opening brief, Reiche states that "there is no substantial evidence before the Court to the effect that she was aware of Jean Boongard's death at the time Ferrera withdrew from the case[.]" This statement is contradicted by the following testimony by Reiche in her deposition on January 23, 2001:

> Q Did you ever tell Mr. Ferrera that you were dissatisfied with his failure to depose Nurse Boongard?
>
> A Yes, I did.
>
> Q Was that while he was acting as your attorney?
>
> A I think so.
>
> Q So you told him during the course of his representation?
>
> A Yes.

Q What did you tell him?

A I believe I asked him if he deposed or talked to her. And he said no several times and, yeah, "I have to do that." And then one day he said, "Well, she died."

Q So prior to learning about her death, you had been urging him to take her deposition?

A Yes, yes. To talk to her, because she was there.

Q And then, when you heard of her death, you were upset with Mr. Ferrera?

A Uh-huh, I was.

Reiche also argued that because Hawai‘i has adopted the "discovery" rule, the trier of fact must determine the date Reiche knew or should have known of her legal malpractice claim. The Hawai‘i Supreme Court has held that "[i]f the Appellants succeed in proving that [the attorney] owed a duty of care to them, . . . the trier of fact must determine the date by which the Appellants knew or should have known of their legal malpractice claim." Blair I, 95 Hawai‘i at 267, 21 P.3d at 472 (citing Dunlea v. Dappen, 83 Hawai‘i 28, 36, 924 P.2d 196, 204 (1996) holding that for statute of limitations purposes, the determination of when a woman discovered or reasonably should have discovered that she was psychologically injured by childhood sexual assaults was a question of fact for the jury)).

We agree that the date by which Reiche knew or should have known of her legal malpractice claim had to be determined. We disagree that it was not determined. The question is whether Reiche knew or should have known of the elements necessary for an actionable claim prior to November 1991, which Reiche alleges is

the month that Parker and Breiner advised her of possible legal malpractice claims against Ferrera. Viewing the facts most favorably to Reiche, there is no factual dispute. As a matter of law, the answer is yes.

B. Attorney Fees and Costs

1. Assumpsit and the Statutory Authorization of Fees

Ferrera argued that Reiche's lawsuit was in the nature of assumpsit and that he was, therefore, entitled to attorney fees and costs pursuant to HRS § 607-14. Judge McKenna agreed and entered the May 3, 2001 Order, which awarded Ferrera $35,903.96 in fees and $5,361.43 in costs for a total of $41,265.39.

As noted previously, HRS § 607-14 (Supp. 2001) states, in relevant part, as follows:

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

Citing Higa v. Mirikitani, Reiche argues that a legal malpractice action is an "amalgam of tort and contract and therefore it cannot, strictly speaking, be an action in

assumpsit." Higa v. Mirikitani, 55 Haw. 167, 172, 517 P.2d 1, 5 (1973). The Hawai‘i Supreme Court has also stated that, in awarding attorney fees in cases involving both assumpsit and non-assumpsit claims, a court must base its award of fees, if practicable, on an apportionment of the fees claimed between the assumpsit and non-assumpsit claims. TSA Int'l, 92 Hawai‘i at 264, 990 P.2d at 734 (citing Selvage v. J.J. Johnson & Assocs., 910 P.2d 1252 (Utah Ct. App. 1996)).

In Shulz v. Honsodor, Inc., the Hawai‘i Supreme Court held that "[a]s a general proposition, the character of an action is determined from the facts stated in, and the issues raised by, the plaintiff's complaint, declaration, or petition. It is determined from the substance of the entire pleading, the nature of the grievance, and the relief sought . . . ." Schulz v. Honsador, Inc., 67 Haw. 433, 436, 690 P.2d 279, 282 (1984) (citation omitted).[7] In Leslie v. Estate of Tavares, the Court said that in "ascertaining the nature of the proceeding on appeal, this court has looked to the essential character of the underlying action in the trial court." Leslie v. Estate of Tavares, 93 Hawai‘i 1, 5, 994 P.2d 1047, 1051 (2000). Clearly, it is the plaintiff's complaint or declaration that reveals the "essential character of the underlying action."

[7] Blair v. Ing, 96 Hawai‘i 327, 332, 31 P.3d 184, 188 (2001), overruled the requirement stated in Schulz v. Honsador, Inc., 67 Haw. 433, 436, 690 P.2d 279, 282 (1984), that a judgment had to be on the merits in order to award fees under HRS § 607-14.

Ferrera and Reiche signed a Contingency Fee Contract on September 10, 1987. In her complaint, Reiche alleged Ferrera breached this contract by negligently failing to adequately prepare her case for trial. She asked for general and special damages, prejudgment interest, and attorney fees and costs to compensate her for the losses she sustained by having to settle for less of an award than she would have received "had Ferrera properly prosecuted the case." Clearly, her negligence claims stem from Ferrera's alleged breach of contract.

In Blair v. Ing, 96 Hawai‘i 327, 332, 31 P.3d 184, 189 (2001) (Blair II), the two claims for relief alleged in the complaint against one defendant (the accountant) were: (1) breach of implied contract and (2) negligence. Both claims were premised on the accountant's failure to take advantage of estate planning techniques while providing tax return preparation services. Id. The court concluded that the negligence claim arose "out of the alleged implied contract . . . . [and observed that] [w]ithout the implied contract, which could create a cognizable duty, Plaintiffs would have no negligence claim." Id. Similarly, Reiche's negligence claims arose out of the alleged breach of Ferrera's contractual duty to provide services, only, in this case, the contract was express and the obligation manifest. The court also concluded that the damages alleged "were more closely akin to contract damages than to tort damages because they were economic damages arising out of the alleged

frustrated expectation [of the plaintiffs.]" Blair II, 96 Hawai‘i at 332-33, 31 P.3d at 189-90.

Here, the damages alleged are more in the nature of contract than tort, and arose from the "frustrated expectation" of Reiche. Blair II held that it was "impracticable, if not impossible" to apportion fees under these circumstances and awarded attorney fees in assumpsit to the accountant who had prevailed in the action. Blair II, 96 Hawai‘i at 333, 31 P.3d at 190. Reiche's negligence claims having derived from and being inextricably linked to the alleged breach of contract, and the damages requested being economic in nature and having arisen out of the frustrated expectations of Reiche, we conclude that her lawsuit was in the nature of assumpsit.

2. Reiche's Request for Reduction or Denial of Fees Based on Ferrera's Failure to Prevail on Ferrera's First Motion.

Reiche argues that the award of fees and costs to the Duffy firm should be set aside or, at the very least, apportioned because Ferrera only partly prevailed on Ferrera's First Motion. We disagree. Long ago, the Hawai‘i Supreme Court concluded that "where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party for the purpose of taxing costs and attorney's fees." Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 620, 757 P.2d 869, 879 (1978). More recently, the court explained that "[u]sually the litigant in whose favor judgment is rendered is the prevailing party . . . . Thus, a

dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party." Wong v. Takeuchi, 88 Hawai‘i 46, 49, 961 P.2d 611, 614 (1998) (citing C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2667 (1983)). Consequently, "[t]here is no requirement that the judgment in favor of the prevailing party be a ruling on the merits of the claim." Wong, 88 Hawai‘i at 49, 961 P.2d at 614. Ferrera, by prevailing on the procedural, yet crucial issue of the statute of limitations, thereby prevailed as to the case as a whole. In Food Pantry, the court stated that "where a party prevails on the disputed main issue, even though not to the extent of his original contention, he will be deemed to be the successful party[.]" Food Pantry, 58 Haw. at 620, 757 P.2d at 879. Even if Ferrera did not prevail on Ferrera's First Motion, he did on Ferrera's Second Motion and, more importantly, as to the lawsuit itself.

3. Fees and Costs Absent Evidence of Customary Charges of the Bar and Expert Testimony

Reiche contends that "[t]he court should have denied the motion for counsel fees in the absence of evidence of customary charges of the bar and expert testimony other than the self-serving declarations of Defendant Ferrera's counsel[.]" We disagree.

"Generally, in order to justify a finding of a 'reasonable' attorney's fee, there must be evidence, or a proper showing made, in support of such finding." Sharp v. Hui Wahine,

Inc., 49 Haw. 241, 250, 413 P.2d 242, 248 (1966) (citations omitted). However, that "does not necessarily mean that the allowance or award of an attorney's fee must always be predicated on evidence presented in its support. The trial judge is, more or less, knowledgeable as to what is reasonable as an attorney's fee." Sharp, 49 Haw. at 250, 413 P.2d at 248 (citing In re Thz Fo Farm, 37 Haw. 447, 453 (1947)). In determining fees, the trial judge is both expert and arbiter of what is customary and reasonable. "In the final analysis, the question is one of abuse of discretion[.]" Sharp, 49 Haw. at 251, 413 P.2d at 248.

4. Excessive Hardship as a Mitigating Factor

Reiche contends that the trial court erred when it did not consider her inability to pay when determining Ferrera's reasonable attorney fees.

HRS § 607-14 specifies that the prevailing party is entitled to recover only "a fee that the court determines to be reasonable[.]" The burden is on the prevailing party to prove those fees and costs were associated with the relief requested and reasonably necessary to achieve the results obtained. *See* Jenkins v. Wise, 58 Haw. 592, 574 P.2d 1337 (1978); Sharp, 49 Haw. at 244-245, 413 P.2d at 245-246; Smothers v. Renander, 2 Haw. App. 400, 633 P.2d 556 (1981).

Ordinarily, the court determines the base amount of the fee to which the prevailing party is entitled by multiplying the number of hours productively expended by counsel times a reasonable hourly rate (the lodestar amount). Montalvo v. Chang,

64 Haw. 345, 347, 641 P.2d 1321, 1323 (1982). *See* Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983). The reasonable hourly rate is that prevailing in the community for similar work. United States v. Metropolitan Dist. Comm'n, 847 F.2d 12, 19 (1st Cir. 1988). In order to compute the lodestar amount, the court must ascertain the time counsel actually spent on the case and subtract hours which were duplicative, unproductive, excessive, or unnecessary. Hensley, 461 U.S. at 433-34, 103 S.Ct. at 1939-40. The lodestar represents a presumptively reasonable fee, although it is subject to upward or downward adjustment in certain circumstances. *See* Blum v. Stenson, 465 U.S. 886, 897, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984).

Hawai‘i courts also consider certain additional factors when determining whether to award attorneys' fees and what fees are reasonable:

> (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly;
>
> (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a loss of other employment while employed in the particular case or antagonisms with other clients;
>
> (3) customary charges of the Bar for similar services;
>
> (4) the amount involved in the controversy and the benefits resulting to the client from the services;
>
> (5) the contingency or the certainty of the compensation; and
>
> (6) the character of the employment, whether casual or for an established and constant client.

Booker v. Midpac Lumber Co., Ltd., 65 Haw. 166, 171 n.2, 649 P.2d 376, 379 n.2 (1982); Sharp, 49 Haw. at 244-45, 413 P.2d at 245-46; In re Property of Marlene Chow, 3 Haw. App. 577, 584, 656 P.2d 105, 111 (1982). These factors are not controlling. They merely serve as guides in "ascertaining the real value of the service," and the court is not required to consider each of them in every case. Booker, 65 Haw. at 171 n.2, 649 P.2d at 379 n.2; Sharp, 49 Haw. at 245, 413 P.2d at 246. The factors adopted by Hawai‘i courts are similar to the Kerr factors adopted by the Ninth Circuit in federal subject matter jurisdiction cases. *See* Johnson v. Georgia Highway Express, 488 F.2d 714, 717-719 (5th Cir. 1974) adopted by the Ninth Circuit in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975) (footnote omitted).

Mitigating factors are not utilized to calculate the lodestar amount, but to justify an award greater or lesser than the presumptively reasonable lodestar. Miller v. Los Angeles County Bd. of Educ., 827 F.2d 617, 621 (9th Cir. 1987). Although not specifically mentioned, it is reasonable to conclude that since some of these factors are used to determine the lodestar these same factors should not be used in adjusting the lodestar.

Courts have also considered such additional factors as:

> (1) the merits of the unsuccessful parties claim or defense; (2)whether litigation could have been avoided or settled; (3) whether assessing fees against the unsuccessful party would cause extreme hardship; (4) whether the successful party prevailed with respect to all relief sought; (5) whether the award would

> discourage other parties with tenable claims or defenses from litigating or defending legitimate contract issues for fear of incurring liability for substantial amounts of attorney's fees.

See e.g., Associated Indem. Corp. v. Warner, 143 Ariz. 567, 694 P.2d 1181, 1184 (1985); Wistuber v. Paradise Valley Unified School, 141 Ariz. 346, 687 P.2d 354 (1984).

Courts generally require the documentation of attorneys' fees and costs to meet certain specificity requirements. *See* Montalvo, 641 P.2d at 1331; Sealy, Inc. v. Easy Living, Inc., 743 F.2d 1378, 1385 (9th Cir. 1985); Furtado v. Bishop, 635 F.2d 915, 922 (1st Cir. 1980). Charges for duplicative work are not recoverable. *See* Furtado at 922.

When two or more attorneys represent a party requesting fees, the court should scrutinize the documents submitted in support of the request for duplication of effort and the proper utilization of time. "The time of two or three lawyers in a courtroom or conference when one would do, may obviously be discounted." Johnson, 488 F.2d at 717.

Certain work, such as filing pleadings with the court, that is not work that requires an attorney's expertise, is not compensable at attorneys' rates. "It is appropriate to distinguish between legal work, . . . and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he has no other help available. Such non-legal work may command a lesser rate. Its dollar value is not enhanced just because a lawyer does it." Id.

In determining reasonable fees, the court also must assess the extent to which fees and costs could have been avoided or were self-imposed. INVST Financial Group v. Chem-Nuclear Systems, 815 F.2d 391, 404 (6th Cir. 1987), *cert denied*, 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987).

Consideration of circumstances where "assessing fees against the unsuccessful party would cause extreme hardship" appears to have started in Arizona in 1982. At that time, Ariz. Rev. Stat. Ann. § 12-341.01 (1982) provided, in relevant part, as follows:

> A. In any contested action arising out of contract, express or implied, the court may award the successful party reasonable attorney's fees. This section shall in no manner be construed as altering, prohibiting or restricting present or future contracts or statutes that may provided for attorney's fees.
>
> B. The award of reasonable attorney's fees awarded pursuant to subsection A should be made to mitigate the burden of the expense of litigation to establish a just claim or just defense. It need not equal or relate to the attorney's fees actually paid or contracted, but such an award may not exceed the amount paid or agreed to be paid.
>
> C. Reasonable attorney's fees shall be awarded by the court in any contested action upon clear and convincing evidence that the claim or defense constitutes harassment, is groundless and not made in good faith.

Although amended in 1999, Arizona's current statute contains essentially the same language. *See* Ariz. Rev. Stat. Ann. § 12-341.01 (1999).

In Catalina Foothills Association, Inc. v. White, 132 Ariz. 427, 646 P.2d 312 (Ct. App. 1982), the court stated, in relevant part, as follows:

> The appellants' final argument is that appellant CFA has only $8,000; is a voluntary organization serving a worthwhile purpose; and this liability [of $6,000 for attorney fees] is burdensome and inequitable. Again, while the trial court can no doubt consider these matters, we cannot substitute our judgment for that of the trial judge.

Id., 132 Ariz. at 429, 646 P.2d at 314.

Thereafter, Arizona courts, and in certain cases involving the application of statutes for equal employment opportunities, the vindication of civil rights and statutes prohibiting unlawful employment practices, the Ninth Circuit Court of Appeals, has listed hardship and inability to pay as factors to consider when determining the amount of reasonable fees.

As noted above, the Hawai‘i Supreme Court has explicitly recognized certain factors that may be considered when determining the reasonableness of the attorney fees to be awarded under HRS § 607-14. We conclude that the ability of the winning party to collect the reasonable fee and the hardship to be suffered by the losing party by the assessment of the fee are not relevant factors. These are matters to be considered by the parties at the commencement of, and during, the case. HRS § 607-14 states that a reasonable attorney fee "shall be taxed." It requires the fee "to be paid by the losing party." It does not require the losing party to be financially able to pay, or not to suffer hardship by, the assessment.

5. The 25% Limitation Does Not Apply

Reiche contends that the court was not authorized to award attorney fees because "there is no evidence in the record as to the amount [Reiche] was seeking in damages in order to determine how the 25% maximum fee was to be calculated." There is no merit to this contention because in the absence of a specified amount, the prevailing party is entitled to all attorney fees reasonably and necessarily incurred in the action. AMFAC, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 134-35, 839 P.2d 10, 35, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992).

6. Minor Computational Errors

Reiche alleges that Exhibits D and E, submitted as part of Ferrera's motion for attorneys' fees and costs, filed April 3, 2001, contain minor computational errors totaling $19.09. Reiche failed to point out exactly where in Exhibits D and E the alleged errors occurred and our review did not locate any errors.

C. Ferrera's Cross-Appeal

Ferrera contends that the January 12, 2000 Order should have awarded him complete summary judgment. We disagree. Judge Nakatani granted summary judgment in favor of Ferrera on Reiche's claims that Ferrera failed to timely file pretrial statements, failed to file timely responses to interrogatories and requests for production of documents, and was negligent in withdrawing from representation without giving adequate warning and time to retain new counsel. Judge Nakatani denied summary judgment

because of Ferrera's alleged failure to depose Boongard, to retain a medical expert, and "to retain a highway accident specialist[.]"

We note the following genuine issues of material fact supporting the January 12, 2000 Order.

First, Ferrera's statute of limitations defense was not argued at the hearing on Ferrera's First Motion. A transcript of Reiche's deposition testimony was not available until after January 22, 2001, so it may not have been readily apparent until that time that the statute of limitations accrued prior to November 1991.

Second, at the hearing on Ferrera's First Motion, Ferrera acknowledged that he did not depose Boongard before her death. He argued that he had no reason to rush to take her deposition because he did not have notice of her impending death.

Third, Ferrera alleged that he did not "retain a highway accident construction specialist" because he thought Reiche's case against Maui County and Maui Land and Pineapple Company was not strong.[8] Seitz, the attorney that represented

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[8] In his September 11, 1999 affidavit, Defendant-Appellee/Cross-Appellant Charles J. Ferrera stated, in relevant part, as follows:

> 28. That if the brain injury were exclusively a diffuse injury and therefore caused by the anoxic event at Maui Memorial Hospital, then the automobile accident case would be nothing but a distraction which would involve the danger of the defendant physicians and Maui Memorial Hospital being able to attempt to apportion some of Plaintiff Katja Reiche's damages to the automobile accident case, the latter being a case which could have resulted in a finding of no liability;

(continued...)

Reiche after Ferrera, discovered that Maui County had hired Thomas G. Shultz as an expert on highway design and engineering. Thereafter, Seitz hired Leo B. Casey to investigate the circumstances of the accident, and eventually concluded, as did Ferrera earlier, that hiring an expert witness on highway accidents was not in Reiche's best interests.

Fourth, although several medical professionals reviewed Reiche's case, Ferrera allegedly could not find a physician who would testify in Reiche's favor. Dr. Alan O. Marcus examined Reiche for Seitz, and Dr. Marcus attributed Reiche's injuries to her automobile accident.

Fifth, Reiche argued that Ferrera's negligence on these issues caused her severe physical and emotional distress and forced her to settle her claims for an inadequate amount. Reiche relied on the Declaration of Arthur E. Ross attached to Reiche's November 2, 1999 memorandum in opposition to Ferrera's First Motion, and argued that Ross' expert opinion created a genuine issue of material fact and was evidence of Ferrera's negligence.

Ferrera's allegation that the issues left alive after the January 12, 2000 Order were failures of subsequent counsel, Seitz, and argument that he (Ferrera) should not have been held to have been possibly liable for the actions or omissions of

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[8](...continued)

> 29. That he thoroughly investigated the injury aspects and the findings were that Plaintiff Katja Reiche suffered absolutely no brain injury whatsoever from either incident occurring on June 8, 1987[.]

Seitz because he (Ferrera) was not the counsel of record at the time the critical events occurred does not support his argument that the court should have awarded him complete summary judgment in the January 12, 2000 Order.

V. CONCLUSION

Accordingly, we affirm the July 3, 2001 Judgment in favor of Defendant-Appellee/Cross-Appellant Charles J. Ferrera and against Plaintiff-Appellant/Cross-Appellee Katja Reiche, and the May 3, 2001 Order Granting Defendant Charles J. Ferrera's Motion for Attorneys' Fees and Costs Filed April 3, 2001.

DATED: Honolulu, Hawai‘i, January 16, 2003.

On the briefs:

A. Peter Howell
for Plaintiff-Appellant/
Cross-Appellee.

Chief Judge

John S. Nishimoto and
Steven L. Goto
(Ayabe, Chong, Nishimoto,
Sia & Nakamura)
for Defendant-Appellee/
Cross-Appellant.

Associate Judge

Associate Judge