

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26704

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

FIRST HAWAIIAN BANK, Plaintiff-Appellee, v. MABEL LAU, also known as MABEL M. Y. LAU, Defendant-Appellant, and JOHN DOE 1 as Trustee, Personal Representative or Administrator of the Trust or Estate of Wai Man Fung; JOHN DOES 2-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 03-1-0101)

K. HAMAKADO
CLERK, AFFILIATE COURTS
STATE OF HAWAII

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MEMORANDUM OPINION

(By: Recktenwald, C.J., Foley and Fujise, JJ.)

Defendant-Appellant Mabel Lau (Lau) appeals from the June 25, 2004 Judgment entered by the Circuit Court of the First Circuit (circuit court)¹ in favor of Plaintiff-Appellee First Hawaiian Bank (FHB). This appeal stems from an action filed by FHB to recover funds withdrawn by Lau's mother and deposited in an account jointly held by Lau and her mother.

I.

FHB seeks to recover funds withdrawn from Account No. 65-915146 (Maximizer Account) in the name of "Wai Man Fung." In a letter to FHB dated April 21, 2000, Lau's elderly mother, Wai Man Fung (Fung) requested that the entire amount of funds in the Maximizer Account be transferred to Account No. 01-158107 (Joint Account), a joint account held by Fung and Lau² with FHB. Upon

¹ The Honorable Eden Elizabeth Hifo presided.

² Defendant-Appellant Mabel Lau (Lau) explained, in an affidavit, that she took her mother, Wai Man Fung (Fung) to Plaintiff-Appellee First Hawaiian Bank's (FHB) Chinatown branch in April 2000 so that Fung could withdraw money from Account Number 65-915146 (Maximizer Account). When Fung submitted the withdrawal slip to the bank teller, the teller refused the slip and informed Fung and Lau that FHB required a notarized statement to withdraw the entire balance from the account. Lau testified at her deposition that she did not

(continued...)

receiving the letter, FHB duly transferred \$22,454.78 from the Maximizer Account into the Joint Account. Lau subsequently withdrew, by bank check, \$20,000 and \$3,500 from the Joint Account on April 26, 2000 and May 8, 2000, respectively.

Fung died on February 8, 2001. In December 2001,³ FHB received "an inquiry requesting information as to why the \$22,454.78 was withdrawn from" the Maximizer Account. Following an investigation by FHB, FHB "determined" that the funds withdrawn from the Maximizer Account did not belong to Lau's mother Wai Man Fung, but to another unrelated FHB customer with the same name. On January 29, 2002, FHB demanded that Lau return the funds, "which [were] incorrectly withdrawn from" the Maximizer Account. FHB reimbursed \$22,454.78 plus accrued interest to, in its view, the proper owner of the Maximizer Account on February 8, 2002. FHB alleged that despite demands, Lau refused to return the funds to FHB.

On January 14, 2003, FHB filed the instant complaint against Lau and numerous other unidentified defendants, alleging that Lau fraudulently transferred and withdrew funds from the Maximizer Account (Count I) and was indebted to FHB for the wrongfully retained the funds (Count II).⁴ The complaint sought

²(...continued)

know who helped Fung subsequently prepare the April 21, 2000 letter and first saw the letter when she took Fung to have the letter notarized by Maybelle Pang on April 25, 2000. The April 21, 2000 letter from Fung to FHB read, "Please help me to transfer the entire amount of fund [sic] from my account MMA # 65-915146 to Another accounts [sic] SAVJ # 01-158-107, which I own with my daughter Mrs. Mabel Lau."

³ The facts leading up to the filing of this lawsuit are taken from the affidavit of FHB Assistant Vice President Carlton Chung (Chung), an authorized representative of FHB and who averred that he had "personal knowledge of such business records relating to the subject transactions described" in FHB's motion for summary judgment. However, Chung's statement that FHB received the inquiry regarding the Maximizer Account in December of 2002, rather than December 2001 is erroneous.

⁴ FHB's complaint filed in the Circuit Court of the First Circuit (circuit court) on January 14, 2003 alleged the following:

1. FIRST HAWAIIAN BANK is a Hawaii corporation doing business in the City and County of Honolulu, State of Hawaii.

(continued...)

⁴(...continued)

2. Defendant MABEL LAU, also known as MABEL M.Y. LAU (hereinafter Defendant "LAU") is and at all times relevant herein a resident of and/or did business in the City and County of Honolulu, State of Hawaii.

3. Defendant JOHN DOE 1 is the Trustee, Personal Representative or Administrator of the Trust or Estate of Wai Man Fung and at all times material herein is or was a resident of or did business in the City and County of Honolulu, State of Hawaii.

4. Defendants JOHN DOES 2-50, JANE DOES 1-50, DOE PARTNERSHIPS 1-50, DOE CORPORATIONS 1-50, and DOE GOVERNMENTAL UNITS 1-50 are persons who, in some manner presently unknown to Plaintiff FIRST HAWAIIAN BANK, participated with Defendant LAU in actions to convert funds belonging to Plaintiff FIRST HAWAIIAN BANK or others and/or to improperly request and obtain possession and control of such funds in a scheme or artifice to convert or defraud Plaintiff FIRST HAWAIIAN BANK or such funds and/or to improperly receive and use such funds, and whose true names, identities and capacities are presently unknown to FIRST HAWAIIAN BANK.

COUNT I

5. At the times material hereto, Defendant LAU maintained a joint savings account ("Joint Account") at First Hawaiian Bank with her mother, Wai Man Fung, now deceased.

6. On or about April 21, 2000, Defendant LAU . . . together with or on behalf of her mother, Wai Man Fung, caused a letter to be sent to Plaintiff FIRST HAWAIIAN BANK requesting that all funds in another First Hawaiian Bank account ("Other Account") in the name of Wai Man Fung be transferred to said Joint Account.

7. Said letter was false, misleading and inaccurate in that Defendant LAU's mother was not the proper owner or holder of said Other Account.

8. Said letter was sent to Plaintiff FIRST HAWAIIAN BANK by Defendant LAU . . . who either knew that the letter was false, misleading and inaccurate or were without knowledge whether the statements contained in said letter were true or false, in contemplation that Plaintiff FIRST HAWAIIAN BANK would rely upon such statements.

9. Plaintiff FIRST HAWAIIAN BANK received said letter and in reliance upon the statement in said letter transferred the sum of Twenty-Two Thousand Four Hundred Fifty-Four and 78/100 Dollars (\$22,454.78) from the Other Account into the Joint Account.

10. Defendant LAU promptly withdrew Twenty-Three Thousand Five Hundred Dollars (\$23,500.00) from the Joint Account by means of two bank checks made payable to Defendant LAU.

(continued...)

to recover the principal amount of \$22,454.78, plus interest and attorney's fees and costs. In her Answer, Lau argued that the complaint "did not state a claim upon which relief can be granted," and denied all material allegations against her in the complaint. Lau did not assert any affirmative defenses, nor did she file any counterclaims.

On October 16, 2003, FHB filed a Motion for Summary Judgment (SJ Motion) arguing,

Although Defendant Mabel Lau contends that she did nothing wrong in receiving the \$22,454.78, which was incorrectly withdrawn from the account of Wai Man Fung, she is not entitled to keep those funds. In the Hawaii[']i case, Territory v. Jason Lee, 29 Haw. 30 (1926), a bank overpaid on a check. The Hawaii[']i Supreme Court ruled in that particular instance not only was the recipient of the funds not entitled to keep them but that by keeping them, the

⁴(...continued)

11. Said funds transferred from the Other Account were not funds belonging to Defendant LAU or her mother but were funds held in an account with Plaintiff FIRST HAWAIIAN BANK for a different customer who had the same name as Defendant LAU's mother, Wai Man Fung.

12. Defendant LAU . . . [has] taken and improperly retained the use and benefit of the funds obtained from Plaintiff FIRST HAWAIIAN BANK.

13. Despite demand, Defendant LAU has failed and refused to return the sum of Twenty-Two Thousand Four Hundred Fifty Four and 78/100 Dollars (22,454.78) to Plaintiff FIRST HAWAIIAN BANK.

14. Plaintiff FIRST HAWAIIAN BANK has been damaged by the actions of Defendant LAU . . . in the amount of Twenty-Two Thousand Four Hundred Fifty Four and 78/100 Dollars (22,454.78), or such other sum as shall be proven in this case.

COUNT II

15. Plaintiff realleges and incorporates herein the allegations set forth in paragraphs numbered 1 through 14 above.

16. Defendant MABEL LAU . . . [is] indebted to Plaintiff FIRST HAWAIIAN BANK in the principal amount of Twenty-Two Thousand Four Hundred Fifty Four and 78/100 Dollars (\$22,454.78), plus interest thereon.

17. Despite demand, Defendant LAU has failed and refused to pay Plaintiff FIRST HAWAIIAN BANK the amount owed.

recipient of the funds was guilty of larceny. In another Hawaii case, Tillman v. Spencer, 2 Haw. 178 (1859), the Hawaii Supreme Court wrote:

In such action founded upon the tortious conversion of the property, it is not necessary for the plaintiff to show privity between himself and the defendant, as in cases purely *ex contractu*. If the money of the plaintiff has come to the hands of the defendant wrongfully, under such circumstances that in equity and good conscience he ought not to retain it, the law, upon principles of natural justice, raises an implied obligation upon his part to refund it. (citations omitted). Tillman, supra at 182.

In this case, Plaintiff FHB transferred funds from an account of a Wai Man Fung into a joint account held by Defendant Mabel Lau and a different Wai Man Fung based upon a letter presented to Plaintiff FHB and ostensibly signed by the Wai Man Fung, Defendant Lau's mother. On the same day, Defendant Mabel Lau withdrew \$20,000.00 from the joint account and purchased a cashier's check payable to herself. Again within days, Defendant Mabel Lau withdrew \$3,500.00 from said joint account and purchased a cashier's check made payable to herself. The Affidavit of Carlton Chung shows that the Bank's investigation has established that the money taken by Defendant Mabel Lau from the joint account is traceable to the funds wrongfully transferred from the first Wai Man Fung account and thus does not belong to the Defendant Mabel Lau and that Defendant and her mother did not make deposits into account 65-915146. The Bank thereafter replaced the funds wrongfully removed from the Wai Man Fung account and thus has standing to bring this case.

Plaintiff FHB made demand upon Defendant Mabel Lau to return the said funds but to date, Defendant Mabel Lau has refused, despite the fact that the Bank has made available its records and files to Defendant Mabel Lau's attorney to establish that the funds withdrawn by Defendant Mabel Lau did not belong to either her or her mother.

At the hearing on the motion, the circuit court asked whether FHB's claim was based on "legal remedies or is that the law based on equity?" To this, counsel for FHB replied:

Well, the early cases that we did cite equitable principle but, you know, they're really old cases. One case, there was a case where a person cashed a check and was overpaid by the bank. But in that case I think there was enough evidence to show that that particular defendant should have known they were paid more than what the bank -- what the check showed.

We're saying that in some of the other cases when you receive money that isn't yours, I don't think it matters whether or not you know it isn't yours. At some point you find out it isn't yours and that's why the case cited by the defendant says the demand has to be made. In other words, some demand has to be made on you before the liability attaches, if the initial taking was not wrongful.

And for purposes of this motion, and we'll concede that, you know, we have to look at it in the light most favorable to them. So she says she didn't know, that's fine. We're saying that at some point she finds out it isn't her mother's money and at that point we're saying that she has an obligation to return it.

Lau opposed the SJ Motion and argued (1) FHB was not a proper party to sue in an action for trover and conversion as it did not own the money at the time of the alleged trover and conversion, rather, it belonged to the "other" Wai Man Fun; (2) Lau did nothing "wrongful" as there was no "suggestion" that either Fung or Lau knew the money in the Maximizer Account did not belong to Fung; (3) Lau acted in good faith and had no wrongful intent when she withdrew the money from the Joint Account; and (4) FHB's demand for the money was untimely as it came more than two years after the withdrawal, almost a year after Fung had died, and long after Lau had spent the money in fulfilling Fung's wishes, based on laches⁵ and/or Hawaii Revised Statutes (HRS) § 657-7 (1993)⁶ (statute of limitations). Lau also attached FHB's "Consolidated Statement of Interest Income" statements, addressed to Fung at Lau's business address for the years 1997 and 1998, showing Fung to be the account holder for

⁵ In her affidavit in opposition to the motion for summary judgment, Lau asserted that in April 2000, Fung summoned Lau, Lau's husband and son to her bedside and instructed them to use money Fung had in the bank for Fung's land burial, and to bring back Fung's deceased husband's remains from Hong Kong to be buried with Fung. Shortly after receiving Fung's instructions, Lau took Fung to the Chinatown branch of First Hawaiian Bank where, after preparing the notarized April 21, 2000 letter, Fung withdrew the funds at issue and deposited it into the Joint Account. Lau withdrew \$23,500.00 from the Joint Account and following Fung's death on February 8, 2001, used the money to pay for funeral expenses and to retrieve the remains of her father from Hong Kong. Lau stated that she had no money left belonging to Fung when FHB made a demand for the funds on January 29, 2002.

⁶ Hawaii Revised Statutes (HRS) § 657-7 (1993) reads:

Damage to persons or property. Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13.

both the Maximizer Account and Joint Account.⁷ At the hearing on the SJ Motion held on November 5, 2003, the circuit court orally denied the motion⁸ and on November 20, 2003, entered an order denying FHB's SJ Motion.

Following Lau's deposition on January 30, 2004,⁹ FHB filed "Plaintiff's Motion for Partial Summary Judgment" (PSJ Motion) on February 26, 2004. In their PSJ Motion, FHB requested that the circuit court find that (1) the funds removed from the Maximizer Account did not belong to Lau or her mother, (2) FHB reimbursed the true owner of the Maximizer Account, and (3) FHB had standing to bring this legal action against Lau.¹⁰ FHB argued that Lau never made any deposits to the Maximizer Account, nor did she know if Fung made any deposits to the Maximizer Account and Lau's only basis for believing that the Maximizer

⁷ These statements also contained Fung's social security number and the amount of interest accrued in both the Maximizer Account and the Joint Account for the years 1997 and 1998. Lau also submitted a copy of Fung's Certificate of Death, which bears the same social security number appearing on these statements.

⁸ At the hearing on FHB's Motion for Summary Judgment (SJ Motion), the circuit court ruled:

So I think if we're talking equity, some part of the bank's error in -- it's an understandable error if there really are two different people and they would have the same name. I don't know how the bank deals with that in other cases. But in this case according to your affidavit, which isn't directly contradicted, but the reasonable inference from the defendant's side is that they were actually hers because they knew she had money. I'm not going to get into that.

The bottom line is if it's equity, then I would think that the bank would have to take some responsibility for sending out these things for the person. How old was she when she passed away? Certificate of death, she was born in 1916, she died in '01, so I think in her 80's.

I mean, that's all I'm saying. I'm going to deny this motion.

⁹ A complete transcript of Lau's deposition taken on January 30, 2004 is not a part of the record on appeal.

¹⁰ In its Motion for Partial Summary Judgment (PSJ Motion) filed on February 26, 2004, FHB contends only that "[b]ased upon the cases cited in [FHB]'s first motion for summary judgment, [FHB] contends that this is a case of assumpsit and [it is] entitled to bring this action."

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Account belonged to Fung were the IRS Interest Income Statements which FHB now conceded were generated in error.¹¹

Lau opposed the PSJ Motion, and argued (1) there was no fraud by Lau because she made no representations to FHB and therefore FHB could not have detrimentally relied on representations made by Lau; (2) contract concepts did not apply in this case as there was no contract, express, implied or "quasi" and that FHB's claim is against Fung, not Lau, as Lau was not enriched by the transfer of the disputed funds; (3) FHB's claims are barred by (a) the statute of limitations, HRS § 560:3-803 (2006) or (b) laches; (4) FHB lacks standing to sue because it has no claim against Lau for the acts of Fung; and (5) FHB provided no legal basis for the granting of its motion.¹²

In their reply memorandum, FHB asserted, for the first time, that FHB had standing to bring this claim against Lau under HRS § 490:4-407 (1993)¹³ and that its claims were supported by

¹¹ FHB's PSJ motion did not contain any additional proof or evidence not presented in its earlier SJ motion. Aside from Chung's affidavit stating that the Interest Income statements were generated by FHB in error, and Lau's deposition testimony stating that she did not make any deposits to the Maximizer Account and that her belief that the Maximizer Account belonged to her mother stemmed from the Interest Income statements, FHB provided no additional evidence to prove that the Maximizer Account did not belong to Lau's mother Wai Man Fung.

¹² Lau attached to her opposition to the PSJ Motion, a January 10, 2001 letter from FHB which listed her mother's name and address as the owner of the Maximizer Account opened on July 5, 1981. Lau also attached Interest Income statements (IRS Form 1099-INT) from the years 1997-2000 listing Fung's name, address and social security number as the owner of the Maximizer Account. Lau also points out a discrepancy in FHB's records on the Maximizer Account in that the signature card produced by FHB states that the account was opened on November 4, 1983, and not on July 5, 1981 as stated in the bank's letter.

¹³ HRS § 490:4-407 (1993) reads:

Payor bank's right to subrogation on improper payment.

If a payor bank has paid an item over the order of the drawer or maker to stop payment, or after an account has been closed, or otherwise under circumstances giving a basis for objection by the drawer or maker, to prevent unjust enrichment and only to the extent necessary to prevent loss to the bank by reason of its payment of the item, the payor bank is subrogated to the rights:

- (1) Of any holder in due course on the item against the drawer or maker;

(continued...)

HRS § 490:3-418 (1993).¹⁴ FHB also clarified,

Since [FHB] is claiming that the payment made to [Lau] was paid by mistake that under [HRS § 490:3-418] subsection (b) the bank has standing to recover the payment from [Lau].

[FHB] notes that it is not asking for full summary judgment against [Lau] only that the Court find that it has legal standing to bring this claim against [Lau]. H.R.S. Section 490:4-407 together with Section 490:3-418, when read together grants [FHB] that standing.

The circuit court orally granted the motion on March 31, 2004, and on April 16, 2004, entered "Findings of Fact,

¹³(...continued)

(2) Of the payee or any other holder of the item against the drawer or maker either on the item or under the transaction out of which the item arose; and

(3) Of the drawer or maker against the payee or any other holder of the item with respect to the transaction out of which the item arose.

¹⁴ HRS § 490:3-418 (1993) reads:

Payment or acceptance by mistake. (a) Except as provided in subsection (c), if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that (i) payment of the draft had not been stopped pursuant to section 490:4-403 or (ii) the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. Rights of the drawee under this subsection are not affected by failure of the drawee to exercise ordinary care in paying or accepting the draft.

(b) Except as provided in subsection (c), if an instrument has been paid or accepted by mistake and the case is not covered by subsection (a), the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, (i) recover the payment from the person to whom or for whose benefit payment was made or (ii) in the case of acceptance, may revoke the acceptance.

(c) The remedies provided by subsection (a) or (b) may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This subsection does not limit remedies provided by section 490:3-417 or 490:4-407.

(d) Notwithstanding section 490:4-215, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under subsection (a) or (b), the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

Conclusions of Law and Order Granting Plaintiff's Motion for Partial Summary Judgment" finding:

(1) That the money removed from the First Hawaiian Bank Account No. 65-915146 by either Defendant Mabel Lau and her mother did not belong to either Mabel Lau or her mother.

(2) That First Hawaiian Bank reimbursed the Wai Man Fung who was the true owner of Account No. 65-915146.

CONCLUSIONS OF LAW

Under HRS § 490:3-418, Plaintiff FIRST HAWAIIAN BANK has standing to bring this claim.

Meanwhile, on April 6, 2004, FHB filed a motion in limine which sought (1) an order invoking the witness exclusionary rule, (2) to make all offers of proof at the bench, and (3) to exclude as inadmissible (a) hearsay statements made by Fung regarding money she had in the bank and her wishes for funeral and burial arrangements,¹⁵ and (b) any testimony regarding Lau's character or conduct regarding her reputation in the community. Lau did not file an opposition to the motion in limine.

At the hearing held on April 14, 2004, the circuit court granted FHB's motion in limine except as to Fung's hearsay statements. Lau argued that Fung's statements to Lau should not be excluded as hearsay because the statements would be offered not to prove the truth of the matter asserted, but for state of mind to support her defenses of undue delay and change of position. The circuit court denied without prejudice the motion

¹⁵ FHB's Motion in Limine sought to exclude:

[A]ny out of Court statements made by Wai Man Fung (mother of Mabel Lau), asserting that Wai Man Fung had money in First Hawaiian Bank; requested a "land burial"; requested that Mabel Lau or any other family members bring back the remains of Mabel Lau's deceased father from Hong Kong and to place said remains in a casket; instructed Mabel Lau or any other family members to purchase burial plots; or any other out of Court verbal instructions of Wai Man Fung concerning her funeral, in as much as such statements constitute hearsay, under H.R.E. 801, not falling within any of the recognized exemption [sic] to the hearsay rule.

in limine as to this evidence and instructed each party to file a trial memorandum on the issue.¹⁶

Both parties filed trial memoranda on April 16, 2004. In her trial memorandum, Lau noted that FHB had "informally" advised Lau of "its intention to abandon the cause of action for fraud." Lau argued that under the law governing mistake and restitution, FHB's mistake is a factor to consider in equity and Lau should not be required to make restitution based on the defenses of change of position and undue delay. In addition, on April 19, 2004, Lau filed a "Notice of Intent to Rely Upon Statements of Wai Man Fung in Defense of the Claim of Mistake and Restitution." Lau again contended that Fung's statements were not hearsay under Hawaii Rules of Evidence (HRE) Rule 801(1) and (3), because the statements were not being used to prove the truth of the matters asserted, but merely that the statements were made. According to Lau, the statements affected Lau's legal rights to justify her conduct and her good faith change of position to withdraw Fung's money from the bank, and to spend the funds on funeral arrangements consistent with Fung's wishes.

Meanwhile, FHB's April 16, 2004 trial memorandum characterized this case as "an action for restitution of moneys paid by mistake, by [FHB] to [Lau] and her mother [Fung,]" and asserted that the complaint "clearly alleges that [FHB] made a

¹⁶ At the hearing on FHB's motion in limine on April 14, 2004, the circuit court stated:

Okay. So, as to [the hearsay issue] the court denies without prejudice and again says that you must approach the bench before eliciting any such hearsay or claimed non-hearsay

. . . .

And, that is absolutely essential so we get a clear ruling after I get the trial memos. Okay.

And, so that will be the rule throughout the trial that you've got to approach the bench to do that. And, we'll have those arguments outside the hearing of the jury and if we can get a clear trial memo and some opposition from [FHB], we can have a clear ruling. I'll try to be as comprehensive as possible.

mistake as to the payee." FHB argued that Lau waived the affirmative defenses of change of position or undue delay by failing to plead them in her Answer, and therefore, any statements by Fung could not be offered under the state of mind exception to support said defenses.

Just prior to the scheduled trial on April 19, 2004, over Lau's objection that the cause of action pleaded in the complaint was not clear, the circuit court granted FHB's motion in limine to exclude Fung's statements on the grounds that Lau failed to plead her affirmative defenses.¹⁷ The circuit court

¹⁷ At the April 19, 2004 proceedings, the circuit court stated, in relevant part:

Good morning to all of you. When last we were in session, there was a motion in limine to exclude testimony attributing certain statements to the decedent, that's the Defendant Mabel Lau's mom. And the Court called for trial briefs, which I received and read, and -- and here's the thing:

Normally, a motion in limine cannot constitute a motion for summary judgment, that's the law set forth in Kuroda versus Kuroda at 87 Hawai[']i 419, the 1998 decision, which held that the motion in limine was an improper vehicle to determine the divorce agreement validity, that is to say whether it was valid or not, but this is not such a motion, this is a motion in limine to keep out statements on the grounds, A, that they're hearsay, inadmissible hearsay.

And [Lau] says they're not offered for the truth, but to give evidence regarding good faith and change in position . . . and that raises the whole point that [FHB] has briefed, which is the good faith and change in position alleged defenses are affirmative defenses as set forth in Touche Ross Limited, the ICA decision of 1989, and Hawai[']i Rules of Civil Procedure 8(c). So I have to rule on it because it's an evidentiary issue, and the motion is granted because they can't come in because, indeed, it is an affirmative defense which was not pleaded, and if I let it in, then the ability to object to the affirmative defense is -- is gone, and it's a perfectly good objection to make.

So I have to decide this in the context of the evidence, and once it's granted, frankly there's nothing left to try. So the Court finds that that which was called a Motion for Partial Summary Judgment last time, either under the theory of quasi-contract, which is restitution which is normally equity anyway to the Court, or under 490:3-418 of the Hawaii Revised Statutes, leaves nothing for the jury to contemplate.

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summarized its ruling: "I'm gonna excuse the jury and . . . technically, the motion for partial summary judgment is now going to be granted as summary judgment, because the motion in limine is granted, because the affirmative defenses were not pleaded. If I am wrong, we'll learn that on appeal."

The circuit court entered its order granting FHB's motion in limine on May 4, 2004,¹⁸ and an Order Sua Sponte

¹⁷(...continued)

[E]ven if you assume [FHB] can't proceed on negotiable instruments, it is all to the same effect, because they did plead assumpsit, which is the restitution claim, which isn't, I think, a jury claim. But I don't need to decide that now, I think that's equity. But -- but, again, the defense has always -- after the defense was to the first motion for summary judgment, hey, in those papers they didn't prove where that money came from, and so I ruled in your favor. And they brought one for partial summary judgment, and they did prove that, at least I believe there's no issue of -- no genuine issue of material fact. And they had crossed the T's and dotted the I's, which doesn't leave us anything left, so as far as I can tell -- and -- and that's consistent with the opening statement that I was, by agreement, to give to the jury. It doesn't give them a clue as to what the case is about, it only reads them the admissions, which constitutes sufficient basis for a verdict in favor of the bank. There's nothing that was there as to what they would have to decide.

And to the extent that we're talking about deciding whether there was promissory estoppel, detrimental reliance, change of position, and -- and good faith or a foreknowledge, you know, all of that has to have been made clear in a defense either to assumpsit when it's understood to be restitution, or -- or whatever else they're pleading.

¹⁸ The circuit court's "Order Granting Plaintiff's Motion in Limine" entered on May 4, 2004 reads, in relevant part:

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that PLAINTIFF FIRST HAWAIIAN BANK's request to bar Defendant MABEL LAU or her witnesses from testifying as to statements made to them by Defendant MABEL LAU's mother, Wai Man Fung, concerning her burial or funeral arrangements, is granted for the following reasons:

a) [FHB]'s motion in limine, filed April 6, 2004, objected to such out of court statements of Wai Man Fung, on the grounds that they constituted hearsay under H.R.E. 801, not falling within any of the recognized exceptions to the hearsay rule;

b) A hearing on [FHB]'s motion in limine was held on April 14, 2004. Counsel for [Lau] had not filed any memorandum in opposition, but orally argued that the out of

(continued...)

Directing that Judgment Be Awarded in Favor of FHB (*sua sponte* order) on June 15, 2004.¹⁹ The circuit court entered Judgment on

¹⁸(...continued)

court statements in question were not being offered for the truth, but to give evidence regarding good faith and change of position of his client;

c) The Court continued the hearing on the issue of Wai Man Fung's out of court statements until April 19, 2004 and asked for written trial memorandum [sic] to be submitted by the parties;

d) In its trial memorandum, [FHB] objected to the introduction of evidence or arguments by [Lau] relating to change of position, undue delay or any affirmative defenses because she failed to plead them in her answer to the complaint;

e) The issue of whether or not the out of court statements made by [Lau]'s mother is admissible evidence is an evidentiary issue, and as such has been properly raised in [FHB]'s motion in limine;

f) The Court finds that [Lau]'s defenses of good faith and change in position defenses are affirmative defenses, and were therefore required to be affirmatively pled in [Lau]'s Answer to complaint, filed February 11, 2003. Touche Ross, Ltd. v. Filipek, 7 Haw. App. 473, 778 P.2d 721 (1989) and Hawai[']i Rules of Civil Procedure, Rule 8(c);

g) [Lau] failed to plead change of position, good faith or any other affirmative defenses in her Answer;

h) Since [Lau] failed to plead the affirmative defenses of good faith and change of position, said defenses have been waived and cannot be asserted at trial.

Accordingly, [FHB]'s request to bar [Lau] or her witnesses from testifying as to the out of court statements made by [Lau]'s mother, Wai Man Fung, is granted.

¹⁹ The circuit court's June 15, 2004 "Order Sua Sponte Directing That Judgment Be Awarded in Favor of Plaintiff and Against Defendant Mabel Lau" reads:

Having granted [FHB]'s Motion in Limine in its Entirety, and having determined that [Lau], by failing to properly plead good faith, change of position or undue delay, has waived said affirmative defenses, the court *sua sponte* finds that there are no remaining issues for determination by a jury. The Court is cognizant of Kuroda v. Kuroda, 87 Hawai[']i 419, 427-28 (App. 1998), but finds the circumstances herein warranted the limine motion and judgment.

(continued...)

June 25, 2004.²⁰ Lau filed her Notice of Appeal on July 21, 2004.

¹⁹(...continued)

As shown by the record herein, [Lau] has admitted that:

1) On or about April 26, 2000, [FHB] received a letter from a Wai Man Fung requesting that funds be transferred from Account 65-915146 to Account 01[-]158107;

2) [FHB] transferred \$22,454.78 from Account 65-915146 to Account 01-158107;

3) On April 26, 2000, [Lau] withdrew \$20,000.00 from Account 01-158107 and purchased a cashier's check made payable to Mabel Lau; and

4) On May 8, 2000, [Lau] withdrew \$3,500.00 from Account 01-158107 and purchased a cashier's check made payable to Mabel Lau.

The Court had originally denied [FHB]'s summary judgment motion and later granted [FHB]'s later filed motion for partial summary judgment in favor of [FHB] and had found:

1. That the money removed from the First Hawaiian Bank Account No. 65-915146 by [Lau] and her mother did not belong to either [Lau] or her mother; and

2. That [FHB] reimbursed the Wai Man Fung who was the true owner of Account No. 65-915146.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment shall be entered in favor of [FHB] and against [Lau] pursuant to Rule 54(b), H.R.C.P., as to [FHB]'s claim for restitution in the principal amount of \$22,454.78, together with interest thereon at the rate of 10% per annum, from and after January 29, 2002 until May 19, 2004 (\$5,173.56), plus attorney's fees and costs of \$7,497.08 for a total Judgment in the sum of \$35,125.42 plus statutory interest of 10% annum on the principal amount of \$22,454.78 from May 20, 2004 until paid. [FHB]'s fraud claim against [Lau] and all other remaining claims and parties are dismissed.

²⁰ The circuit court's Judgment entered on June 25, 2004 reads:

In accordance with Rule 58 of the Hawai['i] Rules of Civil Procedure, and pursuant to the Order Sua Sponte Directing that Judgment be Awarded in Favor of [FHB] and against [Lau], Judgment is hereby entered upon Counts I and II of the Complaint in favor of [FHB] and against [Lau] in the principal amount of the principal amount of \$22,454.78, together with interest thereon at the rate of 10% per annum, from and after January 29, 2002 until May 19, 2004 (\$5,173.56), plus attorney's fees and costs of \$7,497.08 for a total Judgment in the sum of \$35,125.42 plus statutory

(continued...)

II.

On appeal, Lau argues that the circuit court erred by (1) granting FHB's Motion in Limine on May 4, 2004, (2) ordering, *sua sponte*, the entry of judgment in favor of FHB on June 15, 2004 without a trial by jury, and (3) entering Judgment in favor of FHB on June 25, 2004 on Counts I and II of the complaint despite the lack of evidence of fraud. Lau asserts that FHB's complaint claimed fraud and indebtedness, not mistake, and there were no claims in the complaint which warranted the pleading of affirmative defenses. Moreover, Lau argues that the causes of action in the complaint were not proven, and that the circuit court erred when it ordered, *sua sponte*, to direct summary judgment in FHB's favor without either a pending motion or motion hearing.

III.

Lau appeals from the circuit court's June 25, 2004 Judgment in favor of FHB for the total sum of \$35,125.42 plus statutory interest. The circuit court entered the Judgment pursuant to the *sua sponte* order directing summary judgment in favor of FHB after granting FHB's motion in limine in its entirety and determining that since Lau "failed to plead the affirmative defenses of good faith and change of position, said defenses have been waived and cannot be asserted at trial."

The circuit court's grant or denial of summary judgment is reviewed by the appellate courts de novo. Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (citations omitted). "Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law." Iddings v. Mee-Lee, 82 Hawai'i 1, 5, 919 P.2d 263, 267 (1996); see also

²⁰(...continued)

interest of 10% annum on the principal amount of \$22,454.78 from May 20, 2004 until paid. All other remaining claims, counterclaims and cross-claims are hereby dismissed.

Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c).²¹ Once the moving party satisfies the burden of showing that there is no genuine issue of material fact, the opposing party must provide the court with specific facts showing that there is a genuine issue of material fact for the court to adjudicate or summary judgment will be granted. Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988); see also HRCP Rule 56(e).²²

The issues on appeal turn on whether the allegations in FHB's complaint provided sufficient notice of a cause of action that warranted Lau to plead affirmative defenses.

A. FHB's Complaint Did Not Warrant Affirmative Defenses To Be Pled.

FHB's complaint did not give sufficient notice of its cause of action of mistake and restitution. From the outset, both parties and the circuit court seemed to be confused about the nature of this action.²³ The circuit court's decision to

²¹ Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c) states in relevant part:

The judgment sought shall be rendered forthwith 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.

²² HRCP Rule 56(e) states in relevant part:

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.

²³ Lau, in her opposition to FHB's SJ Motion, objected that the motion sounded in a "tort case of action, in trover and conversion, where the complaint alleged only fraud and indebtedness." In its reply memorandum, FHB stated that "this case is treated as one of assumpsit." At the November 5, 2003 hearing on the SJ Motion, the circuit court asked FHB, "Well, what's the law? I mean, . . . I know you cited in the nature of assumpsit for the proposition that you might get attorney's fees, but is this conversion trover? What is the complaint?" FHB's counsel responded that "[i]t's conversion and
(continued...)

grant FHB summary judgment because Lau did not plead the affirmative defenses of good faith and change of position in her Answer cannot be upheld if FHB's complaint did not warrant the pleading of these affirmative defenses.

Under Hawai'i's "notice pleading" approach, it is "no longer necessary to plead legal theories with . . . precision." Leslie v. Estate of Tavares, 93 Hawai'i 1, 4, 994 P.2d 1047, 1050 (2000). "Hawaii's rules of notice pleading require that a complaint set forth a short and plain statement of the claim that provides defendant with fair notice of what the plaintiff's claim is and the grounds upon which the claim rests. Pleadings must be construed liberally." In re Genesys Data Technologies, Inc., 95 Hawai'i 33, 41, 18 P.3d 895, 903 (2001) (internal citations omitted); see also Hall v. Kim, 53 Haw. 215, 221, 491 P.2d 541, 545 (1971) ("[i]t is not necessary to plead under what particular law the recovery is sought").

Even given the liberal construction of the complaint under "notice pleading," FHB's complaint did not state a sufficient cause of action to warrant Lau to plead the affirmative defenses that are at issue here. Count I of the complaint alleges that Lau fraudulently caused a "false, misleading and inaccurate" letter to be sent to FHB in contemplation that FHB would rely upon the statement, then withdrew and "improperly retained the use and benefit of the funds," and refused demands to return the funds she improperly

²³(...continued)

trover at the point when defendant understands that it's not her money or her mother's money and she does not return it."

FHB asserted in their PSJ Motion, "that this is a case of assumpsit." In response to Lau's contention that FHB has failed to establish a cause for relief, FHB stated that their claim was further supported by HRS § 490:3-418 and stated that FHB "is claiming that the payment made to Mabel Lau was paid by mistake." FHB asserted in their motion in limine that "[i]n its claims for restitution, Plaintiff is relying upon [HRS § 490:3-418] entitled, "Payment or Acceptance by Mistake[.]" In the April 16, 2004 trial memorandum, FHB asserted that "[t]his is an action for restitution of moneys paid by mistake." Finally, at the April 19, 2004 hearing, the circuit court stated, "[i]t's assumpsit" to Lau's query as to "where in the complaint . . . is restitution pled? . . . it's assumpsit."

took from FHB. Count II realleged and incorporated the allegations in Count I, and stated that Lau was "indebted" to FHB and despite demand, refused to pay FHB the amounts owed. The complaint however, does not "clearly allege that [FHB] made a mistake as to the payee" as FHB boldly asserted in its Trial Memorandum to the circuit court. Instead, the complaint seems to allege claims of fraud (Count I) and "indebtedness" stemming from Lau's fraudulent actions (Count II).

According to the facts alleged in the complaint, Lau was indebted to FHB due to her misrepresentations which led to the confusion regarding the owner of the Maximizer Account. By the time the parties filed their trial memoranda on April 16, 2004, however, FHB was proceeding under the theory of mistake and restitution, i.e., that FHB made a mistake regarding Fung as the owner of the Maximizer Account. Under HRCF Rule 8(c),²⁴ affirmative defenses must be pleaded properly or they are deemed waived. Touche Ross Ltd. v. Filipek, 7 Haw. App. 473, 487, 778 P.2d 721, 730 (1989) (the defense of lack of good faith and fair dealing could not be asserted in opposition to a motion to summary judgment because appellants did not properly plead the defense in their answer to the complaint and the defense was waived). A claim for fraud however, would not warrant the pleading of the affirmative defenses of change of position and undue delay.

Moreover, under HRCF Rule 8(f), "[a]ll pleadings shall be so construed as to do substantial justice," and the Hawai'i

²⁴ HRCF Rule 8(c) reads:

(c) Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

Supreme Court has rejected "'the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome' and in turn accepted 'the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" Hall v. Kim, 53 Haw. at 221, 491 P.2d at 545 (citations omitted). The allegations of fraud in the complaint probably caused Lau's counsel to assert only general denials in Lau's Answer to FHB's complaint. Lau denied that she caused a misleading, false and inaccurate letter to defraud FHB into transferring \$22,454.78 into the Joint Account she held with Fung. FHB maintained account records and issued the interest income statements giving rise to the impression, if not the fact, of Fung's ownership of the Maximizer Account. Had FHB's complaint hinted as to its own responsibility in the confusion which led to Fung and Lau withdrawing money from the Maximizer Account, as it did on the eve of trial, the complaint would have given Lau notice as to the need to plead affirmative defenses.

Additionally, FHB did not argue its claims under the Uniform Commercial Code as codified under HRS Chapter 490 until March 25, 2004 when it filed a reply brief in support of its motion for partial summary judgment. Under HRS § 490:3-418, "if an instrument has been paid or accepted by mistake . . . the person paying or accepting may, to the extent permitted by the law governing mistake and restitution, . . . recover the payment from the person to whom or for whose benefit payment was made[.]" HRS § 490:3-418(b). This remedy however, "may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance." HRS § 490:3-418(c). Therefore, if FHB clearly asserted their claim for mistake and restitution under HRS § 490:3-418 in their complaint, Lau would have been on notice of the need to plead her defenses. Moreover, summary judgment should have been denied since Lau presented evidence establishing that she withdrew the money in good faith, with no knowledge as to the bank's mistake, and had changed position in reliance on

the payment by spending the money on Fung's funeral and burial arrangements as per Fung's wishes.

Despite FHB's assertions that FHB "had no knowledge" of Lau's defenses until the hearing on the motion in limine on April 14, 2004, Lau asserted her defenses of good faith, change of position, and untimeliness in her October 27, 2003 opposition to FHB's SJ Motion. "The primary purpose of requiring affirmative defenses to be pleaded is to give notice to the parties of such defenses." Hawaii Broadcasting Co. v. Hawaii Radio, Inc., 82 Hawai'i 106, 112, 919 P.2d 1018, 1024 (App. 1996) (citing 6A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1492, at 12 (1990)). The "failure to plead an affirmative defense is immaterial if evidence of the defense is introduced and not objected to for failure to plead it, and no surprise is claimed." Id. (citations omitted). FHB did not object to Lau's affirmative defenses for failure to plead until the trial memorandum filed on April 16, 2004. Therefore, FHB's waived objection to Lau's failure to plead the affirmative defenses in her Answer, and its claim of surprise is without merit.

The facts alleged in the complaint did not give Lau sufficient notice of the cause of action of mistake and restitution. Although the funds withdrawn from the Maximizer Account were traceable to Lau, "in deciding whether there should be restitution . . . , [the courts] are guided by the underlying conception of restitution, the prevention of injustice." Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 502-503, 100 P.3d 60, 72-73 (2004). Given the allegations of fraud in FHB's complaint, the changing theory of its cause of action, and FHB's failure to object to Lau's affirmative defenses early on in the proceedings, Lau should be able to assert her affirmative defenses. Therefore the June 15, 2004 *sua sponte* order finding that there were no remaining issues for determination by a jury and granting summary judgment in favor of FHB must be vacated and this case should be remanded for trial on the merits.

B. This Is Not A Case of Assumpsit And FHB Is Not Entitled To Attorneys Fees Under HRS § 607-14.

Although the parties and the circuit court refer to this case as one of assumpsit, and FHB was awarded attorneys fees under HRS § 607-14 (Supp. 2006),²⁵ this case is not in the nature of assumpsit. "Assumpsit is a common law form of action which allows for the recovery of damages for non-performance of a contract, either express or implied, written or verbal, as well as quasi contractual obligations." Leslie, 93 Hawai'i at 5, 994 P.2d at 1051 (citations omitted); see also Blair v. Ing, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001) (citations and internal quotations omitted). "The determination of when an action is in the nature of assumpsit should be based on whether the actual factual allegations are such that historically the action would have been brought in assumpsit." Leslie, 93 Hawai'i at 5, 994 P.2d at 1052 (citations omitted) Here, no agreement existed between FHB and Lau to give rise to any obligation on Lau's part.

FHB cites to Osorio v. Henry Waterhouse Trust Co., Ltd., 29 Haw. 376 (1926) to support its assertion that this action is a case of assumpsit. In Osorio, the plaintiff paid defendant trust company \$6,400 to purchase shares of stock on behalf of the plaintiff. Id. at 383-84. Plaintiff then requested defendant to hand over said shares of stock, or to

²⁵ HRS § 607-14 (Supp. 2006) states, in relevant part:

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

return the purchase price, and defendant refused. Id. at 384. Without the knowledge or consent of the plaintiff, defendant had wrongfully and unlawfully converted the stock to its own use to the damage of plaintiff. Id. The Hawai'i Supreme Court stated that, "[w]hen a person receives money of another, which in equity and good conscience he ought to refund, the law implies a promise to account for it to the true owner." Id. at 385 (quoting Tugman v. Nat'l Steamship, Co., 76 N.Y. 207, 210 (1879)). However, "where one wrongfully takes and sells the property of another, the law implies a contract to pay for the same, and the owner may elect to waive the tort and bring an action on the implied contract, for the value of the property so taken and disposed of." Osorio, 29 Haw. at 385 (quoting Smith v. McCarthy, 38 Kan. 308, ___, 18 P. 204, 206 (1888)); see also Leslie, 93 Hawai'i at 6, 994 P.2d at 1052 ("[w]here there is doubt as to whether an action is in assumpsit or in tort, there is a presumption that the suit is in assumpsit").

In determining whether the character of the action is in assumpsit, "the facts and issues raised in the complaint, the nature of the entire grievance, and the relief sought" should be examined. Leslie, 93 Hawai'i at 6, 994 P.2d at 1052. Here, FHB alleges that Lau was unjustly enriched, but unlike Osorio, when Lau withdrew the funds from the Joint Account, FHB had no expectation of repayment when the funds were transferred from the Maximizer Account. Under the laws of restitution, unjust enrichment is an indefinite concept of law which cannot definitively be categorized as contract or tort. Durette, 105 Hawai'i at 503 n.10, 100 P.3d at 73 n.10.²⁶ Therefore, an

²⁶ In Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 503 n. 10, 100 P.3d 60, 73 n.10 (2004) (citations omitted), the Court stated:

Underlying all the law of restitution is the conception that no one should unjustly enrich himself at the expense of his neighbour. This conception is too indefinite to be stated as a principle of law: but it sufficiently indicates a new category. Just as the conception of contract is the enforcement of promises, and the conception of tort is damages for wrongdoing, so the conception of

(continued...)

allegation of unjust enrichment does not necessarily give rise to a contract claim and FHB did not prove that any type of contract or agreement existed between the parties to create an obligation between them. The gravamen of FHB's complaint did not sound in contract and FHB is not entitled to attorneys fees under HRS § 607-14.

V.


Based on the aforementioned analysis, the Circuit Court of the First Circuit's June 25, 2004 Judgment must be vacated. Additionally, the Circuit Court of the First Circuit's May 4, 2004 "Order Granting Plaintiff's Motion in Limine" and the June 15, 2004 "Order Sua Sponte Directing that Judgment be Awarded in Favor of Plaintiff and Against Defendant Mabel Lau" are vacated and this case is remanded for further proceedings on the merits.


DATED: Honolulu, Hawai'i, September 11, 2007.


On the briefs:

Dennis W. Jung,
for Defendant-Appellant.

Ken T. Kuniyuki
(Kuniyuki & Chang),
for Plaintiff-Appellee.


Chief Judge


Associate Judge


Associate Judge

²⁶(...continued)

restitution is the prevention of unjust enrichment. Once this category comes to be accepted into the law, the courts will no longer find themselves forced to fit all remedies into the straitjackets of contract and tort, but will be able to develop a comprehensive category with its own distinct principles.