

*** NOT FOR PUBLICATION ***

NO. 25725

IN THE SUPREME COURT OF THE STATE OF HAWAII

CHARLES M. BLACK, Plaintiff/Counterclaim Defendant-
Appellant and Cross-Appellee,

vs.

CHRISTINA POLLACK, PAMELA LIMA, and STEPHEN P. ANDERSON,
Defendants/Counter-Claimants-Appellees and
Cross-Appellants,

and

JOHN DOES 1-10; JANE DOES 1-10; and DOE
ENTITIES 1-10, Defendants.

NORMA T. YARRA
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STATE OF HAWAII

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APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 01-1-2967)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

The instant appeal and cross-appeal arise out of a partition action involving seven adjoining parcels of real property that were inherited and jointly owned by plaintiff-appellant/cross-appellee Charles M. Black and defendants-appellees/cross-appellants Christina Pollack (Christina), Pamela Lima (Pamela), and Stephen P. Anderson (Stephen) [hereinafter, collectively, the Andersons].¹ The instant action was initiated

¹ On October 7, 2005, counsel for the Andersons filed a Suggestion of Death with this court, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 43(a) (2003) (relating to filing a motion suggesting the death on the record after the filing of the notice of appeal), stating that Stephen had passed away. Counsel for the Andersons state that Stephen's interests are
(continued...)

by Black, who sought to partition one of the seven parcels. The Andersons thereafter requested partition of all seven parcels. Consequently, the Circuit Court of the First Circuit² ordered a public auction to sell the seven parcels. After several attempts were made to auction the parcels, the circuit court ultimately confirmed the sale of all seven parcels to Black.

Black and the Andersons appeal from the circuit court's March 19, 2003 amended judgment entered in favor of the Andersons. On appeal, Black challenges, inter alia, the bidding process, the award of attorneys' fees and costs, and the circuit court's order denying his motion for an award of damages for breach of a settlement agreement. The Andersons cross-appeal, challenging the award of attorneys' fees and costs and the circuit court's order denying their motion to remedy breach of settlement agreement.

For the reasons discussed below, we: (1) vacate the award of attorneys' fees and costs; (2) remand to the circuit court for a redetermination of the proper amount of fees and costs to the respective parties; and (3) affirm the March 19, 2003 amended judgment in all other respects.

¹(...continued)
aligned with the interests of Christina and Pamela, who are Stephen's sisters. Because Stephen was still alive at the time the instant matter was considered by the circuit court, we refer to him in the discussion as a live person.

² The Honorable Sabrina S. McKenna presided over the underlying proceedings unless otherwise indicated.

I. BACKGROUND

A. Factual Background

The seven adjoining parcels of real property at issue in the instant case were originally jointly owned by Black's parents, John A. Black (John) and Carol L. Black (Carol), whose respective trusts held an undivided one-half interest in lots assigned tax map key numbers: (1) 2-5-017-008 (Lot #8); (2) 2-5-017-009 (Lot #9); (3) 2-5-017-010 (Lot #10); (4) 2-5-017-014 (Lot #14); (5) 2-5-017-020 (Lot #20); (6) 2-5-017-021 (Lot #21); and (7) 2-5-017-022 (Lot #22) [hereinafter, collectively, the Properties]. The Properties are situated on Round Top Drive, in an area known as Tantalus, in Honolulu, Hawai'i. Black and his brother Gordon Black (Gordon) were beneficiaries of both the John A. Black Trust and the Carol L. Black Trust. The Andersons were beneficiaries of the John A. Black Trust.³ Black is the trustee for both trusts.

The John A. Black Trust terminated upon Carol's death on March 6, 1996.⁴ The John A. Black Trust provided that Gordon, Black, and the Andersons would each receive a one-third share of John's undivided one-half interest in the Properties. The Carol L. Black Trust bequeathed Carol's undivided one-half interest equally to Gordon and Black. In total, both Gordon and Black

³ The Andersons are the grandchildren of John's sister. John and Carol were the legal guardians of the Andersons.

⁴ The record does not indicate when John passed away. However, it appears that John passed away prior to Carol.

were to receive a five-twelfth interest in the Properties, and the Andersons were to receive a one-sixth interest in the Properties.

Following the deaths of his parents, Black sought to purchase the other beneficiaries' interests in the Properties. At some point, Black purchased Gordon's interest in the Properties for \$250,000.00, based upon an agreed-upon value of \$600,000.00 for the Properties.⁵ After the purchase of Gordon's interest was finalized, Black owned an undivided five-sixth interest in the Properties.

On December 15, 2000, Black offered to purchase the Andersons' interests in the Properties. At the time, the Properties were still held in trust. Black maintained that the value of the Properties was \$600,000.00 and offered to purchase each of the Andersons' interests for \$33,333.00. The Andersons claimed that Black's valuation of the Properties, i.e., \$600,000, was less than half the tax assessed value of the Properties, and, thus, the Andersons claimed that each of their interests was worth \$68,411.00. The \$33,333.00 offer was reiterated in a letter dated January 29, 2001 from Black's counsel to each of the Andersons. On June 22, 2001, the Andersons' one-sixth interest

⁵ In December 1999, Black had obtained appraisals for each of the Properties (the December 1999 appraisals). As of December 18, 1999, the collective appraised value of the Properties as determined by Black's appraiser was \$319,000. According to Black's appraiser, the collective appraised value is affected by the steep cliff topography of several of the lots and the limited sub-zone and resource sub-zone designations on the Properties. However, Black claims that he "believed that it was appropriate to purchase Gordon's interest in the . . . Properties based on a \$600,000.00 value."

in the Properties was transferred to them by warranty deed from the John A. Black Trust.

On July 9, 2001, Stephen responded to Black's \$33,333.00 offer with a counteroffer of \$50,000.00 for his interest in the Properties. Stephen indicated that Christina and Pamela would also be willing to accept \$50,000.00 for their respective interests. By letter dated August 14, 2001, Black responded by offering \$33,000.00 for Stephen's interest and authorized his counsel "to file a suit for partition for the [P]roperties" if Stephen did not accept the \$33,000.00 offer by August 31, 2001.

By letter dated August 22, 2001, Stephen rejected Black's \$33,000.00 offer for his interest in the Properties. Therein, Stephen also raised several concerns regarding Black's management of the John A. Black Trust, questioning whether Black had been complying with his fiduciary responsibilities toward the trust. Specifically, Stephen claimed, inter alia, that Black had been residing on the Properties without paying any rent for several years and that Black apparently delayed the distribution of the Properties from the John A. Black Trust for approximately five years beyond the required distribution date. Stephen then indicated that he "would be willing to accept \$44,000.00 in full satisfaction for any claims he might have against the [John A. Black] Trust and for his interest in the real estate."

On August 29, 2001, Black rejected Stephen's offer of \$44,000.00 and countered with an offer to purchase each of the Andersons' interests for \$38,000.00. Black also stated that, as part of his offer, he was not requesting a release of any claim Stephen may have against Black as trustee of the "Carol L. Black Trust."⁶

B. Procedural History

On October 10, 2001, Black filed the instant partition action but only with respect to one of the seven parcels, specifically, Lot #8.⁷ In response, the Andersons filed a counterclaim (1) asserting breach of fiduciary duties and (2) requesting an accounting [hereinafter, collectively, the Trust Claims].

1. **Black's Motion for Summary Judgment on the Trust Claims**

On November 15, 2001, Black moved for summary judgment on the Trust Claims. Therein, Black argued that his motion for summary judgment should be granted inasmuch as: (1) the circuit court lacks jurisdiction over the Trust Claims; and, alternatively, (2) the Andersons failed to bring the Trust Claims

⁶ It is unclear why Black stated that he was not requesting a release of any claim Stephen may have against Black as trustee of the Carol L. Black Trust. As previously mentioned, the Andersons are beneficiaries of the John A. Black Trust and not the Carol L. Black Trust, and, thus, it is not clear why the Andersons would have any claims against Black as trustee of the Carol L. Black Trust.

⁷ According to Black, he sought to partition only one lot because he was concerned that, if the lots were auctioned together, the City might try to consolidate the lots. Black believes that there is value in the separateness of the lots. However, the Andersons characterized Black's action to partition only one lot as an "abusive tactic."

within sixty days following their receipt of the accounting of the John A. Black Trust. Black contended that the probate court, rather than the circuit court, had jurisdiction over the Trust Claims.

On November 30, 2001, the Andersons filed their memorandum in opposition to Black's motion for summary judgment. Therein, the Andersons countered Black's arguments, contending, inter alia, that: (1) the circuit court has jurisdiction inasmuch as the Trust Claims arose under the law of co-tenancy; and (2) the Trust Claims are not barred by the sixty-day provision contained in the John A. Black Trust. The Andersons also argued that exclusive jurisdiction does not reside with the probate court to adjudicate trust-related disputes.

On December 6, 2001, the circuit court entered an order denying Black's motion for summary judgment on the Trust Claims without holding a hearing.

2. The Motions for Summary Judgment for Partition by Sale

On December 7, 2001, the Andersons filed a first amended answer and first amended counterclaim seeking partition with respect to all seven parcels. In their first amended counterclaim, the Andersons specifically requested, inter alia, that the circuit court order a sale of the Properties, with each parcel to be sold separately, unless sale of all seven parcels as one unit would yield a higher sales price.

On December 26, 2001, Black filed a motion for summary judgment, seeking partition by sale with respect to only Lot #8. On January 2, 2002, the Andersons filed a cross-motion for summary judgment, requesting partition by sale with respect to all seven parcels.

On February 6, 2002, the circuit court entered its findings of fact (FOFs), conclusions of law (COLs), and order granting in part Black's motion for summary judgment and granting in part the Anderson's cross-motion for summary judgment (the February 6, 2002 FOFs, COLs, and order). The circuit court concluded, inter alia, that: (1) the Properties should be partitioned by sale at a public auction, COL No. 3; and (2) "[t]he primary objective of judicial sales in partition actions is to sell the Properties in a manner that will yield the best price for all the owners." COL No. 4. The circuit court appointed Fred Lunt as a commissioner to sell the Properties and directed him "to take reasonable steps to market the Properties in order to maximize the number of prospective bidders and the sale price[.]" The circuit court also authorized and directed Lunt to, inter alia: (1) "use his expertise to determine whether selling the Properties collectively or selling the Properties as individual lots will yield the highest total value"; and (2) "utilize the method of sale that [he] believes will yield the highest total value[.]" Finally, the circuit court held that the instant order "resolves all claims under [Black's] complaint and

[the Andersons'] counterclaim for partition of all seven parcels, leaving [the Andersons'] counterclaims for breach of fiduciary duty and an accounting [i.e., the Trust Claims] for later disposition."

As a result of the circuit court ordering the Properties to be sold at a public auction, a "Notice of Partition Sale" (Notice) was published in a newspaper on April 14, April 21, April 28, and May 5, 2002. The Notice did not indicate that the sale would be subject to court confirmation.

3. The May 20, June 7, and July 11, 2002 Auctions

A public auction was held on May 20, 2002 to sell the Properties (the 5/20/02 Auction). Approximately fifty-three individuals attended the 5/20/02 Auction. The only bidders were Steven Jackson, a non-party to the instant action, and Black. The Properties were auctioned off separately, with Black as the high bidder on all seven lots. The high bids were as follows (in order of sale): (1) Lot #9 - \$451,000.00; (2) Lot #20 - \$1,000.00; (3) Lot #22 - \$60,000.00; (4) Lot #14 - \$501.00; (5) Lot #10 - \$40,100.00; (6) Lot #8 - \$500.00; and (7) Lot #21 - \$500.00. The aggregate value of the total bids was \$553,601.00.

In his commissioner's report filed with the circuit court on May 28, 2002, Lunt opined that the \$553,601.00 aggregate value of the total bids was "an expected result considering the sub-zone issues, the amount of repair needed on the property, and the nature of the sale (auction, with no due diligence or

financing contingencies)." Lunt also noted that the aggregate value of the total bids exceeded the December 1999 appraisals by nearly \$240,000.

On May 30, 2002, Black filed a motion to confirm the sale of the Properties. Attached to Black's motion was a declaration by Black's counsel that Lunt "informed the persons present [at the 5/20/02 Auction] that the [circuit c]ourt had not ordered overbidding, and that if any person was interested in the . . . Properties, that person should bid at the auction." (Yee Decl.)

On June 4, 2002, the Andersons filed a memorandum in response to Black's motion to confirm the sale of the Properties. Therein, the Andersons requested the circuit court to exercise its equitable discretion to allow overbidding at the confirmation hearing in order "[t]o obtain the 'best price' possible under the circumstances[.]" The Andersons also maintained that Black's statements to the circuit court, third parties, and Lunt that the circuit court already ruled that overbidding would not be allowed was a "blatant mischaracterization of the record" inasmuch as the circuit court "never made such a ruling." In support of their request to reopen the bidding, the Andersons submitted the affidavit of Jackson, which essentially indicated that Jackson would be willing to bid five percent higher than Black's bid at the 5/20/02 Auction on six of the seven lots collectively.

A confirmation hearing was held on June 7, 2002.⁸

Preliminarily, the circuit court noted that, although the February 6, 2002 FOFs, COLs, and order did not include a provision allowing overbidding, such an omission was not intended to preclude overbidding. The circuit court stated that "overbids at confirmation sales are fairly in my view routinely granted in this jurisdiction. And it appears to the court that this would be a part of the court's equitable jurisdiction." Relying on Brent v. Staveris Development Corp., 7 Haw. App. 40, 741 P.2d 722 (1987), the circuit court reasoned:

[T]he [Intermediate Court of Appeals] ICA noted that the lower court's authority to confirm a judicial sale is a matter of equitable discretion. In exercising its discretion[,] the court should act in the interest of fairness and prudence and with just regard for the rights of all concerned and the stability of judicial sales.

Now I do understand that in terms of stability of judicial sales that would probably dictate against allowing overbidding; however, under the circumstances of this case and being aware of the -- candidly being aware of the prior negotiations, et cetera, and also being aware of the tax assessed values of the [P]roperties,⁹ it appears to the court that despite the fact that this is a partition sale it is still in everyone's best interest really to obtain the highest price.

Actually, [Black], it appears, is not that interested in the highest price because [Black's] interest really is to retain ownership and possession over the property or properties. The [Andersons'] interest is in obtaining the highest price. And[,] in balancing these interests[,] it appears to the court that it makes sense to allow overbidding in this case.

⁸ The confirmation hearing was initially presided over by the Honorable Richard W. Pollack. However, Judge Pollack soon determined that it was necessary for Judge McKenna to interpret her February 6, 2002 FOFs, COLs, and order and, thus, requested that the confirmation hearing resume later in the day in order for Judge McKenna to preside over the hearing.

⁹ Earlier at the confirmation hearing, the circuit court inquired about the tax assessed value of the Properties. Counsel for the Andersons informed the circuit court that the 2001 tax assessed value was \$1,373,000 and that the 2002 tax assessed value was just under \$1,694,800. Counsel for Black reminded the circuit court that the December 1999 appraisals indicate that the appraised value of the Properties was \$319,000.

Extensive discussion of the overbidding procedure then ensued:

[BLACK'S COUNSEL]: -- how do you propose that this bidding go forward? Because my client bid on some of these lots on the premise that he was going to get the next lot. There was a certain strategy on this. Maybe we should start from ground zero on all of them.

THE COURT: My suggestion -- and I wanted to run this by both of you on this issue -- is I would like to request that overbidding be conducted in the alternative; in other words, informing everybody that the court is going to request that the commissioner conduct bidding lot by lot and then one bid for the total with the assumption that the court is prepared to accept what results in the higher yield in total.

[ANDERSONS' COUNSEL]: Um, well, our variation on that, Your Honor, is that you can combine these in any way that the buyers might want. And, for instance, if, well, like Dr. Anderson¹⁰ is interested in [Lot #]20 and [Lot #]14, if he bid on those as a group and that yields a higher price, then -- and he's not willing to bid on the others as a group, he shouldn't -- he shouldn't have to compete.

THE COURT: That's fine. But he'll take the risk as far as I'm concerned because --

[ANDERSONS' COUNSEL]: Right.

THE COURT: I'm not going to confirm his bids for, you know, like -- that's not fair to [Black].

[ANDERSONS' COUNSEL]: No.

THE COURT: [Black] bid a total of [\$553,000] on the assumption that he was getting everything. And --

[ANDERSONS' COUNSEL]: I think I agree with what you just said, Your Honor.

THE COURT: I'm not going to say that, you know, [Black] loses everything except Lot[#]9. I'm only going to -- do you understand what I'm saying? It's only -- I'm only going to accept the individual bids if they are at least 5 percent -- if the total of the individual bids results in a total that is at least 5 percent over the total of what's currently.

[ANDERSONS' COUNSEL]: Right.

THE COURT: Or if the total of one bid for everything is at least 5 percent over what's the total currently. So

¹⁰ Dr. Bruce Anderson was a non-party interested bidder, who, along with Jackson, attended the confirmation hearing. The parties agreed before Judge Pollack that Dr. Anderson could use the Andersons' attorney as his proxy to bid inasmuch as Dr. Anderson had plans to take a flight to Maui later in the day and, thus, would not be present if the circuit court ordered overbidding to take place later that day. However, Judge McKenna determined that there was a "clear conflict of interest" with Dr. Anderson using the Andersons' attorney as proxy, because, while the Andersons "have an interest in seeing that the best possible price is obtained[,] Dr. Anderson "has an interest in getting the [P]roperties without offering his top dollar." Thus, Judge McKenna did not allow the Andersons' attorney to represent Dr. Anderson's interests but did allow Dr. Anderson to relay his bids over the telephone to the commissioner who was to preside over the overbidding. It is unclear whether Dr. Anderson is related to the Andersons.

basically in any event it has to be at least about \$580,000 in total before I will consider it. So people will be taking a risk I recognize that.

[ANDERSONS' COUNSEL]: No, we're in agreement. And I guess what I'm trying to say is that the components don't necessarily have to be single lots. And in Mr. Jackson's case he's made it clear, and I think for good reason, that he would like to bid on [the six lots] other than the house [i.e., Lot #9].

(Emphases added.) The parties then discussed the issues surrounding the Andersons' proposal to "package" some of the lots together, i.e., to auction off certain lots together as one group. Black's counsel pointed out that packaging the lots "like a six-pack" is problematic inasmuch as the house on Lot #9 encroaches Lot #20, and there are various easements providing access to Lot #9 and Lot #14. Black's counsel stated that Black had bid on Lot #9 "with the understanding that he could bid on the individual lots around it[,] " but if "it's packaged and he can't bid on the individual lots, he loses this Lot [#]20 which has the encroachment." The circuit court agreed with Black that the Andersons' proposal to package some of the lots together would be unfair to him and stated:

So if you're going to do it, we'll just do it one by one and all together. One by one and then all together. That's it. People will take the risk as to what they may or may not get because I want to do what's equitable. And what [the Andersons are] proposing is not equitable to [Black].

However, the parties continued to argue over the overbidding procedure and whether it was fair to everyone involved. The circuit court then stated: "Clearly if I was going to allow any overbidding here, it was going to be we're going to start again and nobody was going to be stuck with whatever they bid before.

So it would have to be that the total bid today would have to be at least about \$580,000 before I would consider it." (Emphasis added.) Finally, the hearing concluded when the circuit court stated that it would request that the commissioner "conduct the overbidding first by doing it lot by lot and then doing it with the total and then come back to [her] with the results."

Thereafter, a recess was taken to allow the bidding to be conducted outside the circuit court (the 6/7/02 Auction).

Immediately after the 6/7/02 Auction, the parties appeared before the circuit court to discuss the results. Lunt's assistant, Peter Chessen, who conducted the 6/7/02 Auction, reported the results:

CHESSEN: We opened the bids up in the same order we had asked for bids on Lot [#9] which is the one with the house. Mr. Black was the only one that was interested in that, and he bid a thousand dollars [(\$1,000)] as his bid. We then went on to Lot [#]20 which we had a series of bids and the final bid, which Mr. Black was the winning bidder on that, was twenty-two thousand one hundred [(\$22,100)]. Lot [#]22, that lot went for \$270,100.
Lot [#]14 was \$30,001.
Lot [#]10 was \$100,001.
And Lot [#]8 and Lot[#]21 there were no bidders.

THE COURT: Lot --

[ANDERSONS' COUNSEL]: No --

CHESSEN: No overbidders.

THE COURT: Okay. And that total amounted to \$423,202 on the individual lots?

CHESSEN: Correct. There were no bidders on the property in total and so we closed the bidding off then.

THE COURT: Okay. All right. Then the total on the overbidding \$423,202 is actually substantially less than the bid at the [5/20/02 Auction].

(Emphases added.) The Andersons' counsel, however, disagreed with Chessen's report of the results, and the following discussion occurred:

[ANDERSONS' COUNSEL]: Your Honor, we don't agree with the report. The way the auction was conducted was for overbids and as such apparently Mr. Jackson didn't intend to overbid the house bid. Mr. Black said a thousand dollars which was a nullity as far as I'm concerned.

When all the bidding was done[,] [Black's counsel] was good enough to add up all the numbers and announce the [\$]874,302 which included [\$]451[,000] for [Lot #]9, and [\$500] each for [Lot #]8 and [Lot #]21. So I think they're making a mockery of the process. [Black's counsel is] the one who wrote that on the board, you know, after he came in and wrote than [sic] on the board. And I haven't agreed with that for a moment.

THE COURT: Well, I've heard from the commissioner who said that the only person that bid on [Lot #]9 -- and actually it was supposed to be an overbid. It was only supposed to be if it was over [\$450,000].

[ANDERSONS' COUNSEL]: That's right. We ignored it. And that means the overbid stands.

THE COURT: No, I made that very clear I wasn't going to allow that to happen because that was grossly unfair under the circumstances. Under the circumstances of this case it would be grossly unfair to require that the old bid stand as to one lot only, and I said that wasn't going to happen. So there -- at this point the court is prepared --

[ANDERSONS' COUNSEL]: We really got a mess here. I mean I would suggest that Lot [#]9 should go back to the previous high bidder. If Mr. Black doesn't want it for [\$]541[,000], I think Mr. Jackson will take it for his previous high bid of [\$]450[,000]. But I don't think that -- he wasn't given notice that that was going to be on the table, but I think he would do that.

JACKSON: Yes, I would.

THE COURT: What was that again? What was that again?

[ANDERSONS' COUNSEL]: Mr. Jackson will take [Lot #]9, to have his previous high bid of [\$]450[,000] if no overbidding is required and Mr. Black wants to back out. That's essentially what he's done. He's backed out on [Lot #]9.

THE COURT: Right. I made that fairly clear at the hearing I thought.

[ANDERSONS' COUNSEL]: Yeah. Well, I guess I'm not sure what the proposal is. Obviously this is not a firm and confirmable result.

THE COURT: All right. So, Mr. Jackson, you're indicating you are now willing to pay \$450,000 for Lot [#]9?
.....

[ANDERSONS' COUNSEL]: This is obviously not confirmable. If that is confirmed, with the court's intention, then it should not be confirmed. But if he wanted to renege on his Lot [#]9 bid, we still --

THE COURT: Mr. Jackson was outside and saw Mr. Black bid [\$1,000] on Lot [#]9 and didn't bid? Is that what happened?

[BLACK'S COUNSEL]: That's correct.

[ANDERSONS' COUNSEL]: Right. Because the way the auction was handled was overbidding, so Mr. Jackson opened up on all the other lots he was interested in. He bid 5 percent or more greater. He wasn't going to open up on Lot [#]9 at [\$]475[,000] or whatever it would take.

THE COURT: Mr. Chessen, did you say each lot had to be 5 percent higher than the prior bid?

[ANDERSONS' COUNSEL]: That's the way it was done.

CHESSSEN: I originally asked for overbids or I had originally asked for bids. I was informed by [Andersons' counsel] that after I had opened up the bidding on Lot [#]9 that the intention was that we were just going to do overbids and --

THE COURT: [The Andersons' counsel] told you that, only take overbids?

[ANDERSONS' COUNSEL]: I probably said that that was my understanding, Your Honor.

CHESSSEN: Yes.

CHESSSEN: [Andersons' counsel] said that let's move on. Uh, we're only doing the overbids. And there was nobody -- nobody there wanted to bid on Lot [#]9 on an overbid situation.

THE COURT: Okay. I wasn't clear enough. Let's just do this again. All right.

(Emphasis added.) Thereafter, the following discussion occurred with respect to Black's counsel's understanding of the events surrounding the 6/7/02 Auction:

[BLACK'S COUNSEL]: So today we thought what you [(the Court)] said was go out there and start at zero on all the lots.

THE COURT: That's what I thought.

[BLACK'S COUNSEL]: So that's what we did.

THE COURT: That's not how it was conducted.

[ANDERSONS' COUNSEL]: No.

[BLACK'S COUNSEL]: When we got to Lot[s] [#]20, 22, 14, and 10, Mr. --

THE COURT: I see. So when Mr. Black said [\$1,000], who said stop?

[BLACK'S COUNSEL]: Nobody else bid. There were no other bidders.

THE COURT: Mr. Jackson, you're saying you didn't understand that when Mr. Black said [\$1,000] you could have bid more than [\$1,000] at that point?

JACKSON: I -- at that point, Your Honor, I thought it was strictly overbids. That was my whole impression, the whole thing was overbids. And I wasn't willing to go for four hundred and seventy-three some odd thousand dollars.

[BLACK'S COUNSEL]: Your Honor, the declaration Mr. Jackson signed expressly stated that he was not interested in Lot [#]9.

[ANDERSONS' COUNSEL]: At that price.

JACKSON: At that price.

THE COURT: At what price?

[ANDERSONS' COUNSEL]: In excess of the [\$]451[,000]. I mean it's -- whether he said that or not -- well, we can ask him. He's here.

THE COURT: Okay. Well, being that we would -- this would result in over a three hundred thousand dollar

[\$300,000] difference, the court is going to reschedule this matter. Okay.

[BLACK'S COUNSEL]: Judge -- let me ask you this, Judge.

THE COURT: Sure.

[BLACK'S COUNSEL]: If the point here is that Mr. Jackson and Mr. Black were the only bidders at the auction two weeks ago [*i.e.*, the 5/20/02 Auction], we go to the overbid that you ordered today, they're still the only bidders. Now Mr. Jackson got to change every one of his auction bids.

THE COURT: Oh, Mr. Jackson is the one that bid on these other ones?

[BLACK'S COUNSEL]: Yes. Mr. Jackson was the only other bidder.

THE COURT: What happened to [Dr.] Anderson?

[ANDERSONS' COUNSEL]: We couldn't reach him on the phone, so he would probably like to come the next time.

[BLACK'S COUNSEL]: Judge, let me explain what happened out there if you don't mind.

THE COURT: Sure.

[BLACK'S COUNSEL]: The only bidders at the auction two weeks ago were Mr. Black and Mr. Jackson. The only bidders at the overbid today were Mr. Black and Mr. Jackson. Just like two weeks ago[,] Mr. Black was the successful bidder on every lot.

Now what [the Andersons' counsel's] position is suggesting to the court is the height of unfairness and the proof of unfairness, Mr. Jackson, who was at the auction two weeks ago and understood everything, gets to change every one of his bids today, but they're saying Mr. Black can't. That's their whole argument.

THE COURT: Mr. Black can change his bids too, yes, clearly.

[BLACK'S COUNSEL]: Yes. That's why he bid a thousand dollars.

[ANDERSONS' COUNSEL]: And he did.

THE COURT: That's why I was not clear enough.

(Emphases added.) At the conclusion of the hearing, the circuit court scheduled another hearing on the instant matter. With respect to the procedure to be followed at the third auction, the circuit court stated that:

[A]lternate bidding be conducted lot by lot and then one bid for the total and that it will start from -- because of the circumstances it will start -- it's not an overbid situation.

We will go lot by lot and it can be, you know, a thousand dollars for each lot as far as I'm concerned. And I will see if the total at that bid is at least 5 percent more than the \$553,000 that is the subject of this motion and then I will decide.

Finally, the circuit court rejected the Andersons' proposal to package some of the lots together.

On July 9, 2002, Black filed further objections to the circuit court's order allowing a third auction. Therein, Black renewed his request that his winning bids, i.e., collectively, the \$553,601 total bid at the 5/20/02 Auction, be confirmed. Black also indicated that he hired the same appraiser who had conducted the December 1999 appraisals to conduct new appraisals. The updated appraisals valued the Properties at \$410,000.00 as of June 2002 (the June 2002 appraisals). Black attached the June 2002 appraisals as an exhibit in support of his further objections.

At a hearing held on July 11, 2002, the circuit court allowed a third auction to be conducted despite Black's objections. At the beginning of the hearing, the circuit court noted that "one of the main reasons that the Court decided to allow the overbidding was because it was the Court's understanding that at least some point there had been at least one offer totalling [sic] around a million dollars[.]" However, Black's counsel stated that Black had "never offered a million dollars for the [P]roper[ti]es[ies]." The circuit court then stated that it believed another individual, not Black, had offered approximately a million dollars for the Properties. Despite the circuit court's belief, there apparently was no other offer to purchase the Properties except for Black's offers prior to the

filing of the instant partition action. Nonetheless, the circuit court stated that, "[i]n any event, the Court, in an effort to try to obtain the best price possible, has indicated that it would allow the overbidding."

The circuit court then reiterated the bidding procedure that was to be followed in the third auction. The circuit court stated:

In terms of the procedure, it is my intention to request bidding as to each lot first and then all of the lots together as one. It was my intention -- and I believe I stated that I would only accept an overbid if it was at least five percent in excess of the original total[.] [T]he standard in this Court -- and I do not believe I deviated from that standard -- is to only accept an overbid if it is at least five percent over the previous bid.

. . . . But just to make it clear today, I'm not going to accept any overbids, unless the total comes to at least five percent over the May 20, 2002 auction price of \$553 -- \$553,601. So according to my rough calculations -- and I could be wrong -- but I believe five percent over that means at least [\$]581,281. And if the total does not equal or exceed that \$581,281 figure, the Court is going to confirm the sale of the prior price [i.e., the winning bids from the 5/20/02 Auction].

. . . . The bids -- The bidding will start at zero for each of the seven lots. And then there will be one bid for all of the parcels together.

The Court is not going to allow the person that bid on each individual lot to then increase their offer after the total bid has been received in order to bump up the total bid. I don't think that would be a fair procedure. So basically, it will be a bid on each lot in that order, starting at zero and then one bid for all seven lots total.

I would like to compare the total for the seven separate and for everything together. If neither of those are equal to or exceeds \$581,281, then the May 20th bid of \$553,601 be confirmed. If either of those -- If only one of those is above -- is at or equal to \$581,281, then that bid will probably be confirmed.

If both of those are at or above \$581,281, then the Court will accept the higher of the two. So it can either end up being separate -- the bids for each, the seven, could be accepted separately or it could be the amount for all seven would be accepted, depending on each one. So that's the procedure.

A recess was taken to allow the third auction to be conducted outside the circuit court (the 7/11/02 Auction).

At the 7/11/02 Auction, Black, Stephen, Jackson, and Dr. Anderson placed bids. After the bidding was concluded, the parties returned before the circuit court. The circuit court asked Lunt's assistant, Michael Pietsch, who presided over the 7/11/02 Auction, to report the results. Pietsch stated:

PIETSCH: Your Honor, we bid on each individual parcel. And Mr. Black was the highest bidder on each individual parcel at the end, totalling [sic] \$880,000. And then we had a total bid, and there were no bidders outbidding Mr. Black.

THE COURT: Well, Mr. Black -- Well, since it ended up going with the individual, then --

PIETSCH: You want it by each parcel?

THE COURT: Yes.

PIETSCH: Starting off with [Lot #]9, with a final bid of [L\$]581[,000].

[Lot #]20, [L\$]31,000.

[Lot #]22, bid of [L\$]201,000.

[Lot #]14, with a bid of [L\$]2,000.

[Lot #]10, with a bid of [L\$]61,000.

[Lot #]8, with a bid of [L\$]2,000.

And final [Lot #]21, with a bid of [L\$]2,000.

Thus, based on Pietsch's report, the circuit court orally confirmed the results of the 7/11/02 Auction with the winning bid of \$880,000 for Black.

4. Issuance of a Stay Pending Settlement Negotiations

On July 26, 2002, the circuit court entered an order staying the instant case pending settlement negotiations between Black and the Andersons in an effort to settle the instant case without incurring further attorneys' fees and costs.

Specifically, the circuit court ordered "that all further proceedings in this case, including discovery, be STAYED pending mandatory participation by the parties in good faith settlement

negotiations before the Honorable Colleen Hirai with respect to all issues in this lawsuit." Prior to the order staying the instant case, there were several issues pending before the circuit court, including, inter alia, the parties' entitlement to attorneys' fees and costs, various discovery disputes, and disposition of the Trust Claims.

5. Settlement of the Trust Claims

On August 12, 2002, the parties attended a settlement conference before Judge Hirai, wherein the parties agreed to settle the Trust Claims. Specifically, the parties agreed to "dismiss with prejudice all trust claims asserted against [each] other" and to "release and forever discharge each other from any and all claims, demands, causes of action related to or arising from or on account of the subject matter of this lawsuit" except for those matters before Judge McKenna. With respect to the matters before Judge McKenna, the parties agreed that:

The remaining partition issues which include confirmation of the partition sale, distribution of proceeds, attorneys' fees and costs, and commissioner's fees and expenses related thereto will be left for decision by [Judge McKenna].

No party will be allowed to file additional papers with respect to the partition issues unless ordered by Judge McKenna, and any hearing on the partition issues will be left to the discretion of Judge McKenna.

The right to appeal Judge McKenna's decision with regard to the partition issue is not waived by this agreement.

(Emphasis added.) The parties also agreed, inter alia, that Black "will promptly pay to the Andersons \$3,000 cash" and that Black will also "transfer to the Andersons 644 shares of American Real Estate Partners, Limited Partnership," which the Andersons

understood to be all of the shares of that partnership held by the John A. Black Trust.

6. Resolution of the Remaining Partition Issues

The next day, on August 13, 2002, the circuit court entered an order lifting the stay and ruled on the issues of attorneys' fees and costs and the commissioner's fees and expenses (the Fee Order). The Fee Order stated:

The court has carefully reviewed the record on file and the applicable law, and has considered the equities of the situation. Based on the totality of the circumstances, the court sees no reason to deviate from the standard rule under HRS § 668-17 [(1993), quoted *infra*] and case law in this jurisdiction, that calls for fees and costs to be apportioned based on proportionate interests. The court therefore finds and concludes that the parties are responsible for the following fees and costs in proportion to their respective percentage interests[.]

Thus, inasmuch as Black held a five-sixth interest in the Properties, Black had to pay five-sixth of the total attorneys' fees, costs, and commissioner's costs awarded in the instant partition action. The Andersons, who held the remaining one-sixth interest in the Properties, were liable for one-sixth of the aforementioned fees and costs in the partition action. Specifically, Black was responsible for \$111,987.11, and the Andersons were responsible for \$22,397.42.¹¹

¹¹ The circuit court awarded Black \$52,132.60 in attorneys' fees and \$4,732.45 in costs, for a total of \$56,865.05. The circuit court awarded the Andersons \$67,787.33 in attorneys' fees and \$2,050.39 in costs, for a total of \$69,837.72. And, the circuit court awarded the commissioner \$7,681.76. Thus, the total amount of attorneys' fees, costs, and commissioner's fees and costs awarded was \$134,384.53.

On September 17, 2002, a stipulation and order amending the Fee Order was entered. Therein, the commissioner's fees and costs was amended to \$8,981.76. The stipulation noted that Black shall pay \$7,484.80 to the commissioner, and the Andersons shall pay \$1,496.96 to the commissioner.

Also on August 13, 2002, the circuit court entered its written order confirming the results of the 7/11/02 Auction with the winning bid of \$880,000 for Black. Specifically, the circuit court ordered that the sale of the Properties to Black is confirmed "upon payment through escrow of one-sixth (1/6th) of \$880,000.00, and his share of the [c]ommissioner's fees and expenses, and attorneys' fees and costs approved by the Court."

7. Black's Motion for Reconsideration

On August 23, 2002, Black filed a motion for reconsideration of the Fee Order (motion for reconsideration). Therein, Black stated two grounds for the motion for reconsideration: (1) the Fee Order "inequitably awards the Andersons' attorney fees through July 1, 2002, but awards Black's attorneys fees through only through [sic] June 6, 2002"; and (2) "the parties had agreed that Judge McKenna would rule on the issues in the partition action only because the trust issues were settled." Specifically, with respect to the second ground, Black argued that the attorneys' fees and costs relating to the Trust Claims were included in the August 12, 2002 settlement agreement before Judge Hirai, and, thus, the attorneys' fees and costs relating to the Trust Claims should not have been included in the Fee Order.

On September 30, 2002, the circuit court denied the motion for reconsideration. Therein, the circuit court stated in relevant part:

The court has reviewed the subject motion, the various related submissions, the record on file and the applicable law, and has again considered the equities of the situation. The court informed counsel at the September 16, 2002 hearing that the court had decided the prior motion without specifically considering a separation of fees and costs based on partition and trust issues. Upon reviewing the submissions and the law, however, the court realizes that both sides included fees that may have been related to trust issues in their prior requests. More importantly, considering the nature of the case, the court realizes that it is extremely difficult to distinguish between "partition" and "trust" fees, because the issues are actually intertwined under the circumstances of this case. In addition, the court notes that, in this case the trustee [i.e., Black] only requested a partial partition, which, in effect, forced the [Andersons] to request partition of the remaining parcels. Accordingly, it is not surprising that the [Andersons'] fees would have exceeded [Black's] fees. Moreover, in deciding fees and costs under the partition statute, the court is allowed to consider the equities of the situation. Based on the totality of circumstances of this case, and the equities of the situation, the court sees no reason to reconsider and alter the total fees and costs awarded under its prior order.

8. The Motions for Breach of Settlement Agreement

On October 25, 2002, the Andersons filed a "Motion to Remedy Breach of Settlement Agreement." Therein, the Andersons argued that Black breached the settlement agreement by filing the motion for reconsideration inasmuch as the settlement agreement expressly prohibits both parties from filing "additional papers with respect to the partition issues unless ordered by Judge McKenna." The Andersons also argued that Black failed to transfer 644 units of American Real Estate Partners, L.P. to the Andersons as required under the settlement agreement.

On November 1, 2002, Black filed a "Motion for an Award of Damages for Breach of Settlement Agreement." Therein, Black argued that the Andersons breached the settlement agreement by continuing to seek an award of attorneys' fees and costs relating to the Trust Claims. Stated differently, Black contended that

the Andersons "sought double recovery of amounts already paid in settlement."

After a hearing on both parties' motions, the trial court denied: (1) Black's motion on November 18, 2002; and (2) the Andersons' motion on November 27, 2002.

9. Judgment and Appeal

On December 13, 2002, final judgment was entered in favor of the Andersons. Black, however, had earlier filed a notice of appeal on October 30, 2002. On March 5, 2003, this court dismissed the appeal for lack of appellate jurisdiction inasmuch as the appeal was premature. Black v. Pollack, No. 25438.

On March 19, 2003, the circuit court entered an amended judgment in favor of the Andersons. Black timely appealed on March 25, 2003, and the Andersons cross-appealed on April 17, 2003.

II. STANDARDS OF REVIEW

A. Motion for Summary Judgment

"This court reviews a circuit court's grant or denial of summary judgment de novo." Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 110, 111 P.3d 1, 5 (2005) (citation omitted). The standard for granting a motion for summary judgment is well settled:

[S]ummary 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 judgment as a matter of law. 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. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (citation omitted) (brackets in original).

B. Confirmation of Partition Sale

"[T]he circuit court's authority to confirm a judicial sale is a matter of equitable discretion." Sugarman v. Kapu, 104 Hawai'i 119, 124, 85 P.3d 644, 649 (2004) (internal quotation marks and citation omitted). As such, "[t]he discretion of the court in a partition action . . . will not be disturbed unless there is a clear finding of abuse." Id. (citation omitted). An abuse of discretion occurs where the circuit court "has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Price, 107 Hawai'i at 110, 111 P.3d at 5 (citation omitted).

C. Evidentiary Rulings

A circuit court's ruling with respect to the admissibility of settlement offers under Hawai'i Rules of Evidence (HRE) Rule 408 (1993), quoted infra, is reviewed under the right/wrong standard. Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 136-37, 920 P.2d 334, 350-51 (1996).

D. Constitutional Law

This court reviews questions of constitutional law de novo under the right/wrong standard. Janra Enter., Inc. v. City

& County of Honolulu, 107 Hawai'i 314, 319, 113 P.3d 190, 195 (2005).

E. Motion for Attorneys' Fees and Costs

This court reviews the circuit court's grant or denial of attorneys' fees and costs under the abuse of discretion standard. Price, 107 Hawai'i at 110, 111 P.3d at 5.

III. DISCUSSION

A. Black's Motion for Summary Judgment on the Trust Claims

Black contends that the circuit court erred in denying his motion for summary judgment on the Trust Claims because (1) the Trust Claims were wrongly brought against Black in his individual capacity rather than his fiduciary capacity and (2) the civil division of the circuit court lacked jurisdiction and venue to hear the Trust Claims. The Andersons contend that, inasmuch as the Trust Claims were settled, Black's challenge of the circuit court's order denying his motion for summary judgment on the Trust Claims is moot.

This court has previously stated that

[t]he duty of [the supreme court], as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.

AIG Hawai'i Ins. Co. v. Bateman, 82 Hawai'i 453, 459, 923 P.2d 395, 401 (1996) (citation omitted) (brackets in original).

Therefore, "merely abstract or moot questions will not be determined on appeal and feigned or fictitious appeals ought not

to be tolerated." Id. (internal quotation marks, brackets, and citation omitted).

In the instant case, Black concedes that "the Trust Claims were settled and are not directly contested in this appeal." Indeed, on December 4, 2002, the parties filed a stipulation for dismissal of the Trust Claims with prejudice inasmuch as the parties had reached a settlement agreement regarding the Trust Claims. Thus, Black's challenge of the circuit court's order denying his motion for summary judgment on the Trust Claims is, in fact, moot. See AIG Hawai'i Ins. Co., 82 Hawai'i at 459, 923 P.2d at 401 (noting that, if the settlement between the parties appeared on the record or had counsel for the parties disclosed the settlement to this court, this court likely would have dismissed the appeal as moot). Accordingly, we dismiss that portion of Black's appeal challenging the circuit court's denial of his motion for summary judgment on the Trust Claims as moot.

B. Confirmation of the Partition Sale

1. **Reopening Bidding After the 5/20/02 Auction**

Black contends that the circuit court abused its discretion by reopening the bidding inasmuch as the circuit court failed to recognize that Black's high bids at the 5/20/02 Auction "were more than adequate and do not shock the conscience[.]" Black argues that the circuit court "disregard[ed] the principle of Hawai'i law that a judicial sale should be confirmed unless

the price obtained is grossly inadequate." Black also maintains that the circuit court abused its discretion by allowing overbidding for the purpose of giving Jackson another bidding opportunity.

The Andersons contend that Black is estopped from challenging the confirmation process because he has already taken the benefit of the partition sale, that is, by having the Properties conveyed to him. In support of their argument, the Andersons cite to S. Utsunomiya Enterprises, Inc. v. Moomuku Country Club, 75 Haw. 480, 866 P.2d 951 (1994), for the proposition that, "[a]s a general rule, voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." Id. at 495, 866 P.2d at 960 (citations omitted). Moreover, the Andersons argue that, even if Black is not estopped from challenging the confirmation process, the circuit court properly exercised its "equitable discretion" in allowing overbidding under the circumstances of this case.

In response to the Andersons' estoppel argument, Black contends that, under S. Utsunomiya, "the general rule does not apply where the outcome of the appeal would not have an effect on the appellant's right to the benefit accepted." (Bold emphasis omitted.) Id. at 496, 855 P.2d at 960. Here, inasmuch as Black only disputes the sale price of the Properties, Black argues that "[t]he outcome of this appeal has no effect on [his] rights to own the . . . Properties."

In S. Utsunomiya, this court stated that, "[a]s a general rule, voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." 75 Haw. at 495, 866 P.2d at 960. The rationale supporting such a rule "is that by accepting the benefit of or acquiescing in a judgment or order, or by otherwise taking a position inconsistent with the right of appeal therefrom, a party is deemed to have impliedly waived his or her right to have such judgment or order reviewed by an appellate court." Id. at 495-96, 866 P.2d at 960 (citations omitted). However, this court then stated that,

the general rule does not apply where the outcome of the appeal could have no effect on the appellant's right to the benefit accepted. Thus, no waiver of appeal is implied in those cases in which the appellant is concededly entitled to the accepted benefit; in other words, a party may appeal from a distinct portion of a severable and independent judgment or order while accepting the benefit of the unaffected remaining part.

Id. at 496, 866 P.2d at 960 (citations omitted).

In this case, the parties agree that Black's right to own the Properties constitutes the "benefit" accepted by Black inasmuch as no one disputes that Black is entitled to ownership of the Properties. On the other hand, the instant dispute on appeal is essentially whether the 5/20/02 Auction high bid of \$553,601 or the 7/11/02 Auction high bid of \$880,000 should be confirmed. In other words, the dispute centers on the sale price of the Properties. Inasmuch as the outcome of the appeal would have no effect on Black's right to the benefit accepted, i.e., Black's right to own the Properties, no waiver of appeal is

implied in the instant case. Accordingly, we hold that Black is not estopped from challenging the confirmation process.

Consequently, we next address whether the circuit court abused its discretion by reopening the bidding after the 5/20/02 Auction.

This court recently addressed the parameters of the circuit court's discretion regarding the reopening of bidding after a public auction but before confirmation of the public auction bid in Sugarman v. Kapu, 104 Hawai'i 119, 85 P.3d 644 (2004). In Sugarman, this court held that, when read in pari materia, Hawai'i Revised Statutes (HRS) §§ 668-1 (1993)¹² and 668-14 (1993),¹³ relating to the partition of real property, vest

¹² HRS § 668-1 provides:

Actions for partition. When two or more persons hold or are in possession of real property as joint tenants or as tenants in common, in which one or more of them have an estate in fee, or a life estate in possession, any one or more of such persons may bring an action in the circuit court of the circuit in which the property or some part thereof is situated, for a partition of the property, according to the respective rights of the parties interested therein, and for a sale of the same or a part thereof if it appears that a partition cannot be made without greater prejudice to the owners. The several circuit courts shall have power, in any action for partition, to proceed according to the usual practice of courts of equity in cases of partition, and according to this chapter in enlargement thereof.

(Bold emphasis in original.)

¹³ HRS § 668-14 provides:

Sales; auction, notice. All sales of any property in partition shall be made at public auction, after publication of notice with a brief description of the property to be sold, in at least one newspaper published in the State and having a general circulation in each circuit within which the property is situated, at least once in each of four successive weeks, the first publication to be not less than thirty days prior to the date of sale. The notice otherwise
(continued...)

the circuit court with equitable discretion in judicial sales of such property to reopen bidding after a public auction but before confirmation of the public auction bid. Id. at 122, 85 P.3d at 647. In discussing the circuit court's equitable discretion, this court stated:

[A]bsent arbitrary action, the court has broad discretion regarding confirmation of judicial sales. Rupe v. Oldenburg, 184 Neb. 229, 166 N.W.2d 417, 420 (Neb. 1969). **In exercising its discretion, the "court should act in the interest of fairness and prudence, and with a just regard to the rights of all concerned and the stability of judicial sales."** Brent, 7 Haw. App. at 45, 741 P.2d at 726 (quoting Hoge [v. Kane], 4 Haw. App. [533, 540], 670 P.2d [36, 40 (1983)]). The discretion of the court in a partition action then, will not be disturbed unless there is a clear finding of abuse. Id.

104 Hawai'i at 124, 85 P.3d at 649 (bold emphasis added).

Sugarman also outlined four "considerations" to keep in mind when dealing with reopening bidding after a public auction:

1) In dealing with the problem of a conflict between the court's obligation to maintain the stability and purpose of the judicial sale and its duty to obtain the highest possible price . . . a certain amount of judicial discretion is necessarily vested in the court to shield and promote justice under all circumstances; 2) a successful bidder at a public auction is not vested with any interest in the land until the sale has been confirmed by the court; 3) a bid advancing the purchase price and made before confirmation of the auction sale, which is not merely nominal but is substantial and material, may form the basis for the proper exercise of judicial discretion in directing a resale or reopening the bidding; and 4) in effect, the commissioners left the auction open for more bids to be made up to the confirmation hearing and, in essence, the circuit court merely kept the auction going[.]

¹³(...continued)

shall be in accordance with the direction or order of the court. All sales shall be subject to the approval of and confirmation by the court, and shall be promptly and fully reported by the commissioners to the court.

(Bold emphasis in original.)

Id. at 125, 85 P.3d at 650 (internal quotation marks, brackets, and citations omitted) (ellipses points in original).

In the instant case, the stability and purpose of the judicial sale at the 5/20/02 Auction was not appreciably disturbed by allowing the reopening of bidding inasmuch as Black was not vested with any interest in the Properties until the sale had been confirmed by the circuit court. Although the Notice did not inform bidders the sale was subject to confirmation, HRS § 668-14 makes clear that "[a]ll sales shall be subject to the approval of and confirmation by the court[.]" (Emphasis added.)

In addition, reopening the bidding ensured fairness to the minority owners involved in the instant case, i.e., the Andersons. As previously stated, Black had a five-sixths interest in the Properties, and the Andersons had only a one-sixth interest in the Properties. Inasmuch as "a partition suit often involves the sale of interests of minors in the real estate[,] . . . the court, as a result, is duty bound to protect [the interests of those minors] by securing the highest possible price for the property." Sugarman, 104 Hawai'i at 125-26, 85 P.3d at 650-51 (quoting Rupe, 166 N.W.2d at 420) (footnote and internal quotation marks omitted) (some brackets in original).¹⁴ Thus, the circuit court was "duty bound" to protect the minority

¹⁴ Sugarman notes that "[i]t appears from the context of the case [i.e., Rupe] that the court [in Rupe] uses the term 'minors' in reference to the 'minority interests' in partition cases." Sugarman, 104 Hawai'i at 126 n.4, 85 P.3d at 651 n.4.

interests of the Andersons by securing the highest possible price for the Properties.

Counseling against the reopening of bidding was Jackson's advance purchase bid, which was not "substantial and material" inasmuch as he indicated in his affidavit that he was willing to bid five percent higher than Black's high bid at the 5/20/02 Auction on only six of the seven lots collectively. See Sugarman, 104 Hawai'i at 125, 85 P.3d at 650 (indicating that an advance bid fifty percent higher than the original bid is substantial and material); Brent, 7 Haw. App. at 46, 741 P.2d at 726 (determining that an advance bid in excess of the original bid by eleven percent is substantial and material). However, the lack of a substantial and material advance bid does not preclude the circuit court's exercise of judicial discretion in directing resale or reopening the bidding as long as there are other bases in counseling the reopening of the bidding. The existence of a substantial and material advance bid that appreciably exceeds the highest public auction bid merely makes it "more likely" for the circuit court "to exercise its discretion to reject the result of the auction." Brent, 7 Haw. App. at 46, 741 P.2d at 726 (emphasis added) (citation omitted). Here, at the confirmation hearing held on June 7, 2002, the circuit court appeared to take into consideration the fact that Black's December 1999 appraisals were three years old and, thus, did not accurately indicate the Properties' fair market value. Moreover, in just regard to

Black's rights, the circuit court also stated that it would not confirm the new bid unless it was at least five percent higher than the 5/20/02 Auction bid of \$553,601.00. In attempting to fulfill its "duty to obtain the highest price possible," the circuit court, therefore, did not abuse its discretion in determining "that it makes sense to allow overbidding in this case." Thus, in exercising its discretion, the circuit court acted in the interest of fairness and prudence and with a just regard to the rights of all concerned.

Finally, whether the 5/20/02 Auction "in effect" continued into the confirmation hearing "is not determinative of the proper exercise of the court's equitable discretion under HRS § 668-1." Sugarman, 104 Hawai'i at 126, 85 P.3d at 651. Moreover, as this court stated in Sugarman, "HRS § 668-14 on its face does not prohibit the court from reopening bidding at the confirmation hearing and accepting further bids. In this regard[,] the authority of the court to reopen bidding [i]s not constrained by the statute." Id. Accordingly, we hold that the circuit court did not abuse its discretion by reopening the bidding after the 5/20/02 Auction.

2. The Results of the 6/7/02 Auction

Black next contends that the circuit court abused its discretion by disregarding the results of the 6/7/02 Auction. Black argues that "the Andersons disturbed the bidding process[]" because, "after the bidding on Lot #9 was finished, the

Andersons' counsel re-directed the Commissioner's assistant [i.e., Chessen] to conduct the bidding differently from the [c]ourt's instructions, and the Commissioner's assistant followed the Andersons' counsel's direction." The Andersons contend that the circuit court correctly disregarded the results of the 6/7/02 Auction inasmuch as the results were "inherently contradictory." The Andersons allege that

there was a misunderstanding as to whether the May 20 auction price would stand if there was no overbid as to a particular parcel. It was the [circuit] court's understanding that the June 7 auction price would control regardless of the May 20 prices. The Andersons, however, believed that the May 20 prices would remain only if there was no bid over 5% of the May 20 prices.

The bidding was conducted in a manner that was contradictory to both understandings.

(Citations to the record omitted.)

The following table summarizes the high bids at the 5/20/02 Auction and the 6/7/02 Auction:

LOT #	5/20/02 HIGH BID	6/7/02 HIGH BID
Lot # 9	\$ 451,000	\$ 1,000
Lot #20	\$ 1,000	\$ 22,100
Lot #22	\$ 60,000	\$ 270,100
Lot #14	\$ 501	\$ 30,001
Lot #10	\$ 40,100	\$ 100,001
Lot # 8	\$ 500	\$ 0
Lot #21	\$ 500	\$ 0
Total	\$ 553,601	\$ 423,202

As previously mentioned, the circuit court stated at the June 7, 2002 confirmation hearing that, "[c]learly if I was going to allow any overbidding here, it was going to be we're going to

start again and nobody was going to be stuck with whatever they bid before." (Emphasis added.) The circuit court, thus, essentially concluded that the entire bidding process was to be re-done and that none of the bidders at the 5/20/02 Auction would be "stuck" with what they had bid then. In light of the circuit court's "clear" message, it is curious that no one bid on Lots #8 and #21. On the other hand, the fact that no one had bid on Lots #8 and #21 appears to indicate that everyone participating at the 6/7/02 Auction, including Black, thought that the high bids from the 5/20/02 Auction would stand if there was no overbid as to a particular lot, including the bids on Lots #8 and #21 inasmuch as no one was willing to pay over \$500 for each lot. However, as the circuit court stated, "nobody was going to be stuck with whatever they bid before [i.e., at the 5/20/02 Auction]." Thus, because the bidding at the 6/7/02 Auction was conducted in a manner that was contradictory to the circuit court's mandate, the circuit court did not abuse its discretion in disregarding the results of the 6/7/02 Auction and thereby ordering the parties to conduct another auction to conform to the circuit court's instructions.

3. The June 2002 Appraisals and Ordering the 7/11/02 Auction

Black argues that the circuit court abused its discretion by disregarding the June 2002 appraisals submitted by him inasmuch as they demonstrated that the high bids at the 5/20/02 Auction were fair and more than adequate. The June 2002

appraisals indicated that the Properties' appraised value was \$410,000, and, thus, Black maintains that his \$553,601 high bid at the 5/20/02 Auction should have been confirmed. Black essentially contends that, by disregarding the June 2002 appraisals, the circuit court abused its discretion in ordering the 7/11/02 Auction.

As previously stated, the circuit court "has broad discretion regarding confirmation of judicial sales." Sugarman, 104 Hawai'i at 124, 85 P.3d at 649 (citation omitted). Thus, the discretion of the circuit court in a partition action "will not be disturbed unless there is a clear finding of abuse." Id. (citation omitted).

Here, this court has already concluded that the circuit court did not abuse its discretion by (1) reopening the bidding after the 5/20/02 Auction, see supra Part III.B.1, and (2) reopening the bidding after the 6/7/02 Auction, see supra Part III.B.2. Because the circuit court is vested with broad discretion regarding confirmation of judicial sales, it cannot be concluded that the circuit court "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant" when it refused to place controlling weight on the June 2002 appraisals submitted by Black. Accordingly, we conclude that the circuit court acted within its discretion when it disregarded the June 2002 appraisals and reopened the bidding at the 7/11/02 Auction.

4. The Settlement Offer

Black contends that, at the July 11, 2002 hearing, the circuit court violated HRE Rule 408 by wrongly considering his prior settlement offer in its decision to reopen the bidding. The Andersons counter that the circuit court "was clearly asking about a third party offer" and not about any prior offers made by Black. Moreover, the Andersons contend that the circuit court did not appear to have utilized Black's alleged settlement offer in ordering reopening of the bidding.

HRE Rule 408 provides in relevant part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, or (3) mediation or attempts to mediate a claim which was disputed, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations or mediation proceedings is likewise not admissible.

In the instant case, it is clear that the circuit court did not consider Black's prior offers to purchase the Andersons' interest in the Properties at the July 11, 2002 hearing. Although the circuit court stated that it thought "that at least some point there had been at least one offer totalling [sic] around a million dollars" to purchase the Properties, it believed that a third party, not Black, had made such an offer. Moreover, the circuit court subsequently stated that it would allow reopening of the bidding "in an effort to try to obtain the best price possible," and not because of any settlement offers made by Black prior to the filing of the instant partition action. The

circuit court, therefore, ultimately did not consider any settlement offer in deciding to reopen the bidding. Accordingly, we hold that the circuit court did not violate HRE Rule 408.

5. The Results of the 7/11/02 Auction

Black argues that the circuit court abused its discretion by confirming his high bids submitted during the 7/11/02 Auction. Specifically, Black asserts that conducting the 7/11/02 Auction was "grossly unfair" to him inasmuch as he had already submitted the highest bids at the 5/20/02 Auction and the 6/7/02 Auction. Black also contends that the three bids submitted by Stephen during the 7/11/02 Auction were "sham bids" inasmuch as Stephen did not have sufficient funds to purchase the lots that he had bid on. The Andersons argue that the circuit court correctly confirmed the results of the 7/11/02 Auction. Moreover, the Andersons contend that, inasmuch as Black failed to raise his objection regarding Stephen's "sham" bids at the circuit court level, Black's objection is barred on appeal.

As previously discussed, "a successful bidder at a public auction is not vested with any interest in the land until the sale has been confirmed by the [circuit] court[.]" Sugarman, 104 Hawai'i at 125, 85 P.3d at 650 (internal quotation marks, brackets, and citation omitted). Consequently, although Black was the successful bidder at both the 5/20/02 Auction and the 6/7/02 Auction, he was not vested with any interest in the Properties because the circuit court never confirmed either sale.

Thus, Black's argument that conducting the 7/11/02 Auction was "grossly unfair" to him is without merit.

Moreover, inasmuch as Black failed to raise his objection regarding Stephen's "sham" bids at the circuit court level, Black's objection is barred on appeal. See Price, 107 Hawai'i at 111, 111 P.3d at 6 (stating that "[t]he rule in this jurisdiction . . . prohibits an appellant from complaining for the first time on appeal of error to which he has acquiesced or to which he failed to object") (internal quotation marks and citations omitted) (ellipses points in original); HRS § 641-2 (1993) ("The supreme court . . . need not consider a point which was not presented in the trial court in an appropriate manner."). After Pietsch reported the results of the 7/11/02 Auction to the circuit court, the circuit court stated its inclination that it would confirm Black's bid of \$880,000. The circuit court then stated: "Other than the objections you have already stated, Ms. Yee, [i.e., Black's counsel], do you have any objections to the Court confirming this [i.e., the results of the 7/11/02 Auction]?" Black's counsel subsequently responded that she did not have any objections. A review of the record indicates that Black's earlier objections did not include an objection regarding Stephen's bids as being "sham bids," and, thus, Black is barred from raising such an objection on appeal. Accordingly, we hold that the circuit court did not abuse its discretion by confirming the results of the 7/11/02 Auction.

6. Due Process

Black alleges that the 6/7/02 Auction and the 7/11/02 Auction violated his due process rights inasmuch as "the finality to the bidding process should have been the [5/20/02] Auction." The Andersons contend that Black has not met his burden of demonstrating that his due process rights were violated inasmuch as he "does not allege a deprivation of notice or opportunity to be heard as needed to sustain a procedural due process claim" nor does he "allege an impingement of a fundamental right guaranteed by the Constitution as would support a substantive due process challenge."

This court has previously stated that "[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." KNG Corp. v. Kim, 107 Hawai'i 73, 80, 110 P.3d 397, 404 (2005) (internal quotation marks and citation omitted). In addition, "[s]ubstantive due process has been defined as that which protects those fundamental rights and liberties which are . . . implicit in the concept of ordered liberty." Ek v. Boggs, 102 Hawai'i 289, 297, 75 P.3d 1180, 1188 (2003) (internal quotation marks, brackets, and citation omitted) (ellipses points in original).

In this case, Black has not alleged that the circuit court deprived him of notice or of an opportunity to be heard as

needed to sustain a procedural due process claim. Nor has Black raised the argument that his purported right to have the results of the 5/20/02 Auction confirmed is a fundamental right protected by substantive due process. We, therefore, need not address the contention that Black's due process rights were violated.

Accordingly, we hold that the circuit court did not violate Black's due process rights.

C. Attorneys' Fees and Costs Awarded in the Fee Order

1. The Basis for the Award of Fees and Costs

Black contends that the circuit court abused its discretion by determining that the Andersons should be awarded attorneys' fees and costs inasmuch as (1) Black did not benefit from the services of the Andersons' counsel and (2) the equities of the case demonstrate that Black should not be liable for the Andersons' fees and costs. Black also argues that the circuit court erroneously awarded the Andersons fees and costs relating to the Trust Claims inasmuch as HRS § 668-17 provides for fees and costs for only partition-related matters.

The Andersons contend that the circuit court did not err in exercising its equitable discretion to apportion fees according to the parties' respective ownership interests in the Properties. The Andersons argue that the circuit court correctly awarded them their fees and costs inasmuch as their efforts increased the selling price of the Properties to the collective benefit of the owners of the Properties. They also argue that

they were only awarded fees related to the partition action and that fees related to the Trust Claims that were so "inextricably intertwined" with the partition fees that they could not have been separated.

HRS § 668-17, relating to the award of fees and costs in partition actions, provides:

All costs of the proceedings in partition shall be paid by the plaintiff in the first instance, but eventually by all of the parties in proportion to their interests, except such costs which may be occasioned by contests as to particular shares or interests, which shall be charged against the particular shares or interests involved and be paid as determined by the result of the trial of the particular issue. In addition to costs of the proceeding the judge may allow any fee or fees for legal services rendered by the attorneys for any of the parties, and apportion the same for costs for payment by and between the parties or any of them, all as to the judge shall seem equitable in the light of the services performed and the benefits derived therefrom by the parties, respectively. When more than ten defendants are named in a complaint for partition, no greater payment for costs shall be required of the plaintiff than would be required if there were but ten defendants.

(Emphasis added.) In Pioneer Mill Co. v. Ward, 34 Haw. 854 (1939) (per curiam), this court analyzed Revised Laws of Hawai'i (RLH) § 4756 (1935) (predecessor to HRS § 668-17) and stated:

Said statute, in so far as it relates to the allowance of attorneys' fees, is not mandatory. The judge of the circuit court, and likewise this court, in passing upon such a motion may disallow such fees or allow them with or without apportioning them for payment by the parties to the litigation as to him or it shall seem equitable in the light of the services performed and the benefits derived therefrom by the parties respectively. One of the burdens incident to ownership of land as a tenant in common with others is the chance that partition proceedings will be prosecuted by some one or more of the cotenants and our legislature has, in its wisdom, provided for the allowance of attorneys' fees to all of the parties to such proceedings and has authorized the apportioning of said fees for payment by the parties as to the judge shall seem equitable.

Id. at 857 (emphasis added). This court then awarded attorneys' fees that were "apportioned for payment by all of the parties in

proportion to their several interests in the property to be partitioned." Id. at 858. In so holding, this court stated that:

The question of what is a proper allowance in matters of this kind must be decided in the light of the services performed and the benefits derived therefrom by the parties respectively. If [the party's] argument that it, an adverse party, cannot be required to bear any portion of said expenses was followed[,] the court could never "apportion the same for costs" as authorized by the statute [i.e., RLH § 4756].

Id. (emphasis added). See also Lalakea v. Laupahoehoe Sugar Co., 35 Haw. 262, 298 (1939) (noting that, "[o]rdinarily, in partition cases[,] costs are apportioned between the parties according to their respective interests. . . . The idea is that all parties to the suit are presumed to be proportionately benefitted by all of the steps in which costs are incurred").

Likewise, inasmuch as HRS § 668-17 bestows upon the circuit court discretion to apportion fees and costs according to the parties' respective ownership interests in the partitioned property, the circuit court in the instant case did not abuse its discretion when it ordered Black to pay five-sixths, and the Andersons to pay the remaining one-sixth, of the total fees and costs awarded by the circuit court. Here, it is presumed that both Black and the Andersons were proportionately benefitted by the instant partition action inasmuch as the Properties were successfully partitioned and sold. Moreover, it appears that the circuit court did indeed consider the equities of the instant case by awarding more fees and costs to the Andersons inasmuch as

they requested partition of six of the seven lots comprising the Properties, whereas Black had requested partition of only one lot.

Although the circuit court later admitted in its order denying Black's motion for reconsideration of the Fee Order that it awarded fees that may have been related to the Trust Claims to both parties, the circuit court realized that it was "extremely difficult" to distinguish between fees related to the partition aspect of the case and fees related to the Trust Claims. Indeed, even Black admitted to having included fees and costs related to the Trust Claims. Specifically, Black stated that he "attempted to exclude legal services relating to the [T]rust [C]laims." However, Black then stated that his counsel had included "a few time entries" related to the Trust Claims. Thus, where, as here, the trust and partition claims were inextricably intertwined because the Trust Claims were derived from the partition action, it would have been impracticable for the circuit court to apportion the fees and costs between trust and partition issues. Cf. Blair v. Ing, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001) (noting that, "in awarding attorneys' fees in a case involving both assumpsit and non-assumpsit claims, a court must base its award of fees, if practicable, on an apportionment of the fees claimed between assumpsit and non-assumpsit claims" (Emphasis in original.) (Citation omitted.)).

2. The Amount of the Fees and Costs Awarded

Black argues that the circuit court abused its discretion by applying different cut-off dates in awarding fees and costs to each party. Specifically, Black claims that the circuit court awarded him his requested fees and costs through June 6, 2002 but awarded the Andersons their requested fees and costs through July 1, 2002. Thus, Black contends that the circuit court "neglected several of [his] requests for fees and costs." The Andersons argue that "Black's efforts between June 6 and July 1 added nothing to the partition price of the Properties."

Similarly, the Andersons contend on cross-appeal that the circuit court "erred by arbitrarily and prematurely cutting off [their] attorneys' fees and costs award as of July 1, 2002, without explanation or consideration of the partition fees incurred through July 18, 2002." Black claims that "[t]here is no legal basis for any award of fees to the Andersons, including the additional fees that the Andersons are requesting in this appeal[,] i.e., the fees for the period from July 1 through July 18, 2002. Moreover, Black argues that, based on "public policy reasons," the Andersons should not receive any fees and costs because they did not accept Black's offers to purchase their interest in the Properties prior to the filing of the instant partition action.

The following table summarizes the fee and cost requests made by both parties:

FEES & COSTS REQUESTED	BLACK	THE ANDERSONS
<u>6/4/02 & 6/5/02</u> : The Andersons' Request for Fees and Costs and Errata, respectively	---	\$60,781.26 (through 6/3/02)
<u>6/6/02</u> : Affidavit of Gary Grimmer Re: Fees and Costs Awardable to Black	\$56,865.05 (through 6/6/02)	---
<u>7/3/02</u> : The Andersons' Supplemental Request	---	\$9,056.46 (from 6/3/02 through 7/1/02) [(totaling \$69,837.72)]
<u>7/11/02</u> : Affidavit of James Starshak Re: Additional Fees and Costs Awardable to Black	\$14,499.34 (from 6/4/02 through 7/9/02)	---
<u>7/12/02</u> : Black's Motion for Fees Award	\$3,553.42 (from 7/8/02 through 7/12/02)	---
<u>7/19/02 & 7/25/02</u> : The Andersons' Memo on Issue of Fees and Errata, respectively	---	\$11,654.47 (from 7/1/02 through 7/18/02)
TOTAL FEES & COSTS REQUESTED:	\$73,966.04	\$81,492.19

As previously noted, the circuit court awarded Black \$56,865.05 in fees and costs and awarded the Andersons \$69,837.72 in fees and costs in its Fee Order dated August 13, 2002. See supra note 11. As illustrated by the foregoing table, the circuit court awarded Black his entire fees and costs only up to June 6, 2002, i.e., \$56,865.05. For the Andersons, it appears that the circuit court determined the amount of their award of fees and costs by adding \$60,781.26 (the entire amount requested on June 4 and June

5, 2002) to \$9,056.46 (the entire amount requested on July 3, 2002), resulting in a total award of \$69,837.72 in fees up to July 1, 2002.

Generally, judges must "specify the grounds for awards of attorneys' fees and the amounts awarded with respect to each ground. Without such an explanation, we must vacate and remand awards for redetermination and/or clarification." Price, 107 Hawai'i at 113, 111 P.3d at 8 (citations omitted). Here, although the circuit court relied on HRS § 668-17 as the statutory basis for its award of fees and costs to the parties, the circuit court did not provide any explanation for its award of \$56,865.05 to Black and \$69,837.72 to the Andersons rather than \$73,966.04 and \$81,492.19, as requested by Black and the Andersons, respectively. Based on a review of the record, it appears that the circuit court may have simply overlooked Black's additional request for fees and costs made on July 11 and 12, 2002 and the Andersons' additional request for fees and costs made on July 19 and 25, 2002. Absent an explanation as to apparent oversight, this court cannot effectively review whether the circuit court abused its discretion in awarding attorneys' fees and costs as it did. Accordingly, we must vacate and remand the August 13, 2002 award of fees and costs to the circuit court for redetermination.¹⁵

¹⁵ The Andersons also contest on cross appeal that the circuit court erred "in awarding Black costs not enumerated in [HRS] § 607-9." Specifically, the Andersons allege that the circuit court inappropriately
(continued...)

D. Breach of Settlement Agreement

1. **Black's Motion for an Award of Damages for Breach of Settlement Agreement**

Black contends that the circuit court erred in denying his motion for an award of damages for breach of settlement agreement because the Andersons breached the settlement agreement "by opposing [his] motion for reconsideration and seizing an opportunity for a double recovery of their attorneys' fees and costs relating to the Trust Claims." As a result of the Andersons' alleged breach, Black claims that he was damaged in the sum of \$19,818.87. The Andersons argue that, inasmuch as the issue of attorneys' fees and costs had already been fully briefed before the parties entered into the settlement agreement, they could not have breached an agreement before its existence.

As previously stated, the settlement agreement between the parties provided that "[n]o party will be allowed to file additional papers with respect to the partition issues unless ordered by Judge McKenna." (Emphasis added.) Here, it appears that the parties' respective motions requesting attorneys' fees and costs were already filed prior to the parties reaching a

¹⁵(...continued)
awarded Black "word processing fees" and "messenger fees" inasmuch as such expenses "are not allowable costs under [HRS] § 607-9." However, the circuit court relied solely upon HRS § 668-17 as the statutory basis for its award of fees and costs to the parties, and the Andersons never contested the applicability of section 668-17 to this case. Because the Andersons present no discernible argument with respect to why section 607-9 is applicable to the instant case, we may disregard their contention. See Taomae v. Lingle, 108 Hawai'i 245, 257, 118 P.3d 1188, 1200 (2005) (stating that the court may disregard points of error when the appellant fails to present discernible arguments supporting those assignments of error).

settlement agreement on August 12, 2002. Indeed, Black's motion cites to attorneys' fees and costs requests made by the Andersons prior to August 12, 2002. Specifically, Black cited to the following motions: (1) the "Andersons' Response to Black's Motion for Order Approving Report of Commissioner," filed June 4, 2002; (2) the "Andersons' Errata," filed June 5, 2002; (3) the "Andersons' Supplemental Memorandum," filed July 3, 2002; and (4) the "Andersons' Memorandum on Issue of Attorneys' Fees," filed July 19, 2002. And, in his answering brief on cross appeal, Black unequivocally states that, "[p]rior to the settlement of the Trust Claims, the parties had already submitted their briefs on the issue of attorneys' fees and costs." Thus, it is unclear how the Andersons breached the settlement agreement inasmuch as they had already filed their requests for attorneys' fees and costs prior to the execution of the settlement agreement. Moreover, Black presents no discernible argument with respect to how the Andersons breached the settlement agreement by opposing his motion for reconsideration. Thus, this court may disregard such a contention on appeal. See Taomae, 108 Hawai'i at 257, 118 P.3d at 1200. Accordingly, we hold that the circuit court did not err in denying Black's motion for breach of settlement agreement.

2. The Andersons' Motion to Remedy Breach of Settlement Agreement

On cross-appeal, the Andersons contend that the circuit court erred in denying their motion to remedy breach of

settlement agreement inasmuch as Black filed a motion for reconsideration of the Fee Order when the settlement agreement explicitly stated that no "additional papers" were to be filed with respect to the partition issues. As a result of Black's breach of the settlement agreement, the Andersons claim that they incurred damages in the form of attorneys' fees and costs in opposing Black's motion for reconsideration. Black contends that, when read as a whole, the settlement agreement "sought a ruling from Judge McKenna without further briefing from the parties[] and did not prohibit the filing of the motion for reconsideration after Judge McKenna had ruled" on the issue of attorneys' fees and costs. (Capital letters altered.) Stated differently, Black argues that the intention of the settlement agreement "was that Judge McKenna would rule on the attorneys' fees and costs issue without further briefing from the parties, and the parties could file necessary papers after Judge McKenna had ruled." Moreover, Black points out that the Andersons' understanding of the terms of the settlement agreement "does not make any sense" inasmuch as the Andersons themselves filed partition-related papers after Judge McKenna issued the Fee Order.

This court has stated on prior occasions that:

It is fundamental that terms of a contract should be interpreted according to their plain, ordinary[,] and accepted use in common speech, unless the contract indicates a different meaning. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 108, 839 P.2d 10, 24, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) (citation and internal quotation marks omitted). **Correlatively, in**

construing a contract, a court's principal objective is to ascertain and effectuate the intention of the parties as manifested by the contract in its entirety. If there is any doubt, the interpretation which most reasonably reflects the intent of the parties must be chosen. Univ[.] of Hawai'i Prof[.] Assembly v. Univ[.] of Hawai'i, 66 Haw. 214, 219. 659 P.2d 720, 724 (1983) (citations and internal quotation marks omitted).

Brown v. KFC Nat'l Mgmt. Co., 82 Hawai'i 226, 240, 921 P.2d 146, 160 (1996) (internal quotation marks and brackets omitted) (bold emphasis added).

As previously mentioned, the parties' settlement agreement states in relevant part:

The remaining partition issues which include confirmation of the partition sale, distribution of proceeds, attorneys' fees and costs, and commissioner's fees and expenses related thereto will be left for decision by [Judge McKenna].

No party will be allowed to file additional papers with respect to the partition issues unless ordered by Judge McKenna, and any hearing on the partition issues will be left to the discretion of Judge McKenna.

The right to appeal Judge McKenna's decision with regard to the partition issue is not waived by this agreement.

(Emphases added.) Although the terms of the settlement agreement plainly state that neither party will be allowed to file "additional papers" with respect to the partition issues, it appears that such an interpretation does not reasonably reflect the intent of the parties. A more reasonable interpretation, as reflected by the actions of the parties, is that the parties essentially agreed that Judge McKenna would rule on the pending partition-related issues before her without the parties filing "additional papers" in order to prevent further attorneys' fees and costs from being incurred by the parties. Once Judge McKenna ruled on the pending partition-related issues, it appears that

both parties were free to file "additional papers" as they deemed necessary during the remainder of the litigation. Indeed, once Judge McKenna entered the Fee Order on August 13, 2002, both parties subsequently filed "additional papers" with respect to the partition issues. For example, the Andersons filed a "Motion for Disbursement of Partition Fees and Costs Held by Court Cashier" on October 25, 2002. Under a literal reading of the settlement agreement, such a motion was an "additional paper" filed with respect to the partition issues. However, such a literal interpretation of the settlement agreement does not reasonably reflect the intent of the parties. Thus, the filing of the motion for reconsideration by Black also did not constitute a breach of the terms of the settlement agreement. Accordingly, we hold that the circuit court did not err in denying the Andersons' motion for breach of settlement agreement.

E. Black's Motion for Reconsideration

In light of our holding to vacate and remand the August 13, 2002 award of fees and costs to the circuit court for redetermination, we need not address Black's contention that the circuit court erred in denying his motion for reconsideration of the Fee Order.

IV. CONCLUSION

Based on the foregoing, we: (1) vacate the award of attorneys' fees and costs as determined in the August 13, 2002 order and referred to in the March 19, 2003 amended judgment; (2)

remand to the circuit court for a redetermination of the proper amount of fees and costs to the respective parties; and (3) affirm the March 19, 2003 amended judgment in all other respects.

DATED: Honolulu, Hawai'i, March 21, 2006.

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