FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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BANK OF HAWAII,
Respondent/Plaintiff-Appellee

vs.

MICHAEL L. SHINN,
Petitioner/Defendant-Appellant

and

BAYS, DEAVER, HIATT, KAWACHIKA & LEZAK,
a Hawai'i partnership, Defendant-Appellee

and

DONALD T EOVINO; KAHALA VENTURES, a Hawai'i general partnership; FIRST HAWAIIAN BANK; DONALD H. WILSON, as Trustee of the Jerry T. Lynn Charitable Remainder Trust; B&T ENTERPRISES, a California corporation; RICHARD WALLACE and PATRICIA DAVISON WALLACE, as Trustees of the Muldoon & Associates Money Purchase Plan and Trust; UNIVERSAL SECURITIES CO., LTD., a Japan corporation; LOREN H. COOK; DARCY H. COOK; J. ROGER ALLEN; CATHREINE G. ALLEN; JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50,
Defendants

NO. 27832

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 93-1151)

December 29, 2008

MOON, C.J., ACOBA, AND DUFFY, JJ.;
WITH LEVINSON, J., CONCURRING SEPARATELY,
AND DISSENTING, WITH WHOM NAKAYAMA, J., JOINS

OPINION OF THE COURT BY ACOBA, J.

Petitioner/Defendant-Appellant Michael L. Shinn (Petitioner) seeks review of the judgment of the Intermediate Court of Appeals (ICA), filed on March 30, 2008, pursuant to its published opinion filed on February 29, 2008,[1] affirming the March 7, 2006 Order of the first circuit court (the court)[2] denying Petitioner's Hawai'i Rules of Civil Procedure (HRCP) Rule 60(b) (2008) motion (1) to set aside the court's December 18, 2003 Order granting the motion of Respondent/Plaintiff-Appellee Bank of Hawaii (Respondent) to extend a deficiency judgment against Petitioner entered on December 21, 1993, and (2) to expunge the court's December 21, 1993 joint and several judgment against Petitioner. See Bank of Hawaii v. Shinn, 118 Hawai'i 132, 138, 185 P.3d 880, 886 (App. 2008).

We hold (1) that Hawai'i Revised Statutes (HRS) § 657-5 (Supp. 2007)[3] controls over HRCP Rule 5(a) (2008),[4] and therefore,

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[1] The opinion was authored by Associate Judge Daniel R. Foley and joined by Chief Judge Mark Recktenwald and Associate Judge Craig H. Nakamura.

[2] The Honorable Karen N. Blondin presided.

[3] HRS § 657-5 provides as follows:

> Unless an extension is granted, every judgment and decree of any court of the State shall be presumed to be paid and discharged at the expiration of ten years after the judgment or decree was rendered. No action shall be commenced after the expiration of ten years from the date a judgment or decree was rendered or extended. No extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered. A court shall not extend any judgment or decree beyond twenty years from the date of the original judgment or decree. No extension shall be granted without notice and the filing of a non-hearing

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notice of a proposed extension of a judgment pursuant to HRS § 657-5 must be provided to the judgment debtor prior to the granting of the extension, even if the debtor is in default and is not required under HRCP Rule 5(a) to be served with pleadings; and (2) although the failure to provide notice under HRS § 657-7 (1993) to a party in default is error, such error was harmless under the circumstances of this case. Accordingly, the December 18, 2003 order granting extension of judgment was not void under HRCP Rule 60(b)(4).[5] The error was harmless in this case because

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[3]...continue
motion or a hearing motion to extend the life of the judgment or decree.

(Emphasis added.)

[4] HRCP Rule 5(a) governs the "Service and Filing of Pleadings and Other Papers" and provides as follows:

> (a) *Service: When required.* Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, brief or memorandum of law, offer of judgment, bill of costs, designation of record on appeal, and similar paper shall be served upon each of the parties, but no service need be made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

(Italics in original.) (Emphasis added.)

[5] HRCP Rule 60(b) provides:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule

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Petitioner had never appeared in the action to defend himself, he had an opportunity to be heard at the Rule 60(b) hearing, he offered no defense on the merits to the original judgment or the extension, and thus failed to demonstrate any prejudice. Therefore, the ICA's judgment is affirmed, albeit on different grounds.

I.

In 1990, Petitioner and his business associates formed Kahala Ventures, a Hawai'i partnership. On June 25, 1990, Kahala Ventures borrowed $1,500,000 from Respondent to develop property located in Kahala (property). The lending agreement required the loan to be repaid in full by January 1, 1993. On March 22 of that same year, Respondent filed its complaint for foreclosure and deficiency after Petitioner and his partners failed to make the payments. On April 1, 1993, the complaint and summons were served

[5]...continue

> 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(Italics in original.) (Emphases added.)

on Petitioner at his home. Respondent moved for summary judgment on the foreclosure later that month. Notice of the summary judgment motion and hearing were sent to Petitioner at the same address by U.S. mail. Petitioner filed no answer to the complaint and never appeared in court, resulting in a default judgment against him, entered by the clerk of the court on May 6, 1993.[6]

On June 23, 1993, the court granted Respondent's summary judgment motion. The Foreclosure Decree determined that $1,565,426.17 was due on the loan as of April 23, 1993, with per diem interest of $471.98 thereafter. By August of 1993, Respondent had sold the mortgaged property for $1,208,218.87.

On December 16, 1993, Respondent served the Affidavit of Michael C. Webb, requesting entry of a deficiency judgment against Petitioner and others in the amount of $467,120, on Petitioner by U.S mail to the same residence in Kahala. On December 21, 1993, Respondent obtained a deficiency judgment against Petitioner and others, which was served on Petitioner, also via U.S. mail, to his Hawai'i address.

On August 9, 2000, Respondent filed a release of the judgment as to Petitioner's partner, Defendant Donald Eovino, due to his receipt of a discharge in bankruptcy.

On December 10, 2003, Respondent filed a motion to extend the deficiency judgment for an additional ten years, and to

[6] HRCP Rule 55(a) (2008) states that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

set aside an "order of dismissal," which had been entered on June 28, 2002, for inactivity. The motion to extend was not served on Petitioner. Eight days later, the court held a hearing on the motion and entered an order extending the judgment for ten years and setting aside the order of dismissal to the extent that it dismissed claims and parties that were already subject to judgment or otherwise previously dismissed.

Because Respondent did not notify Petitioner of its motion to extend, he did not learn of the extension until 2005. On January 17, 2006, Petitioner filed a HRCP Rule 60(b) motion seeking to void the trial court's 2003 grant of extension, and to expunge the extended deficiency judgment, which was recorded at the Bureau of Conveyances. Petitioner argued that HRS § 657-5 requires notice to the judgment debtor of any motion to extend a judgment, and that Petitioner had an absolute right to notice of the motion to extend.

The court heard argument on Petitioner's motion on February 7, 2006. At the hearing, Respondent "emphasized that [Petitioner] had never contested the default or appealed the underlying [j]udgment . . . [and] . . . raised no defenses on the merits to the original [j]udgment or its extension." Respondent also offered the testimony of its Vice President of Commercial Collections, David Bowman, by way of a declaration stating that Respondent had been informed on various occasions that Petitioner had moved back and forth between Colorado and Florida, to show

that Respondent was unaware of Petitioner's exact address. Petitioner's arguments focused on the legislative intent in HRS § 657-5 that notice must be provided, on his belief that Respondent actually knew of his exact whereabouts at the time of the extension and that Respondent's assertions to the contrary were hearsay. On March 7, 2006, without announcing any findings of fact or conclusions of law, the court entered an order denying Petitioner's motion to set aside the extension of judgment.

On March 22, 2006, Petitioner filed his notice of appeal. On February 29, 2008, the ICA affirmed the court's March 7, 2006 order denying Petitioner's Rule 60(b) motion. The ICA determined, based on an in pari materia reading of HRS § 657-5 and HRCP Rules 5(a) and 55(b)(2) (2008),[7] that Respondent was not required to provide notice to Petitioner prior to entry of the extension of judgment because the notice requirement does not apply to parties who fail to appear and are defaulted. Shinn, 118 Hawai'i at 136-37, 185 P.3d at 884-85. Therefore, the ICA concluded that the court had properly denied Petitioner's Rule 60(b) motion to set aside the extension of judgment. Petitioner filed his Application for Writ of Certiorari (Application) on June 18, 2008. This court accepted certiorari and oral argument on the merits was heard on October 16, 2008.

[7] See infra note 11.

II.

Petitioner lists the following pertinent questions in his Application:[8]

> 1. Was Petitioner deprived of (a) his . . . HRS [§] 657-5 statutory procedural rights, (b) his [a]rticle [I], [s]ection 5, State [c]onstitutional procedural rights, and (c) his Fifth and Fourteenth Amendment United States [c]onstitutional procedural rights when the lower court[,] without notice to him or service upon him extended the 1993 money judgment against him, rendering that extension defective and null and void?
>
> 2. Was the ICA correct in concluding that construing HRS [§] 657-5 *in pari material* [sic] with HRCP [Rules] 5 and 55, a motion for extension of judgment need not be served upon a previously defaulted party, notwithstanding that notice requirement in HRS 657-5, because an extension on judgment request is supposedly not a new or additional claim?

(Emphases added.)[9]

[8] Petitioner posits a third question as follows: "Is the Legislature's 2006 amending of HRS [§] 636-3 intended to be retroactive?" HRS § 636-3 grants a judgment creditor an automatic lien on any real property of the judgment debtor. Petitioner argues that the lien on real property expired after ten years. Arguably, it is unclear whether Respondent's judgment lien on real property continues with the extension. At the time Respondent filed to extend its judgment, HRS § 636-3 allowed the lien to extend for ten years. HRS § 636-3 (Supp. 2005). In 2006, the statute was amended to allow judgment liens to be extended for the life of the judgment. HRS § 636-3 (Supp. 2006). However, neither Respondent nor Petitioner have pointed to any real property within Hawai'i that can be attached. The facts of this case do not raise the lien issue. Therefore, the issue is not ripe as it is "not yet appropriate for adjudication." Office of Hawaiian Affairs v. Housing & Cmty. Dev. Corp. of Hawaii (HCDCH), 117 Hawai'i 174, 207, 177 P.3d 884, 917 (2008) (citation omitted).

[9] Respondent contends that Petitioner's Application does not comply with HRS § 602-59(b) (Supp. 2007), which sets out the requirements for the contents of an application for certiorari, because (1) "[Petitioner] fails to state whether he is seeking relief from alleged errors of law or fact"; and (2) "[Petitioner] fails to describe how any such error was grave . . . and . . . of sufficient magnitude to dictate further appeal." However, Petitioner's arguments are sufficiently clear as to whether he is seeking relief from errors of law or fact, as he specifically points out under which statutory and constitutional provisions he is seeking relief. Furthermore, because Petitioner alleges errors in violation of state statutory law as well as the state and federal constitutions, we think this rises to the level of "[grave] error . . . of sufficient magnitude to dictate further appeal." Therefore, Petitioner's Application meets the requirements of HRS § 602-59(b).

III.

A.

Petitioner's first argument[10] is that the trial court should not have granted Respondent's motion to extend the underlying judgment because he did not receive notice of the motion as required by HRS § 657-5. See HRS § 657-5 ("No extension shall be granted without notice and the filing of a non-hearing motion or a hearing motion to extend the life of the judgment or decree."). Petitioner argues "that the plain meaning of [the] statute is . . . clear and unambiguous," and therefore should control.

Respondent, on the other hand, asserts that the confluence of HRCP Rules 5(a) and 55(b)(2) create an exception to the notice requirement in HRS § 657-5. See HRCP Rule 5(a) (stating that "no service need be made on parties in default for failure to appear"); HRCP Rule 55(b)(2) ("If the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application.").[11] According to Respondent, HRS § 657-5 and HRCP

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[10] Petitioner also argues that (1) "[t]he filing of a HRCP 60(b) [m]otion was the correct method for seeking affirmative relief below." Respondent does not contest this assertion.

[11] HRCP Rule Rule 55(b)(2) in its entirety reads as follows:

> *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a

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Rule 5 are reconcilable and therefore both should be given effect. Respondent argues that when HRS § 657-5 and HRCP Rule 5 are read in pari materia, or construed with reference to one another, the notice requirement in the statute does not apply to parties who are in default. The ICA agreed with Respondent, thereby concluding:

> In the instant case, we have no difficulty harmonizing the applicable provisions of HRCP Rule[] 5 . . . and HRS § 657-5. All observe the principle that service and notice are generally required, but Rule[] 5 . . . recognize[s] the well-settled exception to that principle applying to parties who fail to appear and are defaulted. Consequently, we hold that the notice requirement contained in HRS § 657-5 does not apply to defaulted parties who have not appeared.

118 Hawai'i at 137, 185 P.3d at 885. Therefore, according to Respondent's argument and the ICA, because default was entered against Petitioner, and he never appeared in the action, the

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[11]...continue

> guardian, or other such representative who has appeared therein, and upon whom service may be made under Rule 17. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

(Italics in original.) (Emphasis added.) Both Respondent and the ICA cite to Pogia v. Ramos, 10 Haw. App. 411, 876 P.2d 1342 (1994), for the proposition that "HRCP Rule 55(b)(2) requires that notice of an application for judgment must be served against a party in default who has appeared in the action; by implication that rule does not require notice to a party in default who has failed to appear in the action." 118 Hawai'i at 136, 185 P.3d at 884 (citing Pogia, 10 Haw. App. at 419, 876 P.2d at 1346).

exception to the notice requirement in Rule 5(a) is applicable and Petitioner was not entitled to notice under HRS § 657-5.

In support of its argument that HRCP Rule 5 "does not require that a defaulted party who has failed to appear in the action receive notice," Respondent cites to the ICA's decision in Pogia. In Pogia, the trial court had entered default judgment after the defendant failed to file an answering brief or appear before the court to contest claims arising out of an automobile accident. 10 Haw. App. at 413, 876 P.2d at 1344. The defendant subsequently asked the court to set aside an award of damages because she had not received notice of the proof hearing. Id. at 418, 876 P.2d at 1346.

The ICA held that notice was not required because HRCP Rule 5(a) stated that no pleadings subsequent to the original complaint need be served in cases where default judgment has been entered. Id. (citing HRCP Rule 5(a)). Additionally, as described in note 11 supra, the ICA construed the notice requirement in HRCP Rule 55(b)(2) for parties who have appeared in the action, as by implication meaning that notice is not required for parties who have not appeared. Id. at 419, 876 P.2d at 1346. However, Pogia is distinguishable from the present case because HRS § 675-5 was not in issue, and in Pogia no other relevant statute was raised that potentially conflicted with the application of HRCP Rule 5(a). Here, however, HRS § 657-5 directly conflicts with HRCP Rule 5(a).

Petitioner's argument that the HRS and HRCP provisions should be harmonized where possible finds some support in case law. In Chock v. Government Employers Insurance Co., 103 Hawai'i 263, 81 P.3d 1178 (2003), this court reconciled a potential conflict between HRS § 431:10-242 (1993) and HRCP Rule 54(d) (2000). HRS 431:10-242[12] gives prevailing insureds the right to seek reimbursement for court costs, but is silent as to whether prevailing insurers could seek reimbursement, whereas HRCP Rule 54(d) gave any prevailing party the right to seek costs. Id. Because the statute was silent on the matter of reimbursement for insurers, the insured argued that it should be interpreted as a negative reimbursement right for insurers. Id. at 268, 81 P.3d at 1183. This court disagreed, construing HRCP Rule 54(d) as merely overlapping with HRS § 431:10-242. Id. at 269, 81 P.3d at 1184. It was concluded that "where the statutes simply overlap in their application, effect will be given to both if possible, as repeal by implication is disfavored." Id. (citing Richardson v. City & County of Honolulu, 76 Hawai'i 46, 55, 868 P.2d 1193, 1202 (1994)) (emphasis omitted). Unlike the reimbursement statute at issue in Chock, HRS § 657-5, which applies to Petitioner's case, is not silent as to notice. The statute unequivocally states that "[n]o extension shall be granted without notice[.]" HRS § 657-5.

[12] HRS § 431:10-242 provides that "[w]here an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder . . . shall be awarded reasonable attorney's fees and the costs of suit, in addition to the benefits under the policy," but is silent as to whether the insurer could be awarded fees. No amendments were made to HRS § 431:10-242 after its enactment in 1987. That statute is now in the 2005 replacement volume.

Respondent further urges this court to adopt the view of the Oregon Supreme Court in Shepard & Morse Lumber Co. v. Clawson, 486 P.2d 542 (Or. 1971), that notice is not required for the extension of judgment. However, Shepard is inapposite to the present case. The relevant Oregon statute addressing judgment extensions did not set forth any requirement that the judgment debtor be notified of the extension. Id. at 544.[13] The Oregon Supreme Court declined to imply such a requirement into the statute. Id. By contrast, HRS § 657-5 clearly sets forth a notice requirement for the filing of an extension of judgment.

B.

In re Doe Children, 94 Hawai'i 485, 17 P.3d 217 (2001), addressed this issue in the context of conflicting HRS and Hawai'i Rules of Appellate Procedure (HRAP) provisions for filing appeals. In Doe Children, the statute required parties to file a motion for reconsideration within twenty days of final judgment before filing an appeal. Id. at 486, 17 P.3d at 218 (citing HRS § 571-54 (1993)). However, HRAP Rule 4 required parties to file an appeal within 30 days of the original judgment. Id. (citing HRAP Rule

[13] Oregon Revised Statutes § 18.360 (repealed in 2003) stated as follows:

> Whenever, after the entry of judgment, a period of 10 years shall elapse, the judgment and the lien shall expire. However, before the expiration of 10 years the circuit court in which such judgment was docketed, on motion, may renew such judgment and cause a new entry of the same to be made in the judgment docket, after which entry the lien of the judgment shall continue for another 10 years unless sooner satisfied, and after which entry execution may issue upon such judgment for another 10 years.

4(a)(1)). The parents, who had been denied custody of their child, filed a motion for reconsideration and appealed within thirty days of denial of that motion, but more than thirty days after the original judgment. Id. at 485-86, 17 P.3d at 217-18. Recognizing that there was a conflict between the filing requirements in the statute and the rule, this court analyzed the judiciary's rule-making powers in determining whether the statute or the rule controlled. Id. at 486-87, 17 P.3d at 218-19. This court looked to the reasoning in In re Doe, which stated as follows:

> Article VI, section 7 of the Hawai'i Constitution provides that "the supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedures and appeals, which shall have the force and effect of law." However, pursuant to HRS § 602-11 (1985), "such rules shall not abridge, enlarge, or modify the substantive rights of any litigant, nor the jurisdiction of any of the courts, nor affect any statute of limitation."

Id. at 487, 17 P.3d at 219 (quoting In re Doe, 77 Hawai'i [109,] 113, 883 P.2d [30,] 34 [(1994)]) (brackets omitted) (emphasis added). In In re Doe, because the statute allowed for a longer period within which to file an appeal under the circumstances of the case than the rule, the court determined that the rule improperly "infringe[d] on an aggrieved party's right to appeal by curtailing the time in which to file a timely notice of appeal." In re Doe, 77 Hawai'i at 113, 883 P.2d at 34. Based on the same reasoning, this court in Doe Children concluded that "the statute, and not the rule, is controlling." 94 Hawai'i at 486, 17 P.3d at 218.

In the present case, this court is similarly faced with a conflict between a statute and a rule. To reiterate, HRS § 657-5 requires that "[n]o extension shall be granted without notice." The notice requirement in HRS § 657-5 is manifest. See, e.g., Doe Children, 94 Hawai'i at 486-87, 17 P.3d at 218-19 ("By the plain language of the statute, a party desiring to appeal from an order entered in a proceeding governed by HRS § 571-54 is required to file a motion for reconsideration[,]" and, therefore, "we cannot construe HRAP Rule 4(a)(3) in such a way as to modify the requisite deadline for filing a[] HRS § 571-54 motion for reconsideration and the subsequent notice of appeal."). As noted, HRCP Rule 5(a) states that "no service need be made on parties in default for failure to appear[.]" (Emphasis added.)

However, the notice requirement in HRS § 657-5 does not allow for any exceptions, even for parties in default. Because HRS § 657-5 contains an unambiguous notice requirement, HRCP Rule 5(a) is in direct conflict with the statute. As we reasoned in Doe Children, the judiciary may not promulgate rules that abridge the rights of any litigant, in this case, the right to notice as provided HRS § 657-5. Therefore, "the statute, and not the rule, is controlling." Doe Children, 94 Hawai'i at 486, 17 P.3d at 218.

Hence, the plain language of HRS § 657-5 requires notice to judgment debtors before an "extension shall be granted" and leaves no room for the modification of that right by the civil

rules of procedure. See HRS § 657-5. Allowing a party, through reliance on HRCP Rule 5(a), to avoid giving notice to a party in default prior to extension of a judgment would eviscerate the legislature's unmistakable mandate in HRS § 657-5 that "[n]o extension shall be granted without notice." As such, we hold that the statute's notice requirement is controlling and that Respondent's failure to provide the notice to Petitioner required by HRS § 657-5 was error.[14]

Petitioner also asserts that the jurisprudence interpreting Hawai'i and U.S. Constitutions has "enshrined" a protection of notice that extends to his claim against Respondent's failure to notify him. Petitioner does not make any discernable argument regarding the constitutionality of the HRS and HRCP notice requirements. As such, this argument may be disregarded by the court. Norton v. Admin. Dir. of the Court, 80 Hawai'i 197, 200, 908 P.2d 545, 548 (1995) (citing HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.")),

[14] Petitioner argues that the declarations of Mr. Bowman, which were offered to show that Respondent was unaware of Petitioner's address during the time when notice should have been given, should not have been admitted at the HRCP Rule 60(b) hearing. Mr. Bowman's affidavit stated that Respondent believed that Petitioner had resided in various places around the country, including Florida and Colorado. Petitioner asserts that Bowman's testimony was "double hearsay[.]" "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the matter asserted." Hawai'i Rules of Evidence (HRE) Rule 801 (Supp. 2007).

Respondent correctly points out that Bowman's statement was not offered to prove that Petitioner had in fact lived in those places; but rather, that Respondent believed Petitioner was absent from Hawai'i and was difficult to locate. Hence, in admitting Bowman's testimony, the court did not violate the HRE bar against hearsay. In any event, whether or not Bowman's testimony should have been admitted is irrelevant to our determination, as we have concluded that the failure to provide notice was harmless. See discussion infra.

reconsideration denied, 80 Hawai'i 357, 910 P.2d 128 (1996). Nevertheless, the notice requirement in HRS § 657-5 would satisfy constitutional requirements.

IV.

A.

Respondent argues that even if the HRS § 657-5 notice requirement supercedes HRCP Rule 5(a), the order granting the extension is not void because the failure to provide notice was harmless error. In support of its harmless error argument, Respondent cites to Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 217, 953 P.2d 1315 (1998) (hereinafter Korean Buddhist Temple). In Korean Buddhist Temple, it was held that "[a] constitutional error is harmless so long as 'the court . . . is able to declare a belief that it was harmless beyond a reasonable doubt.'" Id. at 245, 953 P.2d at 1343 (quoting Chapman v. California, 386 U.S. 18, 24 (1966)) (brackets omitted). In that case, the Dae Won Sa Temple organization (the Temple) appealed the State's denial of a height variance to its temple structure. Id. at 222-23, 953 P.2d at 1320-21. The Temple claimed that its religion required that the structure be built according to certain standards "in order to maintain the necessary 'balance and harmony.'" Id. at 234, 953 P.2d at 1332. After a public hearing regarding the Temple's request for the height variance before a hearing officer, the Director of the Department of Land Utilization (Director) denied the Temple's request for a variance.

Id. at 224-25, 953 P.2d at 1322-23. The Zoning Board of Appeals (ZBA) heard the Temple's appeal and affirmed the Director's decision. Id. at 227-28, 953 P.2d at 1325-26.

The Temple argued

> that its procedural rights were violated by "the prohibition of examination of the Director with respect to documents and at least one expert, presented to the Director privately by his staff, before he made his decision, in rebuttal to the [Temple's] evidence of the religious significance of the building in question."

Id. at 241, 953 P.2d at 1339 (brackets in original). At the administrative hearing, the hearing officer did not allow cross-examination. Id. at 224, 953 P.2d at 1322. However, at the ZBA hearing, the parties were allowed to call and cross-examine witnesses. Id. at 227, 953 P.2d at 1325. At the ZBA hearing, the Director testified that he had reviewed evidence proffered by his staff that was not introduced at the public hearing, but had not considered it in making his decision. Id. at 241, 953 P.2d at 1339. The evidence consisted of a book on Buddhism and advice from "an unidentified 'qualified individual' regarding the Buddhist belief system." Id. The ZBA sustained the City's objection to the Temple's continued cross-examination as to the identity of the individual since the evidence was not actually considered by the Director. Id. at 228, 953 P.2d at 1326.

Despite the fact that consideration of the outside sources violated HRS § 91-13 (1993), which states that "[n]o official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice

and opportunity for all parties to participate," this court determined that the Temple was not prejudiced by the Director's actions. Id. at 241-42, 953 P.2d at 1339-40. It was concluded that the Director's reliance on the ex parte evidence had no bearing on his denial of the height variance because religion was never a factor in whether the variance would be granted. Id. Because the ex parte information was immaterial and did not affect the outcome, this court concluded that the Director's violation of HRS § 91-13 was harmless error. Id.

Additionally, Respondent cites In re Genesys Data Technologies, Inc., 95 Hawai'i 33, 18 P.3d 895 (2001), which involved HRCP Rule 54(c), for the proposition that "the extension order is not void and reversible error simply because it was issued without notice." In that case, the defendant-debtor, Genesys Data Technologies (Data), argued in its defense in an unrelated federal bankruptcy hearing that the underlying default judgment entered against it in the first circuit court was void, because the plaintiff-creditor had failed to provide notice to Data, as required under HRCP Rule 54(c), of the specific amount of damages sought. Genesys, 95 Hawai'i at 35, 18 P.3d at 897. In the underlying action for breach of contract and tortious interference with contractual relationship, the plaintiff had sought "[g]eneral, special, treble and punitive damages in an amount to be determined at trial," as well as attorneys' fees and other related costs. Id. at 36, 18 P.3d at 898. The Fourth

Circuit Court of Appeals, which heard the bankruptcy case on appeal, certified to this court the question of whether the default judgment against Data was void under HRCP Rule 54(c).[15] Id. at 37, 18 P.3d at 899.

Upon this court's review of the issue, it was acknowledged that "the award of a default judgment in violation of HRCP Rule 54(c) implicates the defendant's right to due process." Id. at 38, 18 P.3d at 900. This court recognized that "[t]he purpose of [HRCP Rule 54(c)] is to provide a defending party with adequate notice upon which to make an informed judgment on whether to default or actively defend the action." Id. (citations omitted). Despite the fact that the defendant had not been notified of the specific damage amount sought, it was concluded that a failure to provide notice does not necessarily render the default judgment void:

> [W]hile the failure to give the required notice is generally regarded as a serious procedural irregularity that may afford the basis for reversal on appeal, or for relief under an appropriate clause of Rule 60(b) and in conjunction with other irregularities may render the judgment void, the error should not usually be treated so serious as to render the judgment void. It should be considered in light of the surrounding circumstances and will, at times, be harmless.

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[15] HRCP Rule 54(c) (2008) states as follows:

> *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

(Italics in original.)

Id. at 40, 18 P.3d at 902 (emphasis added) (quoting Richardson v. Lane, 6 Haw. App. 614, 622, 736 P.2d 63, 69 (1987)).

This court considered especially relevant to the question of harmless error the fact that, although Data had not received notice of the specific or additional amounts sought before entry of default, Data did receive such notice prior to entry of the default judgment. Id. at 43, 18 P.3d at 905. Based on the fact that "Data had an opportunity to challenge [the specific] amounts at the damage hearing or move to set aside the entry of default[,]" the court concluded that "Data was provided with sufficient notice of the actual amount of damages sought and an opportunity to defend against it prior to the entry of judgment[,]" and therefore the procedural violation was harmless. Id. Additionally, this court noted that "even after the circuit court entered judgment in the requested amounts, Data had an opportunity to challenge the default judgment pursuant to HRCP Rule 60(b)" and thus "is now precluded from collaterally attacking the judgment." Id.

In opposition, Petitioner does not assert that the court improperly entered the default judgment against him in the 1993 foreclosure case, but argues that, regardless of default, the motion to extend is "null and void" because he did not receive notice as required by HRS § 657-5. Petitioner cites Stafford v. Dickison, 46 Haw. 52, 59, 374 P.2d 665, 670 (1962), for the proposition that a default judgement is void where lack of notice

denied the defendant the right to put forth a defense. Stafford is distinguishable from this case. In Stafford, the defendant had actively participated by filing an answer and counterclaim. Id. at 53, 374 P.2d at 667. It appeared that his attorney had failed to notify the defendant of his withdrawal from the case just prior to the pre-trial conference. Id. at 62, 374 P.2d at 671.

The defendant challenged the entry of default judgment against him, because he had answered, and because he was not provided notice of the default judgment under HRCP Rule 55(b)(2). Id. at 58, 374 P.2d at 669. Based on the fact that the defendant had previously appeared in the case to defend himself against the suit, and the court's determination that "defendant's nonappearance [at the pre-trial conference] was due to the court's abuse of discretion in permitting the withdrawal of his counsel without notice[,]" id. at 63, 374 P.2d at 671, the court held that "[t]here has been a denial of due process and the judgment is void[,]" id. at 63, 374 P.2d at 672. Stafford emphasized that:

> [T]he requirement of due process does not mean that every order entered without notice and a preliminary adversary hearing offends due process. The adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct.

Id. (internal quotation marks and citation omitted). The defendant in Stafford made an effort to participate in the litigation prior to his lawyer withdrawing from the case. See id. at 53, 374 P.2d at 667. By contrast, Petitioner never made an appearance nor did he offer any defense to the claims made by

Respondent in the original 1993 action. Furthermore, Petitioner does not make any discernable argument that the extension of judgment deprived him of substantive rights on the merits or that he was without knowledge that his conduct throughout the case was likely to have adverse consequences, namely default and an extension of the judgment. See id. at 63, 374 P.2d at 671-72.

B.

Petitioner correctly asserts that a judgment may be declared void upon a HRCP Rule 60(b)(4) motion regardless of how much time has passed between entry of judgment and filing the motion. See In re Hana Ranch Co., 3 Haw. App. 141, 146, 642 P.2d 938, 941 (1982). Respondent counter-argues that because the court heard Petitioner's HRCP Rule 60(b)(4) motion, he has had an opportunity to challenge the extension on its merits and lost. Respondent finds support for this view in Blaney v. West, 209 F.3d 1027 (7th Cir. 2000).

In Blaney, the Court of Appeals for the Seventh Circuit held that insufficient notice may constitute harmless error if there had been an opportunity to challenge the ruling on its merits, either by seeking reconsideration under FRCP Rule 59(e) or seeking relief from final judgment through a FRCP Rule 60(b) motion. Id. at 1032. Blaney involved an age discrimination suit filed by Blaney that had been dismissed without giving him actual

notice of the dismissal as required by FRCP Rule 4(m).[16] Id. at 1031. Blaney argued that because the plain meaning of FRCP Rule 4(m) required notice, the dismissal should be overruled. Id. The Seventh Circuit Court disagreed, reasoning that Blaney's opportunity to challenge the judgment via a Rule 59 motion to reconsider or a FRCP Rule 60(b)(4) challenge to the underlying judgment meant that the trial court has had an opportunity to decide the case on its merits. Id. at 1032.

The opportunity to address the case on its merits meant that Blaney was not prejudiced by the lack of notice, rendering the error harmless. Id. That holding is in line with the First and Ninth Circuits, which have held that defective service is harmless error where the party has had the opportunity to move for reconsideration or to move to void the judgment. See Carela v. Velez, 814 F.2d 821 (1st Cir. 1987) (trial court's order of dismissal itself gives plaintiff notice and an opportunity to respond where plaintiff had an opportunity to file and did file a motion for reconsideration following dismissal for defective service); Whale v. United States, 792 F.2d 951 (9th Cir. 1986) (plaintiff not prejudiced by lack of notice when plaintiff had an

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[16] FRCP 4(m) states:

> If a defendant is not served within 120 days after the complaint is filed, the court--on motion or on its own after notice to the plaintiff--must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period. This subdivision (m) does not apply to service in a foreign country under Rule 4(f) or 4(j)(1).

adequate opportunity to demonstrate good cause in FRCP Rule 60(b) motion following dismissal).

Importantly, this court has also addressed the issue of whether HRCP Rule 60(b) motions provide an adequate opportunity to challenge a judgment on the merits. As noted previously, in Genesys, we stated that the defendant "had an opportunity to challenge the default judgment pursuant to HRCP Rule 60(b)." 95 Hawai'i at 43, 18 P.3d at 905. The defendant's failure to do so precluded it from "collaterally attacking the judgment." Id. Likewise, Petitioner has had the opportunity to be heard on the merits of his case when he challenged the extension through a HRCP Rule 60(b)(4) motion. In his HRCP Rule 60(b)(4) motion, Petitioner did not challenge the underlying judgment or offer any affirmative defenses to the extension of judgment. Therefore, the circumstances surrounding Petitioner's case do not rise to the level of seriousness necessary to justify voiding the judgment. See id.

Petitioner has not shown that he was prejudiced by Respondent's failure to notify him of the extension of judgment. Even if Petitioner had received notice of the motion to extend and had been present at the hearing, the outcome would have been the same. Petitioner never appeared to defend himself in the original action or raised any defenses to the original default judgment. He did not contest the validity of the original judgment at the HRCP Rule 60(b) hearing, nor did he claim that he ever satisfied

the judgment by paying Respondent. The court had all the information it needed to determine that the extension should be granted. As such, the extension without notice under HRS § 657-5 must be viewed as harmless error.[17]

V.

The dissent "agree[s] with much of the majority's analysis." Dissenting opinion at 1. However, the dissent believes that, despite the fact that the court had subject matter jurisdiction, id. at 21, it "exceeded its authority" in extending the judgment without notice and therefore the judgment is void, id. at 8, 17. Nevertheless, the dissent maintains that, upon remand, nothing "would preclude the [court] from granting [Respondent's] motion to extend the deficiency judgment," based on the very same motion that suffered from the notice deficiency. Id. at 19-20. We find the dissent's position untenable because (1) contrary to its position, a judgment is void only if the court lacked subject matter jurisdiction, jurisdiction over the person, or violated due process and none of those requirements were violated here; (2) the federal and state cases cited by the dissent do not hold that a judgment is void when "entered without

[17] Respondent cites to HRS § 657-18 (1993), which tolls "causes of actions" if the defendant is out of state and unavailable, arguing that the extension of judgment should be tolled because Petitioner was outside the state. Petitioner maintains that "[t]he ICA erred by ignoring the clear expression of [l]egislative intent found in HRS 634-36 [(1993)] authorizing substitute service by personal service out-of-state and by certified, registered, or express mail." This court has held that where service of process by public notice would have sufficed, causes of action are not tolled. See Eto v. Muranaka, 99 Hawai'i 488, 57 P.3d 413 (2002). Furthermore, because we have determined that the order extending the judgment is not void, Respondent's argument is moot.

authority," see id. at 6; (3) the cases it cites pertaining to any notice requirement are in the context of summary judgment under HRCP Rule 56 and are subject to harmless error analysis rather than a harmful per se rule the dissent advocates; (4) under HRCP Rule 61, the "harmless error" rule, a judgment or order is not to be disturbed absent conflict with the substantial rights of the parties, which is not the case here; and (5) the dissent's formulation is intrinsically a harmless error one.

A.

Initially the dissent points to Wong Kwai Tong v. Choy Yin, 31 Haw. 603 (Haw. Terr. 1930), and Cooper v. Smith, 70 Haw. 449, 776 P.2d 1178 (1989), to support its argument that a judgment or order may be voided on the jurisdictional ground that the court "exceeded its authority." See dissenting opinion at 3-7. However, neither of those cases is apposite, because neither stands for the proposition contended nor pertains to a notice requirement that is the crux of the instant case.

In Wong Kwai Tong, the statute at issue did not grant the divorce court the power to divide the husband's real estate as the circuit court had done. 31 Haw. at 606, 609. Therefore, "the judicial order providing that the wife should 'have the right to occupy the home she is now living in' was beyond the jurisdiction of the court and void." Id. at 609. There is no indication that the decision in Wong Kwai Tong established some jurisdictional category outside of subject matter or personal jurisdiction. As

this court observed, "even when a court has jurisdiction over the parties and the subject matter, yet it may lack jurisdiction to make the particular decree which it attempts to make[.]" Id. at 606 (emphasis added). Only the obvious proposition that there are limits on a court's subject matter jurisdiction was reiterated, because it does not automatically follow that "where a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause[.]" Id. at 607.

Cited as hypothetical examples of instances when a court would be considered to have exceeded its jurisdiction were (1) "[i]f, for instance, the action be upon a money demand, the court . . . has no power to pass judgment of imprisonment[;]" (2) "[i]f the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract[;]" (3) "[i]f the action be for the possession of real property, the court is powerless to admit in the case the probate of a will." Id. at 608. Those examples indicate that Wong Kwai Tong was not referring to the kind of procedural defect present in the instant case, but to situations where the court had been granted a particular type of limited subject matter jurisdiction and exceeded it. Thus, although the circuit court had jurisdiction over the general subject matter of the divorce decree, it did not have jurisdiction, or exceeded the bounds of the subject matter

appropriately before it,[18] with regard to the particular provision regarding the division of property, and, therefore, that provision was void. Id. at 606, 609. This does not provide any support for the proposition that a party's violation of a notice requirement somehow causes a court to "exceed its jurisdiction."

By contrast, in the instant case, the court did not "make[] a decree which is not within the powers granted to it by the law of its organization[.]" See id. at 606. To the contrary, it is manifest from the language of HRS § 657-5 that granting a motion for extension is within the court's power. The error in the instant case is not that the court was without power to extend the judgment, and therefore without jurisdiction, but that the creditor failed to notify the judgment debtor of the extension. As distinguished from Wong Kwai Tong, where the court acted beyond the limited grant of subject matter jurisdiction, failure of notice here is a procedural, as opposed to jurisdictional, matter, and is therefore controlled by the precepts of due process and harmless error, as our cases have held. See infra.

[18] This court in Wong Kwai Tong referred to "excess" of jurisdiction and "lack" of jurisdiction interchangeably. See id. at 606, 607. The defect can be referred to as an "excess" of jurisdiction where the court has subject matter jurisdiction except over an issue which was decided outside of its power. By the same token, as to the particular provision "providing that the wife should 'have the right to occupy the home she is now living in[,]'" id. at 609, jurisdiction was completely absent, and accordingly, had the court in Wong Kwai Tong only attempted to effect a division of property between the parties and nothing more, it would have been completely without jurisdiction. Hence, the difference in terminology was not material.

B.

Cooper also does not support the dissent's position. The dissent states that Cooper "suggest[ed] that a court's judgment may also be void when it is entered without authority." Dissenting opinion at 6 (emphasis added). As the dissent acknowledges, the aforementioned proposition was not a holding in Cooper. See id. The dissent concedes, as it must, that Cooper expressly declared that "only" three grounds support a void judgment. Id. (citation omitted). Reversing the circuit court in Cooper,[19] this court clarified that "[a] judgment is not void because it [may be] erroneous. It is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 70 Haw. at 454, 776 P.2d at 1181 (quoting 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862, at 198-200 (1973)) (internal quotation marks omitted) (emphases added). This court determined in Cooper that "[n]othing in the record indicates the family court's decree was afflicted with any of these infirmities[,]" and therefore, the judgment was not void. Id.

The dissent apparently seizes on dicta in footnote number 1 in Cooper to support its theory that a judgment may be void where the court is "without authority" to enter the judgment. Dissenting opinion at 6 (citing Cooper, 70 Haw. at 454 n.1, 776

[19] In Cooper, the circuit court had invalidated a provision in a divorce decree that had been agreed upon by the parties and approved by the family court because it was an "unenforceable penalty and [] therefore void." 70 Haw. at 450, 776 P.2d at 1179.

P.2d at 1181 n.1). In that footnote, however, this court merely noted that HRS § 580-56(d) "deprives the family court of power to divide the personal estate of the parties after the lapse of the given period over the objections of either party[,]"[20] but that the statute would not have deprived the family court of authority to enforce the division made by agreement of the parties in that case. Cooper, 70 Haw. at 454 n.1, 776 P.2d at 1182 n.1.

Because that discussion was not necessary to this court's decision, and because this court concluded that the statute was inapplicable to the facts of that case, Cooper was not concerned with whether the statutory requirement was procedural or jurisdictional, whether a related error would be subject to a harmless error analysis, or whether the statutory limitation would have been an appropriate basis for collateral attack.[21]

The limited grounds for voiding a judgment adopted in Cooper remain unchanged despite the dissent's effort to extract a fourth ground evincing a void judgment from Cooper. According to Wright & Miller, "[a] judgment . . . is void only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." 11 C. Wright & A. Miller, Federal Practice and

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[20] If this dicta signifies anything, it is the same proposition outlined supra with regard to Wong Kwai Tong, that, although the court had general subject matter jurisdiction over the divorce, the particular matter of the division of the personal estate of the parties was beyond the subject matter jurisdiction granted by the statute.

[21] Indeed, Cooper indicates the opposite by confining the bases for voiding a judgment under Rule 60(b) to challenges based on personal jurisdiction, subject matter jurisdiction, or due process.

Procedure § 2862, at 326-29 (1995) (footnotes omitted). Although the treatise notes that "[s]tate law may have some relevance in determining whether a judgment is void, particularly if it goes beyond federal law and would strike down a judgment that federal law would permit[,]" it does not refer to additional circumstances under which a judgment may be considered void other than those listed above, the same grounds adopted in Cooper. See id. at 325 (footnote omitted).

As the dissent concedes, none of the grounds for a void judgment as set forth in Cooper, i.e., lack of subject matter jurisdiction, jurisdiction over the parties, or due process, are present in the instant case. See dissenting opinion at 3, 8, 21. Cooper, then, offers no support for the dissent's position. On the other hand, it confirms that the three grounds for a void judgment are not present in the instant case inasmuch as the circuit court had subject matter and personal jurisdiction and Petitioner's due process rights have not been violated.

C.

Furthermore, our cases subsequent to Cooper have continued to recognize that collateral attack under Rule 60(b)(4) is limited to three categories of void judgments. For example, in Genesys, this court held that "'[i]n the sound interest of finality, the concept of void judgment must be narrowly restricted.'" 95 Hawai'i at 38, 18 P.3d at 900 (quoting

Dillingham Inv. Corp. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 233, 797 P.2d 1316, 1320 (1990)). Genesys reiterated as follows:

> [a] judgment is void "only if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law." [Cooper], 70 Haw. [at] 454, 776 P.2d [at] 1181, reconsideration denied, 70 Haw. 449, 776 P.2d 1178 (1989). There is no indication that the circuit court lacked jurisdiction over the subject matter or the parties in this case. Thus, our analysis focuses upon whether the circuit court's entry of judgment was consistent with due process.

Id. (emphases added); see also Dillingham, 8 Haw. App. at 233-34, 797 P.2d at 1320 (1990) ("[i]n the sound interest of finality, the concept of void judgment must be narrowly restricted . . . if a court has the general power to adjudicate the issues in the class of suits to which the case belongs then its interim orders and final judgments, whether right or wrong, are not subject to collateral attack, so far as jurisdiction over the subject matter is concerned" (internal quotation marks and citations omitted)); Int'l Sav. & Loan Ass'n, Ltd. v. Woods, 69 Haw. 11, 18 731 P.2d 151, 156 (1987) (stating that finality refers to "very real interests," "not merely those of the immediate parties but also those that pertain to the smooth functioning of our judicial system" (internal quotation marks, brackets, and citation omitted)); Impact Fin. Servs. v. Kamaaina Termite & Pest Control, Inc., No. 27887, at 9 (App. Sept. 29, 2008) (mem.) ("'a judgment is void only if the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process of law' . . . [t]herefore, 'in the sound interest of finality, the concept of void judgment

must be narrowly restricted'" (quoting Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 428, 16 P.3d 827, 833 (App. 2000))).

The dissent maintains that Genesys did not "consider[] whether a court's judgment was void because the court exceeded its authority in entering the judgment." Dissenting opinion at 3. To the contrary as noted above, this court appropriately started with the well-settled proposition that there are limited bases for collateral attack of a judgment as void, and confined itself to those bases. See Genesys, 95 Hawai'i at 38, 18 P.3d at 900. That this court did not consider whether violation of the notice requirement caused the court "to exceed its authority" was not an oversight but an application of Rule 60(b)(4) consistent with other cases in our jurisdiction.

D.

Despite controlling precedent in our jurisdiction, the dissent cites to federal law regarding FRCP Rule 60(b)(4).[22]

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[22] FRCP and HRCP Rules 60(b)(4) are almost identical. FRCP Rule 60(b)(4) provides:

> (b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void[.]

HRCP Rule 60(b)(4) similarly states:

> (b) **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void[.]

This court has said that "FRCP Rule 60(b) and HRCP 60(b) are identical. When a Hawai'i rule of procedure is modeled after a federal rule, 'the

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Dissenting opinion at 7-8. However, the dissent's reliance on those cases, again, is based on its view that they "strongly suggest," rather than hold, that a judgment is void where a court "exceed[s] its authority." Id. at 8 (citing United States v. Indoor Cultivation Equip. From High Tech Indoor Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995) and Carter v. Fenner, 136 F.3d 1000, 1005 (5th Cir. 1998)).

In Indoor Cultivation, the Seventh Circuit's analysis does not sustain the dissent's argument that a notice requirement is jurisdictional, inasmuch as the case involved a statute of limitations, not a notice requirement, and because that court declined to decide whether the 60-day requirement was procedural or jurisdictional, and thus did not address the question of harmless error. See 55 F.3d at 1313-14, 1317. The Seventh Circuit concluded that the court lacked authority to enter a judgment against the defendant's property where the government had failed to commence a forfeiture action within the period prescribed by statute.[23] 55 F.3d at 1317. Carter involved a

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[22]...continue
interpretation of [the rule] by the federal courts [is] deemed to be highly persuasive in the reasoning of this court.'" Moyle v. Y & Y Hyup Shin, Corp., 118 Hawai'i 385, 403, 191 P.3d 1062, 1080 (2008) (quoting Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968)) (brackets in original).

[23] The case revolved around provisions of the Anti-Drug Abuse Act of 1988, codified at 21 U.S.C. § 888, which "[gave] owners of [] conveyances [seized by the government for drug-related offenses] several procedural rights not enjoyed by claimants in other federal forfeiture actions." Id. at 1313. "Most relevant" was 21 U.S.C. § 888(c), which "require[d] the government to file its complaint for forfeiture against any conveyance it [had] seize[d] for a drug-related offense not later than 60 days after a claimant contest[ed] the seizure by filing a claim and cost bond." Id. at 1313-14. Appellant argued and the Seventh Circuit agreed that "because the government did not file its
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wrongful death suit in which the underlying proceeds were to go to the decedent's minor son. 136 F.3d at 1003. The child's mother had settled the claim with the City of New Orleans without judicial review, which was required under Louisiana law. Id. at 1007-08. Although concluding that because the child's rights had not been protected by judicial review, the consent judgment had "no legal effect,"[24] id. at 1008, the Carter court did not hold that the defect was jurisdictional and qualified its decision by emphasizing that Rule 60(b) was an "extraordinary remedy" employed only to do "substantial justice," which in that case was necessary because of the state's special concern for the protection of the rights of minor children,[25] id. at 1007-08.

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[23]...continue
civil complaint seeking the forfeiture of his property until . . . over eighteen months after he filed the appropriate claims and cost bonds, the only jurisdiction the district court retained over these three conveyances, according to § 888(c), was to order their return to [the appellant] and prevent any forfeiture of them from taking place." Id. at 1314.

That court based its decision on the "evident" legislative purpose to protect innocent owners. Id. at 1315-16. As to the statutory intent, the court stated that "[b]ecause conveyances seized under the forfeiture law can remain tied up during the pendency of . . . proceedings for months on end, innocent owners may be deprived of their principal mode of transportation for extended periods of time . . . [and] the conveyances returned to innocent owners may be worth substantially less . . . ." Id. at 1316.

[24] The Fifth Circuit discussed circumstances under which a judgment may be void under FRCP Rule 60(b)(4) in Carter. In its FRCP Rule 60(b) motion, the City had not alleged that the court lacked jurisdiction or that due process was violated, "but instead insisted that Carter's own procedural failures rendered the judgment void." Id. at 1006. In its discussion, the court recognized that "[s]ome circuits have noted that a judgment is void if the rendering court was powerless to enter it . . . [w]hile such holdings most obviously allude to a jurisdictional defect, they allow enough room to capture within their reach situations where the parties' failure to follow relevant law or procedure in securing the judgment will undermine its ultimate validity." Id. (citation omitted).

[25] To that end, the Fifth Circuit concluded that "[u]ltimately, the statute and the jurisprudence elevate the protection of the delicate interests of the minor over all other considerations." Id. at 1008 (emphasis added). No similar considerations are present in the instant case. Furthermore, the
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Furthermore, the dissent does not address federal cases that have held, contrary to the dissent's position, that violation of a notice requirement is not appropriate grounds for voiding a judgment. For instance, in Farm Credit Bank of Baltimore v. Ferrera-Goitia, the appellants used FRCP Rule 60(b)(4) "[to contest] the validity of the district court's confirmation order based upon the Bank's alleged failures (1) properly to give notice of the public sale, and (2) properly to name the junior lienholder as a party." 316 F.3d 62, 68 (1st Cir. 2003). Appellants argued that "the district court's actions patently exceeded its power." Id.

In dismissing that argument, that court noted that "[t]o support this extravagant suggestion, the appellants charge that the foreclosure proceedings were fraught with material defects. The defects that they cite - if defects at all - are technical in nature and do not evince any usurpation of power. In short, the

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[25]...continue
case rested on Fifth Circuit precedent on the issue. That court had previously held that

> [f]or adults functioning on behalf of minors there remains a continuing duty to act in the best interests of the child-"as a prudent administrator," La. Code. Civ. Proc. art. 4262-and to seek and obtain prior court approval under 4271 before compromising those interest". Compromises entered into absent these protections are of no legal effect . . . . "[T]he courts of Louisiana have been most protective of the minor's interest in the area of settlement of claims and have not hesitated to nullify any settlement or compromise that was not judicially approved."

Id. (quoting Johnson v. Ford Motor Company, 707 F.2d 189, 194 (5th Cir. 1983) (emphases in original). No such precedent exists in this court regarding the notice requirement in HRS § 657-5. Instead, this court's precedent indicates that failure to comply with a notice requirement is subject to a harmless error analysis. See, e.g., Genesys, 95 Hawai'i 33, 18 P.3d 895; Jensen v. Pratt, 53 Haw. 201, 491 P.2d 547 (1971).

appellant received all the process that was due." Id. (emphasis added) (footnote omitted). Apparently finding no due process violation, the First Circuit rejected appellant's argument that the judgment was void because the court had "exceeded its power" based on "technical" defects, such as "failure to name . . . a party . . . and . . . failure to give notice . . . in strict accordance with Puerto Rico law." See id. (emphases added); see also U.S. v. Martin, 395 F. Supp. 954, 960-961 (D.C.N.Y. 1975) (holding that "even assuming arguendo both that there was an oral agreement not to take a default judgment without prior notice and that the agreement constituted an appearance by Martin for the purposes of [FRCP] Rules 55(b) and 77(d), the resulting failure to give notice of the application for and the entry of the default judgment is a procedural rather than a jurisdictional defect which does not necessarily render the judgment void") (emphases added). The dissent concedes that Cooper and the foregoing federal cases do not hold that a judgment is void when a court "exceeds its authority" and do not involve notice requirements. See dissenting opinion at 6, 8, 9. In sum, they are not determinative of this case.

VI.

A.

Because none of the foregoing cases involve a notice requirement, the dissent apparently turns to decisions interpreting the notice requirement in HRCP Rule 56(c) as

illustrative of its view that "a violation [of notice] may, in some circumstances, give rise to a jurisdictional defect." Id. at 9. But the cases cited by the dissent are in fact consistent with the proposition that failure to provide notice is subject to a harmless error analysis. Indeed, those cases reflect that a party's failure to comply with a notice requirement is subject to harmless error analysis.

The dissent relies on Clarke v. Civil Service Commission, 50 Haw. 169, 434 P.2d 312 (1967) and Jensen. In Clarke, an institution superintendent who had been dismissed from his job appealed the circuit court's sua sponte grant of summary judgment to the Civil Service Commission, alleging several points of error. 50 Haw. at 169-70, 434 P.2d at 312-13. At a pre-trial conference, "[a]fter a review of memoranda filed by the parties, the court decided to treat the appellees' supplemental memorandum as a motion for summary judgment and thereupon dismissed the appeal." Id. at 170, 434 P.2d at 313. As this court noted, that court erred when it "proceeded to grant summary judgment to the appellees without notice to the appellant and without a hearing on the matter," in contravention of the requirements of HRCP Rule 56(c). Id. (emphasis added). Subsection (c) of Rule 56, "require[d] that the motion for summary judgment be served 'at least 10 days before the time fixed for the hearing.'" Id. It was reasoned that "[t]his provision can only be interpreted as requiring that the time for a hearing be fixed; that the adverse

party be given notice of such setting; and that a hearing in fact be held on the matter." Id. (emphasis added).

From the foregoing the dissent maintains that "[s]uch an error is harmful per se." Dissenting opinion at 10. But the trial court in Clarke had failed to satisfy any of the notice and hearing requirements, and therefore Clarke cannot stand for the solitary proposition that failure of the notice requirement would have risen to reversible error per se. Cf. Genesys, 95 Hawai'i at 40, 18 P.3d at 902 (noting that "while the failure to give the required notice is generally regarded as a serious procedural irregularity that may afford the basis . . . for relief under an appropriate clause of Rule 60(b) and in conjunction with other irregularities may render the judgment void, the error should not usually be treated as so serious as to render the judgment void") (brackets and citation omitted) (emphasis added).

The dissent disputes that as between notice and hearing requirements the absence of a hearing was the "primar[y] concern[]." Dissenting opinion at 11. Nevertheless, that is what this court said:

> The appellant specifies several errors allegedly committed by the trial court in dismissing the appeal below. However, we think that only one of such allegations is vital to the disposition of this appeal. Appellant contends that the court committed reversible error when it granted summary judgment on its own motion without giving opposing counsel an opportunity to be heard on the matter.

Clark, 50 Haw. at 170, 434 P.2d at 313 (emphases added). The dissent also maintains that Clarke referred to "[a] well-settled [proposition] in federal courts that . . . in the absence of such

notice and hearing, the court is without jurisdiction to grant summary judgment." Dissenting opinion at 11. However, Clarke did not say that violation of a notice requirement was harmful per se, but held that "the trial court erred in dismissing the appeal without notice and without a hearing." 50 Haw. at 170, 434 P.2d at 313. Likewise, as noted supra, this court held in Cooper that "[a] judgment is not void because it [may be] erroneous." 70 Haw. at 454, 776 P.2d at 1181 (brackets in original) (citation omitted).

Additionally, Clarke is distinguishable because there the appellant had his case dismissed without ever having the opportunity to raise defenses to summary judgment on the merits. See 50 Haw. at 169-70, 434 P.2d at 312-13. By contrast, here Petitioner received notice and an opportunity to raise defenses on the merits both in the original proceeding and in the Rule 60(b) hearing. Therefore, Clarke is not controlling.[26]

B.

Any question arising from Clarke about whether lack of notice was harmful per se was answered in the negative in Jensen. In Jensen, this court clarified Clarke and concluded that although denial of an opportunity to be heard under HRCP Rule 56 is reversible error because it affects "substantial rights," failure of notice under HRCP Rule 56(c) is subject to a harmless error

[26] Therefore, we disagree with the dissent that Clarke dictates that the error is harmful per se or jurisdictional in this case. See Dissenting opinion at 17 n.6.

analysis. 53 Haw. at 202-03, 491 P.2d at 548. After the defendant in Jensen moved for summary judgment, "the trial judge [had] asked for argument on the motion by written memoranda, setting neither a time limit for the submission of memoranda nor a date for oral hearing." Id. at 201-02, 491 P.2d at 548. The trial judge had then granted summary judgment in favor of the defendants. Id. at 202, 491 P.2d at 548. Jensen manifestly held that the HRCP Rule 56(c) notice requirement is subject to a harmless error analysis.

> Plaintiffs assert that the failure of the trial court to comply with the notice and hearing requirements of [HRCP] Rule 56(c) is reversible error. This court has held that, absent a showing of harm, the failure of the trial court to comply with the requirement of ten days' notice of hearing set forth in H.R.C.P. Rule 56(c) is not reversible error. The requirement of showing that the error is prejudicial stems from [HRCP] Rule 61: "The court at every stage of the proceeding must disregard any error which does not affect the substantial rights of the parties." We think the proper standard of appellate review under [HRCP] Rule 56(c) is to treat periods of notice of less than ten days as non-prejudicial, in the absence of a showing of actual harm . . .
>
> On the other hand, we think the dispensing with the opportunity to be heard orally on a motion for summary judgment, contrary to the requirement of [HRCP] Rule 56(c), so strongly affects the substantial rights of the parties as to constitute harmful error per se.

Id. (citations omitted) (emphases added).

This court directed that the "proper standard of appellate review . . . is to treat periods of notice less than ten days as non-prejudicial, in the absence of . . . actual harm" as contrasted to "dispensing with the opportunity to be heard" which was "harmful error per se." See id. (emphases added). Accordingly, this court emphasized that failure of notice was "non-prejudicial" in the absence of actual harm, and not "harmful

per se" as the dissent would contend. See id. The dissent's rationale then directly conflicts with Jensen's view that reserved the harmful per se designation for the lack of a hearing, and not for a defect in notice.

C.

According to the dissent, Clarke and its progeny stand for the proposition that with respect to "HRCP Rule 56(c)'s notice requirement, [where] there has been at least some notice of the hearing, the aggrieved party must show that he has been prejudiced . . . [b]ut, if . . . there has been no notice of the hearing, then . . . the violation is jurisdictional in nature and thus harmful per se." Dissenting opinion at 15 (emphases in original).

However, Shelton Engineering Contractors, Ltd. v. Hawaiian Pacific Industries, Inc., indicated that, despite the fact that Clarke used the term "jurisdiction," the notice provision in Rule 56(c) was not in fact jurisdictional, even when it came to the necessity for compliance with the "literal requirement of the rule." See 51 Haw. 242, 246, 456 P.2d 222, 225 (1969) (emphasis added). Shelton was the first case to construe Clarke. As the dissent acknowledges, in Shelton, "because the non-moving party had not shown that he had been harmed by not having a full ten days' notice, we would not disturb the entry of summary judgment on the ground that HRCP Rule 56(c) had been violated." Dissenting opinion at 12 (citing Shelton, 51 Haw. at 246, 456 P.2d at 225)(emphasis added).

As noted before, Jensen clarified the notice rule, holding that "absent a showing of harm, the failure of the trial court to comply with the requirement of ten days' notice of hearing set forth in [HRCP] Rule 56(c) is not reversible error[,]" 53 Haw. at 202, 491 P.2d at 548 (emphasis added), without any qualification as to substantial compliance, some compliance, or any compliance. This court did not indicate that in cases where no notice was provided, the court is deprived of jurisdiction or that the defect is harmful per se as the dissent now proposes. See id.

D.

The dissent's position is put to rest by Querubin v. Thronas, 107 Hawai'i 48, 109 P.3d 689 (2005). Decided subsequent to Clarke, Querubin dealt directly with a fact situation in which the Appellants had received no notice of summary judgment under Rule 56(c). Id. at 59, 109 P.3d at 700. That case considered "noteworthy that the [ICA] has held that 'violation of the notice requirement does not automatically result in a reversal,' insofar as '*Clarke*'s progeny holds that absent a showing of harm, the failure of the trial court to comply with the requirement of ten days' notice of hearing set forth in HRCP Rule 56(c) is not reversible error.'" Id. at 58, 109 P.3d at 699 (quoting Kau v. City and County of Honolulu, 6 Haw. App. 370, 372-73, 722 P.2d 1043, 1045) (1986) (emphases and some internal quotation marks omitted) (emphasis added). This court recognized in Querubin that

"in contrast to Kau and Shelton, the Appellants had no notice that Thronas was seeking summary judgment against them precisely because he had not, in fact, moved for summary judgment against them" and because "the circuit court gave the [a]ppellants no notice that it was treating Thronas's joinder as an MSJ against them." Id. at 59, 109 P.3d at 700 (emphases in original).

Despite the fact that no notice had been given, as is the case here, this court did not say that the failure of notice was per se harmful or that it deprived the court of jurisdiction. See id. To the contrary, this court followed the established rule in this jurisdiction for analyzing failures of notice and determined that "the [a]ppellants were obviously and actually prejudiced by the lack of notice" and "that the circuit court erred in sua sponte . . . granting Thronas's MSJ via joinder, . . . without providing the [a]ppellants notice and an oral hearing." Id. at 59-60, 109 P.3d at 700-01 (emphases in original).

Therefore, according to Querubin, violations of the notice requirement in Rule 56(c), whether complete or partial, are subject to a harmless error analysis and are not jurisdictional defects as the dissent would have it. If harmless error were not the doctrine to apply as to the failure to give any notice, Querubin would not have engaged in an "actual prejudice" analysis. If anything, Querubin solidifies this court's position that no notice is not harmful error per se. With all due respect,

Querubin cannot be squared in principle (as neither can our other cases referred to above) with the dissent's contradictory position that the failure to give notice is harmful per se rather than subject to harmless error analysis.

VII.

Additionally, it does not follow that failure of notice under HRS § 657-5 is harmful per se or jurisdictional. The dissent draws its conclusion that "the circuit court exceeded its jurisdiction under HRS § 657-5," dissenting opinion at 17, from the fact that "use of the word 'shall' [in HRS § 657-5] strongly implies that notice is mandatory" and, in this case, no notice was given, id. at 16. But the language of HRCP Rule 56(c) similarly mandates that "[t]he motion shall be filed and served not less than 18 days before the date set for the hearing." (Emphases added.)[27] It is indisputable that the cases construing the notice requirement in HRCP Rule 56(c) hold that failures to comply with the requirement that notice be provided within specified time limits do not constitute reversible error per se. Therefore, the cases interpreting the notice requirement in Rule 56(c) plainly do not stand for the proposition that jurisdiction is nullified when

[27] At the time of Clarke, Jensen, Shelton, and Kau the requirement was 10 days instead of 18. The rule was amended subsequently. See Order Amending the Hawai'i Rules of Civil Procedure (Sept. 11, 1996); Order Amending Rules 6(d) and 56(c) of the Hawai'i Rules of Civil Procedure (May 15, 1997).

the clear and seemingly mandatory requirement of a rule or statute is violated.[28]

VIII.

The dissent also conflicts with HRCP Rule 61, the "harmless error" rule. As this court pointed out in Jensen, "[t]he requirement of showing that the error is prejudicial stems from [HRCP] Rule 61." That rule provides that

> [n]o error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

(Emphases added.)

Where it is necessary to set aside a judgment in order to do "substantial justice" or to safeguard "substantial rights,"

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[28] Similarly, although the dissent attempts to distinguish Stafford and Korean Buddhist Temple as being due process cases, see dissenting opinion at 2, in both cases the statute or rule at issue contained similarly mandatory language and there was no question that the procedures violated were required under the plain language of the rule or statute. Yet this court did not conclude that jurisdiction was lacking. Stafford dealt with violation of HRCP Rule 55(b)(2), see 46 Haw. at 58, 374 P.2d at 669, which provides that "[i]f the party against whom judgment by default is sought has appeared in the action, the party . . . shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application." (Emphasis added.) Despite the plain requirement in the rule, this court "concluded that failure to give the notice of an application for default judgment required by Rule 55(b)(2) does not in itself render the judgment void but instead is a procedural irregularity which may be rectified by appropriate means." Id. at 60, 374 P.2d at 670 (citations omitted).

Likewise, in Korean Buddhist Temple, the language of the statute was mandatory: "No official of an agency who renders a decision in a contested case shall consult any person on any issue of fact except upon notice and opportunity for all parties to participate." 87 Hawai'i at 241, 953 P.2d at 1339 (quoting HRS § 91-13 (1993)) (emphases added) (brackets omitted). Despite the seemingly mandatory language, this court could "discern no prejudice to the Temple's substantial rights . . . and [therefore held] that the error was harmless." Id. at 242, 953 P.2d at 1340 (emphases added).

our courts may act pursuant to HRCP Rule 61. Because, as here, the defect is not inconsistent with substantial justice, we are in no position to set aside the judgment. See, e.g., In re Doe, 100 Hawai'i 335, 343-344, 60 P.3d 285, 293-294 (2002) (although under HRS §§ 587-1 and 587-26, the Department of Human Services has an obligation to offer a service plan "to provide 'every reasonable opportunity' for a parent to be reunited with his or her child" and "[m]erely proffering a list of phone numbers may fall short of the policy[,]" no "substantial prejudice resulted to Mother" under Hawai'i Family Court Rules Rule 61 where "[i]t [was] apparent that Mother was unwilling to participate in DHS services") (brackets omitted); Dang v. F and S Land Development Corp., 62 Haw. 583, 592, 618 P.2d 276, 282-83 (1980) ("[w]ith respect to the contention that the trial court erred in admitting testimony . . . we find this did 'not affect the substantial rights' of plaintiffs" under HRCP Rule 61); Nishitani v. Baker, 82 Hawai'i 281, 292, 921 P.2d 1182, 1193 (App. 1996) ("[s]ince Defendants would have been 'affected' by the notice of substitution, we agree that [the p]laintiff's failure to serve them violated HRCP Rule 5(a). However, based on our review of the record in this case, we conclude that such failure did not affect [the d]efendants' substantial rights and was, thus, [under HRCP Rule 61] harmless error"); In re S Children, No. 28565, at 4 (App. Sept. 22, 2008) (SDO) (citing HRCP Rule 61 and holding that "[g]iven that Father does not explain how he was prejudiced by the court's denial of

his oral motions to continue, we fail to see how the court abused its discretion by denying said motions").

Neither Petitioner nor the dissent can make any colorable argument that the result in this case is "inconsistent with substantial justice."[29] See HRCP Rule 61. Consequently, the dissent's formulation upends the objectives of Rule 61. In insisting on a mechanistic application of procedural requirements, regardless of whether the court's ultimate judgment was consistent with substantial justice, the dissent opens all judgments to collateral attack. It ignores the command in HRCP Rule 61 that "a judgment or order" is not to be "disturb[ed]" unless inconsistent with substantial justice.

IX.

The dissent's formulation is at its core, no different from the harmless error analysis. But the dissent's construct misapplies HRS § 657-5 and undermines the precedents established in our cases on notice defects discussed supra and calls into question their viability.

The dissent does not explain why lack of notice in this case was harmful, or why the notice requirement under HRS § 657-5

[29] As explained at length supra, Petitioner's "substantial rights" were not affected here. Initially, he was provided notice of the original action and failed to defend it. Then, although he was not timely provided notice of extension, he was subsequently put on notice and filed a Rule 60(b) motion to set aside the judgment. In the course of his motion and the Rule 60(b) hearing, he made no argument in his defense on the merits, or ever claimed that the original judgment was faulty or that he had ever attempted to satisfy the judgment. Nor has he made any such argument on appeal to the ICA or to this court. At this point, Petitioner has had more than sufficient process.

is absolute while the requirement under HRCP Rule 56(c) is subject to a harmless error analysis. Anomalously, the dissent states that because Petitioner "has actual notice of [Respondent's] motion to extend . . . the statute's notice requirement has now been satisfied." See dissenting opinion at 18 (emphasis added). This after-the-fact formulation incongruously rests on the same facts that this opinion says rendered the notice error harmless. Consequently, the dissent reaches the same result as would obtain in a harmless error analysis, see id. at 18-21, because its formulation is intrinsically a harmless error one.

A.

The dissent argues that "the circuit court did not have jurisdiction to grant [Respondent's] motion before [Petitioner] was afforded notice" and yet "the circuit court would have jurisdiction to grant the motion on remand, because [Petitioner] has now been afforded such notice." Id. at 20 (emphases added). But the dissent's contention that the requirements have "now been satisfied" is a concession that undercuts its jurisdictional argument. The requirements have "now been satisfied" only because Petitioner received notice years later when Respondent filed a notice of foreign judgment in the district court in Denver, Colorado. Under those circumstances, it cannot reasonably be argued as the dissent does "that HRS § 657-5's requirements, including its notice requirement, have now been satisfied," id. at 19, without doing violence to the ordinary language of the

statute. The only way to reconcile this circumstance is to deem the initial failure to give notice as harmless. In essence, what the dissent refers to as "harmful [error] per se" is in fact rendered harmless error under its own formulation.

B.

Furthermore, the dissent's mechanistic approach elevates form over substance. Although the dissent maintains that "[Petitioner] had to receive notice of the motion before the circuit court could grant [Respondent's] motion[,]" the dissent relies on notice the Respondent received after the fact to supply "jurisdiction to grant the motion on remand[.]" See id. at 20 (emphases added). Thus, the dissent maintains that even though the court was without jurisdiction to grant the motion previously, because Petitioner gained notice years after the fact by other means, the court's jurisdiction to grant the very same motion has "now" been restored. This exercise is a meaningless one, because the dissent voids a judgment, then resurrects it on the same basis on which it voided the judgment.

C.

Additionally, the dissent's construct is antithetical to its own jurisdictional argument. If, as the dissent maintains, failure of notice is "harmful per se," and a jurisdictional defect, see id. at 10, then the order must be void because, under the dissent's theory, the court lacked jurisdiction to enter it. If the order was void for lack of jurisdiction, the case must be

dismissed. The case cannot be remanded in the same proceeding to a court that the dissent has determined lacked jurisdiction because of the failure to give notice. See, e.g., Hawaii Home Infusion Assocs. v. Befitel, 114 Hawai'i 87, 93, 157 P.3d 526, 532 (2007) (holding that "initiating an HRS § 91-7 action in the wrong circuit is a defect of jurisdiction mandating dismissal [and a]ccordingly, we vacate the first circuit court's judgment and remand with instructions to dismiss [the] declaratory action"); Korean Buddhist Dae Won Sa Temple of Hawaii v. Concerned Citizens of Pālolo, 107 Hawai'i 371, 384, 114 P.3d 113, 126 (2005) (holding that circuit court's judgment was void for lack of jurisdiction, retaining jurisdiction solely to correct court's error in assuming jurisdiction, and thereby remanding to the circuit court to dismiss for lack of jurisdiction); Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003) ("it is well settled that an appellate court is under an obligation to ensure that it has jurisdiction to hear and determine each case and to dismiss an appeal on its own motion where it concludes it lacks jurisdiction . . . [and t]herefore, [w]hen we perceive a jurisdictional defect in an appeal, we must, sua sponte, dismiss that appeal") (internal quotation marks and citations omitted).

If the case must be dismissed, then Respondent must refile its motion to extend. See Eto, 99 Hawai'i at 502-03, 57 P.3d at 427-28 (holding that where first case was dismissed without prejudice, second complaint was not an amendment but was a

new filing for statute of limitations purposes and therefore time-barred); Clary Corp. v. Smith, 949 S.W.2d 452, 459 (Tex. App. 1997) (holding that where the plaintiffs were dismissed from a previous action due to lack of jurisdiction, "it was as if they had never filed suit," and, therefore, the second complaint "was a new lawsuit because it was made post-dismissal").

D.

The dissent however "do[es] not believe it necessary for [Respondent] to file a new motion on remand." Dissenting opinion at 20. The dissent cites Clarke for the proposition that the case could be remanded on the premise that in Clarke the error was harmful per se. Id. at 20-21. But first, as discussed supra, Clarke did not hold that a defective notice was harmful per se. See 50 Haw. at 170, 434 P.2d at 313. Second, in clarifying Clarke, Jensen expressly held that failure of notice was subject to "actual harm" analysis, whereas the lack of a hearing and not failed notice was the defect that was "harmful per se." See 53 Haw. at 202, 491 P.2d at 548. Third, Querubin concluded that where there was no notice this court on review would determine whether the appellants had been "actually prejudiced," not that such notice defect was deemed harmful per se. See 107 Hawai'i at 59, 109 P.3d at 700.

Furthermore, in the other cases relied upon by the dissent, there is no indication that upon remand the court could then do what it was without jurisdiction to do in the first

instance. In Wong Kwai Tong, because the circuit court did not have power under the divorce statute to enter that order, it was void. See 31 Haw. at 609. No set of circumstances could have changed the court's authority such that remand would have been appropriate. Similarly, Cooper provides no support for remand and reinstatement following the voiding of a judgment because this court concluded in that case that the provision at issue was not void. See 70 Haw. at 454, 776 P.2d at 1182.

The federal cases relied on by the dissent also do not provide any support for the argument that the court could do the very thing it was held not to have power to do upon remand and based upon the same motion. In Indoor Cultivation, the only power the court had on remand was to "vacate[] the judgment under [FRCP] Rule 60(b)(4) and return[] the conveyances . . . ." 55 F.3d at 1317. There was no action the court could take pursuant to the government's infirm complaint. Finally, in Carter, the Fifth Circuit did not remand but "affirm[ed] the district court's decision, finding that the district court [] properly set aside the consent judgment pursuant to [FRCP] Rule 60(b)(4)[.]" 136 F.3d at 1012. There was no suggestion that the same consent judgment could be reinstated upon remand. Therefore, the dissent's cases do not support the proposition that the court could "grant[] [Respondent's] motion to extend the deficiency judgment on remand." Dissenting opinion at 19.

E.

HRS 657-5 provides that "[n]o extension of a judgment or decree shall be granted unless the extension is sought within ten years of the date the original judgment or decree was rendered." (Emphasis added.) The original judgment was entered on December 21, 1993. Therefore, were Respondent to attempt to refile or reinstate its motion after the extension order was set aside for lack of jurisdiction under the dissent's formulation, the second filing or reinstatement of the motion to extend would fall outside of the ten-year statutory period. Under the dissent's view, Respondent would be entitled to reinstate or resort to its motion "ad infinitum." See Sluka v. Herman, 229 Neb. 200, 201-02, 425 N.W.2d 891, 892 (1988).

In Eto, this court held that, although the Plaintiff's first complaint had been filed within the statutory period, but dismissed due to lack of service, the Plaintiff's second complaint, which was identical to the first, was time-barred as it was filed outside the statute of limitations. 99 Hawai'i at 502-03, 57 P.3d at 427-28. This court stated that "if a court dismisses an initial action, the applicable statute of limitations does not toll unless a savings statute exists which provides for the filing of the second action within a specific amount of time[.]" Id. at 502, 57 P.3d at 427 (footnote omitted); see also Sluka, 229 Neb. at 202, 425 N.W.2d at 892 (stating that "the filing of a petition does not toll the running of a statute of

limitations for the purpose of bringing subsequent actions on the same set of facts" and "[t]o interpret the law in that fashion would create a situation in which a plaintiff could file, have dismissed, refile, and have dismissed, an action, ad infinitum"); Clary, 949 S.W.2d at 459 (holding that "[w]hen a cause of action is dismissed [for want of jurisdiction] and later refiled, limitations are calculated to run from the time the cause of action accrued until the date that the claim is refiled . . . because a dismissal is equivalent to a suit never having been filed"). Consequently, Respondent would be precluded from refiling the motion to extend as it would be untimely.

Following the dissent's rationale, if Respondent were allowed to refile or reinstate its motion after the statutory period had in fact run, the statutory mandate that "[n]o extension of a judgment or decree shall be granted unless the extension is sought within ten years" would be nullified. See HRS § 657-5. Under the dissent's formulation, Respondent is allowed to reinstate its motion for an extension of judgment after the time for seeking an extension had expired. The dissent's approach then would have far reaching adverse consequences for the viability of HRS § 657-5.

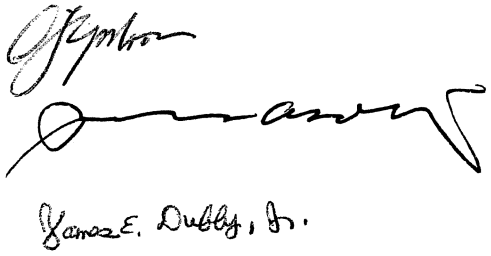
X.

HRS § 657-5 required that Respondent provide notice to Petitioner prior to entry of the extension of judgment. However, on the facts of this case, the court's extension of judgment was

harmless error because Petitioner had an opportunity to be heard in his HRCP Rule 60(b) hearing, offered no defense on the merits to the original judgment or to the judgment extension, and therefore has not demonstrated any prejudice resulting from the lack of notice. Accordingly, for the reasons stated above, the March 30, 2008 judgment of the ICA is affirmed.

Gary Victor Dubin (Lon Huy Vu with him on the application) for petitioner/defendant-appellant.

Peter Van Name Esser (Mark T. Shklov and Michel A. Okazaki with him on the brief & response) for respondent/plaintiff-appellee Bank of Hawaii.



James E. Duffy, Jr.