

NO. CAAP-13-0000418

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

ONE WAILEA DEVELOPMENT, LLC, Plaintiff-Appellant,  
v.  
WARREN S. UNEMORI ENGINEERING, INC., Defendant-Appellee,  
and  
JOHN DOES 1-10, JANE DOES 1-10, DOE CORPORATIONS 1-10,  
DOE PARTNERSHIPS 1-10, and DOE GOVERNMENTAL ENTITIES 1-10,  
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CIVIL NO. 07-1-0212)

MEMORANDUM OPINION

(By: Foley, Presiding J., Fujise and Leonard, JJ.)

The instant appeal arises from professional civil engineering services rendered for a proposed residential development in Wailea, Hawaii on the island of Maui. Plaintiff-Appellant One Wailea Development, LLC (**One Wailea**), appeals from the following entered in the Circuit Court of the Second Circuit<sup>1</sup> (**circuit court**):

(1) "Final Judgment in Favor of Defendant Warren S. Unemori Engineering Inc. As to All Claims," entered March 19, 2013 (**Final Judgment**);

(2) "Order Granting Defendant Warren S. Unemori Engineering Inc.'s Motion For Award of Attorney's Fees and Costs," entered March 22, 2013; and

---

<sup>1</sup> The Honorable Joel E. August presided over the case from its initial filing on June 15, 2007 until it was reassigned to the Honorable Joseph E. Cardoza on May 25, 2011.

(3) "All orders resulting from hearings before The Honorable Joseph E. Cardoza and The Honorable Joel E. August."

One Wailea contends the circuit court erred in:

(1) granting Defendant-Appellee Warren S. Unemori Engineering, Inc.'s (**Unemori Engineering**) motion for summary judgment (**MSJ**);

(2) denying in part One Wailea's motion for reconsideration;

(3) denying One Wailea's motion submitted pursuant to Hawai'i Rules of Civil Procedure (**HRCP**) Rule 60(b);

(4) denying One Wailea's motion for leave to (a) identify doe defendants and (b) amend its complaint (**Motion for Leave to Amend**);

(5) granting the motion to quash subpoena and/or for protective order (**Motion to Quash**), filed by Clyde Murashige (**Murashige**), Senior Vice President of Wailea Resort Company, Ltd. (**WRC**);

(6) granting the motion to withdraw as counsel for One Wailea by the Law Offices of Phillip R. Brown's (**Brown Law Offices**);

(7) denying One Wailea's motion to compel Alexander & Baldwin Wailea, LLC and its related entities (collectively, **A&B**) to (a) produce documents and things pursuant to a subpoena duces tecum, and (b) answer all questions and fully respond to Notice of Taking Deposition Upon Written Interrogatories;

(8) granting Unemori Engineering's motions in limine to exclude testimony by real estate agent and "Manager" of One Wailea, Michael J. Szymanski (**Szymanski**);

(9) denying One Wailea's motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability;

(10) failing to preserve for the record a "significant portion" of Szymanski's May 14, 2012 testimony;

(11) granting Unemori Engineering's oral motion for a directed verdict made on May 15, 2012;

(12) denying One Wailea's oral motion to conform the pleadings to the evidence;

(13) failing to (a) take judicial notice of the National Society of Professional Engineers (**NSPE**) Code of Ethics and (b) admit the NSPE Code of Ethics and "related documents" into evidence; and

(14) excluding testimony, including that of Title Officer Teri Ferreira (**Ferreira**), and exhibits pertaining to related litigation.

We conclude that One Wailea's appeal is without merit.

#### **I. BACKGROUND**

By a "Land Sales Contract" dated May 5, 1999, WRC agreed to sell, and Szymanski agreed to buy, approximately 23.11 acres of land in Wailea, Hawai'i on the island of Maui (**Property**) for \$4,900,000 and the "terms, covenants and conditions set forth in [the Land Sales Contract]."

In June 1999, One Wailea, through Szymanski, submitted an "Application for Special Management Area Permit and Planned Development Approval" (**SMA&PDA Application**) to the County of Maui's Planning Department (**Planning Department**). The SMA&PDA Application sought the Planning Department's approval of One Wailea's plan to develop the Property into a residential community comprised of twenty single-family residential lots. The SMA&PDA Application included a "Letter of Authorization" from Murashige, informing the Director of the Planning Department that WRC, as the fee simple owner of the Property, authorized One Wailea to file the application. DKI & Associates (**DKI**) prepared the SMA&PDA Application for One Wailea.

Unemori Engineering was hired to provide DKI with professional services related to the proposed development of the Property between July 1999 and December 2001. By letter dated July 21, 1999, Szymanski, who held the title of Manager of One Wailea, notified the County of Maui's Department of Public Works and Waste Management (**Department of Public Works**) that Unemori Engineering was authorized to file and process an application for Subdivision Approval (**Subdivision Application**) on behalf of One Wailea, and questions concerning the Subdivision Application could be addressed to Unemori Engineering.

By letter dated November 24, 1999, the Planning Department granted One Wailea's SMA&PDA Application subject to sixteen standard and project-specific conditions.

By letter dated May 2, 2001, the Department of Public Works approved Unemori Engineering's construction plans for subdivision improvements to the Property and informed Unemori Engineering that the approval was valid for one year.

In an email sent May 30, 2001 to Darren Unemori, Szymanski stated: "Please be sure and send me a copy of any correspondence you receive from anyone re: my project, including conversations with anyone, including [Murashige], that may be of interest or importance to me."

By letter dated July 26, 2001, Murashige notified Szymanski that a default had occurred under the terms of the Land Sales Contract because Szymanski failed to place the balance of the purchase price of the Property "into escrow in time for closing . . . ." Murashige notified Szymanski that WRC was electing to cancel the Land Sales Contract and thereby terminate any rights Szymanski "may have and any duties and obligations of [WRC] under the Land Sales Contract[.]"

By letter dated October 5, 2001, DKI requested from the Planning Department an extension of the deadline to initiate construction on the Property under the Planning Department's approval of One Wailea's SMA&PDA Application. By letter dated October 18, 2001, the Planning Department responded by requesting an updated letter of authorization from WRC confirming that One Wailea was authorized to apply for an extension.

In January 2003, the Planning Department denied One Wailea's request for an extension on the deadline to initiate construction. By letter dated March 11, 2003,<sup>2</sup> Unemori Engineering requested from the Department of Public Works approval of a one year extension for One Wailea's SMA&PDA Application, which was "due to expire on April 28, 2003 unless extended." In a fax dated March 17, 2003, Unemori Engineering informed Szymanski that it appeared One Wailea was no longer

---

<sup>2</sup> It appears from the May 2, 2001 and March 11, 2003 letters that the date was extended from April 27, 2002 to April 28, 2003.

required to request extensions for its SMA&PDA Application "[t]hanks to a favorable interpretation of the subdivision ordinance by Corporation Counsel[.]" On March 17, 2003, Unemori Engineering received a letter dated March 14, 2003 from the Department of Public Works that stated, "in accordance with our time extension processing guidelines, no further time extensions are required."

Through a Limited Warranty Deed dated October 1, 2003, WRC transferred ownership of the Property to Wailea Estates LLC (**Wailea Estates**).

On October 20, 2004, the circuit court entered an order in Title Guaranty Escrow Services, Inc's Interpleader Action (**TGES's Interpleader Action**) granting WRC's August 10, 2004 motion for summary judgment and denying Szymanski's October 3, 2002 motion for partial summary judgment. The circuit court entered its final judgment in the TGES's Interpleader Action in favor of WRC on April 20, 2005, from which Szymanski appealed. Title Guar. Escrow Servs., Inc. v. Szymanski, No. 27254 (App. Apr. 27, 2009) (SDO).

In an agreement dated March 20, 2006, Unemori Engineering agreed to provide professional civil engineering services to A&B, which managed Wailea Estates, "for the subdivision and development of the [Property]," and A&B agreed to pay Unemori Engineering \$19,300 for its services as stated in a separate proposal.

In a May 1, 2006 letter, the Department of Public Works notified Unemori Engineering that it was "unable to process [Unemori Engineering's] application for preliminary subdivision approval" because the Department of Public Works was also processing One Wailea's application for the same property. In a June 9, 2006 letter, Paul W. Hallin (**Hallin**), Senior Vice President of A&B, notified Ms. Lesli Otani (**Otani**) of the Department of Public Works that Unemori Engineering had received the May 1, 2006 letter and informed Otani that Wailea Estates was the owner of the Property and "would like to proceed with the subdivision of the [Property]."

On June 15, 2007, One Wailea filed a complaint in the circuit court against Unemori Engineering and unidentified individuals, corporations, partnerships, and governmental entities asserting the five claims for relief: breach of contract (Count I), breach of the duty of good faith and fair dealing (Count II), breach of fiduciary duty (Count III), professional negligence (Count IV), and interference with a prospective economic advantage (Count V). One Wailea prayed for "general, special, incidental, consequential and punitive damages[,] attorneys' fees and costs, and prejudgment interest. Unemori Engineering filed an answer to One Wailea's complaint on July 6, 2007.

On April 27, 2009, this court affirmed the circuit court's final judgment in TGES's Interpleader Action. Title Guar. Escrow Servs., SDO at \*3. Szymanski filed an application for a writ of certiorari to the Hawai'i Supreme Court on August 13, 2009, which was denied on September 17, 2009. Title Guar. Escrow Servs., Inc. v. Szymanski, No. 27254, 2009 WL 2974724 (Haw. Sept. 17, 2009).

On June 26, 2009, Unemori Engineering filed its MSJ on Counts II, III, IV, and V of One Wailea's complaint (**Unemori Engineering's First MSJ**), arguing that One Wailea was asserting negligence claims and sought "to recover economic losses and therefore are barred by the Economic Loss Doctrine."

On August 12, 2009, One Wailea filed a memorandum in opposition to Unemori Engineering's First MSJ, arguing that the economic loss doctrine did not apply, and that even if it did, One Wailea should prevail on its breach of contract claim.

On August 20, 2009, the circuit court held a hearing on Unemori Engineering's First MSJ.<sup>3</sup> On September 29, 2009, the circuit court granted Unemori Engineering's First MSJ as to Count II (breach of the duty of good faith and fair dealing), and denied the MSJ as to Counts III, IV, and V.

On October 14, 2009, Unemori Engineering filed a motion to join Szymanski as a plaintiff and for summary judgment

---

<sup>3</sup> Transcripts for this hearing are not within the record on appeal.

(**Unemori Engineering's Second MSJ**). With regard to One Wailea's breach of contract claim (Count I), Unemori Engineering argued that summary judgment was appropriate because Unemori Engineering was "discharged from its contract obligations to Szymanski by operation of law" in October 2004 when the circuit court ruled against Szymanski and awarded title of the Property to WRC and held that "further work by [Unemori Engineering] for Szymanski in connection with the subdivision of the property was pointless." With regard to One Wailea's other claims, which Unemori Engineering referred to as "negligence claims," Unemori Engineering argued that summary judgment was appropriate because Unemori Engineering's "contract with Szymanski was terminated by operation of law" when Szymanski lost his interest in the property and therefore "any duty that [Unemori Engineering] had to Szymanski was extinguished." One Wailea did not file an opposition to the motion.

On November 16, 2009, the Brown Law Offices filed a "Motion to Withdraw as Counsel for [One Wailea]" (**Motion to Withdraw**). At the January 14, 2010 hearing on the motion, the circuit court noted that it received a letter on December 7, 2009 from Szymanski informing the court that he planned to oppose the motion to withdraw and seeking a continuance. The circuit court noted that a continuance issued on December 16, 2009 stated "[a]ny person or entity failing to personally appear at [the January 14, 2010 hearing] may be deemed to have waived any objection to said motion[,]" and that the court had not received anything from Szymanski or other representatives of One Wailea. The circuit court stated that it would grant the motion because One Wailea was not represented at the hearing and the circuit court had "not received any calls from anybody opposing the motion." The circuit court filed its order granting the Motion to Withdraw on January 26, 2010.

On March 8, 2010, the circuit court entered into the record a letter it received from George B. Hofmann (**Hofmann**), Szymanski's counsel in his "Chapter 7" federal bankruptcy case. In the letter, Hofmann requested the circuit court cancel Unemori Engineering's Second MSJ before the hearing scheduled for March

9, 2010 because the motion violated the automatic stay that applies in bankruptcy cases pursuant to federal law, and because Unemori Engineering's counsel had refused to withdraw the motion. On March 16, 2010, Unemori Engineering filed their memorandum regarding Szymanski's bankruptcy and argued that "[t]he automatic bankruptcy stay applies to actions against [Szymanski]" because Szymanski was the debtor, not One Wailea.

On March 30, 2010, the circuit court held a hearing on Unemori Engineering's Second MSJ. The circuit court explained to Szymanski, who appeared at the hearing via telephone, that under Hawai'i law he could represent himself in the hearing but could not represent One Wailea.<sup>4</sup> Szymanski "respectfully request[ed] if this whole case is not -- this matter is not stayed pending the completion of my bankruptcy, that at a minimum, that it be continued so that [he'd have] additional time to respond[.]" (Emphasis added.) The circuit court made several factual determinations but ultimately found that there were no "disputed issues of material fact with regard to the [MSJ] as to One

---

<sup>4</sup> The following exchange took place:

MR. SZYMANSKI: For the record, all of the allegations that [the court] just read and all those facts are disputed. None of that is actually factual. To this day, there is a lis pendens filed against the court preserving my rights, and at all times [Unemori Engineering] could have performed. It was not impossible. The contract has never been cancelled[.]

And there is a -- I don't have any counsel. I haven't had time to get counsel. And I didn't want to file anything. [One Wailea] didn't want to file anything opposing -- that would be contrary to the position that the entire motion should be stayed.

THE COURT: Well, Mr. Szymanski, you can't speak on behalf of [One Wailea] about what [One Wailea] thought or didn't think. . . .

. . . .

MR. SZYMANSKI: Okay. There's also the declaration in the record from the previous summary judgment motion which disputes all the material statements just made.

THE COURT: Yes. Well, your position will be noted for the record.

MR. SZYMANSKI: Thank you, your Honor.

(Emphases added.)

Wailea" and granted Unemori Engineering's Second MSJ as a matter of law.

On May 25, 2010, the circuit court entered an order granting Unemori Engineering's Second MSJ with regard to the request for summary judgment against One Wailea and staying the motion with regard to its request to join Szymanski. The circuit court's order mirrored its reasoning at the March 30, 2010 hearing.

On June 4, 2010, One Wailea, through new counsel, filed a "Motion for Reconsideration of Order Granting [Unemori Engineering's Second MSJ]" (**Motion for Reconsideration**). One Wailea argued that the circuit court's grant of summary judgment in favor of Unemori Engineering was effectively an order of default judgment because the court did not allow Szymanski to speak for One Wailea and denied Szymanski's request for a continuance for One Wailea to obtain new counsel and submit an opposition. One Wailea contended the circuit court's ruling equated to a denial of due process because One Wailea was given only twenty-one days to obtain new counsel (March 9, 2010 to March 30, 2010), "made diligent efforts to find new counsel but was unable to . . . given the short time frame[,]" and was not given an opportunity to explain to the court why it was unable to obtain new counsel.

As to the substance of Unemori Engineering's Second MSJ, One Wailea argued that Counts I (breach of contract), III (breach of fiduciary duty), and IV (professional negligence) "all stem from [Unemori Engineering's] unauthorized disclosure of work product that belonged to [One Wailea]." One Wailea argued that the termination of One Wailea's "contractual rights to purchase the land" was irrelevant because "[t]he work product remained and the work product was improperly used by A&B for their own profit, at the expenses [sic] of [One Wailea]." One Wailea further argued that even if Unemori Engineering owed no duty to One Wailea after 2004, summary judgment should not have been granted on the basis of lack of duty as to Count V of its complaint, tortious interference with prospective business advantage, because intentional torts do not rely on the existence of a duty.

On June 10, 2010, the circuit court entered Judgment in favor of Unemori Engineering as to all claims in One Wailea's complaint pursuant to HRCF Rule 54(b).

At the July 15, 2010 hearing on One Wailea's Motion for Reconsideration, the circuit court stated that it would "grant the motion for reconsideration to a limited degree," because

not all, but many of the arguments raised in the motion for reconsideration are valid arguments, but with regard to only one limited area, and that's the issue about the Court's ruling of summary judgment that would have included the intentional tort.

. . . [T]hat is the only area that is going to be revived in the motion for reconsideration on summary judgment. . . .

. . . I think there really are some questions about whether the ending of the contract would have necessarily meant that there would be no potential intentional tort for the knowing use of work product to benefit somebody else.

On August 10, 2010, the circuit court entered an order granting in part and denying in part One Wailea's Motion for Reconsideration. The circuit court reinstated Count V of One Wailea's complaint, interference with a prospective economic advantage.

On July 28, 2010, Murashige filed a Motion to Quash the subpoena for his deposition. Keith Kiuchi (**Kiuchi**), counsel for One Wailea, did not oppose the motion at the August 5, 2010 hearing. The circuit court explained that it was granting the Motion to Quash because it was "convinced based on Dr. Park's declaration that [Murashige's] participation [in an oral deposition] could present a significant risk to [Murashige's] health[.]" The circuit court issued an order granting the motion on August 18, 2010.

On August 4, 2010, One Wailea filed its Motion for Leave to Amend, seeking to name Wailea Estates, A&B, and Hallin as now identified Doe Defendants; alleging facts relating to the identified Doe Defendants; pleading certain facts with particularity; and adding a claim for unjust enrichment. On October 26, 2010, the circuit court denied the motion.

On November 16, 2010, Unemori Engineering filed a MSJ as to Count V of One Wailea's complaint (**Unemori Engineering's**

**Third MSJ**). Unemori Engineering argued that summary judgment should be granted because:

at the time [Unemori Engineering] contracted with [A&B] to provide services in connection with the subdivision of the [Property], [One Wailea] had no valid business relationship, prospective advantage or expectancy with respect to the property. . . . [One Wailea] had no reasonable probability of a future economic benefit with respect to the property because it could not proceed to subdivide and/or develop the property since Szymanski no longer had a legal or equitable interest in the property.

On December 13, 2010, One Wailea submitted a memorandum in opposition to Unemori Engineering's Third MSJ.

The circuit court denied Unemori Engineering's Third MSJ at the December 21, 2010 hearing and filed its order March 18, 2011. The circuit court explained that it was denying the motion without prejudice because:

6. The market value of the preliminary subdivision approval and the construction plan approval are disputed issues of material fact. . . .

7. Even if [One Wailea] cannot sufficiently prove at trial that it would have realized the alleged economic opportunity had there been no interference, [One Wailea] still might recover by showing that [Unemori Engineering] was unjustly enriched as a result of the interference.

On April 18, 2011, Unemori Engineering filed a MSJ on unjust enrichment (**Unemori Engineering's Fourth MSJ**). Unemori Engineering argued that "[One Wailea] is not the owner of the plans, specifications and other work prepared by [Unemori Engineering] for [One Wailea] and has no standing to bring a claim for unjust enrichment[,] and such a claim "is preempted by the federal Copyright Act."

On May 25, 2011, One Wailea filed a motion pursuant to HRCP Rule 60(b) to set aside the circuit court's Order Granting Unemori Engineering's Second MSJ as to Counts I, III, and IV (**Motion to Set Aside**). In its memorandum in support of its Motion to Set Aside, One Wailea argued that under HRCP Rule 60((b)(2), Darren Unemori's February 8, 2011 deposition constituted new evidence that Unemori Engineering breached its duty to One Wailea by giving information prepared for One Wailea to A&B and withdrew One Wailea's Subdivision Application without permission, and under HRCP Rule 60(b)(6) based on the

extraordinary circumstances of the case's procedural history warranted relief from the order.

On June 1, 2011, Unemori Engineering filed its second MSJ on Count V, tortious interference with prospective economic advantage (**Unemori Engineering's Fifth MSJ**).

On July 1, 2011, the circuit court held a hearing on Unemori Engineering's Fourth and Fifth MSJ's and One Wailea's Motion to Set Aside. At the hearing, the court "conclude[d] that given the record in this case, that [sic] the [Motion to Set Aside] should be denied[.]"

On August 22, 2011, the circuit court reduced its decision to a written order, denying Unemori Engineering's Fourth and Fifth MSJs. The circuit court explained that Unemori Engineering's Fourth MSJ regarding the unjust enrichment claim was "inappropriate at this time as a claim of unjust enrichment is not currently part of this case[,]" and that it was denying Unemori Engineering's Fifth MSJ on the tortious interference with prospective business advantage claim because "[t]here are genuine issues of material fact." On the same day, the circuit court denied One Wailea's Motion to Set Aside.

On February 6, 2012, One Wailea filed a motion to stay trial and motions or, in the alternative for a continuance of trial. On March 19, 2012, the circuit court denied the motion to stay but granted the motion to continue because of "court congestion."

On March 7, 2012, One Wailea filed a "Motion to Compel [A&B] to: (A) Produce Documents and Things Pursuant to Subpoena Duces Tecum Filed July 16, 2007, and (B) Answer All Questions and Fully Respond to Notice of Taking Deposition Upon Written Interrogatories Filed July 16, 2007" (**Motion to Compel**). Unemori Engineering filed a memorandum in opposition to the Motion to Compel on March 6, 2012. At an April 11, 2012 hearing on the Motion to Compel, the circuit court orally denied One Wailea's motion because "the motion was filed after the discovery cutoff" and because "it relates to an issue that is almost five years old."

On April 20, 2012, the circuit court held a hearing on six motions in limine, granting the motions excluding testimony: (1) by Szymanski that One Wailea owned the drawings, plans, maps, and other work produced by Unemori Engineering for One Wailea; (2) concerning insurance coverage; and (3) by Szymanski regarding offers received for the Property, permits and approvals. The circuit court denied the motions in limine seeking the exclusion of testimony: (1) by Szymanski regarding the value of One Wailea and permits and approvals issued to One Wailea; and (2) by Szymanski of statements attributed to Warren S. Unemori. The circuit court also found "an insufficient factual and legal basis to warrant the granting of this motion and to impose sets of sanctions on [Unemori Engineering,]" and accordingly, denied the motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability.

Jury trial commenced on April 23, 2012, and concluded on May 15, 2012. On May 15, 2012, counsel for One Wailea made an oral motion to conform the pleadings to the evidence to include a claim of unjust enrichment. One Wailea argued that the motion was consistent with the circuit court's ruling in December of 2010. Unemori Engineering objected to the motion on the basis that there was no evidence on the record to support a claim of unjust enrichment. The circuit court denied the motion.

At the close of One Wailea's case in chief on May 15, 2012, Unemori Engineering made an oral motion for judgment as a matter of law (directed verdict) and for punitive damages. In its July 5, 2012 "Order Granting [Unemori Engineering's] Motion for Directed Verdict" (**Motion for Directed Verdict**) and damages based on the claim of tortious interference with a prospective economic advantage, the circuit court explained that it was granting the motion because One Wailea "failed to sustain its burden of proof . . . ."

On October 22, 2012, Unemori Engineering filed a motion for attorney's fees and costs, which the circuit court granted on March 22, 2013.

On March 19, 2013, the circuit court entered its Final Judgment pursuant to HRCF Rule 54(b) in favor of Unemori

Engineering as to all claims made in One Wailea's complaint as well as all of the circuit court's findings, orders, and rulings, including an award of attorney's fees and costs. The circuit court explained that it granted Unemori Engineering's Motion for Directed Verdict because:

The court in reviewing the evidence in the light most favorable to the nonmoving party, [One Wailea], saw issues with respect to virtually every element of [One Wailea's] case. In particular, whether there was a purposeful intent to interfere with the relationship, advantage or expectation and whether there is legal causation between the alleged act of interference and with respect to actual damage to [One Wailea].

On March 22, 2013, the circuit court entered its order awarding fees and costs to Unemori Engineering.

On April 18, 2013, One Wailea filed its notice of appeal from (1) the Final Judgment; (2) the Order Granting Fees and Costs; and (3) "all orders resulting from hearings before The Honorable Joseph E. Cardoza and The Honorable Joel E. August."

## **II. STANDARDS OF REVIEW**

### **A. Motion to Withdraw as Counsel**

"A motion to withdraw as counsel is subject to the 'approval of the court,' Hawai'i Rules of Penal Procedure Rule [(HRPP)] 57, and the court's decision is reviewed for abuse of discretion." State v. Plichta, 116 Hawai'i 200, 214, 172 P.3d 512, 526 (2007).

### **B. Motion for Continuance**

"The circuit court's decision to deny a request for a continuance pursuant to HRCP Rule 56(f) shall not be reversed absent an abuse of discretion." Assocs. Fin. Servs. of Hawaii, Inc. v. Richardson, 99 Hawai'i 446, 454, 56 P.3d 748, 756 (App. 2002). "[T]he request must demonstrate how postponement of a ruling on the motion will enable him or her, by discovery or other means, to rebut the movants' showing of absence of a genuine issue of fact." Id. (citation omitted).

### **C. Summary Judgment**

On appeal, the grant or denial of summary judgment is reviewed de novo.

[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and inferences drawn therefrom in the light most favorable to the party opposing the motion.

Nuuanu Valley Ass'n v. City & Cty. of Honolulu, 119 Hawai'i 90, 96, 194 P.3d 531, 537 (2008) (citation omitted).

**D. Motion for Reconsideration**

[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion. Reconsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding.

Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 110, 58 P.3d 608, 621 (2002) (internal quotation marks omitted) (quoting Sousaris v. Miller, 92 Hawai'i 505, 513, 993 P.2d 539, 547 (2000)). An appellate court reviews a "trial court's ruling on a motion for reconsideration . . . under the abuse of discretion standard." Ass'n of Apartment Owners of Wailea Elua, 100 Hawai'i at 110, 58 P.3d at 621. An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992).

**E. Motion to Quash a Subpoena**

"On review, the action of a trial court in enforcing or quashing [a] subpoena will be disturbed only if plainly arbitrary and without support in the record." Bank of Hawaii v. Shaw, 83 Hawai'i 50, 59, 924 P.2d 544, 553 (App. 1996) (citation and internal quotation marks omitted).

**F. Motion for Leave to Amend Complaint**

"Orders denying motions for leave to amend a complaint are reviewed for an abuse of discretion." Jou v. Dai-Tokyo Royal State Ins. Co., 116 Hawai'i 159, 163, 172 P.3d 471, 475 (2007) (citation and internal quotation marks omitted).

**G. HRCP Rule 60(b) Motion to Set Aside**

"The circuit court's disposition of an HRCP Rule 60(b) motion is reviewed for abuse of discretion." Beneficial Hawai'i, Inc. v. Casey, 98 Hawai'i 159, 164, 45 P.3d 359, 364 (2002).

**H. Motion to Compel Discovery in a Civil Suit**

"We review a trial court's ruling limiting the scope of discovery under the abuse of discretion standard." Fisher v. Grove Farm Co., 123 Hawai'i 82, 94, 230 P.3d 382, 394 (App. 2009).

**I. Motion in Limine**

The granting or denying of a motion in limine is reviewed for abuse of discretion. The denial of a motion in limine, in itself, is not reversible error. The harm, if any, occurs when the evidence is improperly admitted at trial. Thus, even if the trial court abused its discretion in denying a party's motion, the real test is not in the disposition of the motion but the admission of evidence at trial.

State v. Eid, 126 Hawai'i 430, 440, 272 P.3d 1197, 1207 (2012) (quoting Miyamoto v. Lum, 104 Hawai'i 1, 7, 84 P.3d 509, 515 (2004)).

**J. Motion to Conform the Pleadings to the Evidence**

A motion to conform the pleadings to the evidence under HRCP Rule 15(b) is reviewed for an abuse of discretion. Hamm v. Merrick, 61 Haw. 470, 473, 605 P.2d 499, 502 (1980).

**K. Motion for Judgment as a Matter of Law (Directed Verdict)**

The grant or denial of a "motion for judgment as a matter of law" under HRCP Rule 50, also known as a "motion for JNOV" or "motion for a directed verdict," is reviewed de novo. Kramer v. Ellett, 108 Hawai'i 426, 430, 121 P.3d 406, 410 (2005)(citing Nelson v. Univ. of Hawai'i, 97 Hawai'i 376, 393, 38 P.3d 95, 112 (2001)).

When reviewing a motion for judgment as a matter of law, "the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and [the] motion may be granted only where there can be but one reasonable conclusion as to the proper judgment."

Id. (quoting Nelson, 97 Hawai'i at 393, 38 P.3d at 112).

**III. DISCUSSION**

**A. The circuit court did not err in granting the Brown Law Offices' Motion to Withdraw.**

One Wailea contends the circuit court erred in granting the Brown Law Offices' Motion to Withdraw as One Wailea's counsel because One Wailea did not have "sufficient time to obtain replacement counsel and file an opposition" and the circuit court should have considered Szymanski's December 7, 2009 letter to the circuit court as an opposition to the motion.

A motion to withdrawal as counsel may be brought pursuant to HRPP Rule 57, which provides:

**Rule 57. WITHDRAWAL OF COUNSEL.**

Withdrawal of counsel shall require the approval of the court and shall be subject to Rule 1.16 of the Hawaii Rules of Professional Conduct [(HRPC)]. . . . Unless otherwise ordered, withdrawal of counsel shall not become effective until substitute counsel appears or is appointed, the defendant appears pro se or the defendant is deemed to have waived counsel.

HRPC Rule 1.16 provides, in relevant part:

Rule 1.6. DECLINING OR TERMINATING REPRESENTATION.

. . . .

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

. . . .

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

. . . .

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation.

The circuit court granted the Motion to Withdraw because One Wailea did not appear at the January 14, 2010 hearing on the Motion to Withdraw and the circuit court had "not received any calls from anybody opposing this motion." Szymanski, the sole agent for One Wailea, was notified on December 16, 2009 the circuit court was granting his request for a continuance, the hearing on the Motion to Withdraw was scheduled for January 14, 2010, and failure to appear at this hearing may be deemed a waiver to any objection to the motion. One Wailea has not cited

any evidence in the record of its failed attempts to obtain replacement counsel during its continuance or to support an explanation as to why Szymanski failed to seek another continuance for One Wailea. Therefore, the circuit court did not abuse its discretion in granting the Brown Law Offices' motion to withdraw as One Wailea's counsel.

Even if the circuit court erred in denying Szymanski's request for a continuance, the error was harmless because One Wailea made substantive arguments and presented evidence in opposition to Unemori Engineering's Second MSJ in support of its Motion for Reconsideration, which the circuit court considered. One Wailea was not prejudiced by its lack of counsel and failure to oppose Unemori Engineering's Second MSJ.

**B. The circuit court did not err in granting in part Uemori Engineering's Second MSJ as to Counts I, III and IV.**

One Wailea contends the circuit court erred in granting Unemori Engineering's Second MSJ with regard to Counts I (breach of contract), III (breach of fiduciary duty), IV (professional negligence), and V (interference with a prospective economic advantage).

One Wailea's argument with regard to the grant of summary judgment as to Counts I, III, and IV on the basis of the admissibility of exhibits attached to a declaration in support of the MSJ is without merit because the circuit court based its ruling on undisputed facts. As to Count V, One Wailea's argument is again without merit because the circuit court revived Count V after considering One Wailea's motion for reconsideration. We address One Wailea's second and third arguments by evaluating whether the circuit court erred in granting summary judgment on Count I, III, and IV.

**1. Genuine Issues of Material Fact in Count I (Breach of Contract)**

Neither Hawai'i contract law nor the Restatement (Second) of Contracts address "discharge by impossibility." The Restatement (Second) of Contracts, however, addresses a relevant doctrine of "Discharge by Supervening Impracticability," which provides:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981).

Restatement (Second) Contracts § 261 comment "a" to § 261 explains that "[t]his general principle has traditionally been applied" in three categories: "supervening death or incapacity of a person necessary for performance, . . . supervening destruction of a specific thing necessary for performance, . . . and supervening prohibition or prevention by law . . . ." Comment "a" further explains:

[T]his Section states a principle broadly applicable to all types of impracticability and it "deliberately refrains from any effort at an exhaustive expression of contingencies" . . . The rule stated in this Section applies only to discharge a duty to render a performance and does not affect a claim for breach that has already arisen. The effect of events subsequent to a breach on the amount of damages recoverable is governed by the rules on remedies . . . .

In granting summary judgment in favor of Unemori Engineering with regard to Count I, the circuit court found:

On July 26, 2001, because [One Wailea] breached its contractual obligations by failing to obtain financing for the purchase [WRC] cancelled the land sales contract and conveyed the 23 acres to [Wailea Estates].

In October 2004, as a result of an interpleader action involving a dispute as to the legal ownership of [the Property] the Court ruled in favor of [WRC] with respect to title to [the Property]. That decision has not been overturned by any court.

As a result the circuit court held that:

no later than October 2004, neither [One Wailea] nor its principal Szymanski have any legal interest in the property, and it was not possible for [One Wailea] to proceed with any development plans, and it would have been futile for [Unemori Engineering] to act on [One Wailea's] behalf pursuant to the old contract because development on behalf of [One Wailea] would have been impossible, and [Unemori Engineering] was free to contract with any other subsequent owner to develop the [Property], including the Court's determined owner [WRC].

Unemori Engineering was discharged of its duties under its contract with One Wailea by impossibility or supervening frustration. The circuit court did not err in granting summary judgment and denying reconsideration with regard to Count I

because there was no practical way that Unemori Engineering could fulfill its remaining obligations under the contract because Szymanski had no right to develop the Property, which was a basic assumption of the contract between One Wailea and Unemori Engineering. Furthermore, because the Contract does not address changed circumstances, One Wailea's competitors, or whether Unemori Engineering had the duty to maintain One Wailea's subdivision approvals, Unemori Engineering did not breach its contract with One Wailea by making an agreement with A&B.

**2. Genuine Issues of Material Fact in Count III (Breach of Fiduciary Duty)**

One Wailea argues that the circuit court erred in granting summary judgment in favor of Unemori Engineering because there was a genuine issue of material fact as to whether Unemori Engineering owed a fiduciary duty to One Wailea because One Wailea was its client.<sup>5</sup> "Whether a fiduciary duty exists is a question of law." Lahaina Fashions, Inc. v. Bank of Hawai'i, 129 Hawai'i 250, 265, 297 P.3d 1106, 1121 (App. 2013). In Hawai'i, a fiduciary duty is imposed by statute or special relationship. See, e.g., Hawai'i Revised Statutes (HRS) § 425-123 (2004 Repl.) (providing that a partner owes certain fiduciary duties to the partnership and other partners); Matter of Estate of Dwight, 67 Haw. 139, 145, 681 P.2d 563, 567 (1984) (holding that a trustee owed a fiduciary duty to the beneficiaries of the trust via a special relationship); In re Trask, 46 Haw. 404, 412, 380 P.2d 751, 756 (1963) (holding that an attorney owed a fiduciary duty

---

<sup>5</sup> Restatement (Second) of Torts § 874 (1979) ("Violation of Fiduciary Duty) provides, "[o]ne standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." Comment "a" to § 874 explains, "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." Black's Law Dictionary defines "fiduciary" as:

1. Someone who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, loyalty, due care, and disclosure <the corporate officer is a fiduciary to the corporation>.
2. Someone who must exercise a high standard of care in managing another's money or property <the beneficiary sued the fiduciary for investing in speculative securities>.

Black's Law Dictionary 743 (10th ed. 2014).

to his client via a special relationship). One Wailea does not cite to a statute or case imposing fiduciary duty on an engineer who is contracted to provide professional services.

The circuit court did not err in granting summary judgment and denying reconsideration with regard to Count III because under Hawai'i law, Unemori Engineering, as an engineering firm contracted for professional services, owed no fiduciary duty to its client, Szymanski or One Wailea.

**3. Genuine Issues of Material Fact in Count IV  
(Professional Negligence)**

One Wailea challenges the circuit court's conclusion that "[s]ince any contractual duty owed by [Unemori Engineering] to [One Wailea] was terminated because of impossibility of performance, at the time [Unemori Engineering] contracted with [WRC], [Unemori Engineering] owed no duty in tort to [One Wailea].

"The economic loss rule bars recovery in tort for purely economic loss." City Express, Inc. v. Express Partners, 87 Hawai'i 466, 469, 959 P.2d 836, 839 (1998). In City Express, the economic loss rule was applied to bar tort recovery where the plaintiff alleged that the professional negligence of the defendant, an architectural firm with which it contracted, caused the plaintiff to suffer economic loss in the form of "additional costs, lost rent, the cost of remedying the alleged building defects, and the difference between the value of the building as designed and the value it would have had if it had been properly designed." Id. The City Express court explained:

The economic loss rule marks the fundamental boundary between the law of contracts, which is designed to enforce expectations created by agreement, and the law of torts, which is designed to protect citizens and their property by imposing a duty of reasonable care on others. The economic loss rule was designed to prevent disproportionate liability and allow parties to allocate risk by contract.

Id. (internal citation omitted) (quoting Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 881 P.2d 986, 989-90 (Wash. 1994)).

The City Express court further explained:

In the context of construction litigation involving design professionals, sound policy reasons counsel against

providing open-ended tort recovery to parties who have negotiated a contractual relationship.

If tort and contract remedies were allowed to overlap, certainty and predictability in allocating risk would decrease and impede future business activity. The construction industry in particular would suffer, for it is in this industry that we see most clearly the importance of the precise allocation of risk as secured by contract. The fees charged by architects, engineers, contractors, developers, vendors, and so on are founded on their expected liability exposure as bargained and provided for in the contract.

Berschauer/Phillips Constr. Co., 881 P.2d at 992.

. . . .

Construction projects are characterized by detailed and comprehensive contracts that form the foundation of the industry's operations. Contracting parties are free to adjust their respective obligations to satisfy their mutual expectations.

Id. at 470, 959 P.2d at 840 (emphasis, citation and internal quotation marks omitted).

City Express is applicable to the instant case. One Wailea brought suit alleging that Unemori Engineering's professional negligence caused One Wailea to suffer economic loss in the form of lost profits, and the parties admit that they were in privity of contract. Therefore, the circuit court did not err in granting summary judgment and denying reconsideration with respect to Count IV because One Wailea's professional negligence claim is barred by the economic loss rule. City Express, 87 Hawai'i at 469, 959 P.2d at 839.

**C. The circuit court did not err in granting Murashige's Motion to Quash.**

One Wailea contends that Murashige "was a key person in the Land Contract between [Szymanski] and WRC and he was the one that contacted [Unemori Engineering] in 2006 that lead to this lawsuit. . . . [I]mportant evidence was forever lost when [Murashige] died afterwards, without his deposition ever being taken." One Wailea contends the circuit court erred in granting Murashige's Motion to Quash because although Murashige was allegedly ill, he was not exempted from discovery and his testimony was not privileged. One Wailea argues that this error "deprived [One Wailea] of this key discovery opportunity." One

Wailea states that it submitted a memorandum in opposition to the Motion to Quash, but does not provide accurate citations to the record, and it appears that such opposition is not within the record on appeal.

HRCPC Rule 26(c) provides:

**Rule 26. GENERAL PROVISION GOVERNING DISCOVERY.**

. . . .

**(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the circuit where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the disclosure or discovery not be had; (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition, after being sealed, be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

(Emphases added.)

At the August 5, 2010 hearing on Murashige's Motion to Quash, the circuit court explained that it was granting the motion because it was "convinced based on Dr. Park's declaration that [Murashige's] participation [in an oral deposition] could present a significant risk to [Murashige's] health[.]" The circuit court's decision to grant the Motion to Quash based on its conclusion that deposing Murashige could present a significant risk to his health was not plainly arbitrary, and therefore the circuit did not err.

**D. The circuit court did not err in denying One Wailea's Motion for Leave to Amend.**

One Wailea contends the circuit court erred in denying One Wailea's Motion for Leave to Amend because the statute of

limitations had not yet run on its unjust enrichment claim, so One Wailea should have been permitted to amend its complaint to add A&B as a defendant. One Wailea also contends the circuit court "could have found a basis for tolling the statute of limitations on the tortious interference claim because new counsel had just entered."

HRCP Rule 15(c) provides, in relevant part:

**Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS.**

. . . .

**(c) Relation back of amendments.** An amendment of a pleading relates back to the date of the original pleading when

(1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

(3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied and the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

(Emphases added.)

The statute of limitations for the claim of tortious interference with a prospective economic advantage is two years. See HRS § 657-7 (1993).

HRCP Rule 17(d)(1) provides, in relevant part:

**Rule 17. PARTIES PLAINTIFF AND DEFENDANT; CAPACITY.**

. . . .

**(d) Unidentified defendant.**

(1) When it shall be necessary or proper to make a person a party defendant and the party desiring the inclusion of the person as a party defendant has been unable to ascertain the identity of a defendant, the party desiring the inclusion of the person as a party defendant shall in accordance with the criteria of Rule 11 of these rules set forth in a pleading the person's interest in the action, so much of the identity as is known (and if unknown, a fictitious name shall be used), and shall set forth with specificity all actions already undertaken in a diligent and

good-faith effort to ascertain the person's full name and identity.

(Emphasis added.)

"[A] primary purpose of [HRCP Rule 17(d)] is to 'toll the statute of limitations with respect to Doe defendants who cannot be identified prior to the running of the statute.'" Tri-S Corp. v. W. World Ins. Co., 110 Hawai'i 473, 500, 135 P.3d 82, 109 (2006) (quoting Wakuya v. Oahu Plumbing & Sheet Metal, Ltd., 65 Haw. 592, 596, 656 P.2d 84, 88 (1982)). In Tri-S Corp. the Hawai'i Supreme Court concluded that the circuit court erred in allowing the plaintiffs to join a defendant under HRCP 17(d) because the plaintiffs knew of the defendant's identity when they filed their complaint and chose not to name the defendant for strategic purposes. Tri-S Corp., 110 Hawai'i at 499, 135 P.3d at 108. The supreme court, however, held that the error was harmless because even if the circuit court had properly denied the motion for HRCP Rule 17(d) certification, the plaintiffs "could still have brought a timely, separate action against [the defendant] at that point (which ultimately could, and probably would, have later been consolidated with the instant action), or they could have properly joined [the defendant] in the instant action under HRCP Rule 20(a)." Tri-S Corp., at 501, 135 P.3d at 110.

On June 15, 2007, One Wailea filed its complaint against Unemori Engineering and unidentified individuals, corporations, partnerships, and governmental entities. In its complaint, One Wailea alleged facts that specifically include Wailea Estates and A&B. On November 16, 2009, One Wailea's counsel at the time, the Brown Law Offices, filed their Motion to Withdraw. On August 4, 2010, with the aid of its current counsel One Wailea filed its Motion for Leave to Amend.

One Wailea could not join Wailea Estates, A&B, or Hallin under HRCP Rule 15(c) - One Wailea was prohibited from joining new defendants under its tort claims pursuant to the two-year statute of limitations set forth by HRS § 657-7, and One Wailea does not claim to have made a mistake with regard to the identity of the parties. Additionally it was not appropriate for

One Wailea to use HRCF Rule 17(d) to name Wailea Estates, A&B, and Hallin as "Doe Defendants" in its complaint because at that time, One Wailea knew of Wailea Estates and A&B and of the general role each played in the alleged wrongdoing against One Wailea, and likely knew or should have known of Hallin and his general role due to his position as Senior Vice President of A&B. HRCF Rule 17(d) may not be used to join a defendant by a plaintiff who knows the identity of a potential defendant but chooses not to name them for strategic purposes. See Tri-S Corp., 110 Hawai'i at 499, 135 P.3d at 108. Therefore, the circuit court did not abuse its discretion in denying One Wailea's Motion for Leave to Amend because the motion was not warranted under either HRCF Rule 15(c) or HRCF Rule 17(d).

**E. The circuit court did not err in denying One Wailea's HRCF Rule 60(b) Motion to Set Aside.**

One Wailea contends the circuit court abused its discretion in denying One Wailea's HRCF Rule 60(b) Motion to Set Aside because "it should have taken into account the gross negligence of previous counsel, Mr. Brown, in moving to withdraw while a summary judgment motion was pending[.]"

HRCF Rule 60(b) provides, in relevant part:

**Rule 60. RELIEF FROM JUDGMENT OR ORDER.**

. . . .

**(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 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.

In its memorandum in support of its Motion to Set Aside, One Wailea argued that the circuit court should set aside its May 25, 2010 order pursuant to HRCF Rule 60(b)(2) because

Darren Unemori's February 8, 2011 deposition constituted new evidence of the allegation that Unemori Engineering breached its duty to One Wailea by giving information prepared for One Wailea to A&B and by withdrawing One Wailea's Subdivision Application without permission; or pursuant to HRCP Rule 60(b)(6) based on the extraordinary circumstances of the case's procedural history. At the July 1, 2011 hearing on the motion, Unemori Engineering argued that the motion should be denied because One Wailea had not presented any evidence that could not have been previously presented. The circuit court denied the motion at the hearing and on August 22, 2011, issued its order on the same day.

The circuit court did not abuse its discretion in denying One Wailea's Motion to Set Aside because One Wailea did not present any evidence that it could not have presented previously and thus cannot be afforded relief under HRCP Rule 60(b)(2), and failed to identify any extraordinary circumstances that would justify relief under HRCP Rule 60(b)(6).

**F. The circuit court did not abuse its discretion in denying One Wailea's Motion to Compel.**

One Wailea contends the circuit court abused its discretion in denying One Wailea's "Motion to Compel because the documents sought were relevant to [One Wailea's] claims, and A&B had a continuing duty to produce these documents, and didn't." One Wailea argues that there was good cause to grant the motion to compel because even though the motion was late, "A&B still had [a] duty, under HRCP Rule 26(e), to supplement their earlier responses on the original production request."

"[I]t is well-settled that courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them." Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawai'i 452, 457, 903 P.2d 1273, 1278 (1995) (citation and internal quotation mark omitted). Under HRCP Rule 16(b), "the court shall . . . enter a scheduling order that limits the time . . . (3) to complete discovery. . . . A schedule shall not be modified except upon a showing of good cause and by leave of the court." (Emphasis added.)

HRCP Rule 26(e) provides:

**Rule 26. GENERAL PROVISIONS GOVERNING DISCOVERY.**

. . . .

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his or her response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he or she is expected to testify, and the substance of his or her testimony.

(2) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that (A) the response is in some material respect incomplete or incorrect or (B) the response omits information which if disclosed could lead to the discovery of additional admissible evidence.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

One Wailea filed its Motion to Compel on March 7, 2012, seeking to compel A&B to (1) produce documents and things pursuant to subpoena duces tecum filed July 16, 2007, and (2) answer all questions and fully respond to Notice of Taking Deposition Upon Written Interrogatories filed July 16, 2007. At the April 11, 2012 hearing on the Motion to Compel, the circuit court stated that it was denying the motion because it was filed after the discovery cutoff date and on the eve of trial, and therefore granting the motion would disrupt trial. The circuit court did not abuse its discretion in denying One Wailea's Motion to Compel because One Wailea did not make a showing of good cause for granting the motion and the court's denial was within its inherent powers and authority under HRCF Rule 16(b).

**G. The circuit court did not abuse its discretion in ruling on the motions in limine.**

**1. The circuit court did not abuse its discretion in granting Unemori Engineering's motions in limine to exclude testimony by Szymanski.**

One Wailea contends the circuit court abused its discretion in granting Unemori Engineering's motion in limine to

exclude testimony by Szymanski that One Wailea owned the work produced by Unemori Engineering for One Wailea because "there was no testimony that [Unemori Engineering] had copyrighted its work and their work had no copyright symbol." According to One Wailea the circuit court's ruling precluded One Wailea from asserting that the work produced by Unemori Engineering for One Wailea should not have been used for the A&B subdivision application. One Wailea also contends the circuit court erred in granting the motion in limine to exclude Szymanski's testimony regarding offers Szymanski allegedly received for the subdivision approvals because such offers were not hearsay.

Unemori Engineering provided professional civil engineering services related to One Wailea's proposed residential development pursuant to a contract that did not give ownership of work product.

The work product produced by Unemori Engineering was owned by Unemori Engineering under federal copyright law. See 17 U.S.C. § 102(a) (providing that "pictorial, graphic, . . . sculptural works[, ] . . . and architectural works" enjoy copyright protection when "original works of authorship [are] fixed in any tangible medium of expression"); 17 U.S.C. § 101 (defining (1) "architectural works" as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings" and (2) "pictorial, graphic, and sculptural works" to "include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans"). Therefore, the circuit court did not abuse its discretion in granting Unemori Engineering's motion in limine to exclude Szymanski's testimony as to ownership of the work product.

- a. One Wailea waived the issue of whether the circuit court erred in granting Unemori Engineering's motion in limine to exclude Szymanski's testimony as to alleged offers received.**

One Wailea challenges the circuit court's conclusion that Szymanski's testimony regarding offers he received for subdivision approvals were barred as hearsay.

[W]hen the court cannot render an unequivocal pretrial ruling on the admissibility of the particular evidence because it must wait until foundational prerequisites are established at trial or a proper trial record is otherwise first developed, the court should accordingly "refrain from rendering a pretrial ruling and defer such ruling for trial. If the trial court must defer ruling on the motion in limine, its decision should be expressly communicated to the parties and placed on the record."

Kobashigawa v. Silva, 129 Hawai'i 313, 325, 300 P.3d 579, 591 (2013) (internal citations omitted) (quoting Barcai v. Betwee, 98 Hawai'i 470, 491-92, 50 P.3d 946, 967-68 (2002)).

At the April 20, 2012 hearing on the motions in limine, the circuit court reminded the parties twice that all of its rulings on the motions in limine were preliminary in nature, and with respect to the motion in limine to exclude testimony by Szymanski of offers allegedly received, the circuit court specifically informed the parties that it would reconsider the motion if One Wailea wanted to "present a foundation relative to this[.]" At no point during trial did One Wailea attempt to lay foundation to introduce evidence as to offers allegedly received.

The circuit court's pretrial ruling was equivocal because the circuit court informed the parties that it would reconsider the motion if One Wailea provided foundation. See Kobashigawa, 129 Hawai'i at 325, 300 P.3d at 591. By passing on its opportunity to lay foundation for the introduction of such evidence, One Wailea waived this issue for appellate review.

**2. The circuit court did not abuse its discretion in denying One Wailea's motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability.**

One Wailea contends the circuit court abused its discretion in denying One Wailea's motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability because the motion was "intended as a discovery sanction" for Unemori Engineering's failure to produce "two key documents . . . until the eve of trial . . . ."

Unemori Engineering responds by arguing that the circuit court did not abuse its discretion in denying One Wailea's motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability because One Wailea intended the motion to serve as a discovery sanction and therefore should have been filed, prior to the discovery cutoff date, as a motion to compel discovery pursuant to HRCF Rule 37(b).

HRCF Rule 37(b) provides, in relevant part:

**Rule 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY;  
SANCTIONS.**

. . . .

**(b) Failure to Comply With Order.**

. . . .

(2) SANCTIONS BY COURT IN WHICH ACTION IS PENDING. If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . . .

(B) An order . . . prohibiting him or her from introducing designated matters in evidence[.]

The circuit court explained that it was denying One Wailea's motion in limine to exclude any evidence presented by Unemori Engineering on the issue of liability because there was "an insufficient factual and legal basis to warrant the granting of [the] motion and to impose sets of sanctions on [Unemori Engineering]." The circuit court did not abuse its discretion in denying One Wailea's motion because One Wailea sought a discovery sanction and therefore should have filed a motion under HRCF Rule 37(b)(2)(B). Even if the circuit court did abuse its discretion in denying One Wailea's motion in limine, One Wailea has failed to establish that the court's denial of the motion prejudiced One Wailea. See Kobashigawa, 129 Hawai'i at 322, 300 P.3d at 588 (holding that generally the denial of a motion in limine to exclude is not reversible error because it is an interlocutory order and therefore, "[t]he harm, if any, occurs when the evidence is improperly admitted at trial") (citation and internal quotation mark omitted).

**H. The circuit court abused its discretion in denying One Wailea's motion to conform the pleadings to the evidence to include the unpleaded claim of unjust enrichment, but the error was harmless.**

One Wailea contends the circuit court abused its discretion in denying One Wailea's motion to conform the pleadings to the evidence because "the parties had impliedly tried the unjust enrichment claim."

HRCP Rule 15(b)(1) provides, in relevant part:

**Rule 15. AMENDED AND SUPPLEMENTAL PLEADINGS.**

. . . .

**(b) Amendments during and after trial.**

(1) FOR ISSUES TRIED BY CONSENT. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

The Hawai'i Supreme Court has explained:

[HRCP] Rule 15(b) is not permissive in terms: it provides that issues tried by express or implied consent shall be treated as if raised in pleadings. As a general rule, when a party seeks to amend the pleadings to include an unpleaded issue, the critical question is whether that unpleaded issue was tried by the implied consent of the parties[.] In this jurisdiction, consent will be implied from the failure to object to the introduction of evidence relevant to the unpleaded issue.

Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 113, 176 P.3d 91, 112 (2008) (internal quotation marks and brackets omitted) (format altered) (quoting Hamm v. Merrick, 61 Haw. 470, 472-74, 605 P.2d 499, 501-02 (1980)).

Even though One Wailea's pleadings did not include a claim of unjust enrichment, and One Wailea's Motion for Leave to Amend was denied, Unemori Engineering filed a MSJ on the issue of unjust enrichment on April 18, 2011, arguing "that [One Wailea] is not the owner of the plans, specifications and other work prepared by [Unemori Engineering] for [One Wailea] and has no standing to bring a claim for unjust enrichment[,]" and such a claim "is preempted by the federal Copyright Act." The circuit court abused its discretion in denying One Wailea's motion to

conform the pleadings to the evidence because Unemori Engineering expressly consented to trying the issue when it filed a MSJ on the claim and made substantive rather than procedural arguments in support of its MSJ. However, this error was harmless because One Wailea did not introduce evidence to establish that it conferred a benefit upon Unemori Engineering that if retained by Unemori Engineering would be unjust. See Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 504, 100 P.3d 60, 74 (2004) ("[A] claim for unjust enrichment requires only that a plaintiff prove that he or she conferred a benefit upon the opposing party and that the retention of that benefit would be unjust.") (citation, internal quotation marks, and brackets omitted).

**I. The circuit court did not err in granting Unemori Engineering's Motion for Directed Verdict because One Wailea failed to establish a colorable economic relationship between One Wailea and a third party.**

One Wailea contends the circuit court erred in granting Unemori Engineering's Motion for Directed Verdict because it proved the elements of the claim of tortious interference with prospective business advantage.

[T]he elements of the intentional tort of tortious interference with prospective business advantage are:

- (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff;
- (2) knowledge of the relationship, advantage, or expectancy by the defendant;
- (3) a purposeful intent to interfere with the relationship, advantage, or expectancy;
- (4) legal causation between the act of interference and the impairment of the relationship, advantage, or expectancy; and
- (5) actual damages.

Hawaii Med. Ass'n v. Hawaii Med. Servs. Ass'n, Inc., 113 Hawai'i 77, 116, 148 P.3d 1179, 1218 (2006) (quoting Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co., Inc., 91 Hawai'i 224, 258, 982 P.2d 853, 887 (1999)).

"The first element requires 'a colorable economic relationship between the plaintiff and a third party with the potential to develop into a full contractual relationship. The

prospective economic relationship need not take the form of an offer but there must be specific facts proving the possibility of future association.'" Minton v. Quintal, 131 Hawai'i 167, 191, 317 P.3d 1, 25 (2013) (quoting Hawaii Med. Ass'n, 113 Hawai'i at 116, 148 P.3d at 1218) (emphases omitted).

At the May 15, 2012 hearing, the circuit court orally granted Unemori Engineering's Motion for Directed Verdict and explained:

The Court, in considering each of the elements [of the claim of tortious interference with a prospective economic advantage] in the light most -- and in viewing the evidence in the light most favorable to the non-moving party, sees issues with respect to virtually every element, in particular, whether there was a purposeful intent to interfere with your relationship, advantage, or your expectation; whether there's legal causation between the alleged act of interference and with respect to actual damages to the Plaintiff.

. . . .

One Wailea has not established that -- the elements that it must establish with respect to this particular claim as it relates to One Wailea . . . .

(Emphasis added.)

One Wailea provided no specific facts showing that it had a relationship with A&B or any other third party that would potentially lead to a contractual relationship for the sale of One Wailea's preliminary subdivision approval or construction plan approval. One Wailea did not establish a colorable economic relationship through Szymanski's speculations and assumptions that A&B, or another third party, would have paid One Wailea to withdraw its application or transfer its entitlements - a colorable economic relationship is established through specific facts showing that a plaintiff and third party had the potential to enter into a contractual relationship. Hawaii Med. Ass'n, 113 Hawai'i at 116, 148 P.3d at 1218. The circuit court did not err in granting the Motion for Directed Verdict because One Wailea failed to meet its burden of proof with regard to the first element of the claim of tortious interference with a prospective business advantage.

We decline to address One Wailea's remaining points of error because they are either moot or without merit.

**IV. CONCLUSION**

The (1) March 19, 2013 "Final Judgment in Favor of Defendant Warren S. Unemori Engineering Inc. as to All Claims," and (2) March 22, 2013 "Order Granting Defendant Warren S. Unemori Engineering Inc.'s Motion for Award of Attorney's Fees and Costs," both entered in the Circuit Court of the Second Circuit are affirmed.

DATED: Honolulu, Hawai'i, April 20, 2016.

On the briefs:

Keith M. Kiuchi  
for Plaintiff-Appellant.

Presiding Judge

Frank K. Goto, Jr.  
Jan Kwan  
(Law Offices of Frank K. Goto,  
Jr.)  
for Defendant-Appellee.

Associate Judge

Associate Judge