

NO. CAAP-11-0000999

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

SAINGOEN DAVIS, Plaintiff-Appellant/Cross-Appellee,
v.
GARY W. VANCIL; MARK VAN PERNIS; VAN PERNIS-VANCIL,
A Law Corporation, Defendants/Cross-Claim
Plaintiffs-Appellees/Cross-Appellants,
and
NICHOLLE DAVIS, Defendant/Cross-Claim
Defendant-Appellee/Cross-Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 08-1-352K)

MEMORANDUM OPINION

(By: Nakamura, C.J., Leonard and Ginoza, JJ.)

This is a civil suit arising out of the intestate probate of the estate of Richard K. Davis (Richard). Plaintiff-Appellant/Cross-Appellee Saingoen Davis (Saingoen) brought this lawsuit against Defendants/Cross-Claim Plaintiffs-Appellees/Cross-Appellants Gary W. Vancil (Vancil), Mark Van Pernis (Van Pernis), and Van Pernis-Vancil, a law corporation, (collectively, the Attorney Defendants), and Defendant/Cross-Claim Defendant-Appellee/Cross-Appellee Nicholle Davis (Nicholle) alleging ten counts related to the probate. In the probate proceedings, Nicholle, who is Richard's daughter, was the appointed personal representative for the estate, the Attorney Defendants were retained by Nicholle to represent the estate, and Saingoen asserted claims as Richard's surviving spouse.

Saingoen appeals from the Final Judgment entered in this case on November 21, 2011, in the Circuit Court of the Third Circuit (circuit court).¹ Judgment was entered *inter alia* in favor of the Attorney Defendants on all claims asserted by Saingoen in her First Amended Complaint pursuant to two orders granting the Attorney Defendants' two motions for partial summary judgment.²

On appeal, Saingoen asserts that the circuit court erred by (1) granting both of the Attorney Defendants' motions for partial summary judgment; and (2) granting the Attorney Defendants' motion for costs.

The Attorney Defendants cross-appeal from the Judgment, raising points of error related to the "Order Granting in Part and Denying in Part the Van Pernis-Vancil Defendants' Motion for Attorney Fees and Costs" (Order Granting Costs and Denying Fees) filed on September 23, 2011. The Attorney Defendants assert the circuit court (1) erred as a matter of law when it held that the assumpsit statute, Hawaii Revised Statutes (HRS) § 607-14 (Supp. 2014), did not apply; and (2) abused its discretion when it denied the Attorney Defendants' motion for attorneys' fees.

We hold that (1) the circuit court correctly granted summary judgment on all counts except for Counts II (Fraud on Plaintiff) and VI (Punitive Damages); (2) because there is no prevailing party at this time, the award of costs was premature; and (3) the circuit court correctly concluded that the assumpsit statute did not apply.

I. Background

A. Probate Proceedings

On January 4, 2004, Richard, a U.S. citizen, died in Thailand without leaving a will. Saingoen, a resident of Thailand, made claims in probate asserting she is Richard's surviving spouse. Nicholle, a resident of Kailua-Kona, Hawai'i,

¹ The Honorable Ronald Ibarra presided.

² Judgment was also entered in favor of Nicholle based on a stipulation for dismissal that had been filed on August 3, 2011. Saingoen's claims against Nicholle are not at issue in this appeal.

is Richard's adult daughter from a previous marriage. Nicholle retained the Attorney Defendants to represent Richard's estate and guide it through probate in the Circuit Court of the Third Circuit, P. No. 04-1-0158 (probate matter).³ Nicholle was appointed as personal representative of the estate, although there is a dispute as to whether Saingoen was prompted not to submit her own application to be appointed personal representative based on false representations by the Attorney Defendants.

Saingoen, through counsel, asserted claims in the probate case for statutory allowances based on her purported status as surviving spouse. In opposition to Saingoen's petition for statutory allowances, Nicholle, through the Attorney Defendants, asserted that Saingoen had failed to sufficiently prove her identity or her marriage to Richard.⁴ In June 2005, the probate court referred the parties to mediation, noting in part that Saingoen's purported certificate of marriage failed to include a final certification in compliance with Rule 15 of the Hawai'i Probate Rules (HPR).

Both before and after the probate court referred the parties to mediation, Vancil is alleged to have made various representations to Saingoen's counsel acknowledging that Saingoen had established her marriage to Richard. These include, *inter alia*, representations in a May 26, 2005 letter by Vancil, as well as a statement by Vancil in a June 6, 2006 letter that "[s]ince your client has finally provided the necessary documents to prove that she was the spouse at the time of Decedent's death, we should meet and confer about final distribution of the Estate."

Subsequent to the alleged representations by Vancil, Nicholle, through the Attorney Defendants, filed a Petition for Approval of Final Accounts and Distribution and Complete

³ The Honorable Greg K. Nakamura presided over the probate matter.

⁴ Nicholle also contended that Saingoen's claim for statutory allowances under Hawai'i law was questionable because HRS § 560:2-401 (2006) provides that the governing law is the decedent's domicile at death, and Richard died in Thailand.

Settlement of Estate (Petition for Final Accounts). Saingoen argues that contrary to Vancil's previous representations, the Petition for Final Accounts asserted *inter alia* that Saingoen had not proven her status as Richard's surviving spouse and her claim should be dismissed for lack of proof. At that point, Saingoen was not represented by counsel. The probate court set the matter for hearing on October 25, 2007. Saingoen filed objections to Nicholle's Petition for Final Accounts the day before the hearing, October 24, 2007.

On November 19, 2007, the probate court entered an order approving Nicholle's Petition for Final Accounts and dismissing Saingoen's claim with prejudice. Saingoen did not appeal from the November 19, 2007 probate order.

B. The Instant Proceedings

On November 7, 2008, Saingoen initiated this action by filing a Complaint against Nicholle asserting claims of fraud, fraud on the court, and breach of fiduciary duty. Saingoen asserted that: Nicholle made various misrepresentations which lead Saingoen not to challenge Nicholle's request to become personal representative of Richard's estate; Nicholle breached her fiduciary duty to Saingoen as the surviving spouse; and Nicholle committed fraud on the court by telling the probate court that Saingoen had not proven both her status as surviving spouse or that Richard was domiciled in Hawai'i.

In late March/early April 2009, Saingoen and Nicholle entered into a "Settlement Agreement and Release" (Settlement Agreement). Under the terms of the Settlement Agreement, Nicholle agreed to *inter alia* assign to Saingoen all of her claims, individually and as personal representative of the estate, against the Attorney Defendants. The Settlement Agreement also provided that "[i]n the event such assigned claims are not considered legally assignable, to that extent, Nicholle Davis agrees to permit Saingoen Davis and her counsel to prosecute those claims against the lawyers in Nicholle Davis' name[.]" On November 4, 2009, Saingoen filed a petition for determination of good faith settlement.

On April 7, 2010, Saingoen filed the First Amended Complaint against the Attorney Defendants and Nicholle. In the complaint, Saingoen appears to identify ten counts as follows:

- Count I - Fraud, Violation of HRS § 480-1 (2008) (Unfair and Deceptive Trade Practices), Negligence (against Nicholle and the Attorney Defendants);
- Count II - Fraud on Plaintiff (Vancil);
- Count III - Fraud on the Court (Nicholle and the Attorney Defendants);
- Count IV - Negligence (the Attorney Defendants);
- Count V - Breach of Fiduciary Duty (Nicholle);
- Count VI - Punitive Damages (Nicholle and the Attorney Defendants);
- Count VIII⁵ - Grossly Excessive Attorney Fees and Costs (Nicholle and the Attorney Defendants);
- Count IX - Breach of Fiduciary Duty (the Attorney Defendants);
- Count X - Malpractice (the Attorney Defendants);
- Count [XI]⁶ - Standard of Care (the Attorney Defendants).

Saingoen contends that some of the claims against the Attorney Defendants were assigned claims from Nicholle to Saingoen.

On July 30, 2010, the circuit court entered an order granting Saingoen's petition for determination of good faith regarding her Settlement Agreement with Nicholle. On August 19, 2010, the Attorney Defendants filed a notice of appeal from the July 30, 2010 order, which resulted in appellate case no. 30707.

While the appeal in appellate case no. 30707 was proceeding, the Attorney Defendants filed two motions for partial summary judgment in the circuit court: the first involved Counts I, II, III, IV, IX, X and XI; the second covered Counts VI and VIII and any remaining claims against Attorney Defendants, including any allegedly assigned claims. The circuit court granted both motions. In the order granting the Attorney Defendants' first motion (First MSJ Order), the court simply stated that no genuine issues of material fact were in dispute as

⁵ In the First Amended Complaint, Saingoen skipped a Count VII.

⁶ This count is incorrectly labeled as a second Count IX in the First Amended Complaint.

to Counts I, II, III, IV, IX, X and XI. In the order granting the Attorney Defendants' second motion (Second MSJ Order), the court dismissed Counts VI and VIII and any assigned claims with prejudice on grounds that the claims were non-assignable, but noted that the court did not rule on Saingoen's contention that she should be permitted to substitute Nicholle as a plaintiff pursuant to the Settlement Agreement as that issue was not properly before the court because no motion was filed to substitute parties.

On July 29, 2011, the Attorney Defendants filed a motion for attorneys' fees and costs. The Attorney Defendants asserted a right to attorneys' fees under the assumpsit statute, HRS § 607-14. The circuit court granted the request for costs, but denied the motion for fees, explaining that

the court finds the essential character of the action sounds in tort rather than contract and therefore the assumpsit statute does not apply. Moreover, the causes of action that are arguably in the nature of assumpsit are so intertwined with the dominant action that the court would be unable to apportion the total fee requested between the assumpsit and non-assumpsit claims[.]

On November 21, 2011, the circuit court entered the Final Judgment in favor of the Attorney Defendants and against Saingoen. Saingoen filed a timely notice of appeal from the judgment on November 29, 2011. The Attorney Defendants filed a timely notice of cross-appeal on December 21, 2011.

Meanwhile, as to appellate case no. 30707, this court issued a summary disposition order on February 24, 2012, which vacated the circuit court's order granting Saingoen's petition for determination of good faith regarding her Settlement Agreement with Nicholle. That issue was remanded to the circuit court for further proceedings.⁷ Davis v. Davis, No. 30707, 2012 WL 603947, 126 Hawai'i 473, 272 P.3d 1240, at *3 (App. Feb. 24, 2012) (SDO), cert. denied, No. SCWC-30707, 2012 WL 2897545 (July 16, 2012).

⁷ We take judicial notice of appellate case no. 30707, a related appeal. See Kaleikini v. Thielen, 124 Hawai'i 1, 5, 237 P.3d 1067, 1071 (2010).

II. Discussion

A. Saingoen's Appeal

1. Summary Judgment Standard

Saingoen contends that the circuit court erred in granting both of the Attorney Defendants' motions for partial summary judgment.

We review the circuit court's grant or denial of summary judgment *de novo*. The standard for granting a motion for summary judgment is settled:

[S]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

We have further explained the burdens of the moving and non-moving parties on summary judgment as follows:

The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.

First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.

Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving part is entitled to summary judgment as a matter of law.

Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 295-96, 141 P.3d 459, 468-69 (2006) (citations omitted).

2. First MSJ Order

The counts dismissed by the First MSJ Order can be put into two large groups: (1) claims related to misrepresentations (Counts I, II, and III), and (2) claims related to the existence of a duty (Counts IV, IX, X, and XI).

a. Claims related to misrepresentations

In the First Amended Complaint, Saingoen asserted three claims based on the alleged misrepresentations of the Attorney Defendants: (1) Count I, unfair and deceptive trade practices (UDAP) pursuant to HRS Chapter 480; (2) Count II, Fraud on the Plaintiff; and (3) Count III, Fraud on the Court.

1. HRS Chapter 480

Saingoen contends that the circuit court erred in granting summary judgment on Count I because *inter alia* there remained a genuine issue of material fact as to whether Saingoen was a "consumer" within HRS § 480-1 (2008).⁸

Only a "consumer" may bring a private action under HRS Chapter 480 for UDAP. HRS § 480-2(d) (2008). HRS § 480-1 defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

"An interpretation of a statute is a question of law reviewed *de novo*." Cieri v. Leticia Query Realty, Inc., 80 Hawai'i 54, 59, 905 P.2d 29, 34 (1995). "It is well settled that, when construing a statute, this court's foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Moreover, where the language of the statute is plain and unambiguous, our only duty is to give

⁸ In opposition to the summary judgment motion and on appeal, Saingoen asserts that even if she was not a consumer of the Attorney Defendants' services, Nicholle was and Nicholle assigned her claims to Saingoen pursuant to the Settlement Agreement. As discussed *infra*, Saingoen fails to demonstrate that the circuit court erred in granting summary judgment on all assigned claims. We only review here whether Saingoen herself had standing to bring a UDAP claim under HRS chapter 480.

effect to its plain and obvious meaning." Id. at 67, 905 P.2d at 42 (citations, quotation marks, and brackets omitted).

In Count I of the First Amended Complaint, Saingoen broadly asserted she was a "consumer" within HRS § 480-1, but did not explain the basis for this assertion. In support of their motion for partial summary judgment, the Attorney Defendants attached deposition transcripts and the declaration of Vancil showing that Saingoen was not asked to, nor did she attempt to, purchase legal services from the Attorney Defendants. This satisfied the Attorney Defendants' initial burden to affirmatively show that there existed no genuine issue of material fact that Saingoen was not a "consumer" in "a transaction involving conduct in any trade or commerce[.]" Cieri, 80 Hawai'i at 65, 905 P.2d at 40 (quotation marks omitted).

In response, Saingoen, for the first time, asserted that she was a consumer because she committed property (giving up her right to be personal representative of Richard's estate) in a personal investment (financial interest in the proceeds of Richard's estate). Saingoen reiterates this argument on appeal. Despite Saingoen's contentions, there is no evidence, even when viewed in a light most favorable to her as the non-movant, that could raise a genuine issue of material fact that a "transaction" occurred between Saingoen and the Attorney Defendants in a "business context", id. at 65, 905 P.2d at 40; Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 227, 11 P.3d 1, 15 (2000) ("[W]e construed HRS § 480-2 . . . to limit claims of unfair or deceptive trade practices, within the purview of HRS chapter 480, to transactions occurring within a 'business context[.]'" (citation omitted)), or that her alleged decision not to petition to be appointed personal representative amounted to a personal investment of property, Joy A. McElroy, M.D., Inc. v. Maryl Group, Inc., 107 Hawai'i 423, 436, 114 P.3d 929, 942 (App. 2005) ("[T]he concept of 'investment' includes an expectation of 'profitable returns.'"); Black's Law Dictionary 953 (10th ed. 2014) (defining "invest" in part as "[t]o apply (money) for

profit"). Thus, the circuit court properly granted summary judgment as to Count I.

2. Fraud on the Plaintiff

Saingoen contends the circuit court erred in granting summary judgment on Count II because she presented competent evidence of misrepresentations by Vancil and her detrimental reliance on those misrepresentations.

The elements for a claim of fraud are as follows:

(1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them. Further, plaintiff must show that he suffered substantial pecuniary damage for the aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded.

Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 286, 768 P.2d 1293, 1301 (1989) (citations, quotation marks, and brackets omitted). "[T]o prevail on a claim of fraudulent inducement, plaintiffs must prove that their reliance upon a defendant's representations was reasonable." Matsuura v. E.I. du Pont de Nemours & Co., 102 Hawai'i 149, 163, 73 P.3d 687, 701 (2003); see also Restatement (Second) Torts § 525 (1977) (noting the requirement of "justifiable reliance").

Further, we note that an attorney may be sued for fraud by an adverse party. Buscher v. Boning, 114 Hawaii 202, 220 n.13, 159 P.3d 814, 832 n.13 (2007); Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawaii 251, 268-69, 151 P.3d 732, 749-50 (2007); Matsuura, 102 Hawaii at 159, 162, 73 P.3d at 697, 700; Guiliani v. Chuck, 1 Haw. App. 379, 383-84, 620 P.2d 733, 736-37 (1980).

In Count II of the First Amended Complaint, Saingoen asserted that Vancil made intentional misrepresentations of material fact at various points in the probate matter that: (1) there existed no conflict of interest between Nicholle and Saingoen, and that Nicholle and Vancil would cooperate in a quick and efficient probate; and (2) Vancil accepted Saingoen's evidence that she was the surviving spouse and that Richard died domiciled in Hawai'i. Saingoen alleged that Vancil made the

misrepresentations with intent to induce reliance by Saingoen and her attorneys to permit Nicholle to serve as personal representative and to not file further documentation with the probate court or take any other steps concerning the "surviving spouse" issue; Vancil knew, or should have known, the representations were false; and Saingoen's attorneys reasonably relied upon the misrepresentations to Saingoen's detriment.

In their motion for partial summary judgment, the Attorney Defendants asserted that summary judgment on Count II was appropriate because Saingoen could not prove a claim of fraud. The Attorney Defendants argued that (a) Saingoen did not detrimentally rely on any representations because she received Nicholle's Petition for Final Accounts and filed objections; and (b) any reliance was not reasonable because any representations were made during settlement negotiations. In support of their motion as to Count II, the Attorney Defendants only submitted a deposition transcript from Saingoen's brother-in-law, Thomas Stoudt, that Saingoen had received Nicholle's Petition for Final Accounts and filed objections. This evidence does not demonstrate that there existed no genuine issue of material fact on Saingoen's fraud claim.

Moreover, in opposition to the summary judgment motion, Saingoen adduced a multitude of evidence raising genuine issues of material fact. She submitted declarations from two attorneys who represented her for part of the probate proceedings. She also submitted voluminous documentary evidence, including letters between Vancil and Saingoen's attorneys. The evidence submitted by Saingoen shows the following. After Richard's death, Saingoen retained an attorney, Michael J. Matsukawa (Matsukawa), to represent her in the probate matter. Matsukawa attests in his declaration that he took steps to have Saingoen appointed as personal representative of Richard's estate. Matsukawa further attests that during telephone calls, Vancil represented to him that

he saw no conflict of interest between Nicholle Davis and Saingoen Davis concerning the Davis Estate, that their respective shares in the estate were set forth by Hawaii

statute. He also indicated that we could cooperate to close and distribute the estate as quickly and as efficiently as possible. He requested that Saingoen Davis not apply to the Court to be the personal representative of the estate, but that he be permitted to apply for Nicholle Davis as personal representative. . . .

At no time in these telephone calls did Mr. Vancil indicate or suggest that he or Nicholle Davis planned to engage in an adversarial relationship with the surviving spouse when appointed as personal representative of her father's estate.

In a follow-up letter dated May 12, 2004, Vancil attached a draft of the petition to have Nicholle appointed personal representative. In the draft, a "Sain Davis" was identified as "Wife/heir at law". Matsukawa attested that he relied on Vancil's representations in concluding that "it was reasonable in Saingoen Davis' interest to permit Nicholle Davis to act as personal representative of her father's estate[,]" and thus Matsukawa did not file Saingoen's application to be appointed personal representative.

Subsequently, Saingoen filed a Statement of Claim in the probate matter asserting claims for statutory allowances as the surviving spouse. In opposition to Saingoen's petition, Nicholle, through the Attorney Defendants, asserted that Saingoen had failed to sufficiently prove her identity or her marriage to Richard. Nicholle also contended that Saingoen's claim for statutory allowances under Hawai'i law was questionable because HRS § 560:2-401 (2006) provides that the governing law is the decedent's domicile at death, and Richard died in Thailand.

Later, after Matsukawa had provided documentation requested by Vancil, Vancil wrote in a May 26, 2005 letter to Matsukawa that, "since you have finally provided a copy of the affidavit of Richard Kirk Davis showing that the affidavit was dated May 2, 2001 we no longer require any further proof of the marriage of the decedent to your client, Saingoen Davis."

(Emphasis added.) Notwithstanding this statement, five days later, at a May 31, 2005 probate hearing on Saingoen's petition for determination of statutory allowances, Van Pernis contended *inter alia* that Saingoen had not proven marriage by admissible evidence.

In a letter from the probate court to the parties dated June 2, 2005 (which was not file-stamped), the probate court indicated its denial of Saingoen's petition without prejudice, but referred the parties to mediation.⁹ The probate court noted that it declined to receive the purported certificate of marriage into evidence because Saingoen had *inter alia* not provided a final certification in compliance with HPR Rule 15.

Matsukawa attests that on February 23, 2006, he provided to Vancil evidence of Saingoen's marriage to Richard, including the marriage certificate and marriage registration form, certified as required under HPR Rule 15. Matsukawa further attests that upon delivery of the documents, Vancil informed him that Vancil accepted the documents as proof that Saingoen was Richard's surviving spouse, and thus Matsukawa took no further steps to provide further evidence to the probate court to prove Saingoen's status as surviving spouse. In a letter dated June 6, 2006, Vancil represented to Matsukawa that "[s]ince your client has finally provided the necessary documents to prove that she was the spouse at the time of Decedent's death, we should meet and confer about final distribution of the Estate." (Emphasis added.)

On September 27, 2006, Kenneth A. Ross (Ross) replaced Matsukawa as Saingoen's counsel in the probate matter. In a letter to Ross dated October 23, 2006, Vancil again acknowledged that Saingoen had proven her status as the surviving spouse.¹⁰ In subsequent letters,¹¹ the parties debated Richard's domicile

⁹ Based on the record in this case, it is unclear if the probate court ever entered a file-stamped order consistent with this letter. The probate court's letter does not constitute entry of an order.

¹⁰ Vancil's October 23, 2006 letter to Ross stated in pertinent part: "even though your client has proved that she is the 'surviving spouse', since Decedent was not domiciled in Hawaii at the time of his death, the Personal Representative is reluctant to pay anyone any more money unless there is a deal."

¹¹ In a *draft* letter to a mediator attached to Vancil's letter to Ross dated February 15, 2007, Vancil wrote

(continued...)

at death, and Vancil, in fact, argued that Richard's marriage to Saingoen was evidence that Richard was domiciled in Thailand.¹²

Ross attests that "[a]t no time during my representation of Saingoen Davis did Mr. Vancil indicate or suggest to me that an issue existed in the case whether she was a surviving spouse of Mr. Davis' estate[,] or that "any further documents were required to be filed to confirm Saingoen Davis' status as Mr. Davis' surviving spouse." Ross attested that it was in reliance on these representations that he did not take any steps to prove Saingoen's marriage to Richard.

On July 13, 2007, the probate court granted Ross's motion to withdraw as counsel. Thereafter, Saingoen proceeded *pro se* in the probate matter.

A little over two months later, on September 24, 2007, the Petition for Final Accounts was filed by the Attorney Defendants on behalf of Nicholle, which challenged whether Saingoen had proven her status as surviving spouse and whether she had provided any evidence authenticating her identity. A hearing was set for October 25, 2007. At 11:47 am, on October 24, 2007, the day before the hearing, Saingoen, through her brother-in-law, filed objections to Nicholle's Petition for Final Accounts. In support of her objections, Saingoen submitted what she asserted was evidence of her marriage to Richard. It is unclear in our record what evidence Saingoen submitted. Saingoen

¹¹(...continued)

[T]here were only two issues for you to mediate, . . . [h]owever the first issue is now resolved. We finally received the documents that we requested for some time from Mr. Matsukawa and it appears that Saingoen Davis is in fact the wife of the deceased. The only questions now is where the decedent was domiciled at the time of this death.

(Emphasis added.)

¹² The issue of domicile was important because Saingoen asserted claims for statutory allowances under Hawaii law. However, HRS § 560:2-401 provides that "[r]ights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this State are governed by the law of the decedent's domicile at death."

was not present for the hearing the next day as she appears to have been in Thailand.

In the face of this evidence, the Attorney Defendants assert that Saingoen did not detrimentally rely on any representations because she filed an objection to Nicholle's Petition for Final Accounts, and submitted proof of marriage that was rejected by the probate court. However, whether Saingoen, who was *pro se* at the time, filed objections does not establish that there is no genuine issue of material fact as to detrimental reliance. When viewing the evidence in a light most favorable to Saingoen, it shows that Vancil intentionally represented to Saingoen's attorneys on numerous occasions that Saingoen had provided sufficient evidence to establish that she was Richard's surviving spouse. After the probate court had indicated that it declined to receive the purported certificate of marriage between Saingoen and Richard because there was no final certification as required by HPR Rule 15, Matsukawa attests that he subsequently provided to Vancil evidence of marriage and the final certification required by HPR Rule 15. In a letter dated June 6, 2006, Vancil wrote, "[s]ince your client has finally provided the necessary documents to prove that she was the spouse at the time of Decedent's death, we should meet and confer about final distribution of the Estate". Vancil echoed this sentiment in a October 23, 2006 letter, noting that Saingoen had "proved that she is the 'surviving spouse'["¹³

Contrary to these representations, Nicholle, through the Attorney Defendants, raised a challenge to Saingoen's status as surviving spouse as part of Nicholle's Petition for Final Accounts, at a time that Saingoen was *pro se*. Both Matsukawa and Ross attest that, in reliance on Vancil's representations, they did not pursue additional evidence to prove marriage. Thus,

¹³ Additionally, in a draft letter to the designated mediator enclosed with Vancil's February 15, 2007 letter to Ross, Vancil wrote "the first issue is now resolved. We finally received the document that we requested for some time from Mr. Matsukawa and it appears that Saingoen Davis is in fact the wife of the deceased. The only question now is where the decedent was domiciled at the time of his death."

Saingoen asserts she was caught off-guard at a time when she was *pro se* and had not pursued other potential evidence regarding her status as surviving spouse.¹⁴ Given the evidence, there are genuine issues of material fact as to whether Saingoen detrimentally relied on intentional misrepresentations by Vancil.

Further, we reject the Attorney Defendants' contention that the alleged representations were made during failed mediation or settlement negotiations and thus Vancil's letters constitute inadmissible evidence.

First, we note that the Attorney Defendants did not object to the admissibility of Saingoen's exhibits before the circuit court and thus they have waived any challenge as to admissibility. Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 112, 111 P.3d 1, 7 (2005).

Second, even assuming the subject letters were sent as part of settlement negotiations, Hawaii Rules of Evidence (HRE) Rule 408 precludes certain evidence "to prove liability for or invalidity of the claim or its amount." HRE 408 does not bar admission of evidence of compromise negotiations offered for "another purpose", such as to support a fraud claim, and does not render reliance on a party's representations *per se* unreasonable. See HRE Rule 408 ("This rule also does not require exclusion when the evidence is offered for another purpose[.]").

Third, the Attorney Defendants contend that Saingoen's reliance on the letters was improper because the letters were statements made during mediation pursuant to Rule 7 of the Mediation Rules of the HPR. We disagree. Rule 7 provides in pertinent part that "parties and attorneys are prohibited from informing the court of discussions or actions taken at the mediation" However, we note that Vancil's purported representations as to whom should be personal representative and Vancil's May 26, 2005 letter, which provided that "we no longer require any further proof of the marriage," occurred before the

¹⁴ The record does not indicate the basis for the probate court's denial of Saingoen's claims for statutory allowances.

probate court referred the parties to mediation on June 2, 2005. It is also doubtful that Vancil's letters dated June 6, 2006 and October 23, 2006 constitute discussions or actions taken at mediation, as these letters contain no mention or reference to mediation. Further, like HRE Rule 408, Rule 7 provides that "[t]his rule also does not require exclusion of evidence that is offered for another purpose," which in this case is to prove fraud in a separate proceeding before a different court.

The Attorney Defendants cite no authority for the notion that a party cannot rely on the representations of an attorney that a disputed issue had been resolved. At no point in the submitted letters did Vancil couch his concession of marital status as a factual position merely for negotiation or mediation purposes. "As a general principle the question of whether one has acted reasonably under the circumstances is for the trier of fact to determine. Additionally, this court has acknowledged the accepted principle that, where reasonable minds might differ as to the reasonableness of plaintiff's conduct, the question is for the jury." Matsuura, 102 Hawai'i at 163, 73 P.3d at 701 (citations, quotation marks, brackets and ellipsis omitted). Because reasonable minds can differ as to the reasonableness of Saingoen's reliance on Vancil's representations, Count II should not have been resolved by summary judgment.

The circuit court thus erred in granting summary judgment on Count II.

3. Fraud on the Court

Saingoen contends that the circuit court erred in concluding there were no genuine issues of material fact whether the Attorney Defendants committed a fraud on the court where the evidence showed that the Attorney Defendants made misrepresentations to the probate court that deprived Saingoen of her ability to protect her interests as surviving spouse.

The circuit court appears to have questioned whether there is an independent cause of action for fraud on the court. Saingoen cites no authority that establishes a separate cause of action for fraud on the court affording an award of monetary

damages to a plaintiff and our review reveals none. Fraud on the court is a ground upon which a court may set aside a judgment. Standard Mgmt., Inc. v. Kekona, 98 Hawai'i 95, 100, 43 P.3d 232, 237 (App. 2001). It is not a cause of action upon which to award damages to an individual. See Cvitanovich-Dubie v. Dubie, 125 Hawai'i 128, 144-45, 254 P.3d 439, 455-56 (2011) ("[S]ince the remedy for fraud on the court is far reaching, it only applies to very unusual cases involving far more than an injury to a single litigant, but rather, a corruption of the judicial process itself." (citation, quotation marks, and brackets omitted)); Kang v. Harrington, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) ("In assessing punitive damages the trial court should have ignored appellant's fraud upon the court and looked only to his fraud on appellee. The appropriate action to be taken in a case of fraud upon the court is for the injured party to maintain an independent action based on that fraud and seek to be relieved from the judgment of the court.").

Thus, the circuit court properly granted summary judgment as to Count III.

b. Claims related to the existence of a duty

The circuit court granted summary judgment on four claims related to whether the Attorney Defendants owed a duty to Saingoen: Count IV, Negligence; Count IX, Breach of Fiduciary Duty; Count X, Malpractice; and Count XI, Standard of Care. Saingoen contends the circuit court erred in granting summary judgment on these counts because (a) once Vancil acknowledged she was the surviving spouse, she satisfied the six-part test under Blair v. Inq, 95 Hawai'i 247, 21 P.3d 452 (2001) (Blair I), that establishes whether an attorney owes a duty to a non-client beneficiary; and (b) as the surviving spouse, the Attorney Defendants owed her a duty as an intended third-party beneficiary of a contract for legal services.¹⁵ If a duty existed, Saingoen

¹⁵ In her opening brief, Saingoen asserts the Attorney Defendants owed her a duty pursuant to Restatement (Third) of the Law Governing Lawyers § 51 (2000). Saingoen did not assert this as a foundation of the purported duty

(continued...)

contends a jury could have found that the duty was breached based on the evidence.

The existence of a duty is a question of law, Bidar v. Amfac, Inc., 66 Haw. 547, 552, 669 P.2d 154, 158 (1983), that must be decided on a case-by-case basis. Blair I, 95 Hawai'i at 260, 21 P.3d at 465.

The Attorney Defendants moved for summary judgment on these counts asserting broadly that they did not owe a duty to Saingoen because they did not represent her, but rather they only represented the estate. The Attorney Defendants assert that Saingoen cannot satisfy the Blair I balancing test because it is only applicable in the estate planning context and Saingoen was not the intended beneficiary of the Attorney Defendants' legal services.

In Blair I, the Hawai'i Supreme Court adopted a six-factor balancing test "as relevant to the determination whether to impose a duty upon attorneys to non-client beneficiaries in the estate planning context." Id. at 260, 21 P.3d at 465. The supreme court expressly limited the adoption of the balancing test to "the estate planning context." Id. at 253, 258-59, 260, 21 P.3d at 458, 463-64, 466; see Buscher, 114 Hawai'i at 220, 159 P.3d at 832 (distinguishing Blair I as applying "in the estate planning context").

Moreover, the supreme court further held that "[t]he class of individuals who may bring a malpractice action is limited to a client's intended beneficiaries, provided no other remedy exists to prevent future harm." Blair I 95 Hawai'i at 261, 21 P.3d at 466. "[A] benefit that is merely incidentally conferred upon the beneficiary will not meet the first factor of the [Blair I] balancing test or the third party beneficiary principle that the contract be entered into with the intent to benefit the non-client." Id. Saingoen, even if the surviving

¹⁵(...continued)
before the trial court and the argument is thus waived. Cnty. of Hawaii v. UNIDEV, LLC, 129 Hawai'i 378, 387, 301 P.3d 588, 597 (2013) ("It is axiomatic that where a party fails to raise an argument before the courts below, that argument may be deemed waived for purposes of appeal.").

spouse, was not the intended beneficiary of the Attorney Defendants' representation of the estate. See Young v. Van Buren, No. 28543, 2010 WL 4278321, 130 Hawai'i 349, 310 P.3d 1050, at *4 (App. Oct. 29, 2010 as amended Nov. 23, 2010) (SDO) (holding that the plaintiffs did not satisfy the six-factor test because they were not the intended beneficiaries of the trust amendment prepared by counsel).

In deposition testimony, Nicholle testified that she hired the Attorney Defendants to help with the probate of Richard's estate. In that role, the Attorney Defendants had an attorney-client relationship with the fiduciary for the estate (Nicholle) acting in a fiduciary role, but not with the beneficiaries of the estate; owed a duty to notify beneficiaries of the fiduciary's activities known to be illegal that threaten the interests of the beneficiaries; and were officers of the court required to "assist the court in securing the efficient and effective management of the estate." HPR Rule 42. The efficient and effective management of the estate does not mean the protection of one beneficiary's interests at the expense of other interests. The interests of a beneficiary and the interests of the estate are not always aligned. For instance, under HRS § 560:2-102 (2006), a surviving spouse's share of the intestate estate varies based on the number of recognized heirs. Thus, estate counsel's duty to efficiently and effectively manage the estate might be at the expense of the surviving spouse's interest. Counsel for an estate cannot be expected to owe a duty to a particular beneficiary, especially when there are multiple beneficiaries, which would lead to potential conflicts of interest. See Buscher, 114 Hawai'i at 220, 159 P.3d at 832; Blair I, 95 Hawai'i at 262-63, 21 P.3d at 467-68. Clearly, the Attorney Defendants were not retained for the principal purpose to benefit Saingoen. Thus, Saingoen was not an intended beneficiary of a contract for legal services.

Therefore, the circuit court properly granted summary judgment on Counts IV, IX, X, and XI.

3. Second MSJ Order

The Second MSJ Order dismissed Counts VI (Punitive Damages), VIII (Excessive Attorney's Fees), and any claims allegedly assigned to Saingoen by Nicholle. Saingoen contends that the circuit court erred because she adduced evidence raising a genuine issue of material fact whether the Attorney Defendants charged excessive attorneys' fees and that the claims were assignable under her Settlement Agreement with Nicholle.¹⁶

In support of their motion for summary judgment, the Attorney Defendants *inter alia* assert that Nicholle's claims as administrator of estate are personal claims of legal malpractice and cannot be assigned as a matter of law. The circuit court granted summary judgment on the second motion for summary judgment because it concluded that the claims were unassignable. On appeal, Saingoen presents no substantive argument that the claims were assignable besides an assertion that there is no Hawai'i law compelling dismissal with prejudice. In light of her failure to present a substantive argument regarding the assignability of the claims, Saingoen has failed to carry her burden as appellant to show error. See Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 110 n.20, 176 P.3d 91, 109 n.20 (2008); Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co., 116 Hawai'i 277, 309 n.21, 172 P.3d 1021, 1053 n.21 (2007); Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995).

Saingoen also contends the circuit court erred in not allowing her the "opportunity" to substitute Nicholle as a party-in-interest. The circuit court did not rule on the issue of substitution of parties because Saingoen failed to file a proper

¹⁶ In terms of the assignability of claims under the Settlement Agreement, in Case No. 30707 this court vacated the circuit court's order granting Saingoen's petition for determination of good faith settlement and remanded for further proceedings. Davis, 2012 WL 603947, at *3. Clause 7 of the Settlement Agreement provides "[i]n event the court denies the Section 663-15.5(b) motion, . . . the Agreement shall be void." Based on the record in this case, the status of the Settlement Agreement is unclear. Despite all briefing in this case being filed after issuance of the Summary Disposition Order in No. 30707, no party argues that this issue is moot.

motion. On appeal, Saingoen argues that it was the circuit court's burden to dismiss the case without prejudice to permit substitution of parties under Hawai'i Rules of Civil Procedure (HRCP) Rule 25. However, HRCP Rule 25(c) requires a motion for substitution of a transferee of an interest. Sandstrom v. Larsen, 59 Haw. 491, 501 n.5, 583 P.2d 971, 979 n.5 (1978). Saingoen does not assert she filed a proper motion. Therefore, the circuit court did not err in granting summary judgment as to any alleged assigned claim from Nicholle.

In regards to Count VI, the Attorney Defendants moved for summary judgment because a punitive damages claim is not an independent tort, and all of Saingoen's direct claims had been dismissed. However, because we have determined that the circuit court erred in granting summary judgment on Count II and have remanded that count back to the circuit court, we also vacate the circuit court's summary judgment ruling as to Count VI.

4. Costs

Given that we vacate in part the Final Judgment, there is no prevailing party at this time. Thus, we also vacate the circuit court's award of costs.

B. The Attorney Defendants' Cross-Appeal

The Attorney Defendants cross-appeal from the circuit court's denial of their request for attorneys' fees. "The circuit court's grant or denial of attorneys' fees and costs is reviewed under the abuse of discretion standard." Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel, 113 Hawai'i 251, 266, 151 P.3d 732, 747 (2007).

The Attorney Defendants requested attorneys' fees pursuant to HRS § 607-14, asserting that this was essentially an action in the nature of assumpsit. Although we are remanding as to the fraud and punitive damages claims, we will review the Attorney Defendants' cross-appeal because both of the remanded claims clearly are not in the nature of assumpsit. Thus, any potential assumpsit claims are among the claims adjudicated in favor of the Attorney Defendants and which we have affirmed.

In analyzing whether a claim is in the nature of assumpsit under HRS § 607-14, this court has said:

"Assumpsit" is a common law form of action which allows for the recovery of damages for non-performance of a contract, either express or implied, written or verbal, as well as quasi contractual obligations. In deciding whether to award fees under HRS § 607-14, the court must determine the nature of the lawsuit where both assumpsit and non-assumpsit claims are asserted in an action.

In ascertaining the nature of the proceeding on appeal, this court has looked to the essential character of the underlying action in the trial court. The character of the action should be determined from the facts and issues raised in the complaint, the nature of the entire grievance, and the relief sought. Where there is doubt as to whether an action is in assumpsit or in tort, there is a presumption that the suit is in assumpsit. Additionally, this court recently stated, for the first time, that, in awarding attorneys' fees in a case involving both assumpsit and non-assumpsit claims, a court must base its award of fees, *if practicable*, on an apportionment of the fees claimed between assumpsit and non-assumpsit claims.

Blair v. Inq, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001) (Blair II) (citations, quotation marks, brackets, and footnotes omitted).

The Attorney Defendants assert that Saingoen's claims were in the nature of assumpsit because, without a contract between themselves and Nicholle, there would have been no tort claims, plus the damages requested were more closely akin to contract damages because they arose out of alleged frustrated expectations, citing Blair II and Helfand v. Gerson, 105 F.3d 530 (9th Cir. 1997). The Attorney Defendants stress that, if there is any doubt, the presumption is that the claims are assumpsit. In turn, the Attorney Defendants contend that any tort claims were derived from the assumpsit claims, thus were inextricably linked, and the court should have awarded reasonable fees.

To ascertain the nature of the proceeding, we must look to the essential character of the underlying action. Blair II, 96 Hawai'i at 332, 31 P.3d at 189. "The character of the action should be determined from the facts and issues raised in the complaint, the nature of the entire grievance, and the relief sought." Id. Assumpsit claims are premised in the non-performance of a contract. Id. In Blair II, an accountant filed

a request for compensation for necessary expenses and attorney fees in defending a professional malpractice action. Id. at 329, 31 P.3d at 186. In opposition, the plaintiffs contended that the accountant was not entitled to attorneys' fees under the assumpsit statute because the malpractice suit sounded in tort, rather than assumpsit. Id. at 332, 31 P.3d at 189. The Hawai'i Supreme Court disagreed. The supreme court concluded that because the plaintiffs asserted both a claim for breach of implied contract and negligence, and that both claims were premised on the same alleged breach, the negligence claim arose out of the alleged implied contract. Id. The supreme court continued that "[w]ithout the implied contract, which could create a cognizable duty, Plaintiffs would have no negligence claim." Id. Further, the supreme court noted that the alleged damages were more closely akin to contract damages because they were economic damages arising out of the alleged breach of contract. Id. at 332-33, 31 P.3d at 189-90; see also Helfand, 105 F.3d at 538-39.

Here, Saingoen did not allege a breach a contract. In her First Amended Complaint, Saingoen's multitude of claims stem from allegations of fraud and breach of duty which sound in tort. Further, Saingoen does not assert breach of contract or seek damages based upon frustrated contractual expectations, as opposed to injury from the alleged torts. See Kahala Royal Corp., 113 Hawai'i at 281-82, 151 P.3d at 762-63; TSA Int'l, Ltd. v. Shimuzu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 734 (1999).

The asserted claims are not in the nature of assumpsit. "The mere fact that [the plaintiff's] claims relate to a contract . . . does not render a dispute between the parties an assumpsit action." TSA Int'l, 92 Hawai'i at 264, 990 P.2d at 734. The essential character of the action was not in the nature of assumpsit and the circuit court did not abuse its discretion in denying the Attorney Defendants' motion for attorneys' fees.

III. Conclusion

Based on the foregoing, we vacate the Final Judgment as to Counts II and VI. We remand this case to the circuit court for further proceedings on these counts consistent with this opinion. We affirm the Final Judgment with respect to the remaining counts (Counts I, III, IV, V, VIII, IX, X, and the second IX).

Because we vacate the Final Judgment in part, we also vacate the circuit court's "Order Granting in Part and Denying in Part the Van Pernis-Vancil Defendants' Motion for Attorney Fees and Costs," entered on September 23, 2011, to the extent it awarded costs to the Attorney Defendants. We affirm the order to the extent it denied attorneys' fees requested pursuant to HRS § 607-14.

DATED: Honolulu, Hawai'i, June 30, 2015.

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Chief Judge

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