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NO. CAAP-13-0000101

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DAVID W. SWIFT, JR. and LOIS F. SWIFT,  
Plaintiffs-Appellees/Cross-Appellants,  
v.  
CATHERINE SWIFT and JAY NELSON,  
Defendants-Appellants/Cross-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 11-1-0567 (KTN))

MEMORANDUM OPINION

(By: Fujise, Presiding Judge, Leonard and Ginoza, JJ.)

Plaintiffs-Appellees/Cross-Appellants David W. Swift, Jr. (**Father**) and Lois F. Swift (**Mother**) (**collectively Parents**) brought this lawsuit against their daughter and son-in-law, Defendants-Appellants/Cross-Appellees Catherine Swift (**Daughter**) and Jay Nelson (**Husband**), alleging claims for breach of contract, fraudulent misrepresentation/concealment, unjust enrichment, assault and battery, negligence and breach of fiduciary duty/constructive trust. After a jury trial, the Circuit Court of the First Circuit (**circuit court**)<sup>1</sup> entered a Second Amended Final Judgment, filed on February 14, 2013, which entered judgment in favor of Parents and against Daughter and Husband for the sum of \$462,998.50, and in favor of Mother and against

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<sup>1</sup> The Honorable Karen T. Nakasone presided.

Daughter for the sum of \$3,000. The parties appeal and cross-appeal from the Second Amended Final Judgment.

On appeal, Daughter and Husband contend the circuit court erred: (1) in denying Daughter and Husband's Hawai'i Rules of Civil Procedure (HRCPP) Rule 50 Motion for Judgment as a Matter of Law (JMOL); (2) in denying Daughter and Husband's Motion for Remittitur; and (3) when it entered the Second Amended Final Judgment because it awards duplicative damages and there was not sufficient evidence to support Parents' claims and damages.

On cross-appeal, Parents contend the circuit court erred by (1) *sua sponte* granting JMOL that dismissed Parents' punitive damages claim; (2) refusing Parents' proposed jury instruction on punitive damages related to the fraud claim; and (3) not instructing the jury on punitive damages for fraud.

For the reasons set out below, we affirm, except to the extent that the issue of punitive damages as to Parents' fraud claim and breach of fiduciary duty claim should have reached the jury.

## **I. Background**

This case involves two properties, one located at 420 Hao St. (420 Property) and another at 412 Hao St. (412 Property). In addition, this case involves an incident where Mother and Daughter had an argument that resulted in Daughter throwing a cup at Mother, which caused Mother's head to bleed.

The first issue with regard to the properties involves the transfer of the deed for the 412 Property. Parents purchased the 412 Property in 1999 and the deed to the property originally indicated that Parents owned a 99% interest and Daughter owned a 1% interest. On March 3, 2004, Parents transferred their 99% interest and Daughter transferred her 1% interest to Daughter and Husband jointly. Parents contend that the transfer of their 99% interest was meant to be temporary until Daughter and Husband refinanced the 412 Property and then Daughter and Husband were to transfer the interest back to Parents. Daughter and Husband contend that the 412 Property was a gift.

The second issue with regard to the properties involves a view easement. Parents originally bought the 412 Property with the intent to preserve their view of the ocean from the 420 Property. On July 23, 2004, Parents and Daughter signed a view easement granting an easement to Parents over the 412 Property. However, the view easement was apparently incomplete because at that point Parents had conveyed their interest in the 412 Property to both Daughter and Husband and Husband did not sign the view easement document. Later, in 2006, Husband represented that he would sign the document, but never did.

The third issue with regard to the properties involves a contract. On March 2, 2006, Parents, Daughter, and Husband signed "Agreement by Catherine Swift and Jay Nelson to pay the Remaining Mortgage Balance in its entirety on the 420 Hao Street property, Honolulu, owned by David and Lois Swift, Beginning at the time of David Swift's Retirement" (2006 Agreement). The 2006 Agreement states that Parents loaned Daughter and Husband approximately \$250,000 of Parents' retirement and other savings with the understanding that Daughter and Husband would repay this loan at some future date. Daughter and Husband signed the 2006 Agreement, agreeing to make monthly payments equivalent to Parents' mortgage payments, to begin when Father retired and until the mortgage on the 420 Property was in paid in full.

In a letter dated January 9, 2011, Parents stated they had not received any payments after Father's retirement on June 1, 2010. Daughter and Husband responded in a letter dated January 25, 2011 and denied any financial obligation to parents regarding the 412 Property.

On March 23, 2011, Parents filed a Complaint against Daughter and Husband asserting six counts: (1) Breach of Contract; (2) Fraudulent Misrepresentation/Fraudulent Concealment; (3) Unjust Enrichment/Equitable Lien; (4) Assault and Battery; (5) Negligence; and (6) Breach of Fiduciary Duty/Constructive Trust.

On December 20, 2011, the circuit court filed an order granting Parents' motion for partial summary judgment finding Daughter and Husband liable as a matter of law on the 2006 Agreement.

The case went to trial commencing on March 19, 2012. On March 23, 2012, upon conclusion of Parents' case at trial, Daughter and Husband orally moved for JMOL regarding fraud, unjust enrichment, assault and battery, negligence and breach of fiduciary duty and punitive damages regarding assault and battery. The circuit court orally denied Daughter and Husband's Motion for JMOL.

On March 28, 2012, the circuit court held a hearing reconsidering JMOL on the issue of punitive damages. The circuit court granted JMOL as to punitive damages with regard to Parents' causes of action based on (1) unjust enrichment; (2) assault and battery; and (3) breach of fiduciary duty.

On April 3, 2012, a Special Verdict Form was filed in which the jury awarded Parents: \$41,326.97 for past monthly payments under the 2006 Agreement; \$302,000 for fraud damages; \$5,000 in general damages for negligence associated with the cup incident, but apportioning fault at forty percent to Mother and sixty percent to Daughter; \$55,000 for breach of promise with regard to the view easement; and \$55,000 for breach of promise with regard to the transfer of the deed.

On April 11, 2012, the circuit court filed a Judgment awarding Parents the sum of \$453,326.97 against both Daughter and Husband, and \$3,000 to Mother against Daughter.

On April 16, 2012, Daughter and Husband filed a motion for remittitur. On April 20, 2012, Daughter and Husband filed a "Motion for Judgment as a Matter of Law, Or, Alternatively, Motion for New Trial," which sought JMOL regarding the fraud claim, breach of fiduciary duty claim, and the damages awarded for fraud and breach of fiduciary duty.

On June 13, 2012, the circuit court filed an order denying Daughter and Husband's motion for remittitur. On June

13, 2012, the circuit court also filed an "Order Denying Defendants' Motion for Judgment as a Matter of Law, Or, Alternatively, Motion for New Trial."

On June 13, 2012, the circuit court filed an Amended Final Judgment which included, pursuant to a previous order, an award of costs in the amount of \$1,406.14 and attorney's fees in the amount of \$8,265.39 to Parents. Thus, the circuit court awarded \$462,998.50 to Parents and against both Daughter and Husband, and \$3,000 to Mother against Daughter.

Daughter and Husband appealed and Parents cross-appealed from the Amended Final Judgment, however, this court dismissed the appeal for lack of jurisdiction because the Amended Final Judgment did not specifically identify the claim or claims on which the circuit court intended to enter judgment, as required in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994). Therefore, on February 14, 2013, the circuit court entered a Second Amended Final Judgment against Daughter and Husband for the sum of \$462,998.50 upon Counts One, Two, Three, and Six of the Complaint and against Daughter for the sum of \$3,000 upon Counts Four and Five of the Complaint.

## **II. Standards of Review**

Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

In deciding a motion for directed verdict or [judgment notwithstanding the verdict], the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and either motion may be granted only where there can be but one reasonable conclusion as to the proper judgment.

Nelson v. Univ. of Haw., 97 Hawai'i 376, 393, 38 P.3d 95, 112 (2001) (citation, brackets and block format omitted).<sup>2</sup> "A motion

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<sup>2</sup> See Nelson, 97 Hawai'i at 392 n.14, 38 P.3d at 111 n.14 ("We note that HRCF Rule 50 was recently amended and no longer refers to motions for directed verdict or for JNOV. HRCF Rule 50 (2000). The new rule . . . refers to motions for 'judgment as a matter of law,' and motions made after trial are

for judgment as a matter of law asks the trial court to rule that the movant's opponent has introduced so little evidence to support a verdict in his favor that the case does not raise a jury question." Miyamoto v. Lum, 104 Hawai'i 1, 14, 84 P.3d 509, 522 (2004) (citation, block format and brackets omitted).

### **III. Daughter and Husband's Appeal**

#### **A. Breach of fiduciary duty**

Daughter and Husband contend the circuit court erred in denying their Motion for JMOL and entering the Second Amended Judgment because there was not sufficient evidence to support a finding of breach of fiduciary duty and the claim was barred by the statute of limitations and the statute of frauds.

To claim breach of fiduciary duty, a plaintiff must show that a fiduciary relationship existed between the parties, the defendant breached a fiduciary duty to the plaintiff, and the breach proximately caused injury to the plaintiff. See 37 C.J.S. Fraud § 15 (2012); Cochrane v. Azman, No. 29562, 2011 WL 661714 125 Hawai'i 242, 257 P.3d 1219, at \*5 (Haw. App. Feb. 22, 2011) (mem.). A fiduciary relationship exists when there is a relationship of trust and confidence. Meheula v. Hausten, 29 Haw. 304, 314 (Haw. Terr. 1926).

Parents' Complaint asserts that Daughter and Husband breached their fiduciary duty by: persuading Parents to transfer their 99% interest in the 412 Property to Daughter and Husband and failing to transfer said interest back to Parents; and by refusing to grant a view easement over the 412 Property.

#### **1. Statute of limitations**

Daughter and Husband contend that a claim for breach of fiduciary duty related to the view easement and the failure to transfer the 99% interest back to Parents is barred by the statute of limitations.

A six-year statute of limitations applies to Parents' breach of fiduciary duty claim. Hawaii Revised Statutes (HRS)

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referred to as 'renewed motions for judgment as a matter of law.'").

§ 657-1(4) (1993) The statute of limitations began to run when Parents discovered, or reasonably should have discovered, that: defendants would not transfer back the 99% interest in the 412 Property; and, respectively, defendants were refusing to grant a view easement. See Blair v. Ing, 95 Hawai'i 247, 264, 21 P.3d 452, 469 (2001) (applying the discovery rule in determining when the limitations period begins to run). "[T]he moment at which a statute of limitations is triggered is ordinarily a question of fact." Norris v. Six Flags Theme Parks, Inc., 102 Hawai'i 203, 206, 74 P.3d 26, 29 (2003); see Dunlea v. Dappen, 83 Hawai'i 28, 34, 924 P.2d 196, 202 (1996), abrogated on different grounds by Hac v. Univ. of Haw., 102 Hawai'i 92, 73 P.3d 46 (2003) (stating "the issue of when plaintiff discovered, or reasonably should have discovered, that she or he was psychologically injured and that the injury was caused by CSA is a question of fact for the jury").

With regard to the deed transfer, Daughter and Husband contend that Parents expected that Daughter and Husband would immediately reconvey the deed back to Parents after Parents transferred their 99% interest in the 412 Property to Daughter and Husband on March 3, 2004. Daughter and Husband further contend that when the 99% interest was not immediately transferred back to Parents, Parents knew or should have known that Daughter and Husband breached their fiduciary duty. Thus, they assert, the Complaint was filed outside the statute of limitations because it was filed on March 23, 2011, seven years after Parents transferred their 99% in the 412 Property.

The evidence in this case, however, is far from clear when Parents knew or reasonably should have known that Daughter and Husband would not transfer back the 99% interest in the 412 Property, especially given the family relationship and the ongoing nature of this matter. Perhaps the clearest evidence on this issue is a letter in January or February of 2006, from Father to Husband, in which Father contends that Husband obtained ownership of the 412 Property under false pretenses. The letter

further reflects a knowledge by Father at that point that Parents had "lost 412." However, the Complaint in this case was filed within six years of this letter.

With regard to the view easement, Daughter and Husband contend that the statute of limitations had run because a view easement, which Parents later deemed unenforceable without Husband's signature, was signed on July 23, 2004, thus Parents waited seven years to file their complaint. However, Husband testified that he represented to Parents in 2006 that he would consider signing the view easement. Thus, as of that time in 2006 -- less than six years before the filing of the complaint -- there is evidence supporting Parents' reasonable belief that they would receive a fully executed view easement.

Given the evidence and viewing it in a light most favorable to Parents as non-movants, there was more than one reasonable conclusion as to when Parents discovered, or reasonably should have discovered, the breach of fiduciary duty. Therefore, the circuit court did not err in denying Daughter and Husband's motions for JMOL with regard to whether the statute of limitations had run on the breach of fiduciary duty claim related to the deed transfer and view easement.

## **2. Statute of frauds**

Daughter and Husband contend that the statute of frauds defense bars Parents' claim for breach of fiduciary duty with regard to both the view easement and Daughter and Husband's failure to reconvey the 99% interest in the 412 Property back to Parents.

The statute of frauds provides in pertinent part: "No action shall be brought . . . [u]pon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them . . . unless the promise, contract, or agreement, upon which the action is brought . . . is in writing, and is signed by the party to be charged therewith[.]" HRS § 656-1 (4) (1993) (emphasis added). Thus, HRS § 656-1 requires any contract for the sale of lands, tenements, or of any interest in or



concerning them be in writing. See Credit Assocs. of Maui, Ltd v. Carlbom, 98 Hawai'i 462, 467-68, 50 P.3d 431, 436-37 (App. 2002).

Parents, however, did not assert a contract claim with regard to the view easement and the deed transfer. Rather, Parents contended that Daughter and Husband breached their fiduciary duty to Parents, given their relationship, when they assured Parents they would execute the view easement and transfer back the 99% interest, but failed to do so thus resulting in Daughter and Husband benefitting from the breach by obtaining full ownership of the 412 Property and without a view easement attached. Parents sought damages resulting from Daughter and Husband's breach of fiduciary duties, not a contract claim, and thus the Statute of Frauds does not apply.

### **3. Confidential relationship**

Daughter and Husband contend the circuit court erred in denying their Motion for JMOL and entering the Second Amended Final Judgment because Parents did not present evidence of a confidential relationship to succeed on their breach of fiduciary duty claim related to both the view easement and the deed transfer.

As noted, a fiduciary relationship exists when there is a relationship of trust and confidence. Meheula, 29 Haw. at 314.

Kinship, by itself, is not sufficient to establish a confidential relationship. Indeed, relatives are often hostile to, or deal at arms' length with each other. However, when parties are closely related, the imposition of great trust and the letting down of all guards is natural, and the relationship, coupled with evidence as to intrusting, the status of the parties as to health, age, education and dominance, may lead a court to find that a confidential relationship existed.

Kam Oi Lee v. Fong Wong, 57 Haw. 137, 140, 552 P.2d 635, 638 (1976) (citations omitted).

In this case, Mother testified that Parents put Daughter on the deed originally "believing and trusting that she would be forthcoming, and she was not . . . [W]hen [Husband] and [Daughter] were married and [Husband] took over a great deal

of the communication, we also were trusting that his representations were true, and . . . they were not." Mother also testified that she felt she was tricked out of her 99% interest in the 412 Property and the view easement. Further, it is undisputed that Daughter signed a view easement and Husband later represented he would consider signing a view easement, but a view easement was never fully executed.

Given Mother's testimony and the evidence presented to the jury, more than one reasonable conclusion could be reached with regard to whether a confidential relationship existed. Therefore, the circuit court did not err when it denied Daughter and Husband's motion for JMOL regarding breach of fiduciary duty. Further, substantial evidence supports a verdict in favor of Parents for breach of fiduciary duty.

**B. Fraud**

Daughter and Husband contend the circuit court erred in denying their Motion for JMOL and entering the Second Amended Final Judgment because Parents did not present clear and convincing evidence as to all the elements of fraud.

The elements of fraud include: "(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." Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 286, 768 P.2d 1293, 1301 (1989). "[A] promise made without the present intent to fulfill the promise is actionable as fraud." E. Star, Inc., S.A. v. Union Bldg. Materials Corp., 6 Haw. App. 125, 140, 712 P.2d 1148, 1159 (1985).

Parents' Complaint limits the claim for fraud to the actions of Daughter and Husband regarding the 2006 Agreement. The 2006 Agreement required Daughter and Husband to begin making mortgage payments on the 420 Property upon Father's retirement to repay the \$250,000 that Daughter and Husband owed Parents. Daughter and Husband did not begin making payments the month

after Father retired on June 1, 2010, as called for under the 2006 Agreement. On January 9, 2011, Parents sent Daughter and Husband a letter requesting payments under the 2006 Agreement. On January 25, 2011, in response to Parents' letter requesting that Daughter and Husband begin making payments, Daughter and Husband sent a letter to Parents denying that Parents loaned Daughter and Husband \$250,000 and disagreeing that they owed Parents retroactive mortgage payments prior to Parents' January 9, 2011 letter. Further, when asked at trial if she intended to repay Parents for the monies that Parents had invested in the 412 Property, Daughter responded, "It was a gift." When asked whether she intended to pay Parents back after signing the 2006 Agreement, Daughter testified: "We agreed in that agreement that if my parents were having difficulty paying their mortgage that they had in 2006, that we would do everything that we could to help them meet their mortgage payments, because we didn't want them to be worried that they would lose their house."

The statements made by Daughter and Husband in their January 25, 2011 letter and Daughter's testimony at trial could lead a jury to believe Daughter and Husband never intended to fulfill the 2006 Agreement. Therefore, the circuit court did not err when it denied Daughter and Husband's Motion for JMOL with regard to fraud. Further, substantial evidence supports a verdict in favor of Parents for fraud.

**C. Damages awarded for breach of fiduciary duty and fraud**

Daughter and Husband contend the jury improperly awarded damages for breach of fiduciary duty amounting to \$55,000 for the view easement and another \$55,000 for the deed transfer. Daughter and Husband also contend there was insufficient evidence to award Parents \$302,000 for fraud, and that the damages awarded for fraud and breach of the 2006 Agreement constitute an impermissible double recovery.

It is a "well-settled principle in this jurisdiction that the proper amount of damages to be awarded...is within the

exclusive province of the jury, since jurors are the sole judges of all disputed questions of fact." Kato v. Funari, 118 Hawai'i 375, 381, 191 P.3d 1052, 1058 (2008) (citation, quotation marks and brackets omitted, ellipses in original). Further,

a finding of an amount of damages is so much within the exclusive province of the jury that it will not be disturbed on appellate review unless palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.

Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 436, 32 P.3d 52, 80 (2001) (citation and block format omitted).

With regard to breach of fiduciary duty, Mother testified that Parents were asking for \$200,000 in damages for the breach of fiduciary duty claim. Mother testified that Parents requested damages because of the ongoing problems with Daughter and Husband and because they have not gotten the issue of the view easement handled, when ensuring that the view from the 420 Property (where Parents resided) was not blocked by anything on the 412 Property next door was the reason Parents bought the 412 Property in the first place. In addition, Mother testified that the damages were to compensate Parents for trusting Daughter and Husband to reconvey the 99% interest in the property.

With regard to fraud, it does not appear that Mother or Father testified to a specific amount that they were requesting for fraud damages. Father testified that Parents paid \$302,000 for the 412 Property and improvements made to the property. Mother testified that Parents put \$70,000 as a down payment and took out a mortgage for \$210,000 on the 412 Property and then liquidated both Parents' retirement accounts to pay for the additional costs of improvements to the 412 Property, which totaled around \$302,000. Mother also testified that Husband talked Parents into reducing the amount of pay back in the 2006 Agreement to \$250,000. Finally, Mother also testified that Parents wanted the equity for the 412 Property back.

Given the testimony from Parents, we cannot conclude that the damages awarded for breach of fiduciary duty and fraud were palpably not supported by the evidence or so excessive and outrageous when considered with the circumstances. Further, neither the jury instructions nor the Special Verdict Form instructed the jury that the damages from the 2006 Agreement and the damages from fraud should be considered together and Daughter and Husband do not challenge the jury instructions or the wording on the Special Verdict Form on appeal. Given the unchallenged format of the Special Verdict Form, the fraud damages and the damages for the 2006 Agreement do not constitute a double recovery.

Therefore, the circuit court did not err when it entered the Second Amended Final Judgment with regard to damages awarded for breach of fiduciary duty and fraud, and the circuit court did not err in denying Daughter and Husband's motion for remittitur.

## **II. Parent's Cross-Appeal**

### **A. JMOL for punitive damages**

Parents contend that the circuit court erred when it *sua sponte* granted JMOL as to punitive damages when Daughter and Husband did not address punitive damages in their oral motion for JMOL. While Daughter and Husband did not specifically address punitive damages in their oral motion for JMOL regarding the unjust enrichment and the breach of fiduciary duty claims, Daughter and Husband did raise the issue of punitive damages with regard to the assault and battery.

Nonetheless, Parents waived their argument that it was error to *sua sponte* grant JMOL for punitive damages because Parents did not object to the circuit court's ruling *sua sponte*. See Ass'n of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 107, 58 P.3d 608, 618 (2002) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.")

**B. Punitive damages for unjust enrichment, assault and battery, and breach of fiduciary duty**

Parents contend that the circuit court erred when it granted JMOL for punitive damages associated with unjust enrichment, assault and battery, and breach of fiduciary duty. We note initially that the claims for unjust enrichment and assault and battery were not included on the Special Verdict Form and Parents do not challenge this fact.

Punitive damages are "assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future." Masaki v. Gen. Motors Corp., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989).

For an award of punitive damages,

[t]he plaintiff must prove by clear and convincing evidence that the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, or where there has been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

Id. at 16-17, 780 P.2d at 575 (emphasis added). "Thus, punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment." Id. at 7, 780 P.2d at 571.

Given that the unjust enrichment and assault/battery claims were not included on the Special Verdict Form, and Parents do not contend on appeal that these claims should have been submitted to the jury, we can see no error in regard to the granting of JMOL for punitive damages arising from those claims.

With regard to breach of fiduciary duty, Parents based their claim on unfulfilled assurances made by Daughter and Husband to grant a view easement over the 412 Property as well as a failure to reconvey the 99% interest in the 412 Property back to Parents. Regarding the view easement, Husband testified that in 2003 he told Parents that he would consider a view easement if there was a clause in the easement that it would terminate upon Parents' death. In 2004, although the view easement included a

clause stating "[t]his easement will last until both [Parents] have died," only Daughter and Parents signed the document and Husband did not. Husband also testified that in 2006 he told Parents that he would consider adding his signature to the view easement, but never did. Husband testified that he did not sign the view easement in 2006 because he never had a copy of it and he also realized that Daughter did not want him to sign it.

Given the evidence related to the view easement, a jury could conclude that Daughter and Husband's conduct rose to the level of oppressiveness sufficient to support an award of punitive damages.

Further, regarding the 99% interest in the 412 Property, Parents contend that the transfer to Daughter and Husband was meant to be temporary. In 2006, Father wrote Husband a letter stating that Daughter and Husband obtained ownership to the 412 Property "under false pretenses." The letter also stated that it was Parents understanding "that title transfer would be TEMPORARY, to qualify for improved mortgage rates, and would be almost instantly returned to us."

By contrast, both Husband and Daughter testified that the 412 Property was a gift. In addition, Daughter testified: "[w]e did not trick my parents into signing that deed. They were fully aware that they were signing a deed. And they never asked for it back, even though we saw them on a daily basis."

Given the evidence in this case, a jury could conclude that Daughter and Husband acted wantonly or oppressively and acted with a conscious indifference to their actions when they did not reconvey the 99% interest in the 412 Property back to Parents.

Therefore, the circuit court did not err in granting JMOL for punitive damages associated with unjust enrichment and assault and battery, but should not have granted JMOL for punitive damages related to Parents' claim for breach of fiduciary duty.

**C. Jury instructions regarding punitive damages for fraud.**

Parents contend the circuit court erred in refusing Parents' proposed jury instructions for punitive damages and then refusing to submit the question of punitive damages for fraud to the jury.

"The standard of review for a trial court's issuance or refusal of a jury instruction is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading." Moyle v. Y & Y Hyup Shin, Corp., 118 Hawai'i 385, 391, 191 P.3d 1062, 1068 (2008) (citation and quotation marks omitted).

In this case, the circuit court had granted summary judgment with regard to punitive damages associated with breach of contract. After Parents' case-in-chief at trial, the circuit court also granted JMOL as to punitive damages associated with unjust enrichment, assault and battery, and breach of fiduciary duty, leaving punitive damages associated with fraud undecided. Subsequently, at the end of trial, the circuit court refused, over objection, Parents proposed jury instructions 8.12-8.17, which generally addressed punitive damages. Parents objected as follows:

Punitive damages are properly pleaded in this case. We believe the grounds for punitive damages have been proved rather overwhelmingly in regards to those causes of action where punitive damages were sought. We believe that some of the case that's gone to the jury are truncated because this Court has decided that punitive damages are not an issue.

For example, the cup incident. And in the fraud or in the 2006 agreement in particular, punitive damages would seem to follow that light and we therefore object to this Court I guess granting a Rule 50 motion taking punitive damages out of this case.

On April 3, 2012, following the circuit court's reading of the completed Special Verdict Form, Parents requested that the court present the jury with one additional question regarding punitive damages for fraud. The circuit court denied the request.

In Kang v. Harrington, 59 Haw. 652, 587 P.2d 285 (1978), the court held that the fraudulent conduct in that case



warranted punitive damages. In Kang, a renter, unbeknownst to the landlord, added a perpetual renewal option to the rental lease, instead of the one year renewal option they had previously agreed to. Id. at 659, 587 P.2d at 290. The supreme court found that the renter "embarked upon a fraudulent scheme designed to acquire a long-term right to appellee's property." Id. at 662, 587 P.2d at 292. Furthermore, the renter intentionally made misstatements in the rental agreement and intentionally inserted the perpetual renewal option. Id. He also rushed the landlord into signing the document, made improvements to the property without the landlord's approval, and fraudulently acquired approval of other improvements that he did not make. Id. Therefore, the court held that the renter's fraudulent conduct rose "to the level of oppressiveness, wantonness and malice sufficient to support an award of punitive damages." Id.

In this case, Parents presented evidence by way of the 2006 Agreement that, as repayment for \$250,000 loaned to Daughter and Husband related to the 412 Property, Daughter and Husband agreed to make mortgage payments for Parents' 420 Property upon Father's retirement.<sup>3</sup> Parents also presented evidence that Daughter and Husband never made payments, although they knew that Father had retired, and the January 25, 2011 letter by Daughter and Husband appears to disavow their obligations directly in contradiction to the 2006 Agreement that they signed. Moreover, Daughter and Husband testified that although they signed the 2006 Agreement, they maintained their belief that the 412 Property was a gift. Given the evidence related to the 2006 Agreement, there is evidence that could lead a jury to find that Daughter and Husband's fraudulent conduct rose to the level of oppressiveness sufficient to support an award of punitive damages.

Therefore, the circuit court erred when it did not instruct the jury regarding punitive damages associated with the

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<sup>3</sup> As previously noted, Parents' fraud claim was based on Daughter and Husband's conduct related to the 2006 Agreement.

fraud claim. This issue should have been included among the questions presented to the jury.

Therefore,


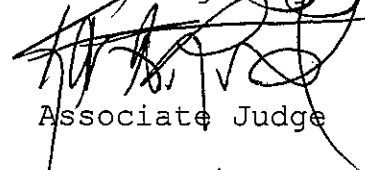
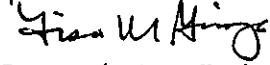
IT IS HEREBY ORDERED that the Second Amended Final Judgment, filed on February 14, 2013 in the Circuit Court of the First Circuit is affirmed, except to the extent that the issue of punitive damages related to Parents' fraud claim and breach of fiduciary duty claim should have reached the jury for consideration. Therefore, the case is remanded to the circuit court for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, June 30, 2016.

On the briefs:

Gary G. Grimmer,  
Ann C. Kemp,  
for Defendants-Appellants/  
Cross-Appellees.

Fred Paul Benco,  
for Plaintiffs-Appellees/  
Cross-Appellants.

  
Presiding Judge  
  
Associate Judge  
  
Associate Judge