IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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THEODORICO ERUM, JR.,
Petitioner/Plaintiff-Appellant,

vs.

JOSUE BUMATAY LLEGO,
Respondent/Defendant-Appellee.

SCWC-17-0000762

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000762; CIV. NO. 14-1-0199)

JUNE 18, 2020

DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH RECKTENWALD, C.J., JOINS

On certiorari, the majority creates a new heightened standard for involuntary dismissals with prejudice by importing the standard that this court set forth in In re Blaisdell, 125 Hawaiʻi 44, 49, 252 P.3d 63, 68 (2011), for an involuntary dismissal pursuant to Hawaiʻi Rules of Civil Procedure (HRCP)

Rule 41(b), then expanding and applying it to a dismissal with prejudice pursuant to HRCP Rules 16(f) and 37(b)(2)(C). Under this new heightened standard, the majority holds that a trial court abuses its discretion by involuntarily dismissing a claim with prejudice — pursuant to any rule — unless the "plaintiff's deliberate delay or contumacious conduct causes actual prejudice . . . [and] the actual prejudice cannot be addressed through lesser sanctions." Majority at 30-31. The majority also announces a new prospective rule that a trial court must make relevant findings of deliberate delay or contumacious conduct and actual prejudice, and explain why lesser sanctions are insufficient any time that the trial court enters an involuntary dismissal with prejudice based on procedural violations of court rules. Majority at 54.

Pursuant to HRCP Rules 16(f) and 37(b)(2)(C), a trial court may sanction a party for failure to appear at a scheduling or pretrial conference by dismissing the action. This court has never required a showing of deliberate delay or contumacious conduct that causes actual prejudice to affirm an involuntary dismissal pursuant to HRCP Rules 16(f) and 37(b)(2)(C), nor do I believe that we should do so now.

Here, Petitioner/Plaintiff-Appellant Theodorico Erum, Jr. (Erum), a retired attorney who was proceeding pro se, missed

numerous court filing deadlines and a scheduled settlement conference, for which he was sanctioned by the Circuit Court of the Fifth Circuit (circuit court) five times. Erum never paid any of those monetary sanctions and continued to engage in dilatory tactics throughout this litigation for more than three years. When Erum missed a scheduled pretrial conference four weeks before trial, Respondent/Defendant-Appellee Josue Bumatay Llego (Llego) orally moved to dismiss Erum's claim with prejudice pursuant to HRCP Rules 16 and 37. The circuit court granted Llego's motion. A few weeks later, Erum filed an emergency motion requesting that the circuit court reschedule trial and allow him time to respond to Llego's motion to dismiss, which the circuit court denied.

Because HRCP Rules 16(f) and 37(b)(2)(C) explicitly permit a trial court to dismiss a claim with prejudice as a sanction for failure to appear at a pretrial conference, I believe that the circuit court did not abuse its discretion in dismissing Erum's claim. I also disagree that the circuit court abused its discretion by not explicitly denominating Erum's emergency motion as a motion to reconsider, because doing so would not have provided Erum with a route to relief, given that the record amply supported the circuit court's decision to dismiss his claim with prejudice.

I strongly oppose the majority's decision to address the fact that the circuit court granted a motion that was not in writing, because Erum did not raise the issue on appeal or in his application for writ of certiorari. The majority's claim that, by liberally construing Erum's application for writ of certiorari, it can discern that Erum raised the issue, see Majority at 28, is an attempt to sidestep our established plain error doctrine and disregards the principle of party presentation.

I also disagree with the majority's new prospective rule requiring trial courts to make relevant findings on the record for dismissals pursuant to HRCP Rules 16(f) and 37(b), because the rules set forth the precise conduct that warrants dismissal.

Accordingly, I dissent.

I. BACKGROUND

On July 12, 2012, Erum and Llego were involved in a minor auto collision on the island of Kauaʻi. The accident occurred when Llego's Dodge taxi van rear-ended Erum's pickup truck while Erum was stopped at a stop sign. Erum subsequently sued Llego in small claims court for $2,650.00 for physical damage to his truck. After a trial, the small claims court awarded Erum $236.69 in damages — the estimated cost to replace

his rear bumper, plus costs for a total judgment of $311.69 (small claims court judgment). Llego's insurance company paid Erum $311.69 by check.

On August 8, 2013, Erum filed a motion to set aside the small claims court judgment, which the small claims court denied.

On July 11, 2014, Erum, proceeding pro se,[1] brought a second action against Llego in the District Court of the Fifth Circuit (district court), seeking damages for physical injury that he claimed to have sustained as a result of the 2012 accident, in addition to $2,650.00 in property damage to his truck. Llego filed an answer and a demand for a jury trial and the case was assigned to the circuit court.[2]

On June 10, 2015 — after the deadline set by the circuit court for filing of pretrial statements had already passed — Erum filed an ex parte motion for extension of time.[3]

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[1] While Erum is a pro se litigant, it bears noting that he is a retired attorney and was admitted to practice in the state of California for over thirty years. Attorney Search, The State Bar of California, http://members.calbar.ca.gov/fal/Licensee/Detail/42219 (last visited February 21, 2020). Erum was a solo practitioner in California and has represented himself in several matters in Hawaiʻi including a bankruptcy proceeding, foreclosures, property tax appeals, and criminal cases.

[2] The Honorable Randal G.B. Valenciano presided.

[3] The parties agree that Erum filed his motion for extension of time late. Erum claims that the circuit court's deadline was June 6, 2015 and Llego contends that the deadline was March 11, 2015.

The circuit court granted Erum's motion and set a new deadline for Erum's pretrial statement to be received by December 6, 2015.

On March 7, 2016, after Erum again failed to file a pretrial statement, Llego filed a motion to dismiss the case for failure to prosecute (first motion to dismiss). In the memorandum filed in support of his motion, Llego argued that (1) he was prejudiced by Erum's delay and failure to prosecute because the accident had occurred more than three-and-a-half years earlier and witnesses' memories had faded; (2) Erum "has a history of abusing court processes" and was ordered to pay $6,000 in sanctions by the United States District Court in 2008 for a bad faith filing,[4] which Erum never paid; and (3) Erum's failure to prosecute was interfering with the circuit court's busy docket.

On March 16, 2016, Erum finally filed his pretrial statement. On March 21, 2016, Erum filed a memorandum in opposition to Llego's motion to dismiss. In a declaration attached to his memorandum in opposition, Erum claimed that his failure to file his pretrial statement was not "a deliberate delay," but was the result of "mistakenly placing the wrong date of June 10, 2016, instead of December 6, 2015, on [his] personal calendar[.]"

[4] See Erum v. County of Kauai, No. 08-00113, 2008 WL 2598138, *1 (D. Haw. June 30, 2008).

After hearing oral argument on Llego's first motion to dismiss, the circuit court denied the motion. Despite the fact that the circuit court found that Erum violated its order by failing to timely file his pretrial statement, the circuit court concluded that dismissal of Erum's complaint was too harsh a sanction. However, because Erum's failure to file his pretrial statement compelled Llego to file his first motion to dismiss, the circuit court imposed sanctions on Erum of attorneys' fees and costs related to the motion ($3,280.19).

On July 5, 2016, the circuit court entered an order setting trial for the week of January 17, 2017 and a pretrial conference on December 22, 2016.

On July 11, 2016, Llego moved to dismiss Erum's property damage claim with prejudice (motion to dismiss property damage claim) on the grounds that Erum's claim was barred by res judicata because the property damage claim resulted in a final judgment on the merits in the small claims court. Llego also sought attorneys' fees and costs associated with his motion because Llego notified Erum at his July 30, 2015 deposition and in a June 24, 2016 letter that Llego would seek sanctions against Erum for failure to "withdraw his frivolous property damage claim[,]" unless Erum did so before Llego filed his motion. Erum did not file an opposition to Llego's motion to

dismiss property damage claim. Instead, Erum filed a cross-motion on July 27, 2016, seeking a continuance of the hearing on Llego's motion, pending his application to this court for a writ of mandamus directing the district court to vacate the small claims court judgment.

At a hearing on August 4, 2016, the circuit court granted Llego's motion to dismiss property damage claim, denied Erum's motion to continue, and imposed sanctions on Erum for attorneys' fees and costs related to Llego's motion ($3,089.54). In a written order entered on December 2, 2016, the circuit court found, inter alia, that (1) Erum's cross-motion to continue hearing was untimely and was based on a petition for a writ of mandamus to this court which (a) Erum did not actually file until one hour before the scheduled hearing on Llego's motion to dismiss property damage claim; and (b) was filed more than three years after the trial was held in small claims court; and (2) Llego afforded Erum an opportunity to withdraw his property damage claim and Erum refused to do so.

On December 8, 2016, Llego filed a motion to enforce settlement, or in the alternative, to continue trial (motion to enforce settlement). In a declaration attached to Llego's motion, Llego's attorney attested that (1) on November 9, 2016, Erum agreed to release all claims against Llego arising from the

2012 accident, in exchange for (a) $16,000 in general damages; (b) Llego's agreement not to pursue collections of any sanctions against Erum; and (c) agreement that Erum would be responsible for any medical bills related to the accident; (2) immediately after the agreement was reached, Llego's attorney mailed Erum a confirmatory letter setting forth the exact terms of the agreement and asking Erum to contact Llego's attorney immediately if he disagreed with any of the settlement terms; (3) on November 15, 2016, in reliance on the settlement, Llego cancelled two scheduled depositions and advised his expert witnesses that the case had settled; (4) on November 16, 2016, Llego's attorney mailed to Erum the settlement documents; (5) on November 29, 2016, Erum communicated to Llego's attorney that he would not sign the settlement documents unless J's Taxi[5] was removed from the release, or, unless Erum received more than the agreed upon $16,000 settlement; (6) on November 29, 2016, (a) Llego's attorney notified Erum that Llego's insurance carrier agreed to delete J's Taxi from the release; (b) Erum

[5] Contrary to the majority's assertion that the "confirmatory letter sent to Erum by defense counsel did not refer to the release of J's Taxi," Majority at 9 n.5, the confirmatory letter stated that Erum "would sign a standard Release and Indemnity Agreement and Stipulation For Dismissal With Prejudice Of All Claims And All Parties. (Emphasis added.) While J's Taxi was never formally a party to this action, Llego operated his taxi as J's Taxi, his vehicle was registered to Josue B. and Jessica M. Llego, dba J's Taxi, and the payment that Erum received for his property damage claim was made by the insurance carrier for J's Taxi. Thus, Erum had notice when he received the November 9, 2016 confirmatory letter that the settlement agreement included his agreement to release J's Taxi as well.

stated that he required more money to settle because Erum was considering pursuing a claim against the insurance adjuster who handled the claim and Erum might require future medical treatment; and (7) as of December 5, 2016, Llego's attorney had continued to contact Erum to try to resolve the dispute, but Erum had "continued to delay and demand even more money to resolve a case that had previously been settled." Llego also requested costs and fees associated with his motion to enforce settlement.

On December 12, 2016, Erum filed a memorandum in opposition to Llego's motion to enforce settlement. Erum argued that because he never signed the "purported settlement agreement," it was not enforceable. Erum also contended that there was "no mutual assent," as evidenced by Llego's attorney's declaration stating that Erum communicated to her his refusal to sign the agreement on November 29, 2016. According to Erum, on November 29, 2016, Erum communicated to Llego's counsel his refusal to sign the agreement because it (1) released J's Taxi from liability; (2) did not provide for payment of Erum's future medical expenses; and (3) did not include an agreement to vacate the order and final judgment against Erum for sanctions.

At a hearing on December 13, 2016, the circuit court denied Llego's motion to enforce settlement, but granted his

alternative motion to continue. Trial was set for the week of April 3, 2017. At the hearing and in its subsequent written order, the circuit court found that Llego's attorney acted in good faith in the settlement negotiations, but that Erum had not acted in good faith. Therefore, the circuit court awarded sanctions against Erum for attorneys' fees and costs from November 9, 2016, through the time spent to submit the January 27, 2017 order ($4,577.04).

When the circuit court continued the trial to April 2017, it entered an order setting new dates for submission of pretrial documents (Amended Order Setting Trial Date). The circuit court ordered that (1) Erum file a list of witnesses by January 30, 2017 and that Llego file a list of witnesses within thirty days after Erum; (2) proposed exhibits, jury instructions, and statement of the case be received by February 17, 2017; (3) motions in limine and designation of depositions be filed by February 27, 2017; and (4) memoranda in opposition to proposed documents be received by February 27, 2017. Llego timely filed and submitted all of his pretrial documents, but Erum failed to submit any pretrial documents by the court-imposed deadlines. On February 27, 2017, Erum filed a motion for continuance of trial, which included his declaration that the parties were engaged in settlement negotiations that would render a trial

unnecessary and that, if a settlement was not reached, Erum would retain counsel to represent him at trial. Erum averred that the requested continuance would allow his counsel to prepare for trial and comply with the circuit court's deadlines for pretrial documents.

On March 3, 2017, Llego filed a motion to dismiss with prejudice, or in the alternative, to exclude all of Erum's pretrial documents that were due under the Amended Order Setting Trial Date (third motion to dismiss). Llego argued that (1) Erum's case should be dismissed because Erum repeatedly failed to comply with the circuit court's orders, including the deadlines imposed in the Amended Order Setting Trial Date; (2) the fact that the parties were still negotiating did not excuse Erum's compliance with the circuit court's Amended Order Setting Trial Date; (3) Llego had been unduly prejudiced by Erum's failure to comply with pretrial deadlines for submission of documents; and (4) the fact that the circuit court had already sanctioned Erum three times in relation to this litigation demonstrated Erum's history of dilatory tactics. If the circuit court determined that dismissal with prejudice was not warranted, Llego argued that the circuit court should

sanction Erum pursuant to HRCP Rules 16(f)[6] and 37(b)(2)(B),[7] for

[6] HRCP Rule 16 (2000) provides in relevant part:

> (f) Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[7] HRCP Rule 37(b)(2) (2015) provides in relevant part:

> **(b) Failure to Comply With Order.**
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> . . . .
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> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), 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:
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> . . . .
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> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(continued . . .)

failing to comply with the Amended Order Setting Trial Date by excluding the documents (including exhibits, proposed jury instructions, statements of the case, proposed verdict forms, motions in limine, designations of depositions, counter designations to any depositions, memoranda in opposition to Llego's filings, and objections to designations) that Erum failed to file. Llego also sought "all attorneys' fees and costs incurred in this case."

On March 17, 2017, Llego filed a memorandum in opposition to Erum's motion for continuance, which incorporated by reference the arguments made in his third motion to dismiss.

On March 22, 2017 — the day before a scheduled settlement conference — Erum filed his "Settlement Conference Statement and Ex Parte Motion for Extension of Time to Deliver Confidential Settlement Letter to the [circuit court]." Erum included his declaration stating that the reason he failed to file his settlement conference statement by the March 16, 2017 deadline was because, at eighty-four years old, he suffered from memory lapses and confusion due to his age and the side effects of medications that he takes. On March 22, 2017, Erum also

> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination[.]

filed a memorandum in opposition to Llego's third motion to dismiss, wherein Erum argued that dismissal was not warranted because there was no showing of "deliberate delay, contumacious conduct, or actual prejudice[]" by Erum. In a declaration included in his memorandum in opposition, Erum averred that he failed to file his pretrial documents by the deadlines in the Amended Order Setting Trial Date because he believed that the circuit court would grant his February 27, 2017 motion for continuance of trial and order new deadlines.

At a hearing on March 23, 2017, Erum informed the circuit court that he had filed for bankruptcy and "questioned how that affects this case." The circuit court continued all matters to April 18, 2017, and took off calendar: (1) the settlement conference set for that day; (2) the hearing on Llego's third motion to dismiss set for the following week; and (3) the trial set for April 3, 2017.

Llego's third motion to dismiss was finally heard on April 18, 2017, at 1:00 p.m. Llego appeared with his counsel and Erum appeared pro se. Before hearing Llego's third motion to dismiss, the circuit court addressed the issue of whether Erum's bankruptcy affected this case, and the parties agreed that Erum's chapter 13 bankruptcy did not divest the circuit

court of jurisdiction to preside over the case.[8] After hearing oral argument from the parties, the circuit court denied Llego's third motion to dismiss, or in the alternative to exclude Erum's pretrial documents, but awarded Llego sanctions against Erum in the form of attorneys' fees and costs associated with Llego's motion. At the hearing, the circuit court re-set trial for September 18, 2017, scheduled a pretrial conference on August 24, 2017 at 2:30 p.m., and ordered Erum to submit his pretrial documents by May 31, 2017. At the request of both parties to proceed with the previously-scheduled settlement conference, the circuit court scheduled the settlement conference for 4:00 p.m. that same day — April 18, 2017 — two hours and seventeen minutes after the hearing on the third motion to dismiss concluded.

Both Llego and his attorney appeared for the 4:00 p.m.

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[8] The circuit court minutes from the April 18, 2017 hearing state, in relevant part:

> Court stated that the [circuit court] received a pleading in civil 13-1-0288 a notice of bankruptcy & stated the foreclosure was dismissed with the 180 day bar for failure to file documents. [Erum] stated that the bankruptcy court reinstated his case. [Llego's counsel] stated the case was dismissed for failure to pay the filing fee, then the filing fee was provided & the court reinstated the case. [Llego's counsel] stated that [Erum] filed a chapter 13 bankruptcy that does not apply to this case. [Erum] agreed with [Llego's counsel].

Erum filed for bankruptcy in 2013 and reinstated his 2013 bankruptcy proceeding on March 16, 2017. Thus, Erum's decision to reinstate his bankruptcy proceeding three years after it was dismissed and to inform the circuit court about it at the March 23, 2017 hearing appears to have been yet another attempt to delay the proceedings.

settlement conference, but Erum did not appear. "Both the bailiff and the law clerk checked the courthouse and the law library for [Erum]." After a short recess to allow Erum time to appear, the circuit court reconvened and stated that "[Erum] was advised of the 4:00 p.m. start time." Llego requested that the circuit court dismiss the case based on Erum's failure to appear for the scheduled settlement conference. The circuit court stated that it would not grant an oral motion, but would allow Llego to file a written motion.

On May 11, 2017, Llego filed a motion to dismiss with prejudice (fourth motion to dismiss). In his fourth motion to dismiss, Llego contended that the circuit court should dismiss Llego's case as a sanction for either: (1) Erum's unexcused failure to attend the scheduled settlement conference; or (2) Erum's deliberate and contumacious delays. Llego argued that Erum's delays caused him to expend significant time and resources throughout the course of the litigation. In particular, both Llego and his counsel changed their plans — including scheduled travel — to attend the scheduled settlement conference "only to discover that they had wasted their afternoons in anticipation of a settlement conference that never took place." Based on Erum's "bad faith and lack of good cause for failing to adhere to the [circuit court's orders]," Llego

also sought "all attorneys' fees and costs associated with this entire case."

On May 24, 2017, Erum filed a memorandum in opposition to Llego's fourth motion to dismiss. Erum argued that Llego's motion should be denied because (1) Erum's failure to attend the settlement conference was the result of an illness and not deliberate delay or contumacious conduct; and (2) any prejudice that Llego suffered was caused by the circuit court's decision to hold the settlement conference later in the afternoon, rather than at 1:00 p.m.[9] Erum's memorandum in opposition included his declaration that he "inadvertently overlooked and failed to comply" with the circuit court's order that he attend the scheduled settlement conference on April 18, 2017, because his list of illnesses includes sporadic atrial fibrillation and he had to drive home to obtain his medication at the onset of symptoms.

On June 1, 2017, the circuit court heard Llego's fourth motion to dismiss. The circuit court denied Llego's motion to dismiss but awarded Llego sanctions against Erum in

[9] The circuit court was unable to hold the settlement conference at 1:00 p.m. because it was in the middle of a jury trial. The 1:00 p.m. hearing lasted thirty-three minutes because the circuit court had to address a total of five motions by the parties, as well as the question of jurisdiction raised by Erum's pending bankruptcy. Thus, the circuit court's decision to schedule the settlement conference at 4:00 p.m. was both reasonable and an attempt to accommodate the parties' request.

the form of attorneys' fees and costs associated with Llego's motion.[10] The circuit court noted this exchange, which occurred during the hearing, in its written order denying Llego's fourth motion to dismiss:

> [Llego's] counsel again noted that [Erum] had still failed to file any pre-trial documents as ordered by the Court's Order Setting Trial Date filed on July 5, 2016. [Llego's] counsel requested that the Court order [Erum] to file his pre-trial documents by a date certain to avoid unduly prejudicing [Llego]. [Erum] represented to the Court that he made an intentional and strategic decision not to file said pretrial documents.[11]

(Emphasis added.) Thus, despite Erum's previous attestations to the circuit court that (1) if granted a continuance, he would retain counsel to prepare for trial and comply with deadlines for submitting pretrial documents; and (2) his previous failures to timely file pretrial documents were because he was relying on the circuit court granting his motion for continuance of trial and ordering new deadlines, Erum for the first time articulated his deliberate intent not to file pretrial documents of any kind.

On August 24, 2017 at 2:30 p.m., Erum again failed to appear before the circuit court, this time at a scheduled pretrial conference. Both Llego and his counsel appeared at the

[10] The record does not include the amount of sanctions ordered by the circuit court against Erum for attorneys' fees and costs associated with Llego's third and fourth motions to dismiss. However, the first three sanction awards against Erum in this case total $10,946.77. Erum has not paid any of the monetary sanctions.

[11] The circuit court instructed Llego's counsel, who was charged with preparing the order, to include Erum's representation that he would not file any pretrial documents for tactical reasons.

pretrial conference. Approximately forty minutes after the pretrial conference was scheduled to begin, the bailiff called for Erum three times outside the courtroom, but Erum failed to appear. Llego made an oral motion for the circuit court to dismiss with prejudice pursuant to HRCP Rules 16[12] and 37[13] (fifth motion to dismiss). After hearing argument from Llego on the motion, the circuit court stated on the record that Llego's request was reasonable, orally granted the motion, and directed Llego's counsel to prepare the order. The trial set for September 18, 2017, was taken off calendar.

On August 31, 2017, Llego served Erum with a copy of the minutes from the April 18, 2017 hearing — which was when the circuit court had scheduled the August 24, 2017 pretrial conference in the presence of both parties — via a process server. On September 5, 2017, Llego's counsel filed a proposed Order Granting Llego's Motion to Dismiss with Prejudice.

On September 13, 2017, Erum filed an "Emergency Ex Parte Motion to Reschedule Trial" (emergency motion) — two weeks after he accepted personal service notifying him that he had missed the August 24, 2017 pretrial conference. In his emergency motion, Erum stated that he was aware that Llego had

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[12] See supra n.6 for the relevant text of HRCP Rule 16.

[13] See supra n.7 for the relevant text of HRCP Rule 37.

made an "apparent request for dismissal" and filed a proposed Order Granting Llego's Motion to Dismiss with Prejudice. Erum claimed that the uncertainty as to whether the circuit court would grant Llego's fifth motion to dismiss had "interfered with and disrupted [Erum's] preparation for trial[.]" Erum also claimed to have no knowledge as to whether the circuit court had already considered Llego's fifth motion to dismiss. Erum requested that the circuit court continue trial to a later date to allow Erum time to respond to Llego's motion and to permit the circuit court sufficient time to consider Llego's motion, which Erum contended should be made in writing.

In a written order entered on September 15, 2017, the circuit court granted Llego's fifth motion to dismiss (dismissal order). In the dismissal order, the circuit court found that (1) Erum failed to appear at the August 24, 2017 pretrial conference; (2) the circuit court "orally ordered the parties to appear for the August 24, 2017 pretrial conference" at the April 18, 2017 hearing where Erum, Llego, and Llego's counsel appeared; and (3) approximately forty minutes after the August 24, 2017 pretrial conference was scheduled to begin, the bailiff called for Erum three times outside the courtroom but Erum failed to appear. The dismissal order further states:

> Defendant made an oral motion for the Court to dismiss the case with prejudice pursuant to Rules 16 and 37 of the Hawaiʻi Rules of Civil Procedure. The Court having

> reviewed the pleadings, considered the entire case record and heard oral argument,
>
> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion to Dismiss the Case With Prejudice is hereby GRANTED.

(Emphasis added.) Immediately after entering the dismissal order, the circuit court denied Erum's Emergency Motion.

On September 27, 2017, the circuit court entered a Judgment Re: Order Granting Defendant [Llego's] Oral Motion for Dismissal with Prejudice (circuit court judgment). The circuit court judgment dismissed Erum's complaint with prejudice and entered final judgment in favor of Llego and against Erum, "pursuant to Order Granting Defendant [Llego's] Oral Motion for Dismissal With Prejudice heard on August 24, 2017[.]"

On October 10, 2017, Erum filed a Motion to Set Aside Judgment and to Reschedule Trial Without Further Pretrial Conferences (motion to set aside judgment). Erum attributed his failure to attend the August 24, 2017 pretrial conference as a "mistake in calendaring" — the same reason Erum cited for missing the December 6, 2015 deadline to file his pretrial statement. Erum argued that (1) dismissal with prejudice is too severe a sanction in his case, because the record does not support that his failure to attend the scheduled pretrial conference was the result of contumacious conduct or deliberate delay; and (2) the circuit erred by entering a judgment of dismissal without requiring Llego to file a written motion.

Erum's motion to set aside judgment included his declaration that he suffers from memory lapses and mental confusion due to his age and the side effects of medications that he takes.

On October 27, 2017, Llego filed a memorandum in opposition to Erum's motion to set aside judgment. That same day, Erum filed a Notice of Appeal in the Intermediate Court of Appeals (ICA) appealing the circuit court's judgment.[14] Because the circuit court found that it lacked jurisdiction after Erum filed his notice of appeal, the circuit court denied Erum's motion to set aside judgment.

On appeal, Erum raised a single point of error. Erum argued that the circuit court abused its discretion by granting Llego's fifth motion to dismiss because dismissal with prejudice is a sanction of "'last resort' that cannot be affirmed 'absent deliberate delay, contumacious conduct, or actual prejudice.'" (quoting Blaisdell, 125 Hawaiʻi at 49, 252 P.3d at 68). The ICA affirmed the circuit court's judgment dismissing Erum's case with prejudice. The ICA concluded that, based on the entire record, the circuit court did not abuse its discretion by

[14] Along with his Notice of Appeal, Erum filed a declaration in support of his request to proceed in forma pauperis. In his declaration, Erum averred that his last employer was the U.S. Air Force, where he earned a salary of $600.00 per month. This directly contradicts Erum's own deposition testimony. During his deposition, Erum testified that he served in the Air Force in the 1950s, and subsequently worked for a bank and the federal government before he started his law practice. In short, Erum's own statements in the record support the conclusion that he is willing to make false statements to the court for financial gain.

dismissing Erum's case with prejudice.

II. DISCUSSION

A. Plain error review is to be exercised only when justice so requires.

Plain error doctrine is not applicable to this case. See Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2016) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."). Plain error doctrine is "based on notions of equity and justice" and "represents a departure from the normal rules of waiver that govern appellate review." Montalvo v. Lapez, 77 Hawaiʻi 282, 291, 884 P.2d 345, 354 (1994) (internal quotation marks and citations omitted). This court has stated numerous times that "[i]n civil cases, the plain error rule is only invoked when 'justice so requires.'" Alvarez Family Tr. v. Ass'n of Apartment Owners of Kaanapali Alii, 121 Hawaiʻi 474, 490, 221 P.3d 452, 468 (2009) (quoting Montalvo, 77 Hawaiʻi at 290, 884 P.2d at 353) (internal citations omitted) (emphasis added). Accord Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973).

HRAP Rule 40.1(d)(2017) sets forth the requirements for an application for writ of certiorari:

> (1) A short and concise statement of the questions presented for decision, set forth in the most general terms possible. The statement of a question presented will be

> deemed to include every subsidiary question fairly comprised therein. Questions not presented according to this paragraph will be disregarded. The supreme court, at its option, may notice a plain error not presented.
> (2) A statement of prior proceedings in the case.
> (3) A short statement of the case containing the facts material to the consideration of the questions presented.
> (4) A brief argument with supporting authorities.
> A copy of the challenged opinion, dispositional order, or ruling of the intermediate court of appeals shall be attached as an appendix.

(Emphasis added.)

Both on appeal and in his application for writ of certiorari, Erum argued that the circuit court abused its discretion by dismissing his claim with prejudice absent a showing of deliberate delay, contumacious conduct, or actual prejudice.[15] In his application for writ of certiorari, Erum does not present any question as to whether the ICA properly affirmed the circuit court's dismissal of his case on the basis

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[15] In his statement of prior proceedings, Erum mentions that Llego's fifth motion to dismiss was an oral motion.

> Thereafter when Erum mistakenly failed to attend a rescheduled pretrial conference on [August 24, 2017,] the circuit court granted an oral motion by Llego to dismiss the case with prejudice[,] without a hearing which the circuitt [sic] court granted.

However, the circuit court's noncompliance with HRCP Rule 7(b) was not a question presented to this court for decision, nor did Erum present any argument or authority in support of the issue, as required by HRAP Rule 40.1(d).

The fact that Erum argued in two motions to the circuit court that Llego's motion should have been made in writing, see Majority at 27-28, does not satisfy the requirements of HRAP Rule 28(b)(4), which requires "a concise statement of the points of error," or HRAP Rule 40.1(d), which requires a "short and concise statement of the questions presented for decision[.]"

that Llego's motion was not in writing.[16] Thus, the issue is not before this court on certiorari and should not be considered. See Alvarez Family Tr., 121 Hawaiʻi at 488, 221 P.3d at 466 ("It is well-established in this jurisdiction that, where a party does not raise specific issues on appeal to the ICA or on application to this court, the issues are deemed waived and need not be considered.").

Pro se litigants must still comply with the relevant rules of procedure and substantive law. See Mala v. Crown Bay Marina, Inc., 704 F.3d 239, 245 (3d Cir. 2013) (Pro se litigants "cannot flout procedural rules—they must abide by the same rules that apply to all other litigants."); Ghazali v. Moran, 46 F.3d 52, 54 (9th Cir. 1995) ("Although we construe pleadings liberally in their favor, pro se litigants are bound by the rules of procedure."); Schwartz v. Schwartz, 835 So.2d 1017, 1018 (Ala. Civ. App. 2002) (affirming the dismissal of a civil litigant's appeal for failure to comply with the requirements of Rule 28 because it is neither the appellate court's "duty nor its function to perform an appellant's legal research[]") (internal quotation marks and citation omitted); Lepere v.

[16] HRCP Rule 7(b) (2000) states in relevant part:

> (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing[.]

United Pub. Workers, Local 646, AFL-CIO, 77 Hawaiʻi 471, 473, 887 P.2d 1029, 1031 n.2 (1995) (quoting Faretta v. California, 422 U.S. 806, 835 n.46 (1975)) (explaining that a plaintiff's pro se status is not a "license not to comply with the relevant rules of procedural and substantive law."). Thus, Erum, a retired attorney proceeding pro se throughout this case and on appeal is not exempted from complying with HRAP Rule 40.1(d).

Despite the fact that neither party raised the issue of the circuit court's noncompliance with HRCP Rule 7(b)(1) on appeal or before this court, the majority denies that it is exercising plain error review. Majority at 28 n.19. Instead, the majority claims that, construing Erum's application for writ of certiorari liberally "as informed by the arguments Erum made before the trial court," Erum presented the question of the circuit court's noncompliance with HRCP Rule 7(b), in addition to his claim that the circuit court erred by dismissing his claim with prejudice absent a showing of deliberate delay, contumacious conduct, or actual prejudice. Majority at 28.

The majority presents a strawman argument in support of its claim that a liberal interpretation of Erum's application for writ of certiorari is necessary, stating that "[a] strict application of HRAP Rule 40.1(d) would require that Erum's application for writ of certiorari be disregarded unless plain

error was to be invoked." Majority at 23. However, the majority misrepresents the relative completeness of Erum's application for writ of certiorari. Erum's application for writ of certiorari contained (1) "a short and concise statement of the questions presented for decision[;]"[17] (2) "a statement of prior proceedings in the case[;]" (3) "a short statement of the case[;]" (4) "[a] brief argument with supporting authorities[;]" and Erum attached a copy of the ICA's judgment on appeal that he challenged. See Haw. R. App. P. 40.1(d). Thus, Erum's application for writ of certiorari largely satisfied the requirements of HRAP Rule 40.1(d) for the point of error that he actually raised — that the circuit court erred by dismissing his claim with prejudice absent a showing of deliberate delay, contumacious conduct, or actual prejudice.

The majority justifies its decision to address a point of error not raised by Erum on appeal by claiming that the error and arguments are discernible through a liberal interpretation of Erum's application for writ of certiorari, which is consistent with the policy of affording litigants the opportunity to be heard on the merits. Majority at 24-28. However, it is clear that it is the majority — and not Erum —

[17] Even though Erum's application for writ of certiorari did not contain a separate section setting forth his question presented, Erum's statement within his argument that the ICA "erred in the following ways" adequately set forth the sole question he presented to this court for decision.

who is intent on reaching the issue of the circuit court's noncompliance with HRCP Rule 7(b). Erum clearly set forth his single point of error, argument, and authority to challenge the circuit court's dismissal of his claim with prejudice absent a showing of deliberate delay, contumacious conduct, or actual prejudice, and is entitled to be heard on the merits of that issue — not the additional issue that the majority raised for him. It is not the role of an appellate court to raise additional errors for the purpose of instructing lower courts. Courts, as "passive instruments of government . . . do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." United States v. Sineneng-Smith, 140 S.Ct. 1575, 1579 (2020) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987) (Arnold, J., concurring in denial of reh'g en banc)).

"A fundamental tenet of Hawaiʻi law is that [p]leadings prepared by pro se litigants should be interpreted liberally." Waltrip v. TS Enters., Inc., 140 Hawaiʻi 226, 239, 398 P.3d 815, 828 (2016) (internal quotation marks and citation omitted). The purpose of the "liberality doctrine" is to

promote equal access to justice.[18] Id. Under the liberality doctrine, courts may recharacterize a pro se litigant's misbranded motion, Castro v. United States, 540 U.S. 375, 381 (2003), or, interpret a pro se filing in a way that does not foreclose relief, if another route to relief is possible. Waltrip, 140 Hawaiʻi at 241, 398 P.3d at 830.

However, the fact that a "pro se document is to be liberally construed[,]" Estelle v. Gamble, 429 U.S. 97, 106 (1976), does not mean it should be construed to say something which it does not. See Hessmer v. Hessmer, 138 S.W.3d 901, 904 (Tenn. Ct. App. 2003) (noting that "courts cannot create claims

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[18] As the Second Circuit observed, liberal construction of pleadings, motion papers, and appellate briefs is a form of "special solicitude" afforded to pro se litigants based on the rule that a "pro se litigant generally lacks both legal training and experience and, accordingly, is likely to forfeit important rights through inadvertence if he is not afforded some degree of protection." Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010). Thus, if a pro se litigant "is deemed to have become generally experienced in litigation through participation in a large number of previous legal actions[,]" some courts withdraw this solicitude. Id.

Nor is the degree of special solicitude afforded to pro se litigants identical. As the Second Circuit stated,

> [A] court should be particularly solicitous of pro se litigants who assert civil rights claims, and litigants who are incarcerated also receive certain special solicitude . . . Alternatively, as noted above, the degree of solicitude may be lessened where the particular pro se litigant is experienced in litigation and familiar with the procedural setting presented. The ultimate extension of this reasoning is that a lawyer representing himself ordinarily receives no such solicitude at all.

Id. at 102 (internal citations omitted) (emphasis added). Thus, even if liberality doctrine were expanded to permit an appellate court to raise an issue not raised by a pro se civil litigant, Erum, as a retired attorney experienced in matters of litigation, would not be entitled to such a degree of special solicitude.

or defenses for pro se litigants" but "should give effect to the substance, rather than the form or terminology, of a pro se litigant's papers"). The liberality doctrine does not permit an appellate court to take it upon itself to identify an issue on behalf of a pro se litigant and then consider the unraised issue on the merits. Raising an issue on behalf of a pro se litigant is fundamentally different than recharacterizing a misbranded motion or liberally interpreting a pleading.

Here, the majority goes beyond liberally interpreting an issue or argument raised by Erum in his application for writ of certiorari by raising and framing an issue for him. In doing so, the majority is not acting as a neutral arbiter, but is stepping into the role of the Erum's appellate counsel, which directly contradicts the purpose behind the liberality doctrine. Instead of promoting equal access to justice for pro se litigants, see Waltrip, 140 Hawai'i at 239, 398 P.3d at 828, raising a point of error on behalf of a pro se litigant tips the scales of justice unfairly because it disadvantages the party on the opposite side of the litigation. See Hessmer, 138 S.W.3d at 903 ("[C]ourts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary.").

The majority's conclusion that a liberal

interpretation of Erum's application for writ of certiorari permits it to reach an error not actually presented by Erum on appeal or to this court, based on arguments that Erum made before the circuit court, effectively erases the requirements of HRAP Rule 40.1(d). Under the majority's interpretation, a pro se litigant's application for writ of certiorari need only claim that a court below erred in taking a particular action, and this court will bear the burden of researching all possible errors and provide its own argument and supporting authority. However, that is not the role of an appellate court. See id. at 904 ("Pro se litigants should not be permitted to shift the burden of the litigation to the courts[.]").

The majority's interpretation that Erum's application for writ of certiorari adequately raised the circuit court's noncompliance with HRCP Rule 7(b) disregards the principle of party presentation[19] and implicates the same issues as our discretionary authority to review for plain error.

> A fundamental underpinning of the adversary system is "the principle of party presentation." Greenlaw v. United States, 554 U.S. 237, 243, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008). Under the principle of party presentation, courts "rely on the parties to frame the issues for decision" and

[19] The majority claims that the principle of party presentation is inapplicable here because Erum was proceeding pro se. Majority at 28 n.19. This is incorrect. "To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a pro se litigant's rights." Greenlaw v. United States, 554 U.S. 237, 243–44 (2008) (emphasis added). Because this is a civil matter, a departure from the principle of party presentation is unwarranted.

> are "assign[ed] . . . the role of neutral arbiter of matters the parties present." Id. Put differently, the adversary system is "designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." Id. at 244, 128 S.Ct. 2559 (quoting Castro v. United States, 540 U.S. 375, 386, 124 S.Ct. 786, 157 L.Ed.2d 778 (2003) (Scalia, J., concurring)). Consequently, courts generally hesitate to consider issues not raised by the parties "both because our system assumes and depends upon the assistance of counsel, and because of the unfairness of such a practice to the other party." United States v. Pryce, 938 F.2d 1343, 1353 (D.C. Cir. 1991) (Silberman, J., dissenting) (citations omitted).

Castro v. Melchor, 142 Hawaiʻi 1, 18-19, 414 P.3d 53, 70-71 (2018) (Nakayama, J., concurring) (alterations in original). As neutral arbiters in an adversarial system, our discretionary authority to consider questions that the parties have not presented should be used sparingly, in circumstances "where the interests of justice require such action." Id. (quoting Bertelmann v. Taas Assoc., 69 Haw. 95, 103, 735 P.2d 930, 935 (1987)).

In this case, neither party raised a potential violation of HRCP Rule 7(b) on appeal and the majority resolves Erum's application for writ of certiorari on other issues. Majority at 28. Yet, the majority exercises its discretion to address plain error by "liberally construing Erum's application for certiorari," Majority at 28, in order to instruct trial courts on the importance of written motions. In choosing to address an issue not presented in accordance with HRAP Rule 28(b)(4) solely for the purpose of "reaffirm[ing]" the

requirements of HRCP Rule 7(b), Majority at 29, the majority disregards the principle of party presentation and "the sine qua non to the plain error doctrine — that it is to be invoked only when 'justice so requires.'" Montalvo, 77 Hawai'i at 305, 884 P.2d at 368 (Nakayama, J., dissenting).

Because Erum did not raise the issue of the circuit court's compliance with HRCP Rule 7(b) on certiorari and the interests of justice do not justify plain error review, I disagree with the majority's decision to address the issue.

B. The circuit court did not abuse its discretion by dismissing Erum's complaint with prejudice.

1. A trial court may dismiss an action with prejudice as a sanction for failure to appear at a pretrial conference.

Pursuant to HRCP Rule 16(f), when a party fails to (1) obey a scheduling or pretrial order; (2) appear at a scheduling or pretrial conference or is "substantially unprepared to participate in the conference[;]" or (3) participate in good faith at a scheduling or pretrial conference, a trial court may, "upon motion or the judge's own initiative . . . make such orders with regard thereto as are just[.]" Under those circumstances, one of the sanctions available to the presiding court is "dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party[.]" Haw. R. Civ. P.

37(b)(2)(C).

An appellate court reviews the imposition of sanctions by a trial court for abuse of discretion. Gap v. Puna Geothermal Venture, 106 Hawaiʻi 325, 331, 104 P.3d 912, 918 (2004). An abuse of discretion occurs when 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).

Here, the circuit court did not abuse its discretion by dismissing Erum's claim with prejudice because both HRCP Rules 16(f) and 37(b)(2)(C) and established caselaw permit dismissal when a party fails to appear at a pretrial conference. In Webb v. Harvey, a pro se plaintiff first failed to attend a scheduled settlement conference, but then attended the rescheduled settlement conference telephonically. 103 Hawaiʻi 63, 64, 79 P.3d 681, 682 (App. 2003). Later, the plaintiff failed to attend a pretrial conference scheduled for two weeks before trial. Id. When the plaintiff failed to appear, the circuit court first determined that the plaintiff had received the order scheduling the pretrial conference, and the bailiff made three calls for the plaintiff, who did not appear. Id. at 64-65, 79 P.3d at 682-83. The circuit court stated that it "(a) viewed

[the plaintiff's] 'absence as indicating [a] lack of prosecution' and (b) 'will enter an order dismissing the case with prejudice.'" Id. at 65, 79 P.3d at 683. The day after the plaintiff failed to appear, plaintiff's motion for continuance was filed, which plaintiff had sent by UPS Next Day Air from Las Vegas, Nevada to the circuit court. Id. Three days later, the circuit court filed orders dismissing the case with prejudice for lack of prosecution. Id. On appeal, the ICA affirmed the circuit court's dismissal of the case as a sanction for the plaintiff's unexcused non-attendance at the pretrial conference, noting that even if the circuit court had received plaintiff's motion for continuance before the pretrial conference, it "would not have precluded the court from doing what it did." Id. at 66, 79 P.3d at 684.[20]

The facts of Erum's failure to appear and subsequent dismissal with prejudice are nearly identical to the facts in Webb, although the record in this case demonstrates an even greater disregard for the circuit court's orders. When Erum failed to appear at the August 24, 2017 pretrial conference, the

[20] The majority asserts that Webb's affirmance of dismissal with prejudice, absent a finding of "deliberate delay or contumacious conduct causing actual prejudice," was implicitly overruled by Blaisdell. See Majority at 36 n.31. However, this assertion is baseless because Blaisdell provided the standard for an involuntary dismissal pursuant to HRCP Rule 41(b), while Webb considered dismissal with prejudice as a sanction pursuant to HRCP Rules 16(f) and 37(b)(2). Compare Blaisdell, 125 Hawaiʻi at 49, 252 P.3d at 68, with Webb, 103 Hawaiʻi at 66-67, 79 P.3d at 684-85.

circuit court noted that (1) it had orally ordered the parties to appear on that date four months prior, at a hearing where Erum was present; and (2) approximately forty minutes after the pretrial conference was scheduled to begin, the bailiff called for Erum three times outside the courtroom, but Erum still failed to appear. Llego made an oral motion to dismiss with prejudice pursuant to HRCP Rules 16 and 37. The circuit court heard oral argument on Llego's motion, and "having reviewed the pleadings [and] considered the entire case record"[21] granted Llego's motion to dismiss with prejudice.[22]

On the facts of this case, the circuit court did not abuse its discretion by issuing orders with regard to Erum's failure to appear at the pretrial conference as it deemed just, including dismissing Erum's claim with prejudice, pursuant to

[21] It bears noting that the entire record before the circuit court at the time it dismissed Erum's claim with prejudice reflects that (1) Erum twice missed deadlines for filing his pretrial statement, despite being granted an extension; (2) Erum missed a scheduled settlement conference on April 18, 2017, with no explanation as to why until three weeks later on May 11, 2017; (3) Erum missed both the initial and rescheduled deadlines for filing his pretrial documents and ultimately refused to file any pretrial documents; (4) Erum had not acted in good faith during settlement negotiations with Llego; (5) the circuit court had already sanctioned Erum five times, yet Erum still was not complying with the circuit court's deadlines and court orders.

[22] The majority claims that "the circuit court did not cite any rule as authority in its Dismissal Order." Majority at 31-32. The circuit court's dismissal order states that Llego orally moved to dismiss pursuant to HRCP Rules 16 and 37, and the circuit court minutes from the August 24, 2017 hearing also state that the circuit court determined that Llego's oral motion was reasonable and granted the oral motion. Thus, there is no question that the circuit court dismissed Erum's claim with prejudice pursuant to HRCP Rules 16 and 37.

HRCP Rules 16(f) and 37(b)(2)(C). HRCP Rule 16(f) permits the trial court to "make such orders" either "upon motion" — as the circuit court did here — or, upon "the judge's own initiative[.]" Haw. R. Civ. P. 16(f). Because the rules explicitly allow a presiding court to dismiss an action when a party fails to appear at a pretrial conference, as Erum failed to appear at the August 24, 2017 pretrial conference, the circuit court's order dismissing Erum's case with prejudice did not "clearly exceed[] the bounds of reason or disregard[] rules or principles of law or practice[.]" See Amfac, Inc., 74 Haw. at 114, 839 P.2d at 26. Accordingly, it was not an abuse of discretion.

2. The Blaisdell standard for involuntary dismissal does not apply to dismissal pursuant to HRCP Rules 16(f) and 37(b)(2)(C).

Despite the fact that the circuit court did not rely upon HRCP Rule 41(b)[23] in dismissing Erum's case, the majority imports the standard for an involuntary dismissal pursuant to HRCP Rule 41(b), as set forth in Blaisdell, 125 Hawaiʻi at 49, 252 P.3d at 68, and applies it for the first time to a dismissal pursuant to HRCP Rules 16(f) and 37(b)(2)(C). Majority at 29-37. In applying the Blaisdell standard here, the majority creates a

[23] HRCP Rule 41(b) (2012) states in relevant part:

> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against it.

new rule for dismissals pursuant to HRCP Rules 16(f) and 37(b)(2)(C) and proposes to apply this standard to involuntary dismissals with prejudice pursuant to any rule.[24] Majority at 34-37.

In addition, the majority expands upon Blaisdell's standard for involuntary dismissals pursuant to HRCP Rule 41(b) and creates an even higher standard. Compare Majority at 30-31 ("Dismissal with prejudice is not an abuse of discretion when a plaintiff's deliberate delay or contumacious conduct causes actual prejudice. Additionally, . . . the sanction of dismissal with prejudice . . . may be invoked only when the actual prejudice cannot be addressed through lesser sanctions.") (emphasis added) (citing Chen v. Mah, 146 Hawaiʻi 157, 179-80, 457 P.3d 796, 818-19 (2020)),[25] with Blaisdell, 125 Hawaiʻi at 49,

[24] As the majority notes, HRCP Rule 41(b)(1) permits a defendant to move for dismissal for failure to comply with the HRCP or any court order. Majority at 34, 36 n.31. However, it is a fallacy to state that whenever a defendant moves for dismissal with prejudice as a sanction for failure to appear or follow a court order, HRCP Rule 41(b)(1) applies. To the extent that "HRCP Rule 16 does not state that it is excepted from HRCP Rule 41(b)(1)[,]" Majority at 34 n.32, neither does HRCP Rule 41(b)(1) specifically state that a dismissal pursuant to HRCP Rules 16 and 37 must satisfy the standard for HRCP Rule 41(b)(1).

[25] The majority correctly notes that its expansion of the Blaisdell standard for involuntary dismissals pursuant to HRCP Rule 41(b) began with Chen, 146 Hawaiʻi at 179–80, 457 P.3d at 818-19. Majority at 30 n.21. In Chen, the majority imported the Blaisdell standard for an involuntary dismissal to replace the established test for granting a defendant's motion to set aside entry of default, despite the fact that Blaisdell defined the circumstances when a court could properly dismiss a plaintiff's claim with prejudice. Id. at 181, 183, 457 P.3d at 820, 822 (Recktenwald, C.J. dissenting). In my view, the continued expansion of the Blaisdell standard,

(continued . . .)

252 P.3d at 68 ("The threshold standard for granting an involuntary dismissal of a complaint with prejudice is set high: the record must show deliberate delay, contumacious conduct or actual prejudice. . . . absent a clear record of delay or contumacious conduct . . . a [trial] court [must] consider less severe sanctions and explain, where not obvious, their inadequacy for promoting the interests of justice.") (internal quotation marks and citation omitted). Accord Shasteen, Inc. v. Hilton Hawaiian Vill. Joint Venture, 79 Hawaiʻi 103, 107, 899 P.2d 386, 390 (1995) ("[A]n order of dismissal cannot be affirmed '[a]bsent deliberate delay, contumacious conduct or actual prejudice[.]'") (citation omitted).

Under Blaisdell and its predecessors, a trial court did not abuse its discretion by dismissing a case if the record showed "deliberate delay, contumacious conduct or actual prejudice" and the trial court need only explain why lesser sanctions were inadequate to promoted the interests of justice "where not obvious[.]" 125 Hawaiʻi at 49, 252 P.3d at 68 (emphasis added). However, under the majority's new standard, a

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to situations in which it has never before applied, is incorrect.

The majority mischaracterizes my view, stating that "the dissent would allow dismissal with prejudice solely based on a showing that the defendant suffered actual prejudice, without any causal connection to the plaintiff's conduct." See Majority at 30 n.21. Simply put, I do not believe that the Blaisdell standard — let alone a heightened Blaisdell standard — should apply to a dismissal pursuant to HRCP Rules 16(f) and 37(b)(2)(C).

trial court abuses its discretion when it enters an involuntary dismissal with prejudice, pursuant to any rule, unless there is (1) a clear record of deliberate delay or contumacious conduct (2) that causes actual prejudice, and (3) the trial court justifies why the actual prejudice cannot be addressed through lesser sanctions, even when it is obvious from the record why lesser sanctions are inadequate to promote the interests of justice. See Majority at 30-31. What this court characterized as an already "high standard" in Blaisdell, the majority makes even higher. See 125 Hawaiʻi at 49, 252 P.3d at 68.

Thus, I disagree with the majority's application of its heightened HRCP Rule 41(b) standard to this case. However, even if our precedent did require application of the Blaisdell standard to dismissals with prejudice pursuant to HRCP Rules 16(f) and 37(b), the circuit court did not abuse its discretion by dismissing Erum's case because Erum's deliberate delay over three years is clear from the record. "A dismissal with prejudice would not constitute an abuse of discretion where a plaintiff's deliberate delay causes actual prejudice to a defendant. Although the law presumes injury from unreasonable delay, the presumption of prejudice is rebuttable upon a showing that actual prejudice did not occur." Id.

The majority's reliance on Ryan v. Palmer, 130 Hawaiʻi

321, 310 P.3d 1022 (App. 2013), to support its conclusion that Erum's conduct did not amount to deliberate delay actually illustrates the egregiousness of Erum's dilatory conduct. See Majority at 38-39. In Ryan, the circuit court dismissed the plaintiff's claim just twenty-two days after the deadline for filing a pretrial statement, and the dismissal with prejudice was based solely on the plaintiff's failure to file the pretrial statement. Id. at 322, 310 P.3d at 1023. In its decision vacating the order of dismissal, the ICA noted that (1) the "plaintiff was not dilatory in any [other] respect" and that the failure to file a pretrial statement alone does not constitute deliberate delay; (2) the defendant did not claim actual prejudice at any point or refute the plaintiff's argument that they suffered no prejudice; and (3) the record did not indicate that the circuit court considered any sanctions less severe than dismissal. Id. at 324, 310 P.3d at 1025 (emphasis added).

While missing a single filing deadline does not constitute deliberate delay, Erum engaged in numerous dilatory tactics that, taken together, show a deliberate attempt to delay: (1) twice missing deadlines for filing of pretrial statements; (2) refusing to dismiss his property damage claim that had resulted in a final judgment on the merits three years earlier, then filing a writ of mandamus seeking to vacate the small

claims court judgment; (3) acting in bad faith by verbally agreeing to settlement terms and then refusing to sign the settlement agreement, in an attempt to obtain more money from Llego; (4) seeking multiple extensions and continuances from the circuit court to prolong the litigation and avoid trial; (5) first missing deadlines for filing pretrial documents, then promising to file them, and finally refusing to file them at all; (6) raising the issue of his dismissed-then-reinstated chapter 13 bankruptcy, which caused the circuit court to take off calendar (a) a settlement conference; (b) a hearing on Llego's third motion to dismiss; and (c) the trial, only for Erum to concede the following month that the bankruptcy had no bearing on this case; (7) failing to appear at a settlement conference that was scheduled at the parties' request, then inexplicably failing to contact the court to explain his absence until five weeks later; and (8) failing to appear at a scheduled pretrial conference four weeks before trial, then failing to contact the circuit court to explain his non-appearance until five days before trial had been scheduled. By the time the circuit court finally dismissed Erum's case with prejudice, the accident had occurred more than five years earlier, and the litigation had continued for more than three years.

In Ryan, the ICA held that the failure to file a

pretrial statement alone does not constitute deliberate delay. Id. at 324, 310 P.3d at 1025. But here, the majority holds that the failure to file a pretrial statement, refusal to comply with the circuit court's scheduling order by submitting pretrial documents, failing to appear at a scheduled settlement conference and a pretrial conference, and other, more creative dilatory tactics such as reinstating dismissed bankruptcy proceedings and filing a petition for a writ of mandamus to this court to avoid going to trial also do not rise to the level of deliberate delay. I have a deep sense of foreboding for our already overburdened trial courts, now that the majority gives license to such tactics.

Unlike in Ryan, Llego claimed actual prejudice numerous times during these proceedings. See Blaisdell, 125 Hawaiʻi at 49, 252 P.3d at 68 ("Although the law presumes injury from unreasonable delay, the presumption of prejudice is rebuttable upon a showing that actual prejudice did not occur."). This case is also distinguishable from Ryan because here, the circuit court had already imposed monetary sanctions five times, but these sanctions appeared to have no effect on Erum — likely because, based on the record, he had no intention of ever paying them. It is obvious from the record that the circuit court had already considered and ordered lesser sanctions to no avail, and

that lesser sanctions were inadequate to promote the interests of justice. See Blaisdell, 125 Hawaiʻi at 49, 252 P.3d at 68.

Thus, even if our precedent did require Blasdell's HRCP Rule 41(b) standard for dismissals with prejudice pursuant to HRCP Rules 16(f) and 37(b), the circuit court did not abuse its discretion by dismissing Erum's claim.

3. The circuit court's dismissal order adequately stated its findings for dismissing with prejudice pursuant to HRCP Rules 16(f) and 37(b)(2)(C).

Despite the fact that the record in this case amply demonstrates that the circuit court did not abuse its discretion by dismissing Erum's claim with prejudice, the majority takes this opportunity to announce a new prospective rule that "[w]henever a case is involuntarily dismissed with prejudice, the trial court must state essential findings on the record or make written findings as to deliberate delay or contumacious conduct and actual prejudice and explain why a lesser sanction than dismissal with prejudice is insufficient to serve the interests of justice."[26] Majority at 53.

[26] The majority justifies its new rule, in part, on the need for "efficacious and meaningful" appellate review. Majority at 52. The majority purportedly seeks to save appellate courts the trouble of "review[ing] the entire record for abuse of discretion" when there are no specific findings underlying the involuntary dismissal. Majority at 53. This reasoning is both suspect and illogical, given that it is offered in the same opinion where the majority, having combed the record for errors not raised by the parties, chooses to address an alleged HRCP Rule 7(b) violation by the circuit court, see Majority at 28-29, and to vacate the circuit court's orders of sanctions against Erum because the sanction orders did not

(continued . . .)

Again, this new rule conflates the standard for involuntary dismissal pursuant to HRCP Rule 41(b) with dismissal as a sanction, pursuant to HRCP Rules 16(f) and 37(b)(2)(C), and creates a new rule for all involuntary dismissals with prejudice. See supra Part II(B)(2). Even more confusing is the majority's assertion that "[m]inimal oral or written findings will suffice when the cited rule provides the precise conduct in question that warrants dismissal and the order of dismissal or rule specifically provides the party with the ability to seek reinstatement of the case." Majority at 53 n.40.

When a party fails to appear at a pretrial conference, HRCP Rule 16(f) empowers a trial court to "make such orders with regard thereto as are just . . . and among others any of the orders provided in Rule 37(b)(2)(B),(C),(D)." HRCP Rule 37(b)(2)(C) in turn explicitly permits the presiding court to "dismiss[] the action or proceeding or any part thereof[.]" Here, the dismissal order states that (1) Erum failed to appear at a scheduled pretrial conference on August 24, 2017; (2) the circuit court orally ordered the parties' appearance at a hearing on April 18, 2017; (3) the circuit court waited forty

explicitly contain findings of bad faith or cite the legal authority for imposition of the sanction. See Majority at 58-65. Although Erum did not challenge the award of sanctions in either his appeal to the ICA or his application for writ of certiorari to this court, the majority still chooses to address the issue here.

minutes for Erum after the time the conference was scheduled to begin and the bailiff called for him three times outside the courtroom; and (4) after Erum still failed to appear, the circuit court dismissed Erum's case with prejudice for failure to appear at a scheduled pretrial conference, "pursuant to Rules 16 and 37 of the Hawaiʻi Rules of Civil Procedure." Thus, the circuit court's findings in the dismissal order meet the majority's standard for "[m]inimal oral or written findings," since "the cited rule provides the precise conduct in question that warrants dismissal[.]" See Majority at 53 n.40.

However, the majority adds an additional requirement — the ability to seek reinstatement of the case — which underscores the difference between a dismissal pursuant to HRCP Rules 16(f) and 37(b)(2)(C) and a dismissal pursuant to HRCP Rule 41(b) and similar rules. Dismissal as a sanction pursuant to HRCP Rules 16(f) and 37(b)(2)(C) does not allow the sanctioned party to seek reinstatement within a specified period of time. However, when a court sua sponte enters a dismissal with prejudice for failure to prosecute pursuant to HRCP Rule 41(b)(2), or its analog Rule 12(q) of the Rules of the Circuit Courts of the State of Hawaiʻi, the "dismissal may be set aside and the action reinstated by order of the court for good cause shown upon motion duly filed not later than ten [(10)] days from

the date of the order of dismissal." Ryan, 130 Hawai'i at 323, 310 P.3d at 1024. In a case where the circuit court entered a dismissal as a sanction pursuant to HRCP Rules 16(f) and 37(b)(2)(C), as it did here, minimal oral or written findings will never suffice because the rule does not specifically provide the party with the ability to seek reinstatement of the case, and a court is unlikely to take the extraordinary step of providing for reinstatement in its order of dismissal.

The majority's conclusion thus belies its claim that minimal oral or written findings will suffice, because that will only apply to cases "when the cited rule provides the precise conduct in question that warrants dismissal and the order of dismissal or rule specifically provides the party with the ability to seek reinstatement of the case." Majority at 53 n.40 (emphasis added). In the instant case, despite the fact that the circuit court set forth findings in the dismissal order, the majority demands findings that are more robust and specific. In doing so, the majority overlooks the fact that such specificity in findings often will impose an additional and unnecessary burden on trial courts that is impracticable to satisfy, especially given their already crowded court dockets.

Accordingly, I would not require trial courts to make findings on the record of deliberate delay or contumacious

conduct and actual prejudice when entering a dismissal with prejudice pursuant to HRCP Rules 16(f) and 37(b)(2)(C), especially when the record, as demonstrated here, amply supports it.

B. The circuit court did not abuse its discretion by denying Erum's emergency motion.

Having already reviewed the pleadings, considered the entire case record, heard oral argument, and decided to dismiss Erum's claim with prejudice, the circuit court did not abuse its discretion by denying Erum's emergency motion.

Contrary to the majority's claim that the circuit court failed to consider the merits of Erum's emergency motion, Majority at 57, the record does not specify whether the circuit court considered the merits of Erum's argument or how the circuit court construed Erum's emergency motion. The record only indicates that the circuit court denied Erum's motion on September 15, 2017 — three weeks after orally granting Llego's fifth motion to dismiss. Thus, it is entirely plausible that the circuit court considered Erum's emergency motion, including Erum's arguments that (1) Erum should be permitted time to respond to Llego's motion to dismiss; (2) Llego's motion should have been made in writing; and (3) the circuit court needed additional time to consider Llego's motion, and still decided to

deny Erum's motion.[27]

Nor was the circuit court required to denominate Erum's emergency motion as a motion to reconsider in order to actually consider the motion. Merely calling the motion by a different name (motion to reconsider) is a distinction without a difference. Irrespective of how Erum titled his emergency motion, he stated his arguments for the circuit court's consideration, and the record does not support the majority's conclusion that the circuit court's denial of Erum's motion connotes a failure to consider the motion.

However, even if the circuit court did not construe Erum's emergency motion as a motion to reconsider or consider the merits of Erum's arguments, the circuit court still did not abuse its discretion because construing Erum's filing differently would not have provided him with another route to relief.

This court has stated that courts and administrative agencies have discretion to construe the filings of pro se litigants liberally to promote access to justice. Waltrip, 140

[27] Based on the fact that the circuit court had previously considered three written motions to dismiss by Llego based on similar grounds — Erum's failure to either comply with court deadlines or to appear — and that Erum had responded to each of those, the record supports the inference that the circuit court did not believe that it would benefit from an additional written motion from Llego, response by Erum, or additional time to consider Llego's fifth motion to dismiss.

Hawaiʻi at 239, 398 P.3d at 828. We provided this admonishment to warn courts and administrative agencies against "construing away" jurisdiction when a pro se litigant misbrands a filing, and the effect of the misbranding is to foreclose relief, but another route to relief is available. Id. at 241, 398 P.3d at 830. In such situations, we have instructed that "pro se filings, even when 'misbranded,' should be reasonably construed in a manner that 'results in identifying a route to relief, not in rendering relief impossible.'" Id. (quoting Mata v. Lynch, 576 U.S. 143, 151 (2015)).

However, this court has never stated, as the majority does now, that "a court abuses its discretion if it construes a filing by a pro se litigant in a manner that prevents the litigant from proceeding when a reasonable, liberal construction of the document would permit the litigant to do so." Majority at 55-56 (citing Waltrip, 140 Hawaiʻi at 239, 398 P.3d at 828). Here, the majority uses Waltrip's instruction that courts should exercise discretion to construe pro se filings liberally when it is possible to identify a route to relief for the litigant to leap to the conclusion that a court abuses its discretion by failing to construe a filing as a reviewing court later deems proper. This broadening of the liberality doctrine is neither supported by our holding in Waltrip, nor appropriate to the

facts of this case.

The circuit court exercised its discretion to deny Erum's emergency motion, and this denial did not "clearly exceed[] the bounds of reason or disregard[] rules or principles of law or practice to the substantial detriment of a party litigant." See Amfac, 74 Haw. at 114, 839 P.2d at 26. As previously noted, even if the circuit court explicitly denominated Erum's motion as a motion to reconsider, it still would not have provided a "route to relief" for Erum, see Waltrip, 140 Hawai'i at 241, 398 P.3d at 830, because the circuit court could have deemed that the interests of justice supported its original decision to grant Llego's fifth motion to dismiss.[28] This was not a case where the circuit court was faced with a pro se litigant who, but for a misbranded filing, could have proceeded with his case if the circuit court merely construed the filing more liberally. Instead, the circuit court was faced with Erum — a retired attorney who was admitted to practice in another state for over thirty years and chose to represent

[28] Both at the hearing and in its dismissal order, the circuit court provided justification for dismissing Erum's case with prejudice, stating that Llego's fifth motion to dismiss was "reasonable" and that the circuit court had "reviewed the pleadings, considered the entire case record and heard oral argument[.]" Thus, the record does not support the majority's conclusion that the circuit court might have decided not to dismiss Erum's claim with prejudice if it had treated Erum's emergency motion as a motion to reconsider. See Majority at 57-58.

himself in numerous legal matters in Hawaiʻi. Erum was not a pro se litigant who merely misbranded his filing and should have been assisted by the circuit court in identifying a route to relief, but a litigation-savvy retired attorney who engaged in numerous creative tactics to prolong his case for more than three years, with seemingly no intention of ever proceeding to trial. Having already determined that dismissal with prejudice was warranted pursuant to HRCP Rules 16(f) and 37(b)(2)(C), the circuit court did not abuse its discretion by denying Erum's emergency motion for more time to engage in similar tactics.

Although Erum was technically proceeding pro se, I disagree with the majority that the circuit court abused its discretion by not explicitly denominating Erum's emergency motion as a motion to reconsider, because doing so would not have provided Erum with a route to relief.

III. CONCLUSION

For the reasons stated above, I respectfully dissent. In accordance with the plain language of HRCP Rules 16(f) and 37(b)(2)(C), I would hold that the circuit court did not abuse its discretion by dismissing Erum's claim with prejudice as a sanction for his failure to appear at a scheduled pretrial conference, or, by denying Erum's emergency motion. Consequently, I would affirm the ICA's June 28, 2019 judgment on

appeal, issued pursuant to its April 30, 2019 summary disposition order.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama