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NOS. CAAP-23-0000180, CAAP-23-0000465,
CAAP-24-0000025 AND CAAP-24-0000374

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

JARED KAWAOKA MURAYAMA, Individually and as Co-Trustees of the JARED AND DONNA MURAYAMA 1997 TRUST dated January 8, 1997, ET AL., Plaintiffs/Counterclaim Defendants-Appellants,
v.
KALANI CONSTRUCTION INCORPORATED, a Hawaiʻi corporation; ET AL.; Defendants/Counterclaimants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 5CC191000062)

MEMORANDUM OPINION
(By: Nakasone, Chief Judge, Wadsworth and Guidry, JJ.)

This consolidated appeal[1] arises out of a dispute between a construction contractor and the appellant for whom the

[1] On February 26, 2025, this court consolidated the appeals in CAAP-23-0000180, CAAP-23-0000465, CAAP-24-0000025, and CAAP-24-0000374 under CAAP-23-0000180. CAAP-23-0000180 involves sanctions for a motion for interlocutory appeal (**Interlocutory Appeal Sanction**). CAAP-23-0000465 involves sanctions for a motion in limine (**MIL**) violation (**MIL Violation Sanction**). CAAP-24-0000025 is the appeal arising out of the trial. CAAP-24-0000374 involves attorneys' fees to the prevailing party.

contractor built a warehouse, and their claims against each other regarding whether they had a partnership agreement to construct the warehouse, how much the contractor was owed for construction of the warehouse, and the ownership of equipment the appellant paid for that was used by the contractor in the warehouse's construction. After the appellant's complaint was dismissed on summary judgment, an eight-day jury trial was held in April 2023 on the contractor's counterclaim, and the contractor prevailed. This appeal challenges two sanction orders, various summary judgment, discovery, and evidentiary rulings, the special verdict form, the judgment, and the attorneys' fees awarded to the contractor. We affirm in part, vacate in part, and remand for a new trial on the complaint and the counterclaim. We reverse the two sanction orders.

Plaintiff/Counterclaim Defendant-Appellant Jared Kawaoka Murayama (**Jared**), individually and in his capacity as trustee of the Jared and Donna Murayama 1997 Trust (**Trust**), and Jared's spouse, Counterclaim Defendant-Appellant Donna Moi Linn Murayama in her trustee capacity (**Donna**), appeal from the Circuit Court of the Fifth Circuit's (**Circuit Court**)[2] January 12, 2024 Final Judgment (**Judgment**) in favor of Defendants/ Counterclaimants-Appellees Randal K. Miyashiro, Sr. (**Randal**) and Kalani Construction Incorporated (**KCI**), and from various orders.

This court also separately resolved another related appeal arising out of the same underlying case, in a 2024 summary disposition order reversing a $6,887.43 sanction against the same appellant. See Murayama v. Kalani Construction Inc., No. CAAP-21-0000399, 2024 WL 4647904 (Haw. App. Nov. 1, 2024) (SDO).

[2] The Honorable Kathleen N.A. Watanabe presided.

Jared and Donna collectively raise the following seventeen points of error (**POEs**) on appeal,[3] contending that the Circuit Court erred in: **(1)** denying Jared's motion for partial summary judgment (**MPSJ**) as to the formation of a partnership contract (**Partnership MPSJ Order**); **(2)** dismissing all claims against Defendant-Appellee Samuel K. Thronas Construction, Inc. (**Thronas**) on summary judgment (**Thronas MSJ Order**);[4] **(3)** dismissing Jared's Complaint on summary judgment on the basis that it should have been brought in Jared's trustee capacity (**Complaint MSJ Order**); **(4)** denying Jared's motion to compel discovery or impose sanctions due to KCI's untimely acknowledgment of deleted evidence and discovery production; **(5)** issuing the Interlocutory Appeal Sanction of $8,968.58 against Jared for filing a motion for leave to file an interlocutory appeal; **(6)** issuing the MIL Violation Sanction for a question asked by Donna's counsel, finding that the question violated an in limine ruling, and awarding Randal and KCI $329,763.18 in attorneys' fees and costs as the sanction; **(7)** excluding evidence, including expert witness testimony, regarding the value of certain equipment Jared had purchased for KCI's use to construct the warehouse (the **Equipment**), effectively dismissing Jared and Donna's affirmative defense of offset; prohibiting Jared from cross-examining Randal about the money Randal received from selling the Equipment; admitting evidence of the value of the warehouse; and excluding evidence that Randal wanted his spouse and KCI co-director, Defendant-Appellee Hildegarde Miyashiro (**Hildegarde**), to sell Randal her

[3] We have consolidated, restated, and renumbered the POEs for clarity and conciseness.

[4] Though not identified as a POE, Jared claims the Circuit Court erred in dismissing all claims in the Complaint as to Thronas.

50% share of KCI so that Randal could then sell it to Jared; **(8)** ordering Jared and Donna to remove trial exhibits concerning the Equipment and denying Jared an opportunity to file an offer of proof concerning the defense of offset; **(9)** denying Jared and Donna's pre-verdict motions for judgment as a matter of law (**JMOL**); **(10)** giving the jury incorrect and incomplete instructions; **(11)** sending the jury a defective Special Verdict Form; **(12)** entering a Judgment that awards duplicative damages on counts 1, 3, and 5; **(13)** awarding prejudgment interest for amounts allegedly owed for future rents; **(14)** denying Donna's motion to amend the trial exhibit list; **(15)** denying Donna's renewed motion for JMOL or for new trial; **(16)** entering a defective Judgment that incorrectly states the First Amended Counterclaim (**FACC**) was amended to conform to the evidence presented at trial as to the respective parties' liability on each count and that improperly awarded both legal and equitable damages when they are alternative forms of relief; **(17)** awarding attorneys' fees on equitable counts that are in excess of the statutory threshold, failing to apportion the fees, not identifying the grounds for the fee awards, awarding the fees jointly and severally, and failing to find that the attorneys' fees and costs were reasonable.

As POE 3's challenge to the Complaint MSJ Order is dispositive, we focus our review in this opinion to the summary judgment rulings in POEs 1, 2, and 3; the denial of the motion to compel discovery or impose sanctions in POE 4; and the Interlocutory Appeal Sanction and the MIL Violation Sanction in POEs 5 and 6. Because we conclude that Jared's Complaint was erroneously dismissed by the Complaint MSJ Order, and the factually intertwined Complaint and FACC should have been tried together, we vacate the Judgment and the derivative award of attorneys' fees. Because we remand for a new trial on the Complaint and the FACC, and the trial record will develop differently after remand, we do not address the remaining trial-related and judgment-related POEs. We do, however, briefly address certain errors related to the Special Verdict Form to provide guidance on remand.[5]

I. BACKGROUND

On April 25, 2019, Jared filed a Complaint alleging that in May 2014, Jared engaged KCI as a general contractor to develop a lot owned by the Trust (**project**). Jared purchased the Equipment for KCI's use on the project. The Complaint alleged that in 2017, Jared demanded KCI return the Equipment, but KCI did not, and Jared filed a theft report with the police. Jared's Complaint was filed against Randal, KCI, Hildegarde, and other parties who allegedly purchased the Equipment from KCI, including Thronas. The Complaint included claims for: conversion of the Equipment in Count 1, civil conspiracy in the commission of conversion in Count 2, declaratory judgment that Jared had valid title to the Equipment in Count 3, injunctive relief enjoining further transfer of the Equipment in Count 4, and punitive damages.

On March 11, 2021, Randal and KCI filed their FACC against Jared individually, and against Jared and Donna in their trustee capacities as to two counts. The FACC alleged that in May of 2014, Jared, "individually and as Co-trustee of the Trust," engaged Randal to form a partnership to develop a lot owned by the Trust through construction of a warehouse; that an oral partnership agreement (**Partnership Agreement**) was formed with Jared but the "specific terms of the Partnership

[5] The judge who presided over these proceedings has retired, and a different judge will preside on remand.

[Agreement] were not memorialized in writing"; that the partnership ultimately obtained favorable pricing on materials; that Randal and KCI declined other jobs to work on the project; that Randal and KCI did not receive fair market value (**FMV**) for their work on the project; and that Jared breached the Partnership Agreement by failing to share profits obtained from the project. The FACC brought claims for: Count 1, Declaratory Ruling, seeking a declaratory judgment that a partnership was formed, that the Equipment was a partnership asset, and that Jared owed Randal monies; Count 2, Breach of Duty of Good Faith and Fair Dealing; Count 3, Breach of Contract, for breach of the Partnership Agreement; Count 4, Misrepresentation; Count 5, Unjust Enrichment; Count 6, Civil Conspiracy; Count 7, Fraudulent Inducement; and Count 8, Violation of Hawaii Revised Statutes (**HRS**) § 480-2, for an unfair method of competition. As pleaded, all claims in the FACC were brought against Jared in his individual capacity, except for Count 5 (Unjust Enrichment) against "Jared and the Trust" and Count 6 (Civil Conspiracy) against "Jared and Donna."[6] The FACC also alleged that Jared and Randal's mutual understanding of the Partnership Agreement was that: Jared would provide financing to purchase materials and Equipment for the project; KCI and Randal would perform work as general contractor and manager for the project; Jared and Randal "would hold themselves out as partners to assist in securing favorable pricing" for the materials, Equipment, and subcontractor work; and Randal and Jared would "share in the reasonable profits and/or losses" in the project. The FACC

[6] Count 5, Unjust Enrichment, pled that if no partnership was found, Randal and KCI "are entitled to compensation because Jared and the Trust would be unjustly enriched"; and "[t]o prevent injustice, Jared and the Trust should be ordered to compensate [KCI] and Randal in amounts to be proven at trial." (Emphases added.) The allegations in Count 6, Civil Conspiracy, paragraphs 64 to 68, were pled against "Jared and Donna."

alleged that the Equipment was in KCI's name, and KCI later sold the Equipment to "recoup a small amount of the monies owed by Jared under the terms of the Partnership [Agreement]."

The following abbreviated procedural history is pertinent to the POEs we address. The Circuit Court denied Jared's Partnership MPSJ, which argued that a partnership had not formed because there was no meeting of the minds, and that in any event Randal and KCI's claims were barred by the statute of frauds (**SOF**). The Circuit Court granted the Thronas MSJ on all claims against Thronas in the Complaint, on the basis that there was no evidence Thronas conspired to convert the Equipment. The Circuit Court granted Randal and KCI's Complaint MSJ as to all claims in the Complaint on the basis that the real party in interest was "the Trust" and not Jared individually.

The Circuit Court denied Jared's motion to compel discovery or impose sanctions, in which Jared had requested relief due to Randal and KCI's counsel's eleventh-hour admission that KCI's business records pertaining to the costs of the project, which were not produced, did indeed exist at one point, but had been deleted prior to litigation.

The Circuit Court issued the $8,968.58 Interlocutory Appeal Sanction against Jared based on "bad faith" arguments he raised in his motion for leave to file an interlocutory appeal of the Complaint MSJ Order that dismissed his Complaint.

During trial, the Circuit Court issued the MIL Violation Sanction against Jared and Donna when Donna's counsel asked Randal if it was true that he filed the FACC only because Jared first filed the Complaint, which the Circuit Court concluded was a violation of an in limine ruling.

At the conclusion of trial, the claims for Declaratory Relief (Count 1), Breach of Contract (Count 3), Unjust

Enrichment (Count 5), Misrepresentation (Count 4), and a punitive damages interrogatory were included on the Special Verdict Form. The jury's completed Special Verdict Form awarded Randal and KCI $2,323,000.00 for Declaratory Relief (Count 1), $1,440,000.00 for Breach of Contract (Count 3), $7,000,000.00 for Unjust Enrichment (Count 5), $1.00 for Misrepresentation (Count 4), and denied punitive damages. All of the damage awards in the Special Verdict Form were against Jared in both his trustee and individual capacities and Donna in her trustee capacity. The Circuit Court affirmed the awards in the Final Judgment.

II. STANDARDS OF REVIEW

Summary Judgment

The court reviews the grant of summary judgment de novo. Thomas v. Kidani, 126 Hawaiʻi 125, 127-28, 267 P.3d 1230, 1232-33 (2011).

Discovery Motions

Trial court rulings limiting the scope of discovery are reviewed for abuse of discretion. Fisher v. Grove Farm Co., 123 Hawaiʻi 82, 94, 230 P.3d 382, 394 (App. 2009).

Sanctions

"Regardless of whether sanctions are imposed pursuant to statute, circuit court rule, or the trial court's inherent powers, such awards are reviewed for an abuse of discretion." Kaina v. Gellman, 119 Hawaiʻi 324, 329, 197 P.3d 776, 781 (App. 2008) (citation omitted).

Verdict Form

"In analyzing alleged errors in special verdict forms, the instructions and the interrogatories on the verdict form are considered as a whole." Montalvo v. Lapez, 77 Hawaiʻi 282, 292, 884 P.2d 345, 355 (1994) (citation omitted). See also Makila

Land Co. v. Heirs or Assigns of Apaa (k), 146 Hawaiʻi 600, 616, 463 P.3d 1257, 1273 (App. 2020) (applying the same standard of review as Montalvo and the standard of review for jury instructions to verdict forms). On appellate review of civil trial jury instructions, we review "to determine whether, considered as a whole, the instructions were prejudicially insufficient, erroneous, inconsistent, or misleading." Foresman v. Foresman, 156 Hawaiʻi 128, 135, 570 P.3d 1095, 1102 (2025) (citation omitted).

III. DISCUSSION

A. The denial of Jared's Partnership MPSJ was not erroneous (POE 1).

Jared contends his July 23, 2020 Partnership MPSJ on the contract claims in the FACC should have been granted because the "alleged contract lacked material terms" where "KCI and Randal never offered evidence of the terms of payment or the duration of the alleged contract[,]" and the contract claims were subject to the SOF, which required the alleged agreement between the parties to be in writing.[7]

The record reflects the Circuit Court denied the motion at a September 1, 2020 hearing, concluding that there

[7] The SOF, HRS § 656-1 (2016), requires contracts concerning the sale of lands or any interest that cannot be performed within one year to be in writing, as follows:

> No action shall be brought and maintained in any of the following cases: . . . (4) Upon any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them; (5) Upon any agreement that is not to be performed within one year from the making thereof; . . . unless the promise, contract, or agreement, upon which the action is brought, or some memorandum or note thereof, is in writing, and is signed by the party to be charged therewith[.]

"are genuine issues of material facts" as to whether an alleged agreement or partnership was formed.

Summary judgment is appropriate if the evidence in the record shows no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law; a fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action. Ralston v. Yim, 129 Hawaiʻi 46, 55-56, 292 P.3d 1276, 1285-86 (2013). Once the moving party satisfies its initial burden of production, the burden shifts to the nonmoving party to demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Id. at 56-57, 292 P.3d at 1286-87.

We address Jared's first argument regarding the lack of material terms precluding contract formation. KCI and Randal's Answering Brief asserts that Jared did not make the Opening Brief's "broad arguments relating to a contract generally" in the MPSJ record below, and these arguments should be waived. Jared's Opening Brief argument in this regard is set forth in half a page, without pointing to where in the ***relevant record of the Partnership MPSJ*** that the argument raised on appeal was made below. Instead, Jared points to testimony from the 2023 trial to support his argument that the Circuit Court erroneously denied the Partnership MPSJ because "[t]here was no contract, as a matter of law." The trial record is not the correct record upon which this court may review a pre-trial summary judgment ruling. Jared's challenge to the denial of the Partnership MPSJ on this ground lacks merit.

Jared's second argument, that the SOF barred the contract claim, is also set forth in half a page of the Opening Brief. Jared claims the SOF applied to the alleged contract, citing evidence supplied with his May 6, 2021 second motion for reconsideration of the denial of the Partnership MPSJ and other unspecified evidence "at trial and the verdict" that purportedly showed the existence of a rent-splitting agreement, which "is a contract of or concerning an interest in land" that "would take over a year to perform." Jared does not point to evidence in the relevant record of the Partnership MPSJ litigated in 2020 to support this argument on appeal. Jared's challenge to the denial of the Partnership MPSJ on this ground also lacks merit.

B. The grant of the Thronas MSJ was not erroneous (POE 2).

While not identified as a POE, Jared argues that the Thronas MSJ was erroneously granted because "[b]ut for Thronas' own declaration, neither he nor any of the Appellees offered ***evidence*** that Thronas paid FMV for the Fecon Head [equipment]." In support of this argument, Jared cites to purported evidence in the record for which inadequate or no citation is provided. In the Argument section's single paragraph devoted to the contention that the Circuit Court clearly erred by finding "there was no dispute that Thronas was a [bona fide purchaser (**BFP**)] who paid FMV" and that summary judgment for Thronas "should be reversed," Jared provides no legal analysis or authority. These arguments are waived. See Hawai‘i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(7). We affirm the Circuit Court's grant of the Thronas MSJ as to Thronas.

C. The grant of Randal and KCI's Complaint MSJ was erroneous (POE 3).

Jared argues the Circuit Court erred by dismissing Jared's Complaint "after finding that the Trust owned the equipment" and that therefore the "wrong Plaintiff" had brought the Complaint, and by disregarding KCI and Randal's long delay before challenging the Complaint under Hawaiʻi Rules of Civil Procedure (**HRCP**) Rule 17(a).[8] The record reflects that Randal and KCI's Complaint MSJ was filed August 29, 2022, three years after the April 25, 2019 Complaint was filed and less than two months before the then-scheduled trial date. The Complaint MSJ argued, *inter alia*, that the Trust owned the Equipment, not Jared, and therefore Jared in his individual capacity was not the "real party in interest" under HRCP Rule 17. In opposing the Complaint MSJ, Jared argued that under the Trust's terms, he was entitled to use Trust funds for any personal purchases, including luxuries, and that those purchases do not become property of the Trust. Jared also submitted a September 30, 2022 Assignment of Claims, in which Jared and Donna, in their trustee capacities, assigned to Jared all rights, title, and interest in and to the claims asserted in the Complaint. Jared further argued that Randal and KCI's real party in interest objection was untimely, and in any event, Jared was entitled to a reasonable time to substitute himself in his trustee capacity as plaintiff. The Circuit Court rejected Jared's arguments and granted summary judgment to dismiss the Complaint.

The not-the-real-party-in-interest defense under HRCP Rule 17 "is not jurisdictional and may be waived if not timely raised." <u>Dacanay v. Liberty Mut. Ins. Co.</u>, 108 Hawaiʻi 393,

[8] HRCP Rule 17(a) states in relevant part:

> Every action shall be prosecuted in the name of the real party in interest. . . . <u>No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for</u> ratification of commencement of the action by, or joinder or <u>substitution of, the real party in interest</u> . . . .

(Emphases added.)

399-400, 120 P.3d 1128, 1134-35 (App. 2005) (citations omitted). HRCP Rule 17(a) "should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice." Fujimoto v. Au, 95 Hawaiʻi 116, 143, 19 P.3d 699, 726 (2001) (citation omitted). Moreover, "modern rules of procedure are intended to allow the court to reach the merits," and HRCP Rule 17(a) "is designed to expedite litigation, not to allow narrow constructions or technicalities to interfere with the merits of a legitimate controversy." Id. (citation and internal quotation marks omitted). In Lagondino v. Maldonado, 7 Haw. App. 591, 596, 789 P.2d 1129, 1132 (1990), this court found a two-year-and-five-month delay for a real party in interest objection was untimely, and explained that the purpose of HRCP Rule 17 is

> to protect the defendant from a multiplicity of suits, to allow defendant to present all his defenses, to protect defendant from multiple liability. Since a real party in interest objection under Rule 17(a) is for the benefit of a defendant, it should be raised in a timely fashion or it may be deemed waived.
>
> . . . [W]hatever vehicle is utilized to present the objection, it should be done with reasonable promptness. Otherwise, the court may conclude that the point has been waived by the delay.
>
> Here, the [defendants] raised their HRCP Rule 17(a) objection by a motion for summary judgment almost two years and five months after [plaintiff] filed his complaint. . . . Clearly, the [defendants'] motion for summary judgment raising an objection under HRCP Rule 17(a) was untimely.

(citation modified) (emphases added).

Here, the record reflects that Jared, individually, is the real party in interest. The Trust states that Trust funds may be used for the benefit of Jared or Donna, including luxuries, and it does not state that purchases made or reimbursed with Trust funds remain the property of the Trust.

Even assuming arguendo the Complaint should have been filed by Jared and Donna in their trustee capacities, the Complaint MSJ was filed over three years into the litigation and did not constitute an objection lodged "with reasonable promptness." See id. (concluding a two-year-and-five-month delay in raising an HRCP Rule 17(a) objection was untimely). In addition, nothing in the record or the Complaint MSJ Order suggests Randal or KCI were in danger of duplicate suits by Jared in his separate capacities, and assuming arguendo such danger existed, it would have been cured by the Assignment of Claims. The jury trial that followed on Randal and KCI's FACC, without the intertwined claims in Jared's Complaint that also dealt with the parties' May 2014 arrangement or agreement for construction of the warehouse and the equipment dispute that followed, did not reach the merits of the claims brought by both sides. The Circuit Court's MSJ ruling was a narrow and technical misapplication of Rule 17(a). See Fujimoto, 95 Hawaiʻi at 143, 19 P.3d at 726. We conclude the Circuit Court erred in granting the Complaint MSJ and dismissing Jared's Complaint. See Ralston, 129 Hawaiʻi at 55-56, 292 P.3d at 1285-86.

D. The denial of Jared's request for any discovery relief in his motion to compel was outside the permissible scope of the Circuit Court's discretion (POE 4).

Regarding the denial of the motion to compel discovery, Jared argues that he was substantially prejudiced by KCI's failure to timely produce relevant documents and by the Circuit Court's failure to allow Jared to depose KCI regarding the deleted business records or to impeach Randal when he testified at trial that no records were deleted.

The record reflects that Jared had sought discovery from KCI and Randal as to their alleged money damages, including bookkeeping records supporting KCI's position that it worked at cost for the benefit of the alleged Partnership rather than for profit. Randal testified at deposition that he kept no records of costs and labor on the project, and Hildegarde testified that KCI typically kept records of income and expenses, but she did not know the form of those records, or where they were kept. KCI's former supervisor Liliane Corpuz (**Corpuz**) later testified at deposition that KCI did in fact keep records for the project, and that Hildegarde knew the records were kept on Quickbooks. Jared requested a meet and confer. One day after the close of discovery, KCI's counsel sent a letter to Jared (**Deleted Records Letter**) representing that bookkeeping records for the project had indeed been created and were originally saved on KCI's computer, but prior to litigation, they had already been deleted pursuant to Hildegarde's "routine practice" of deleting files once a job is completed, and that some new records had been found which would be turned over. Jared filed a motion to compel discovery or impose sanctions, seeking, *inter alia*, an extension of time to conduct discovery, an HRCP Rule 30(b)(6)[9] deposition of KCI to obtain sworn testimony about the alleged routine practice of deleting files, and a jury instruction mandating an "adverse inference to any KCI testimony about how the [project] affected its finances, profits, and/or alleged losses[.]" The Circuit Court denied the motion. At trial, Randal denied that any records related to the project were deleted, and the Circuit Court denied Jared's request to use the Deleted Records Letter to impeach Randal.

[9] HRCP Rule 30(b)(6) provides for the deposition of an entity or organization which "shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf[.]"

The following factors are relevant in determining whether a discovery sanction is appropriate:

> (1) the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery; (2) whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence; and (3) the inequity that would occur in allowing the offending party to accrue a benefit from its conduct.

Stender v. Vincent, 92 Hawaiʻi 355, 363, 992 P.2d 50, 58 (2000) (citation omitted). In Dahlager v. Jack's Diving Locker, No. CAAP-17-0000663, 2023 WL 4174552, at *7-8 (Haw. App. June 26, 2023) (mem. op.), this court held that the circuit court did not abuse its discretion in granting discovery sanctions for "failing to preserve [an item of physical evidence] and withholding . . . reports.".

Here, while the record does not clearly indicate whether KCI intentionally deleted or withheld discoverable evidence, it nonetheless suggests that Jared may have been misled as to whether KCI had kept certain bookkeeping records for the project in the first place. It appears that Hildegarde and Corpuz gave conflicting responses in discovery regarding the creation and deletion of KCI's records pertaining to the project. Specifically, KCI did not admit the existence and deletion of such records until after discovery closed, KCI made this admission in the Deleted Records Letter from counsel rather than in a sworn discovery response, and the Circuit Court denied the requested relief of further remedial discovery or an adverse inference instruction. These circumstances reflect that Jared was prejudiced by the denial of any of the various avenues for relief presented in the motion, in the face of KCI's culpable conduct. See Vincent, 92 Hawaiʻi at 363, 992 P.2d at 58. The record also reflects that inequity resulted when Jared was not permitted to impeach Randal's credibility at trial, where Randal denied that any project records were deleted, which allowed Randal and KCI to "accrue a benefit" from KCI's misleading discovery responses. See id. On this record, we conclude the Circuit Court's denial of any form of discovery relief that Jared requested in the motion was outside the permissible scope of its discretion. See Fisher, 123 Hawaiʻi at 94, 230 P.3d at 394.

E. The Interlocutory Appeal Sanction against Jared was outside the Circuit Court's permissible scope of its discretion (POE 5).

Jared argues, *inter alia*, that the Circuit Court's "bad faith" findings in the Interlocutory Appeal Sanction Order lack specificity and support in the record. Jared claims that his characterization of the pleadings was within the bounds of legitimate advocacy, and the Circuit Court failed to make a specific finding of bad faith.

The relevant record preceding the Interlocutory Appeal Sanction reflects that after the Circuit Court's October 11, 2022 oral ruling granting the Complaint MSJ, trial was continued to April 3, 2023. On December 20, 2022, Jared moved for leave to file an interlocutory appeal from the Complaint MSJ Order dismissing the Complaint, arguing that such an appeal would more speedily resolve the action and prevent the possibility of inconsistent verdicts on the Complaint and FACC. The Circuit Court denied the motion, finding that Jared had not "established that the standard" for an interlocutory appeal had been met. Further, citing its inherent powers under HRS § 603-21.9(6) (2016), the Circuit Court sanctioned Jared $8,968.58 for his "bad faith" argument that the Complaint and the FACC did not "mirror" each other, and for his "constant and continual movement in position" on whether he acted in his individual or trustee capacity, reasoning as follows:

> 2. The Court also finds, contrary to [Jared]'s arguments, that the claims in the Complaint, filed April 25, 2019 and First Amended Counterclaim, filed March 11, 2021 do not "mirror" each other.
>
> 3. The Court further notes the constant and continual movement in position on [Jared]'s part as Plaintiff with respect to his references to the Jared and Donna Murayama 1997 Trust dated January 8, 1997 ("Trust") versus his individual capacity in this case, including his positions in the Motion and filing of the Joinder.
>
> 4. . . . Specifically, the Court finds that [Jared]'s arguments are in bad faith based on: (a) the findings in paragraphs 2 and 3, above; (b) the reasons set forth in [Randal and KCI]'s Memorandum in Opposition to the Motion, filed January 24, 2023; (c) counsel's arguments made during the hearing on the Motion; and (d) the record in this case. Thus, the Court is awarding reasonable attorneys' fees and costs to Defendants/Counterclaimants for defending against the Motion in the amount of $8,968.58.

(Emphases added.)

A court may order a party or its attorney to pay an opposing party's attorney's fees and costs as a sanction for abusive litigation practices, but it is required to make a specific finding of bad faith. Kukui Nuts of Haw. Inc. v. R. Baird & Co., 7 Haw. App. 598, 624, 789 P.2d 501, 517 (App. 1990) (citation omitted). "'Bad faith' is defined as 'actual or constructive fraud or a neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive.'" Sandomire v. Brown, 144 Hawaiʻi 314, 331, 439 P.3d 266, 283 (App. 2019) (citations omitted). The record must show "clear evidence that the challenged actions [were] entirely without color, and [were] taken for reasons of harassment or delay or for other improper purposes." Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawaiʻi 452, 458, 903 P.2d 1273, 1279 (1995) (citations omitted). The perceived misconduct must be described in findings "with reasonable specificity," and "[f]or purposes of appellate review, a distinction must be made between 'zealous advocacy and plain pettifoggery[.]'" Id. at 459, 903 P.2d at 1280 (citations omitted).

Here, nothing about Jared's motion for interlocutory appeal, and no findings in the order issuing the Interlocutory Appeal Sanction, indicate that the motion was prompted by an interested or sinister motive, or that it was filed as an abusive tactic or for any improper purpose. In our view, it is not evident how the two specific grounds set forth in the order -- regarding whether the Complaint and FACC "mirror" each other, and Jared's interchanging references to his individual and trustee capacity -- rise to the level of sanctionable misconduct. See id. We conclude the Interlocutory Appeal Sanction was outside the permissible scope of the Circuit Court's discretion, and we reverse. See Kaina, 119 Hawai'i at 329, 197 P.3d at 781.

F. The MIL Violation Sanction was outside the permissible scope of the Circuit Court's discretion (POE 6).

Jared and Donna argue, *inter alia*, that the question for which the MIL Violation Sanction was imposed did not invite a narrative response that would violate the Equipment MIL Order; the MIL Violation Sanction lacked "a high degree of specificity in the factual findings"; sanctioning both Donna and Jared for a question asked by Donna's counsel constituted an abuse of discretion; and the controlling standard for awarding attorneys' fees as a sanction is that the conduct in question must have resulted in the unnecessary incurrence of attorneys' fees, which did not occur.

The record reflects that the Circuit Court granted Randal and KCI's request to exclude any evidence that the proceeds from Randal's sale of the Equipment offset any amounts Jared may have owed him (**Equipment MIL Order**), because presenting such evidence would be the functional equivalent of reasserting the claims in Jared's dismissed Complaint. The Circuit Court further "warned the parties and their counsel to . . . avoid asking questions . . . that would illicit narrative responses that could touch upon areas that the Court ruled were not to come in." At trial, Randal testified on direct examination that the reason he did not immediately bring his claim was because Jared had "millions of dollars" to defend himself, and because he needed time to find an attorney willing to take his case. On cross-examination, Donna's counsel asked Randal, "Isn't it true that you filed this case because [Jared] filed a claim against you first?" The Circuit Court excused the jury upon Randal's objection, and Randal orally moved for a mistrial or sanctions on the basis that Donna's counsel violated the Equipment MIL Order. The Circuit Court orally granted the motion for sanctions, sanctioning Jared and Donna, but not Donna's counsel, because it was "not convinced" the question posed by Donna's counsel "was intentional." It further gave the jury a curative instruction to disregard the question.

The Circuit Court's subsequently issued written MIL Violation Sanction, however, contradicted its oral finding that the question was not "intentional," finding that "<u>the question by [Donna's counsel] . . . was in bad faith</u> not only based on the prior orders of the Court but also because of the numerous warnings given to Defendants' counsel during the trial to abstain from going to areas that were barred by the Court's prior orders." (Emphasis added.) The $329,763.18 sanction against Jared and Donna as trustees and against Jared individually, compensated KCI and Randal for all attorneys' fees incurred after the Complaint was dismissed.

When a trial court imposes payment of attorneys' fees against a party as a sanction for bad faith conduct, it must find that the conduct "resulted in the unnecessary incurrence of attorney's fees." Lester v. Rapp, 85 Hawaiʻi 238, 242, 942 P.2d 502, 506 (1997) (citation omitted). In Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawaiʻi 292, 303, 972 P.2d 295, 306 (1999), a trial court's imposition of sanctions was held improper where there was "insufficient evidence" to "conclude that the attorney's fees incurred by Defendants were 'directly and unavoidably' caused" by the improper conduct.

Here, the question regarding the responsive nature of Randal's FACC to Jared's Complaint did not invite a narrative response, nor did it violate the Equipment MIL Order or the Circuit Court's further oral instructions, and it did not taint the jury with information about the Equipment. Randal's counsel objected before Randal could answer the question, and the Circuit Court gave the jury a curative instruction. No attorneys' fees were incurred by KCI and Randal as a result of the question. See Lester, 85 Hawaiʻi at 242, 942 P.2d at 506. The "bad faith" finding in the written order was not supported by "clear evidence" that the challenged action was "entirely without color," because the finding was contradicted by the Circuit Court's oral on-the-record finding that the question asked by Donna's counsel may not have been intentional. See Enos, 79 Hawaiʻi at 458, 903 P.2d at 1279 (citation omitted). Under these circumstances, the record does not reflect that the question itself, or the trial context within which it was asked, rose to the level of "bad faith" sanctionable conduct. We further conclude that the record does not support the imposition of sanctions against both Jared and Donna, as opposed to a sanction solely against Donna's counsel who asked the purportedly offending question. Assuming arguendo Donna or her counsel had an "interested or sinister motive" in asking the question, such motive cannot be ascribed to Jared. See Sandomire, 144 Hawaiʻi at 331, 439 P.3d at 283 (citations omitted); cf. Enos, 79 Hawaiʻi at 457, 903 P.2d at 1278 ("[B]ecause sanctions under HRCP Rule 11 are imposed only upon 'the person who signed' the 'pleading, motion, or other paper' and [plaintiffs' attorney] did not sign the motion for examination, HRCP Rule 11 is not applicable to him, and he cannot be sanctioned thereunder.").

We conclude the MIL Violation Sanction was outside the permissible scope of the Circuit Court's discretion, and we reverse. See Kaina, 119 Hawaiʻi at 329, 197 P.3d at 781.

G. Errors related to the Special Verdict Form (POEs 11, 12, 15, 16).

We briefly address the following issues related to the Special Verdict Form to provide guidance for the new trial on remand.

Jared and Donna argue, *inter alia*, that the Special Verdict Form did not conform to the claims in the FACC, in which only Count 5 was pleaded against the Trust and Counts 1, 3, and 4 were pleaded against Jared individually; the questions for each claim in the Special Verdict Form did not distinguish between Jared individually versus Jared and Donna as trustees; no damages are permissible for the Declaratory Relief claim; the $2,323,000.00 award for Declaratory Relief and $1,440,000.00 award for Breach of Contract were conflicting where both purported to compensate KCI and Randal for breach of contract but awarded different amounts; and a jury may not award equitable relief on the Unjust Enrichment claim if it also awarded damages for the Breach of Contract claim. These arguments have merit.

The Special Verdict Form identified Randal and KCI as "Plaintiffs," and Jared individually and Jared and Donna as co-trustees as "Defendants." The Special Verdict Form reflected the following jury responses for Questions 1 and 2 for Declaratory Relief; Questions 3 and 4 for Breach of Contract; and Questions 5, 6, and 7 for Unjust Enrichment:

> **Question No.1**
>
> **Was there a Partnership formed between Plaintiffs and the Defendants related to the Puhi Lot Project?**
>
> ✓ YES
>
> __ NO
>
> If your answer is "YES", proceed to answer Question No. 2.
>
> If your answer is "NO", do not answer Question No. 2, but proceed to Question No. 3.
>
> **Question No.2**
>
> **How much is owed to Plaintiffs?**
>
> $2,323,000
>
> Proceed to Question No. 3 if you answered this Question.
>
> **BREACH OF CONTRACT**
>
> **Question No.3**
>
> **Did the Defendants breach a contract it had with Plaintiffs?**
>
> ✓ YES
>
> __ NO
>
> If your answer is "Yes", proceed to answer Question No. 4.
>
> If your answer is "No", do not answer Question No. 4, but proceed to Question No. 5.
>
> **Question No.4**

> **How much is owed to Plaintiffs for the Defendants' breach of contract?**
>
> Damages: $1,440,000
>
> Proceed to Question No. 5.
>
> **UNJUST ENRICHMENT**
>
> **Question No. 5**
>
> **Did Plaintiffs confer a benefit upon the Defendants by building the Puhi Lot warehouse?**
>
> ✓ YES
>
> __ NO
>
> If your answer is "YES", proceed to answer Question No. 6.
>
> If your answer is "NO", do not answer Question No. 6, but proceed to Question No. 8.
>
> **Question No. 6**
>
> **Would it be unjust for the Defendants to retain that benefit without paying Plaintiffs?**
>
> ✓ YES
>
> __ NO
>
> If your answer is "YES", proceed to answer Question No. 7.
>
> If your answer is "NO", do not answer Question No. 7, but proceed to Question No. 8.
>
> **Question No. 7**
>
> **What is value [sic] of the benefit that Plaintiffs provided to the Defendants?**
>
> $7,000,000
>
> Proceed to Question No. 8.

We conclude the Special Verdict Form contained the following errors. The Special Verdict Form did not conform to the claims pleaded in the FACC, because Counts 1, 3, and 4 were pleaded only against Jared individually; and the Special Verdict Form permitted the jury to award damages on each claim against the undifferentiated "Defendants," which the Verdict Form defined as Jared individually and Jared and Donna as co-trustees. While a complaint may be amended during and after trial to conform to the evidence under HRCP Rule 15(b),[10] the record does not reflect a ruling on a motion regarding such amendment by express or implied consent. The Special Verdict Form was erroneous to the extent it included the unpled claims, and for its lack of specificity between Jared individually, and Jared and Donna as co-trustees, for each claim. See Makila Land Co., 146 Hawaiʻi at 616, 463 P.3d at 1273.

Regarding the Declaratory Relief claim, the "declaratory judgment statute provides a remedy but does not furnish a cause of action; the substantive law the plaintiff seeks to enforce by way of a declaratory judgment must itself do so." Org. of Police Officers v. City & Cnty. of Honolulu, 149 Hawaiʻi 492, 505, 494 P.3d 1225, 1238 (2021). Because declaratory judgment is not a cause of action, Question 2 in the Special Verdict Form permitting an award of damages for Declaratory Relief in Count 1, was error. See Makila Land Co., 146 Hawaiʻi at 616, 463 P.3d at 1273.

The erroneous inclusion of damages for Declaratory Relief created an irreconcilable inconsistency in the Special Verdict Form when the jury awarded different amounts for breach of the same alleged agreement, of $2,323,000.00 as the amount owed in Question 2 for Declaratory Relief, and $1,440,000.00 as the amount owed in Question 4 for Breach of Contract. See Carr

[10] HRCP Rule 15(b)(1) provides for amendment of pleadings during and after trial by express or implied consent, as follows:

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

v. Strode, 79 Hawaiʻi 475, 489, 904 P.2d 489, 503 (1995) ("A conflict in the jury's answers to questions in a special verdict will warrant a new trial only if those answers are irreconcilably inconsistent, and the verdict will not be disturbed if the answers can be reconciled under any theory." (citation omitted)).

Regarding the equitable claim of Unjust Enrichment, equitable remedies are only available if a remedy at law such as breach of contract is unavailable. See Porter v. Hu, 116 Hawaiʻi 42, 55, 169 P.3d 994, 1007 (App. 2007) ("[E]quity has always acted only when legal remedies were inadequate." (citation omitted)); see also AAA Haw., LLC v. Haw. Ins. Consultants, Ltd., No. CIV 08-00299DAE-BMK, 2008 WL 4907976, at *3 (D. Haw. Nov. 12, 2008) ("It is . . . well settled in federal courts that equitable remedies are not available when an express contract exists between the parties concerning the same subject matter. Hawaiʻi law has recently endorsed application of this principle as well." (citations omitted)). The Special Verdict Form was erroneous because it should have directed the jury to consider the Unjust Enrichment claim in the alternative, only if it rejected the Breach of Contract claim. See Makila Land Co., 146 Hawaiʻi at 616, 463 P.3d at 1273.

H. Unchallenged orders

We affirm the non-trial-related orders that Jared appeals from in CAAP-24-0000025, for which no arguments were made. See HRAP Rule 28(b)(7) (providing that contentions on appeal not supported by argument may be waived). These orders include the following: (1) April 20, 2022 "Order Denying [Jared]'s Motion to Bifurcate Trial"; (2) April 20, 2022 "Order Denying [Jared]'s Motion to Compel Deposition and for

Sanctions"; (3) June 4, 2021 "Order Denying [Jared]'s Second Motion for Reconsideration of Denial of Motion for Partial Summary Judgment, or in the Alternative to Preclude [Randal and KCI] from Seeking or Obtaining any Interest in the Puhi Lot"; (4) March 11, 2021 "Order Granting [Randal and KCI]'s Motion to Amend Counterclaim"; and (5) October 28, 2021 "Order Denying [Donna]'s Motion to Dismiss."

IV. CONCLUSION

For the foregoing reasons, we resolve this consolidated appeal from the Circuit Court of the Fifth Circuit as follows:

In CAAP-23-0000180, with respect to the February 21, 2023 Interlocutory Appeal Sanction Order, i.e., the "Order Denying [Jared]'s Motion for Leave to File an Interlocutory Appeal of the Order Granting [KCI and Randal]'s Motion for Summary Judgment on Complaint," we reverse.

In CAAP-23-0000465, with respect to the July 7, 2023 MIL Violation Sanction Order, i.e., the "Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part [KCI and Randal]'s Oral Motion for Mistrial and for Sanctions Against the Defendants," we reverse.

In CAAP-24-0000025, with respect to the (1) September 25, 2020 Partnership MPSJ Order, i.e., the "Order Denying [Jared]'s Motion for Partial Summary Judgment," and (2) August 15, 2022 Thronas MSJ Order, i.e., the "Order Granting Defendants' [sic] John Mundon and Samuel K. Thronas Construction, Inc.'s Motion for Summary Judgment," we affirm. With respect to the (1) November 29, 2022 Complaint MSJ Order, i.e., the "Findings of Fact, Conclusions of Law, and Order Granting [KCI and Randal]'s Motion for Summary Judgment on Complaint," (2) October 7, 2022 "Order Denying [Jared]'s Motion to Compel Discovery and for Sanctions," (3) January 12, 2024 Final Judgment, and all of the remaining trial-related and judgment-related orders set forth in Jared and Donna's notices of appeal in CAAP-24-0000025 not specifically addressed herein, we vacate and remand for a new trial consistent with this memorandum opinion.

In CAAP-24-0000374, with respect to the April 25, 2024 "Judgment on (1) [KCI and Randal]'s Bill of Costs, and (2) Order Granting [KCI and Randal]'s Motion for Attorneys' Fees as the Prevailing Parties," we vacate and remand for further proceedings consistent with this memorandum opinion.

DATED: Honolulu, Hawaiʻi, August 19, 2026.

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/s/ Karen T. Nakasone
Chief Judge

/s/ Clyde J. Wadsworth
Associate Judge

/s/ Kimberly T. Guidry
Associate Judge