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NO. CAAP-25-0000249

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HAI RUN LLC, a Hawai'i Limited Liability Corporation,
Plaintiff-Appellant, and
MICHELLE ZHANG, Individually and as a Member of the
LLC appearing for Hai Run LLC,
Plaintiff/Counterclaim Defendant-Appellant, v.
AIWU LIU, Individually and in her capacity as a Member of
Hai Run LLC, a Hawai'i Limited Liability Corporation,
Defendant/Counterclaim Plaintiff/Third-Party Plaintiff-Appellee,
and RICHARD WU aka WU ZIFENG,
Third-Party Defendant-Appellant, et al.

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CCV-21-0001447)

SUMMARY DISPOSITION ORDER

(By: Hiraoka, Presiding Judge, Wadsworth and McCullen, JJ.)

Michelle **Zhang** and Richard **Wu** appeal from the *Amended Final Judgment* for Aiwu **Liu** entered by the Circuit Court of the First Circuit. They challenge the order granting Liu's motion to bar Zhang from testifying at trial, and the order denying their motion to recuse the trial judge.¹ We vacate and remand.

Zhang, for herself and derivatively for Hai Run **LLC**, sued Liu on November 22, 2021. Her complaint alleged she was a member of LLC and Liu was LLC's manager-member. Liu was alleged to have "fraudulently divested, diverted or deprive[d]" Zhang of Zhang's interest in LLC.

¹ The Honorable Dean E. Ochiai presided over both motions and the trial.

Liu answered the complaint, counterclaimed against Zhang, and asserted a third-party complaint against Zhang's husband, Wu.²

By *Pretrial Conference Order* entered on June 12, 2024, jury-waived trial was set for July 8, 2024. On June 26, 2024, Liu moved in limine to preclude Zhang from testifying at trial. The motion was heard on the first day of trial, and orally granted. Findings of fact, conclusions of law, and an order granting the motion were entered on August 20, 2024.

Trial was held on July 8, 9, 11, and 12, 2024. On September 3, 2024, LLC, Zhang, and Wu moved to recuse the trial judge.

On September 10, 2024, the trial court entered findings of fact, conclusions of law, and an order on Liu's counterclaim and third-party complaint. It found that Wu made negligent or intentional misrepresentations upon which Liu detrimentally relied, and awarded Liu damages of \$753,878.61. It also found that Zhang would be unjustly enriched if she received compensation for her disassociation from LLC.

On October 30, 2024, the trial court entered findings of fact, conclusions of law, and an order granting Liu's motion for judgment as a matter of law on all claims alleged in the complaint.

Also on October 30, 2024, the trial court entered findings of fact, conclusions of law, and an order denying the motion to recuse.

A *Final Judgment* was entered on January 23, 2025. This appeal followed. We temporarily remanded to the circuit court for entry of an appealable judgment. The Amended Final Judgment was entered on July 2, 2025.³

Zhang and Wu state two points of error. They contend the trial court erred by: (1) granting the motion in limine to preclude Zhang from testifying at trial and denying Zhang's

² Liu's pleading incorrectly titled her claim against Wu as a "crossclaim" and referred to Wu as "crossclaim defendant."

³ The Amended Final Judgment was entered by the Honorable Taryn R. Tomasa, because Judge Ochiai had retired from the bench.

motion for reconsideration; and (2) denying their motion to recuse the trial judge. Their statement of the points of error doesn't challenge the trial court's findings of fact.

Unchallenged findings of fact are binding on appeal. Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 459, 40 P.3d 73, 82 (2002).

(1) The trial court granted the motion in limine as a sanction for Zhang's failure to cooperate during her deposition and failing to appear for her continued deposition. "The imposition of a sanction is generally within the discretion of the trial court." Weinberg v. Dickson-Weinberg, 123 Hawai'i 68, 71, 229 P.3d 1133, 1136 (2010).

The trial court found, and Zhang and Wu do not contest, that:

2. [Liu's] counsel Rex Y. Fujichaku, Esq. ("Mr. Fujichaku"), began attempting to schedule [Zhang]'s deposition on March 17, 2024.

. . . .

6. Mr. Gao [(Zhang's counsel)] asked that the deposition be delayed until Ms. Zhang returned to Hawai'i. Mr. Fujichaku set the deposition for May 7, 2024, and it was noticed on April 2, 2024.

7. At the May 7, 2024 deposition, Ms. Zhang was questioned for a total of four hours and seven minutes. However, the deposition was cut short to allow Mr. Gao to attend to other matters.

8. On May 14, 2024, Mr. Fujichaku tried to finish deposing Ms. Zhang. However, after twenty-eight minutes of questioning, Ms. Zhang claimed she was too ill to continue.

9. Mr. Fujichaku was only able to question Ms. Zhang for four hours and thirty-five minutes in total. During the four hours and thirty-five minutes of questioning, Ms. Zhang evaded or refused to answer legitimate questions from Mr. Fujichaku.

10. Ms. Zhang's further deposition was set for May 22, 2024.

11. However, on May 18, 2024 Mr. Gao informed Mr. Fujichaku that Ms. Zhang could not attend the May 22, 2024 deposition due to infirmity, and indicated that he has requested that she obtain a doctor's note. Mr. Fujichaku asked that Ms. Zhang provide a doctor's note before rescheduling the deposition.

12. On May 21, 2024, the day before the scheduled deposition, Mr. Gao sent a doctor's note for Ms. Zhang, which he said "directs her not to back [sic] to work until May 28, which should include not to go for more intensive

litigation proceedings." The note did not include any specifics about Ms. Zhang's illness.

13. On May 28, 2024, Mr. Fujichaku again reached out to Mr. Gao seeking to schedule the last of Ms. Zhang's deposition for May 30, 2024. That evening, Mr. Gao responded, claiming that "Michelle is still very sick, and not surprisingly she got another Doctor's note. I will send you the copy tomorrow morning." Mr. Fujichaku responded the next morning asking that Mr. Gao send the doctor's note, and stating that "[w]e need to finish her deposition before the discovery cut off on June 7. Can she do June 7 at 2pm?" Mr. Gao did not respond to Mr. Fujichaku's question about the June 7 date, but just sent a photo of a doctor's note on May 29, 2024. Again, the note did not indicate the type of illness Ms. Zhang was experiencing, why it lasted for weeks, or when she may be able to be deposed.

14. On June 6, 2024, the day before the discovery cut off, Mr. Fujichaku emailed Mr. Gao again, asking "will Michelle make herself available to complete her deposition on Friday afternoon, the last day of discovery? If not, we will also file a motion to compel her deposition or for sanctions and will expect to discuss this issue during our meet and confer on Monday."

15. Mr. Gao responded, "no court will sanction someone for being sick." The proper approach may be stipulation for further discovery to continue cutoff deadline." At this point, trial was just over four weeks away. The deposition designation deadline was less than three weeks away. Mr. Fujichaku replied,

Wen, we have extended Michelle's deposition for more than 2 weeks. A further extension beyond discovery cutoff will prejudice my client's ability to prepare for trial. You have not even provided any documentation on the type of sickness she allegedly has been experiencing, and her doctor's notes provide no explanation.

16. Ms. Zhang did not make herself available for her deposition on June 7, the discovery cutoff.

17. The Court finds that, despite reasonable and diligent efforts by [Liu] and her counsel over the course of months, [Liu] was unable to finish deposing Ms. Zhang, which in turn prevented [Liu] from fully preparing for trial.

18. The Court also finds that, during the partial deposition that [Liu] was able to conduct, Ms. Zhang refused to answer appropriate questions, further stymying [Liu]'s ability to effectively prepare for trial.

19. The Court also finds that Ms. Zhang made numerous detrimental admissions during her deposition, raising concern that her refusal to finish her deposition had more to do with avoiding answering [Liu]'s questions than her health. For example, Ms. Zhang admitted that she did not contribute to the \$2 million purchase of the Pukalani Property, or make a capital contribution to Hai Run LLC, and that there is no written document reflecting any promise to convey any interest in the Piikoi Property to her as she alleges in her complaint, and conceding that she signed the document relinquishing her Hai Runn [sic] LLC membership in 2014.

20. Ms. Zhang did not provide any more information or insight about her illness in her opposition to this Motion.

(citations to record omitted).

Zhang argues that "medical issues preventing a party from attending a deposition do not constitute the sort of bad faith that justifies a preclusion order." But she provided no objective evidence of what kind of "medical issues" – actual illness or symptoms – prevented her from giving truthful deposition testimony for three weeks.

The trial court concluded and ordered:

35. The Court concludes that Ms. Zhang's conduct prevented [Liu] from deposing Ms. Zhang in full, and as a result, [Liu] was not able to fully prepare for Ms. Zhang's testimony at trial. Accordingly, it is appropriate to sanction Ms. Zhang by "prohibiting . . . her from introducing designated matters in evidence[,] i.e. to bar Ms. Zhang from testifying at trial. HRCp 37(b)(2)(B). See, e.g., Conquistador v. Hurdle, 2021 WL 2376361, at *4 (D. Conn. June 10, 2021) (ordering under FRCP 37(d) that plaintiff's failure to attend re-noticed deposition shall result in preclusion of his testimony at trial).

ORDER

. . . . Ms. Zhang is barred from testifying at trial in this matter.

Hawaii Rules of Civil Procedure (**HRCp**) Rule 37(d) addresses a party's failure to appear for a properly noticed deposition. It authorizes a court to "take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule." HRCp Rule 37(b)(2) authorizes these sanctions:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the disobedient party 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[.]

In Conquistador v. Hurdle, No. 3:20-CV-01658 (KAD), 2021 WL 2376361 (D. Conn. June 10, 2021), cited by the trial court, a self-represented plaintiff failed to appear for his video deposition. He claimed to have had a reaction to a COVID-19 vaccine he received the previous day. The court ordered him to submit, under seal, documentary evidence of his COVID-19 vaccination. He didn't. The defendants moved for dismissal of the lawsuit as a sanction. The federal court noted that "dismissal is only appropriate after the district court has considered lesser alternatives." Id., 2021 WL 2376361, at *4. Instead, the court set a deadline for the plaintiff to appear for deposition and ruled that his failure to appear "shall result in the preclusion of his testimony at trial." Id.

The Hawai'i Supreme Court has vacated dismissals as sanctions for discovery violations where the trial court didn't first consider lesser sanctions. See Weinberg, 123 Hawai'i at 77, 229 P.3d at 1142 ("on remand, the family court should determine what, if any, lesser sanctions would be appropriate"); JK v. DK, 153 Hawai'i 268, 279, 533 P.3d 1215, 1226 (2023) ("Before invoking [HRCF Rule] 37(b)(2)(C)'s case-ending consequence, the family court should have considered other measures, 'lesser sanctions.'").

Here, although the trial court did not dismiss Zhang's complaint, the sanction of precluding her from testifying at trial was effectively a dismissal because she was the only plaintiff, she had the burden of proving her claims, and she wasn't allowed to rebut Liu's testimony or evidence supporting Liu's counterclaim. See Weinberg, 123 Hawai'i at 73, 229 P.3d at 1138 (noting that "a sanction that precludes a material witness from testifying . . . effectively dismisses a potentially meritorious claim without a trial").

Lesser sanctions should have been considered. As the trial court noted, Fujichaku was able to question Zhang for four hours and seven minutes. The court asked him:

THE COURT: What was covered in the deposition, Mr. Fujichaku? And if that's sufficient, I can just limit it to topics covered within the four corners of the depo or that -- that was a sufficient period.

. . . .

MR. FUJICHAKU: Yeah. So to answer your question, Your Honor, ***I think there are some topics that were covered by Ms. Zhang's deposition testimony***, but for those topics that were not covered, I think it would be prejudicial for her to go up on the stand today and testify about those things for the first time without having them covered in the deposition.

(emphasis added).

Zhang should at least have been allowed to testify about the "topics that were covered by [her] deposition testimony[.]" On this record, we conclude the trial court exceeded its discretion by precluding Zhang from testifying at all during trial.

(2) The motion to recuse the trial judge wasn't made until two months after the trial ended. It was untimely and no good cause was shown for the late filing. See Hawaii Revised Statutes (**HRS**) § 601-7(b) (2016); Chen v. Hoeflinger, 127 Hawai'i 346, 361, 279 P.3d 11, 26 (App. 2012). At any rate, the judge who presided over the trial has retired and could not preside on remand. Zhang and Wu's appeal from the denial of their motion to recuse is moot.

The July 2, 2025 Amended Final Judgment is vacated. This case is remanded to the circuit court for further proceedings not inconsistent with this summary disposition order.

DATED: Honolulu, Hawai'i, September 29, 2026.

On the briefs:

Frederick J. Arensmeyer,
for Appellants Hai Run LLC,
Michelle Zhang, and
Richard Wu.

/s/ Keith K. Hiraoka
Presiding Judge

/s/ Clyde J. Wadsworth
Associate Judge

Rex Y. Fujichaku,
for Defendant/Counterclaim
Plaintiff/Third-Party
Plaintiff-Appellee Aiwu Liu.

/s/ Sonja M.P. McCullen
Associate Judge