NO. 21732

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

AQUARIAN FOUNDATION, a Washington non-profit corporation,
Respondent/Appellant

vs.

ASSOCIATION OF APARTMENT OWNERS OF WAIKIKI PARK HEIGHTS, an association of apartment owners;
Cross-Petitioner-Respondent/Appellee

and

UNIPACK COMPANY, LTD., a Japan corporation,
Petitioner-Cross-Respondent/Appellee

and

JOHN DOES, JANE DOES, DOE PARTNERSHIPS and DOE OTHER ENTITIES,
Defendants

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 93-4924)

MEMORANDUM OPINION
(By: Moon, C.J., Levinson, Nakayama and Ramil, JJ.
and Circuit Judge Ibarra, assigned by reason of vacancy)

Cross-petitioner-respondent-appellee, Association of Apartment Owners of Waikiki Park Heights (AOAO) and petitioner-cross-respondent-appellee, Unipack Co., Ltd. (Unipack Japan)[1] (collectively, petitioners), who were defendants in the circuit court, apply to this court for a writ of certiorari to review the opinion of the Intermediate Court of Appeals (ICA) in Aquarian Foundation v. Association of Apartment Owners of Waikiki Park

[1] Petitioner Unipack Japan is a Japan corporation that is not authorized to do business in Hawaiʻi. Certain documents in this case refer to Unipack Co., Ltd., a Hawaiʻi corporation (Unipack Hawaiʻi). However, Unipack Hawaiʻi was never incorporated in Hawaiʻi. The record also refers to Union Air Service, Inc., a Hawaiʻi corporation, (Union Air Hawaiʻi) and Union Air Service Co., Ltd., a Japan corporation, (Union Air Japan).

Heights, No. 21732 (Haw. Ct. App. Dec. 27, 1999) (mem. op.) [hereinafter, the "ICA's opinion"], vacating the following orders of the circuit court: 1) the June 26, 1995 order granting in part and denying in part Union Air Hawaii's joinder in AOAO's motion for partial dismissal and partial summary judgment; 2) the July 20, 1995 order granting in part and denying in part AOAO's motion for partial dismissal and partial summary judgment;[2] 3) the April 17, 1998 order granting AOAO's motion to dismiss for failure to serve an indispensable party; 4) the April 17, 1998 order granting Unipack Japan's motion to dismiss the first amended complaint without prejudice; 5) the July 6, 1998 order denying plaintiff Aquarian Foundation's motion for relief from judgment; and 6) the July 28, 1998 order entering final judgment pursuant to Rule 58 of the Hawai‘i Rules of Civil Procedure (HRCP) (1990). Petitioners' arguments are similar to one another. Their positions are best articulated by AOAO, which argues that the ICA erred in: 1) failing to address whether Unipack Japan was timely served; 2) concluding that Unipack Japan became a party by virtue of the actions or nonactions of Aquarian, Unipack Japan, and the circuit court; 3) failing to

[2] The June 26, 1995 order and the July 20, 1995 order (collectively Summary Judgment Orders) are identical in substance. AOAO filed the underlying motion, which Union Air Hawai‘i subsequently joined. The June 26 order granted summary judgment in favor of Union Air Hawai‘i and against Aquarian (Union Air Summary Judgment Order), and the July 20 order granted summary judgment in favor of AOAO and against Aquarian (AOAO Summary Judgment Order).

apply the abuse of discretion standard to the circuit court's ruling on the dismissal for failure to join an indispensable party; and 4) vacating the Summary Judgment Orders. We hold that: the circuit court did not abuse its discretion in dismissing Unipack Japan; Unipack Japan was not an indispensable party; and the ICA erred in vacating the Summary Judgment Orders. Therefore, we affirm the ICA's opinion in part and reverse it in part.

I. BACKGROUND

A. The parties

Plaintiff Aquarian Foundation (Aquarian), a non-profit religious corporation, owns two commercial units on the ground floor of the Waikiki Park Heights Condominium (WPHC). Aquarian is a member of the AOAO. Unipack Japan primarily arranges ground services, including ground transportation and hotel accommodations, for Japanese tour groups. Union Air Hawai‘i provides ground services in Hawai‘i. Unipack Japan and Union Air Hawai‘i are among several entities owned and controlled by the Nishitani family. Unipack Japan owns three WPHC units. Union Air Hawai‘i does not own any units, but provides maintenance services for approximately thirty units that were owned by Kiyoshi Nishitani, former president of Union Air Hawai‘i, until

his death in 1991.[3] These units are used to provide hotel accommodations to Japanese tourists.

B. Factual Background

From 1979 to the fall of 1988, Aquarian's members regularly used the open lobby area adjacent to its units before and after church functions. On September 1, 1988, AOAO and Unipack Hawai'i entered into a Common Area Use Agreement (1988 Agreement). AOAO agreed to lease a portion of the WPHC lobby area to Unipack Hawai'i for general office use. The term of the 1988 Agreement was four years. Because the AOAO Board determined that the area was not being used for an originally intended purpose, it did not present the matter to the members prior to entering into the lease.[4] Unipack Hawai'i constructed walls around the leased premises, preventing Aquarian and others from using that portion of the lobby. AOAO and Unipack Hawai'i entered into another Common Area Use Agreement commencing on November 1, 1993 (1993 Agreement). The 1993 Agreement was for an

[3] Koji Takeda, a Union Air officer, stated in a 1997 deposition that he was unsure who owned the 30 units at that time because Kiyoshi Nishitani's estate was still being probated. According to Takeda, the property tax bill that the company receives annually lists June Nishitani, Tasuo Nishitani, Hitomi Nishitani, Eiko Nishitani, Kiyoshi Nishitani, Kazue Someya, Resort, Inc., Union Air, and Unipack as owners. However, he noted that Someya had recently left the company and sold her units.

[4] In order to lease a common element that is being used for an originally intended purpose, the board of directors must obtain the approval of the owners of 75% of the common elements, including all directly affected owners and owners. Hawai'i Revised Statutes (HRS) § 514A-13(d)(3) (1993). The by-laws of the WPHC AOAO do not impose any additional limitations on the Board's authority to lease common elements.

initial term of two years, with options to extend for two one-year periods. AOAO characterized the 1993 Agreement as a renewal of the 1988 Agreement. On October 29, 1995, the 1993 Agreement was amended (Amended 1993 Agreement). The Amended 1993 Agreement stated that the 1993 Agreement had incorrectly identified Unipack Hawai‘i as the tenant and clarified that Union Air Hawai‘i was the tenant. The Amended 1993 Agreement also provided that the agreement could be terminated by either party with sixty days' written notice.

C. Circuit court proceedings

The original complaint in this case was filed on December 20, 1993. The complaint named as defendants: AOAO, Unipack Hawai‘i, and various Doe defendants. The complaint alleged that the 1988 Agreement and/or any similar subsequent agreements constituted: a violation of HRS § 514A-13 (1993), which constituted conversion, an unlawful cloud on title, and an unlawful deprivation of property rights (Count I); a deprivation of property without due process (Count II); an unfair and deceptive trade practice in violation of HRS § 480-2 (1993) (Count III); and willful, wanton, and intentional action entitling Aquarian to punitive damages (Count IV). The complaint was served on AOAO and Unipack Hawai‘i.[5] AOAO filed an answer on

[5] The complaint was served on Michael Prog, office manager of "Unipack Co., Ltd." at the address listed for Unipack Hawai‘i in the 1988 Agreement.

February 9, 1994. Unipack Hawai‘i did not file an answer and default judgment was entered on May 10, 1995. However, on May 23, 1995, the default judgment was set aside. Aquarian, AOAO, and Union Air Hawai‘i stipulated that the complaint incorrectly referred to Unipack Hawai‘i when it should have referred to Union Air Hawai‘i. Pursuant to the stipulation, Union Air Hawai‘i filed an answer on June 15, 1995.

AOAO moved for partial summary judgment and partial dismissal on March 3, 1995, and Union Air Hawai‘i filed a joinder in the motion on May 24, 1995. The circuit court held a hearing on the motion on May 26, 1995. In the Summary Judgment Orders, the circuit court granted the motion in part and denied it in part. The circuit court ruled as follows: a two-year statute of limitations applied as to Count I, and, therefore, summary judgment was granted in favor of the defendants as to the 1988 Agreement but denied as to the 1993 Agreement; summary judgment was granted as to Counts II and IV; and Count III was dismissed.[6]

On July 21, 1995, the circuit court granted Aquarian leave to file a first amended complaint. Aquarian filed the first amended complaint on August 3, 1995 (First Amended Complaint), naming the same defendants and alleging the same

[6] In its motion, AOAO requested the dismissal of Count III on the grounds that Aquarian lacked standing to pursue a deceptive trade practices claim because Aquarian was not a consumer as defined in HRS § 480-2. Citing Paulson, Inc. v. Bromar, Inc., 775 F. Supp. 1329, 1337 (D. Haw. 1991), AOAO argued that a lack of standing should be decided in a motion to dismiss rather than a motion for summary judgment.

counts as in the original complaint. However, the First Amended Complaint also referenced the 1993 Agreement,[7] and the amended Count I also alleged a violation of HRS § 514A-89 (1993). AOAO filed an answer to the First Amended Complaint on August 14, 1995. Union Air Hawai'i filed an answer on August 23, 1995, stating that it had been incorrectly identified as Unipack Hawai'i in the First Amended Complaint.[8] Union Air Hawai'i stated that the 1988 and 1993 Agreements had also incorrectly identified Unipack Hawai'i as the lessee instead of Union Air Hawai'i. Union Air Hawai'i also admitted that it had constructed the walls around the leased common area.

Union Air Hawai'i filed a motion for partial dismissal or partial summary judgment on March 14, 1997. In a supplemental memorandum in support of the motion, Union Air Hawai'i alleged, for the first time, that it was not an apartment owner as defined in HRS § 514A-89 and, therefore, that it was entitled to summary judgment or dismissal. In its April 16, 1997 memorandum in opposition to the motion, Aquarian noted that: Kiyoshi Nishitani owned twenty-five WPHC units and one parking space; an entity named "Uni Pack Co., Ltd." was listed as the owner of three

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[7] In the original complaint, Aquarian stated that it had been informed by the managing agent for AOAO that Unipack Hawai'i was leasing the area on a month-to-month basis and that a new lease was being negotiated.

[8] Aquarian filed two motions for leave to file a second amended complaint, primarily to change the named defendant Unipack Hawai'i to Union Air Hawai'i. Both motions were denied.

units; and Union Air Service Co., Ltd. owned two units. Aquarian also noted that "[t]he problem is that it appears . . . that the actual Hawaii entity is named Union Air Service, Inc. and the Japan parent company is named Union Air Service Co., Ltd. There is no entity, as far as it appears, that is named Uni Pack Co., Ltd."

In its April 18, 1997 reply memorandum, Union Air Hawai'i stated that Union Air Japan owned units and Unipack Japan owned the three units Aquarian listed under "Uni Pack Co., Ltd.". However, Union Air Hawai'i argued that it was a separate entity from the Japan corporations and that it did not own any units and had never registered any of the leases. There is nothing in the record indicating the disposition of Union Air Hawaii's March 14, 1997 summary judgment motion.

On September 23, 1997, AOAO and Union Air Hawai'i entered into a collateral settlement agreement. AOAO and Union Air Hawai'i agreed to terminate the Amended 1993 Agreement and remove the walls. Aquarian, AOAO, and Union Air Hawai'i stipulated to the dismissal of all claims against Union Air Hawai'i on December 29, 1997. The stipulation recited that the claims against AOAO and Unipack[9] remained.

On December 29, 1997, Aquarian also filed a request for

[9] The stipulation referred to "Unipack Co., Ltd." without indicating whether it was referring to Unipack Japan or Unipack Hawai'i. The caption of the stipulation listed Unipack Hawai'i as a defendant.

entry of default judgment against "Unipack Company, Ltd." Aquarian apparently considered Unipack Japan and Unipack Hawai'i to be the same entity, "Unipack Company, Ltd.," and attempted to treat them interchangeably. Aquarian substituted Unipack Japan for Unipack Hawai'i in the caption and alleged that the complaint had been served on "Defendant Unipack Company, Ltd." However, Unipack Japan was not a party to the case; the complaint was served on Unipack Hawai'i. The clerk of the court denied the request because "[t]he Court record does not reflect any service of said [First] Amended Complaint on defendant Unipack Company, Ltd."

On December 31, 1997, Aquarian filed a motion requesting a trial continuance in order to serve Unipack Japan.[10] The record does not reflect the disposition of this motion, but, on January 21, 1998, Aquarian issued eight alias summonses to "Unipack Co., Ltd.," addressed care of various persons or entities, including two in Japan. The caption of each summons listed Union Air Hawai'i as a defendant; it listed neither Unipack Hawai'i nor Unipack Japan. Aquarian filed three returns and acknowledgments of service, one indicating that Koji Takeda, vice president of Union Air Hawai'i, had not been found and the other two indicating service upon Miiko Herek.

[10] The motion refers to "Unipack Co., Ltd." and notes that the original complaint was served upon "Unipack Co., Ltd." However, the caption of the motion identifies Unipack Japan as a defendant.

On March 19, 1998, Unipack Japan appeared for the first time and filed a motion to dismiss the First Amended Complaint. Unipack Japan argued that the complaint should be dismissed or the return of service should be quashed for either insufficiency of service of process or plaintiff's failure to make a diligent effort to effect service. In the memorandum in support of the motion, Unipack Japan argued that the First Amended Complaint should be dismissed because: 1) well over six months had passed since the filing of the complaint, and allowing Aquarian to proceed against Unipack Japan would be prejudicial because of the impending trial date; 2) service was insufficient because the caption of the summons (Union Air Hawai‘i), the summons addressee (Unipack Co., Ltd.), and the caption of the First Amended Complaint (Unipack Hawai‘i) were inconsistent; 3) Union Air Hawai‘i was not an agent authorized to receive service for Unipack Japan; and 4) Herek, a tour coordinator, was not authorized to receive service for Union Air Hawai‘i. Unipack Japan appended a declaration by Tatsuo Nishitani stating that: 1) he is the president of Unipack Japan and is responsible for the management affairs of the company; 2) Unipack Japan utilizes Union Air Hawai‘i as a provider of transportation services; 3) Unipack Japan does not have an ownership interest in Union Air Hawai‘i, and Union Air Hawai‘i does not have an ownership interest in Unipack Japan; 4) he is the president, and a director and

shareholder, of Union Air Hawai‘i, but he is not involved in the day-to-day operations and management of Union Air Hawai‘i; and 5) Koji Takeda and June Nishitani, the vice president and secretary/treasurer of Union Air Hawai‘i, manage that company. Unipack Japan did not raise the argument that it had not been properly made a party to the case.

Aquarian filed a memorandum in opposition on March 31, 1998. Aquarian alleged that Unipack Japan had built the walls in the common area. Aquarian further alleged that Unipack Japan had been properly served with the First Amended Complaint through its agent, Union Air Hawai‘i. However, Union Air Hawai‘i voluntarily appeared in Unipack Japan's place only to deny that it was the real party in interest on the eve of trial. Aquarian stated that it had been diligently attempting to serve the real party in interest, Unipack Japan. Aquarian also argued that the service on Herek was effective because Takeda, who was Union Air Hawaii's authorized agent for service of process, avoided service. Aquarian stated that it was still attempting to serve Unipack Japan in Japan, but had been experiencing difficulties because the relevant incorporation documents had not given a complete address. However, according to Aquarian, the service upon Union Air Hawai‘i and its subsequent appearance negated the requirement of serving Unipack Japan separately. In the alternative, Aquarian argued that, in a case with multiple defendants, service

upon the other defendants relates back to the service upon the first defendant.

The circuit court held a hearing on the motion on April 3, 1998. The circuit court orally granted the motion to dismiss Unipack Japan on the following grounds: 1) Aquarian had not timely served Unipack Japan as required by Rule 28 of the Rules of the Circuit Courts of the State of Hawai‘i (RCCSH) (1971); 2) Herek was not an authorized person to receive service for Union Air Hawai‘i; and 3) Union Air Hawai‘i is not an authorized agent of Unipack Japan for the purposes of receiving service. An order to this effect was entered on April 17, 1998.

On April 8, 1998, AOAO filed a motion to dismiss for failure to serve an indispensable party. The circuit court held a hearing on the motion on April 9, 1998. The circuit court orally granted the motion, stating the Unipack Japan was an indispensable party under HRCP Rule 19 (1980) because "[i]t is undisputed that Unipack was the entity that in fact constructed the improvement in the lobby which is the subject of the claim brought by the plaintiff against the Association in this case." The circuit court also noted that the absence of Unipack Japan would result in multiple litigations, inconsistent results, and jury confusion. An order granting the motion was entered on

April 17, 1998.[11]

On May 26, 1998, Aquarian filed a motion for relief from judgment.[12] Aquarian argued that Unipack Japan had been served in March 1998 and that this was known to the defendant at the hearing on the motion.[13] This, in plaintiff's view, constituted either newly discovered evidence or misconduct on the part of Unipack Japan. The circuit court held a hearing on the motion on June 23, 1998. The circuit court orally denied the motion on the grounds that Aquarian's proof of service of Unipack Japan did not constitute newly discovered evidence, and even if it were considered, would not have changed the outcome. The circuit court did not address Aquarian's argument that Unipack Japan's failure to disclose the fact that it had been served constituted fraud, misrepresentation, or misconduct. The order denying the motion was entered on July 6, 1998. The circuit court entered final judgment on July 28, 1998. Aquarian timely appealed.

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[11] Aquarian filed a notice of appeal on May 7, 1998 appealing from the orders dismissing Unipack Japan and AOAO and the July 20, 1995 summary judgment order. However, we dismissed the appeal as premature because the orders had not been reduced to a final judgment.

[12] Although titled a motion for relief from judgment, the motion was for relief from the April 17, 1998 orders dismissing Unipack Japan and AOAO. HRCP Rule 60(b) also authorizes motions to amend final order that are in the nature of judgments. Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 262, 799 P.2d 60, 65 (App. 1990).

[13] Aquarian filed a return of service on June 5, 1998, which indicated that Tatsuo Nishitani received service on behalf of Unipack Japan on March 26, 1998.

D. The ICA's opinion

On appeal, Aquarian argued that: 1) the circuit court erred in dismissing Unipack Japan for failure to serve because it had been served and because service of its agent, Union Air Hawai‘i, was sufficient; 2) even if Unipack Japan was properly dismissed, the circuit court erred in dismissing AOAO for failure to serve Unipack Japan as an indispensable party; 3) dismissing the case violated its due process rights; 4) the circuit court erred in granting summary judgment on the constitutional and punitive damages claims; and 5) the circuit court erred in concluding that the two-year statute of limitations applied to Count I.

The ICA agreed and vacated the circuit court's orders. The ICA held that, even though Aquarian had not complied with the requirements of HRCP Rule 17(d) (1990), Unipack Japan became a party as one of the originally named Doe defendants. Further, the ICA held that, because Unipack Japan could be made a party, it was not an indispensable party under HRCP Rule 19(b) (1980) and, therefore, the circuit court erred in dismissing AOAO based on Aquarian's failure to serve an indispensable party. The ICA stated that Aquarian's claim under Count I was based upon rights in real property, but did not expressly identify the applicable statute of limitations. Finally, the ICA held that Aquarian had presented enough evidence to defeat AOAO's motion for summary

judgment on the punitive damages issue. AOAO and Unipack Japan filed timely applications for a writ of certiorari.

II. DISCUSSION

A. Standard of review

A circuit court's dismissal under RCCSH Rule 28 is reviewed under the abuse of discretion standard. See RCCSH Rule 28 ("may be dismissed"). The denial of an HRCP Rule 60(b) (1980) motion for relief from judgment is also reviewed under the abuse of discretion standard. Leslie v. Estate of Tavares, 91 Hawai'i 394, 399, 984 P.2d 1220, 1225 (1999). "'An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant.'" LeMay v. Leander, 92 Hawai'i 614, 620, 994 P.2d 546, 552 (2000) (quoting State v. Dudoit, 90 Hawai'i 262, 266 978 P.2d 700, 704 (1999)).

HRCP Rule 19(b) (1980) lists four factors to be considered in determining whether an action should be dismissed for failure to join an indispensable party. See infra section II.C. The ICA has previously stated:

> These four factors are in [sic] not in any way exclusive. Moreover, the rule does not state the weight each factor should be given. Rather, a court should consider all of the factors and employ a functional balancing approach. Because of the flexibility of the "equity and good conscience" test and the general nature of the factors listed in HRPP Rule 19(b), whether a particular non-party described in Rule 19(a) will be regarded as indispensable depends to a considerable degree on the circumstances of each case.

GGS Co., Ltd. v. Masuda, 82 Hawai'i 96, 105, 919 P.2d 1008, 1017

(App. 1996) (footnote and citations omitted). Thus, a circuit court's dismissal of a complaint under HRCP Rule 19(b) is reviewed under the abuse of discretion standard. Cf. Clinton v. Babbit, 180 F.3d 1081, 1086 (9th Cir. 1999) (dismissal under FRCP Rule 19(b) is reviewed for an abuse of discretion).

A circuit court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are reviewed under the right/wrong standard. Leslie, 91 Hawai'i at 399, 984 P.2d at 1225.

> We review [a] circuit court's [grant or denial] of summary judgment de novo under the same standard applied by the circuit court. Amfac, Inc. [v. Waikiki Beachcomber Inv. Co., 74 Haw. 85,] 104, 839 P.2d [10,] 22, [reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992)] (citation omitted). As we have often articulated:
>
> > [s]ummary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.
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> Id. (citations and internal quotation marks omitted); see . . . HRCP . . . Rule 56(c) (1990).

Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 411, 992 P.2d 93, 106 (2000) (quoting Bronster v. United Public Workers, 90 Hawai'i 9, 13, 975 P.2d 766, 770 (1999)) (some citations omitted) (brackets in original).

B. The ICA erred in vacating the circuit court's order granting Unipack Japan's motion to dismiss.

The ICA held that "the combination of the actions and nonactions of Aquarian, Unipack Japan, and the circuit court caused Unipack Japan to be a party defendant in this case

notwithstanding Aquarian's failure to comply with HRCP Rule 17(d)[.]" ICA's opinion at 41. The ICA apparently reviewed the dismissal of Unipack Japan on the assumption that the circuit court granted the motion to dismiss on the ground that Unipack Japan had not been served. See id. at 39. Although Aquarian did not comply with the procedures required by HRCP Rule 17(d), Unipack Japan was in fact served on March 26, 1998. Therefore, the ICA vacated the April 17, 1998 order granting Unipack Japan's motion to dismiss. In its application for certiorari, Unipack Japan argues that the ICA erred in vacating the dismissal because compliance with HRCP Rule 17(d) was not at issue on appeal and because the ICA did not address Aquarian's failure to serve Unipack Japan within six months of filing the First Amended Complaint, as required by RCCSH Rule 28.[14]

Unipack Japan was not named as one of the original defendants in this case. One of the ways that Aquarian could have named Unipack Japan as a party was by identifying it as one of the named Doe defendants. HRCP Rule 17(d) states in relevant part:

> (3) Any party may, by motion for certification, make the name or identity of the party defendant known to the court within a reasonable time after the moving party knew or should have known the name or identity of the party defendant. The motion shall be supported by affidavit setting forth all facts substantiating the movant's claim

[14] RCCSH Rule 28 states: "A diligent effort to effect service shall be made in all actions, and if no service be made within 6 months after an action has been filed then after notice of not less than 5 days the same may be dismissed."

> that the naming or identification has been made with due diligence. When the naming or identification is made by a plaintiff, it shall be made prior to the filing of the pretrial statement by that plaintiff, or within such reasonable additional time as the court may allow. The court shall freely grant reasonable extensions of the time in which to name or identify the party defendant to any party exercising due diligence in attempting to ascertain the party defendant's name or identity.
>
> (4) When a party defendant has been named or identified in accordance with this rule, the court shall so certify and may make any order that justice requires to protect any party from undue burden and expense in any further proceedings involving the party defendant.

Typically, strict compliance with these procedures is required based on the due process rights of the defendant that is made a party without actual notice of the action. Tobosa v. Owens, 69 Haw. 305, 313, 741 P.2d 1280, 1285-86 (1987).

None of the parties moved to certify Unipack Japan as a Doe defendant and the circuit court never entered an order certifying Unipack Japan. Aquarian only requested a trial continuance in order to serve Unipack Japan. The circuit court erred in allowing Aquarian to proceed against Unipack Japan without requiring Aquarian to comply with Rule 17(d). However, Unipack Japan failed to object on this ground before the circuit court and, in its motion to dismiss, acknowledged that it was a defendant. Further, Unipack Japan does not argue on appeal that it was not properly made a party. The ICA erred in holding that Unipack Japan became a party as a result of "the combination of the actions and nonactions of Aquarian, Unipack Japan, and the circuit court . . . ." Unipack Japan was not properly made a party defendant, but it waived its right to object on this issue

by failing to raise the issue in the circuit court.

In its application for certiorari, Unipack Japan primarily argues that the ICA erred in vacating the dismissal because Unipack Japan had not been timely served. Had Aquarian complied with the requirements of HRCP Rule 17(d), the six-month period provided in RCCSH Rule 28 would not have begun to run until Unipack Japan was identified as a Doe defendant on the record. See Wakuya v. Oahu Plumbing & Sheet Metal, Ltd., 2 Haw. App. 373, 379, 636 P.2d 1352, 1357 (1981), aff'd, 65 Haw. 592, 656 P.2d 84 (1982). Because this exception does not apply due to the failure to properly identify Unipack Japan as a Doe defendant, the dispositive issue is whether the circuit court abused its discretion in ruling that service of the First Amended Complaint more than two and a half years after it was filed was untimely.

The First Amended Complaint was filed on August 3, 1995. Aquarian issued eight alias summons for "Unipack Co., Ltd." on January 21, 1998, and Unipack Japan was served in Japan on March 26, 1998. Aquarian argues that the delay does not reflect a lack of diligence on its part "given the self-serving and misleading actions of Union Air [Hawai'i], Unipack [Japan], and related organizations, given the multitude of family-owned similarly named corporations in Hawaii and Japan, and given the failure of Unipack [Japan] to register pursuant to Hawaii

Corporation law . . . ." Memorandum opposing points in Unipack Japan's application for writ of certiorari.

Essentially, Aquarian argues that its failure to timely serve Unipack Japan is excusable because the delay was caused by the misleading actions of Unipack Japan and Union Air Hawai'i. According to Aquarian, Union Air Hawai'i appeared as a defendant in this case even though it was not the real party in interest, thus preventing Aquarian from pursuing the proper defendant, Unipack Japan.[15] However, in addition to damages, the First Amended Complaint sought a declaration that the 1993 Agreement was null and void and an order requiring AOAO to return the lobby to its original condition. As the tenant under the 1993 Agreement, Union Air Hawai'i appeared in order to protect its interests in the agreement and in the improvements it admitted it constructed. Further, Union Air Hawai'i did not make any representations regarding whether it owned WPHC units. The appearance of Union Air Hawai'i as a defendant in this case did not justify Aquarian's failure to timely serve Unipack Japan. Aquarian has failed to point to any evidence indicating that the circuit court exceeded the bounds of reason in dismissing the

[15] Aquarian also argues that "Union Air [Hawai'i] had voluntarily appeared for Unipack, and arguably was already served for Unipack." Union Air Hawai'i voluntarily appeared, stating that it had been mistakenly identified as Unipack Hawai'i in the 1988 and 1993 Agreements and in the First Amended Complaint. At no point did Union Air Hawai'i state that it was appearing on behalf or in place of Unipack Japan. The service of the First Amended Complaint on Union Air Hawai'i was not effective service on Unipack Japan.

First Amended Complaint, which was filed on August 3, 1995, against Unipack Japan, which was not served until March 26, 1998.

Further, the circuit court did not abuse its discretion in denying Aquarian's motion for relief from the order dismissing Unipack Japan based upon the actual service of Unipack Japan. Relief under HRCP Rule 60(b)(2) may be available where the moving party presents new evidence and: "'(1) it must be previously undiscovered even though due diligence was exercised; (2) it must be admissible and credible; (3) it must be of such a material and controlling nature as will probably change the outcome and not merely cumulative or tending only to impeach or contradict a witness.'" Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 259, 948 P.2d 1055, 1100 (1997) (quoting Orso v. City & County of Honolulu, 56 Haw. 241, 250, 534 P.2d 489, 494 (1975)). At the time of the hearing, Aquarian was unaware that Unipack Japan had been served. Aquarian's attorney informed the court that they had been checking with the serving company daily but had not gotten a response. The actual service was previously undiscovered evidence even though due diligence was exercised. The return of service, which was filed on June 5, 1998, was admissible and credible. However, it would not have changed the disposition of the motion because the service was untimely.

Aquarian also argues that it was entitled to relief from the order dismissing Unipack Japan under HRCP Rule 60(b)(3).

In order to obtain relief under Rule 60(b)(3), "'the movant must, (1) prove by clear and convincing evidence that the [order] was obtained through fraud, misrepresentation, or other misconduct[, and] (2) establish that the conduct complained of prevented the losing party from fully and fairly presenting his case or defense.'" Kawamata Farms, 86 Hawai'i at 252, 948 P.2d at 1093 (quoting Jones v. Aero/Chem Corp., 921 F.2d 875, 878-79 (9th Cir. 1990)) (some alterations in original).

Aquarian argued that it was entitled to relief because Unipack Japan knew, even if its counsel did not, that it had been served by the time of the April 7, 1998 hearing on the motion to dismiss and failed to disclose this fact to the circuit court. Aquarian further argued that the circuit court would not have dismissed the complaint against Unipack Japan if it had known about the completed service. In its memorandum in opposition to the motion for relief, Unipack Japan argued that its attorney did not have knowledge of the completed service in Japan. Unipack Japan further stated that its counsel learned of the completed service shortly after the hearing but, based on his understanding of the court's ruling, did not believe he had an obligation to disclose the information. Tatsuo Nishitani, who received the service, filed a declaration stating that he did not immediately realize the significance of the documents because English is his second language and he is not familiar with the legal process in

Hawai‘i. Therefore, Unipack Japan argued that neither it nor its counsel committed fraud, misrepresentation, or misconduct in failing to disclose the completed service. Even assuming that there was clear and convincing evidence of fraud, misrepresentation, or misconduct, Unipack Japan argued that it did not prevent Aquarian from fully and fairly defending against the motion to dismiss because the motion focused on whether the service upon Herek on March 3, 1998 was effective. In denying the motion, the circuit court did not make any findings or conclusions regarding Aquarian's claim for relief under HRCP Rule 60(b)(3).

Based on the record, Aquarian failed to provide clear and convincing evidence that the failure to disclose the completed service constituted fraud, misrepresentation, or misconduct. Even assuming arguendo that it did, the conduct did not prevent Aquarian from fully and fairly defending against the motion to dismiss. The dispositive issue in our review of the dismissal of Unipack Japan is whether Aquarian effected timely service. Aquarian had a full and fair opportunity to argue that the service upon Herek on March 3, 1998 was timely, but the circuit court concluded that it was not. Knowledge of the actual service, which occurred in Japan on March 26, 1998, would not have aided Aquarian's position on the motion because the actual service was also untimely. Aquarian was not entitled to relief

from the order dismissing Unipack Japan under HRCP Rule 60(b)(3).

The circuit court did not abuse its discretion in denying Aquarian's motion for relief from the order dismissing Unipack Japan. We reverse the ICA's opinion with regard to this issue and affirm the following orders of the circuit court: the April 17, 1998 order granting Unipack Japan's motion to dismiss; the July 6, 1998 order denying Aquarian's motion for relief from judgment as to the dismissal of Unipack Japan; and the July 28, 1998 order entering final judgment in favor of Unipack Japan.

C. Unipack Japan was not an indispensable party and, therefore, Aquarian can proceed against AOAO alone.

The ICA held that, because Unipack Japan could be joined as a party, the circuit court erred in granting AOAO's motion to dismiss for failure to serve an indispensable party. The ICA did not address whether Aquarian could proceed against AOAO if Unipack Japan were not made a party. HRCP Rule 19 states:

> (a) Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.

(Emphases added.) We hold that Unipack Japan was not a necessary

party because the absence of Unipack Japan did not create any of the circumstances described in HRCP Rule 19(a)(1) and (2). Aquarian initially sought the termination of the lease, the removal of the structures built pursuant to the lease, damages for the loss of the use of common area and other related property damage, and punitive damages. In Count I of the First Amended Complaint, Aquarian asserted that it was entitled to the requested relief under HRS §§ 514A-13[16] and 514A-89[17] because the

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[16] HRS § 514A-13(d) (1993) provides in relevant part:

> Each apartment owner may use the common elements in accordance with the purpose for which they were intended without hindering or encroaching upon the lawful rights of the other apartment owners, subject to:
>
> . . . .
>
> (2) The right of the board of directors, on behalf of the association of apartment owners, to lease or otherwise use for the benefit of the association of apartment owners those common elements which are not actually used by any of the apartment owners for an originally intended special purpose, as determined by the board of directors; provided that unless the approval of the owners of seventy-five per cent of the common interest is obtained, any such lease shall not have a term exceeding five years and shall contain a provision that the lease or agreement for use may be terminated by either party thereto on not more than sixty days written notice;
>
> (3) The right of the board of directors to lease or otherwise use for the benefit of the association of apartment owners those common elements not falling within paragraph (2) above, upon obtaining: (A) the approval of the owners of seventy-five per cent of the common elements, including all directly affected owners and all owners of apartments to which such common elements are appurtenant in the case of limited common elements and (B) approval of all mortgagees of record on apartments with respect to which owner approval is required by (A) above, if such lease or use would be in derogation of the interest of such mortgagees[.]

[17] HRS § 514A-89 provides in relevant part:

> No apartment owner shall do any work which could jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement or hereditament, nor may any apartment owner add any material structure or excavate any additional basement or cellar, without in every such case the consent of seventy-five per cent of the

defendants' violation of those sections constituted conversion of Aquarian's property interests, an unlawful cloud on its title, and an unlawful deprivation of its property rights. However, in light of the collateral settlement agreement between AOAO and Union Air Hawai'i, only the damages issues remained when Unipack Japan and AOAO were dismissed.

An apartment owner has the right to use common elements, but this right is subject to the ability of the board of directors, on behalf of its association of apartment owners, to lease common elements under certain circumstances. See HRS § 514A-13(d)(2) (1993). Where the board enters into a lease without complying with HRS § 514A-13(d)(2), an aggrieved apartment owner has standing to assert a claim for relief against the owner's association. Cf. Penney v. Association of Apartment Owners of Hale Kaanapali, 70 Haw. 469, 776 P.2d 393 (1989) (violation of HRS § 514A-13(b)). However, HRS § 514A-13(d)(2) does not provide aggrieved apartment owners with a claim for relief against the lessees. The presence of Unipack Japan is therefore not necessary to adjudicate Aquarian's claim under that section. Aquarian can obtain complete relief against AOAO under HRS § 514A-13(d)(2) without Unipack Japan.

Further, Unipack Japan is not a party described in HRCP

> apartment owners, together with the consent of all apartment owners whose apartments or limited common elements appurtenant thereto are directly affected, being first obtained . . . .

Rule 19(a)(2). Unipack Japan asserts that it claims absolutely no interest in any of the agreements that caused the alleged damages to Aquarian's property rights. These alleged damages are the subject matter of the action. Insofar as Unipack Japan claims no interest in the subject matter of the action, the absence of Unipack Japan would not impair its ability to protect its interest, nor would it be at a substantial risk of incurring inconsistent obligations with regard to its interest.[18]

Because Unipack Japan is not a necessary party under HRCP Rule 19(a), it cannot be considered an indispensable party under HRCP Rule 19(b). HRCP Rule 19(b) provides:

> Determination by court whenever joinder not feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(Emphasis added.) Under HRCP Rule 19(b), a court can only find that a party is indispensable if the party is necessary under subsection (a), but cannot be made a party. Because Unipack Japan is not a necessary party under Rule 19(a), we do not need

[18] Furthermore, if AOAO wanted to contest Unipack Japan's assertion that it did not have any interest in the agreements, it was incumbent upon AOAO to file a cross-claim against Unipack Japan. In the alternative, AOAO may file a separate indemnity suit against Unipack Japan.

to invoke "equity and good conscience" to determine whether Aquarian should be allowed to proceed against AOAO alone. Because Unipack Japan is neither a necessary nor an indispensable party,[19] the circuit court erred in granting AOAO's motion to dismiss the complaint due to Aquarian's failure to serve an indispensable party. We affirm the ICA's opinion, although on different grounds, insofar as it vacated the April 17, 1998 order granting AOAO's motion, the July 6, 1998 order denying Aquarian's motion for relief from judgment as to AOAO, and the July 28, 1998 order entering final judgment in favor of AOAO.

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[19] Courts in factually analogous cases have found the offending unit owners to be indispensable or necessary parties. See Bonneville Tower Condominium Management Comm. v. Thompson Michie Assocs., Inc., 728 P.2d 1017 (Utah 1986); Gallagher v. Seagate of Gulfstream Condominium Ass'n, Inc., 423 So.2d 640 (Fla. Dist. Ct. App. 1983). In Bonneville, the condominium in question featured common elements that included extra parking spaces and storage areas. The defendants, the predecessor management committee, sold exclusive use of these common elements to 34 unit owners. The plaintiff, the current management committee, filed a complaint that prayed for damages and the return of the parking and storage to common element status. The Utah Supreme Court held that the lower court properly granted defendants' motion to dismiss for failure to join the 34 unit owners as defendants.

In Gallagher, the condominium association was the lessee of certain recreational facilities that it leased for use by the unit owners. The lease payments were treated as a common expense and distributed equally among all unit owners. Subsequently, 298 unit owners elected to purchase 1/360th interests in the recreational area. The remaining interests were leased to the association, which distributed the lease payments among the 62 unit owners who had not purchased interests. Three of the 62 unit owners filed suit against the association arguing, inter alia, that the court should invalidate the sale of the partial interests. On appeal, the court noted that "[a]lthough the court did not deal with the plaintiffs' request to invalidate the overall buy-out transaction [the owner/developer of the recreational area and the 298 owners of 1/360th interests] may well have been indispensable to these issues which were not ruled upon." 423 So.2d at 642.

However, Bonneville and Gallagher are distinguishable from the present case because the offending unit owners in those cases could have lost their interests in common elements that were purchased. In the present case, the Amended 1993 Agreement was terminated and the structures removed, and Unipack Japan claims no interest in any of the agreements giving rise to Aquarian's claims.

D. The ICA erred in vacating the Summary Judgment Orders.

The ICA addressed the statute of limitations issue and the punitive damages issue as "comments relevant to some of the issues on remand." ICA's opinion at 41. The petitioners argue that the ICA erred in vacating the Summary Judgment Orders in their entirety. The ICA held that the issue of punitive damages should not have been decided on summary judgment, and stated that Aquarian's claims under HRS Chapter 514A (1993 & Supp. 1999) dealt with rights in real property.[20] However, the ICA's opinion vacated both orders in their entirety and effectively reinstated all of Aquarian's claims.

1. Statute of limitations

On appeal, Aquarian argued that the circuit court erred in concluding that the two-year statute of limitations under HRS § 657-7 (1993)[21] applied to Count I. Aquarian argued that it had requested equitable relief in the First Amended Complaint, removal of the structures and restoration of the common area to its original state. Because there is no section establishing a statute of limitations for such equitable relief, Aquarian argued

[20] Although the ICA held that Aquarian's claims dealt with rights in real property, it did not identify the ramifications of this holding. However, insofar as the ICA held that the case involved property rights, the two-year statute of limitations in HRS § 657-7 (1993) would apply.

[21] HRS § 657-7 provides: "Actions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13."

that the six-year statute of limitations under HRS § 657-1(4) (1993)[22] applied.

However, as stated by the ICA: "HRS § 514A-13 states a right of each apartment owner to use and enjoy those portions of the property designated as common areas, subject to certain conditions. This right of enjoyment constitutes a right in real property as a right appurtenant to an apartment in a condominium." ICA's opinion at 41-42. Although Aquarian requested equitable relief, Aquarian requested the relief in response to the alleged encroachment on its real property right to use the common elements. "The proper standard to determine the relevant limitations period is the nature of the claim or right, not the form of the pleading. The nature of the right or claim is determined from the allegations contained in the pleadings." Au v. Au, 63 Haw. 210, 214, 626 P.2d 173, 177 (1981) (citations omitted). Because the nature of the rights Aquarian sought to enforce was based in property rights, HRS § 657-7 applied and Aquarian's claims were subject to a two-year statute of limitations. The ICA erred in vacating the Summary Judgment Orders on the statute of limitations issue. The circuit court properly granted summary judgment in favor of the defendants as

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[22] HRS § 657-1 (1993) provides in relevant part:

> The following actions shall be commenced within six years next after the cause of action accrued, and not after:
> . . . .
> (4) Personal actions of any nature whatsoever not specifically covered by the laws of the State.

to Count I with regard to the 1988 Agreement.[23]

2. Due process

In the First Amended Complaint, Aquarian alleged due process violations under the United States and Hawai‘i Constitutions. However, both the fourteenth amendment and article I, section 5 of the Hawai‘i Constitution require state action.

> A state can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the State. [W]hen the state directs, supports, and encourages those private parties to take specific action, that is State action. In other words, there must be a sufficiently close nexus between the State and the challenged action so that the action of the private entity may be fairly treated as that of the State itself.

Estes v. Kapiolani Women’s and Children’s Med. Ctr., 71 Haw. 190, 193, 787 P.2d 216, 219 (1990) (internal citations and quotation marks omitted) (alteration in original). The cases cited by Aquarian in its opening brief do not state the due process law in Hawai‘i and are unpersuasive.[24] There was no evidence

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[23] AOAO did not raise the statute of limitations issue with regard to the other counts. However, Count IV alleges that the defendants committed the violations alleged in Counts I, II, and III in such a manner as to warrant punitive damages. Thus, the statute of limitations bar for Count I also relates to Count IV insofar as Count IV alleges that AOAO violated HRS Chapter 514A in such a manner as to warrant punitive damages. See infra section II.D.4.

[24] Aquarian cites Gerber v. Longboat Harbour N. Condominium, Inc. for the proposition that judicial enforcement of private condominium declarations constitutes state action. 724 F. Supp. 884, vacated in part on other grounds, 757 F. Supp. 1339 (M.D. Fla. 1989). Even if this were the law in Hawai‘i, Aquarian’s cause of action arose out of the lease, not the condominium declaration, and the lease was never judicially enforced. Aquarian also cites Elgin v. Montgomery County Farm Bureau, 549 So.2d 486 (Ala. 1989), for the proposition that a member of a private voluntary association has a due process claim where a property right granted by the association has been invaded.

establishing a nexus between the State and AOAO. Therefore, the circuit court did not err in granting summary judgment in favor of the defendants on the due process claim. The ICA erred in vacating this portion of the AOAO Summary Judgment Order.

3. Deceptive trade practices

In its opening brief, Aquarian did not argue that the circuit court erred in dismissing its claim under HRS § 480-1 (1993). Therefore, the issue was not raised on appeal. Further, even if the issue had been raised on appeal, the circuit court correctly concluded that Aquarian had no standing to bring an action under HRS Chapter 480 (1993 & Supp. 1999) because it was not a "consumer."[25] The ICA erred insofar as its opinion vacated these portions of Summary Judgment Orders, which were not contested on appeal.

4. Punitive damages

The ICA held that the circuit court erred in granting summary judgment in favor AOAO because Aquarian had presented

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However, Elgin was based on Alabama case law recognizing due process rights for members of private voluntary associations. See, e.g., Tucker v. Jefferson County Truck Growers' Ass'n, 487 So. 2d 240 (Ala. 1986). No similar due process right has been recognized in Hawai'i, nor do we recognize one in the present case.

[25] Aquarian alleged that the conduct of the defendants constituted an unfair or deceptive trade practice or act and, therefore, it had a right of action under HRS § 480-13(b) (Supp. 1999), which provides a right of action for "[a]ny consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2." HRS § 480-1 states: "'Consumer' means a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

evidence that the AOAO Board made its determination that the common area was not in use contrary to the known and/or obvious facts and without making a reasonable inquiry into the actual use. AOAO argues that the ICA erred in so holding because: 1) Aquarian's allegations were factually insufficient to sustain a cause of action for punitive damages; and 2) the legislature intended to confer discretion on apartment association boards and curtail punitive damages claims.

"In order to justify an award of punitive damages, 'a positive element of conscious wrongdoing is always required.'" Masaki v. General Motors Corp., 71 Haw. 1, 7, 780 P.2d 566, 570-71 (1989) (quoting C. McCormick, Handbook on the Law of Damages § 77 at 275 (1935)). In the complaint, Aquarian argued that it was entitled to punitive damages because, at the time the 1988 Agreement was entered into, the defendants knew or should have known that they were violating HRS § 514A-13. Neither the complaint nor the memoranda regarding summary judgment addressed a claim for punitive damages arising from the 1993 Agreement or the Amended 1993 Agreement. Further, neither the complaint nor the memoranda alleged any facts that would have indicated that Union Air Hawai‘i intentionally violated HRS Chapter 514A.

In its motion for summary judgment, AOAO argued that it had acted in good faith because it entered into the 1988 Agreement pursuant to the advice of its attorney. AOAO's

attorney advised that AOAO could enter into the lease under HRS § 514A-13(d)(2)[26] if it determined that the common area was not being used for an "originally intended purpose." AOAO's attorney also advised that, if the area was being used for an originally indented purpose, under HRS § 514A-13(d)(3),[27] the board was required to obtain the consent of seventy-five percent of the owners of common elements, one hundred percent of the owners that would be directly affected, and all mortgagees of the directly affected units if the lease would derogate the interest of the mortgagees. At a regularly scheduled meeting held on July 5, 1988, the AOAO Board discussed this advice and made the determination that the lobby was not being used for an originally intended purpose. A representative from Aquarian was present at the meeting. However, the minutes of the meeting do not state the basis upon which the board made the non-use determination.

In its memorandum in opposition to the motion, Aquarian argued that AOAO clearly had notice that the lobby was being used for its intended purpose. Aquarian cited the rejection of a 1984 proposal to lease a portion of the lobby and its objection to the Unipack lease. In 1984, Hy's Restaurant, another WPHC tenant, offered to lease a portion of the lobby and Aquarian objected because Aquarian's members and guests used the lobby on a regular

[26] See supra note 16.

[27] See supra note 16.

basis. The AOAO president reported that before the AOAO could lease lobby space to Hy's, the AOAO would have to obtain Aquarian's consent. The offer from Hy's was not accepted.

On August 23, 1988, Aquarian submitted a letter to the AOAO Board protesting the construction in the lobby under the Unipack lease. In the letter, Aquarian noted that it had never consented to the construction, that the AOAO had not obtained the consent of seventy-five percent of the apartment owners prior to construction, and that it impaired ingress and egress to Aquarian's units. Aquarian's letter also argued that the construction was a violation of HRS Chapter 514A. Based on the circumstances of the proposed Hy's lease and the Unipack lease, Aquarian argued that the AOAO was aware of the requirements of HRS Chapter 514A and intentionally disregarded them.

Aquarian also argued that AOAO did not make a reasonable inquiry into whether the lobby was in fact being used for an originally intended purpose. Aquarian cited the deposition testimony of Elton Propes, WPHC resident manager. Propes admitted to observing the following uses of the lobby space prior to the Unipack lease: AOAO board meetings, private parties, and apartment owners using vending machines and sitting on the lobby furniture approximately twice a week. Propes also admitted that he saw people using the lobby following Aquarian's Sunday morning functions. According to Propes, who usually

attended AOAO board meetings, none of the directors asked him about the actual usage of the lobby area or conducted other research regarding usage.

In its reply to Aquarian's memorandum in opposition, AOAO argued that Aquarian had "not even beg[u]n to present clear and convincing evidence" supporting its punitive damages claim. AOAO noted that Propes also stated in his deposition that "[t]here was never a whole lot of activity [in the lobby area] . . . . . Some days there wouldn't be anyone there."

Based on the materials relied upon by the parties, there was a genuine issue of material fact regarding whether the AOAO Board entered into the 1988 Agreement even though it knew or should have known that it had not complied with the requirements of HRS Chapter 514A. However, Aquarian's punitive damages claim is a derivative claim of Count I, and a two-year statute of limitations applied to both claims. Because the circuit court correctly concluded that Aquarian's Count I claims as to the 1988 Agreement were time-barred, Aquarian's punitive damages claim arising from the 1988 Agreement was also time-barred.[28] Further, Aquarian did not present any evidence that there was conscious

[28] We note that, although AOAO asserted a general statute of limitations defense in its answer, it did not at any point specifically argue that Count IV was time-barred. Statute of limitations violations are waivable. See Torres v. Northwest Engineering Co., 86 Hawai'i 383, 398, 949 P.2d 1004, 1019 (App. 1997). However, where the underlying claim has been disposed of on statute of limitations grounds, the derivative punitive damages claim cannot stand.

wrongdoing in the 1993 Agreement or the Amended 1993 Agreement.

Because Aquarian's punitive damages claim under the 1988 Agreement was time-barred and because Aquarian did not present any arguments that it was entitled to punitive damages under the Amended 1993 Agreement, the circuit court correctly ruled that AOAO was entitled to summary judgment on the punitive damages claim. Therefore, the ICA erred in vacating the Summary Judgment Orders.

III. CONCLUSION

Based on the foregoing, we affirm the ICA's opinion in part and reverse it in part. The circuit court did not err in dismissing Unipack Japan based on Aquarian's failure to effect timely service. Therefore, we reverse the ICA's opinion as to this issue and affirm the following orders of the circuit court: the April 17, 1998 order granting Unipack Japan's motion to dismiss the First Amended Complaint; the July 6, 1998 order denying Aquarian's motion for relief from judgment as to Unipack Japan; and the July 28, 1998 order entering final judgment as to Unipack Japan. However, the circuit court erred in dismissing AOAO based on Aquarian's failure to serve Unipack Japan. Although on different grounds, the ICA correctly vacated the following orders: the April 17, 1998 order granting AOAO's motion to dismiss the First Amended Complaint for failure to serve an indispensable party; the July 6, 1998 order denying

Aquarian's motion for relief from judgment as to AOAO; and the July 28, 1998 order entering final judgment as to AOAO. We affirm the ICA's opinion, as modified by our analysis, regarding the circuit court's erroneous dismissal of AOAO.

The ICA erred in vacating the AOAO Summary Judgment Order. Aquarian raised a genuine issue of material fact as to the punitive damages claim against AOAO regarding the 1988 Agreement but did not present any material that would support a punitive damages claim regarding the 1993 Agreement. The circuit court properly dismissed Count IV because the two-year statute of limitations barred Aquarian's claim regarding the 1988 Agreement. Therefore, we reverse the ICA's opinion regarding the issues addressed in the Summary Judgment Orders and affirm the circuit court's July 20, 1995 order granting in part and denying in part AOAO's motion for partial dismissal or partial summary judgment

and the circuit court's June 26, 1995 order granting in part and denying in part Union Air Hawaii's joinder in AOAO's motion. We remand this case for further proceedings against AOAO as to Count I.

DATED: Honolulu, Hawai'i, March 2, 2001.

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