NO. 22323

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

BUSINESS BROKERS HAWAII, INC., Plaintiff/Counterclaim Defendant-Appellant, vs. FTF, INC., dba MAUI MOUNTAIN CRUISERS, a Hawaii corporation, JON THURO, CHERYL THURO, Defendants/ Counterclaimants-Appellees, JOHN DOES 1 THROUGH 10, JANE DOES 1 THROUGH 10, DOE PARTNERSHIPS 1 THROUGH 10, DOE CORPORATIONS 1 THROUGH 10, AND DOE GOVERNMENTAL ENTITIES 1 THROUGH 10, Defendants.	CIVIL NO. 97-0120(3) APPEAL FROM 1) ORDER GRANTING DEFENDANTS JON THURO AND CHERYL THURO PARTIAL SUMMARY JUDGMENT AGAINST PLAINTIFF BUSINESS BROKERS HAWAII, INC., AND DENYING RULE 54(B) CERTIFICATION, FILED SEPTEMBER 11, 1998; 2) ORDER GRANTING DEFENDANT FTF, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE GENERAL AND PUNITIVE DAMAGES, FILED SEPTEMBER 11, 1998; 3) ORDER GRANTING DEFENDANT FTF, INC.'S MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF BUSINESS BROKERS HAWAII, INC., FILED OCTOBER 8, 1998; 4) ORDER GRANTING DEFENDANTS FTF, INC., JON THURO, AND CHERYL THURO'S MOTION FOR ATTORNEYS' FEES AND COSTS FILED DECEMBER 3, 1998, FILED ON DECEMBER 28, 1998 & 5) FINAL JUDGMENT, FILED JANUARY 20, 1999 SECOND CIRCUIT COURT

MEMORANDUM OPINION

Plaintiff-Appellant Business Brokers Hawaii, Inc. (Plaintiff) appeals the adverse January 20, 1999 Final Judgment of the Circuit Court of the Second Circuit in favor of Defendants/Counterclaimants-Appellees FTF, Inc. dba Maui Mountain

Cruisers (Defendant Cruisers), and Jon Thuro and Cheryl Thuro (the Thuro Defendants).

Plaintiff also appeals the following orders of the circuit court underlying the Final Judgment: (1) Order Granting Defendants Jon Thuro and Cheryl Thuro Partial Summary Judgment Against Plaintiff Business Brokers Hawaii, Inc., and Denying Rule 54(b) Certification, filed September 11, 1998; (2) Order Granting Defendant FTF, Inc.'s Motion for Partial Summary Judgment Re General and Punitive Damages, filed September 11, 1998; (3) Order Granting FTF, Inc.'s Motion for Summary Judgment Against Plaintiff Business Brokers Hawaii, Inc., filed October 8, 1998; and (4) Order Granting Defendants FTF, Inc., Jon Thuro, and Cheryl Thuro's Motion for Attorneys' Fees and Costs Filed December 3, 1998, filed December 28, 1998.

For the following reasons, we vacate the court's award of attorneys' fees of $53,157.24 and remand with instruction that the amount be reduced to $21,225.00. We affirm the judgment in all other particulars.

Background.

On February 20, 1997, Plaintiff filed a Verified Complaint[1] against Defendant Cruisers and the Thuro Defendants.

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[1] The verification was in the following form:

STATE OF HAWAII)
) SS.
COUNTY OF MAUI)

Insofar as it is usefully descriptive, the complaint alleged as follows:

> 1. Plaintiff . . . is a Hawaii corporation, engaged in the business of listing and brokering the sale of real estate and business assets . . . in the County of Maui, State of Hawaii.
>
> 2. [Defendant Cruisers] is a Hawaii corporation . . . engaged in the business of providing bicycle tours . . . in the County of Maui, State of Hawaii.
>
> 3. [The Thuro Defendants] are husband and wife and . . . are also believed to be shareholders, officers, directors and/or employees of Defendant Cruisers.
>
> . . . .
>
> 5. On or about July 21, 1996, Plaintiff as "Broker" and Defendant Cruisers as "Seller" entered into that certain "Listing Agreement For Sole And Exclusive Right To Sell" ("THE LISTING AGREEMENT") under the terms of which Plaintiff agreed to procure a "ready, willing and able" purchaser for the assets of Defendant Cruisers at the price set forth thereon in return for which Plaintiff would receive a commission equal to ten percent (10%) of the selling price. A

VERIFICATION

MILTON DOCKTOR, President of [Plaintiff], a Hawaii corporation, being first duly sworn, upon oath deposes and states that he has read the foregoing Verified Complaint, knows the contents thereof, and that the same are true to the best of his information, knowledge and belief.

BUSINESS BROKERS HAWAII, INC.

By: /s/
Its President

Subscribed and sworn to before me
this 19th day of February, 1997.

/s/
Notary Public, State of Hawaii
My commission expires: 2/6/2000

true and correct copy of the Listing Agreement is attached hereto as Exhibit 1.

6. In the course of completing The Listing Agreement, and in order to aid in the sale of the assets of Defendant Cruisers, Plaintiff was supplied with certain material information directly by [t]he Thuro Defendants upon which it would rely in marketing the assets of Defendant Cruisers and upon which any prospective purchaser would rely in deciding whether to purchase those assets. Among this material information was the representation that the "Annual Pre-Tax Profit" of Defendant Cruisers was $400,000.00.

7. The material information that the sum of $400,000.00 was the Annual Pre-Tax Profit of Defendant Cruisers was false and misleading, and known to be false and misleading to [t]he Thuro Defendants at the time it was given to Plaintiff and subsequently acknowledged as false and misleading by [t]he Thuro Defendants.

8. Upon discovery by Plaintiff of the false and misleading information supplied by [t]he Thuro Defendants, Plaintiff and Defendant Cruisers executed that certain "Amendment To The Listing Contract" ("THE AMENDMENT") under which the sales price for the assets of Defendant Cruisers was reduced to $849,000.00 and other terms adjusted accordingly. A true and correct copy of The Amendment is attached hereto as Exhibit 2.

9. By that certain "Offer To Purchase" ("THE OFFER") dated October 31, 1996, Mr. Joseph Luithly ("MR. LUITHLY") agreed to purchase the assets of Defendant Cruisers at the price and upon all of the terms set forth in The Listing Agreement as modified by The Amendment. A true and correct copy of The Listing Agreement [sic] is attached hereto as Exhibit 3.

10. The Offer was immediately delivered to Defendant Cruisers, however, Defendant

Cruisers refused to accept the Offer and though often demanded continues to refuse and decline to accept the Offer and to consumate [sic] the sale and purchase of the assets of Defendant Cruisers to Mr. Luithly.

COUNT I

. . . .

12. Plaintiff complied with its duties and obligations under The Listing Agreement and The Amendment by procuring a purchaser who was ready, willing and able to purchase the assets of Defendant Cruisers on the terms set forth in The Listing Agreement and The Amendment.

13. Plaintiff has demanded that Defendant Cruisers pay to it the commission required by The Listing Agreement and The Amendment, namely ten percent (10%) of the total purchase price of $849,000.00, for the sum of $84,900.00, but Defendant Cruisers has failed and refused to do so and continues to fail and so refuse to pay the commission.

14. Defendant Cruisers has breached the terms of The Listing Agreement and The Amendment.

15. As a result of the breach of Defendant Cruisers, Plaintiff is entitled to recover its commission in the sum of $84,900.00, together with such general, special and consequential damages as shall be shown at a trial of this case.

16. Defendant Cruiser's breach is intentional.

17. As a result of the intentional breach of contract by Defendant Cruisers, Plaintiff is entitled to punitive damages in a sum not less than $500,000.00.

COUNT II

. . . .

19. The Thuro Defendants have at all times used the [sic] deployed Defendant Cruisers as their alter ego.

20. The Thuro Defendants are jointly and severally liable to Plaintiff for all damages due and owing by Defendant Cruisers.

21. In using and deploying Defendant Cruisers, [t]he Thuro Defendants actively misrepresented material facts concerning Defendant Cruisers which [t]he Thuro Defendants knew or should have known would affect the marketing and sale of the assets of Defendant Cruisers.

22. As a result of the material misrepresentations of [t]he Thuro Defendants, Plaintiff suffered such special, general and consequential damages as shall be shown at a trial of this case.

WHEREFORE, Plaintiff prays that Judgment be entered in its favor and against Defendants and each of them as follows:

1. For the sum of $84,900.00 being the commission due and owing to Plaintiff.

2. For such special, general and consequential damages as shall be shown at a trial of this case.

3. For punitive damages in a sum not less than $500,000.00.

4. For such other relief to which Plaintiff is entitled pursuant to Rule 54(c) of the Hawaii Rules of Civil Procedure.

The document attached to the complaint as Exhibit 1, and described in the complaint as "[a] true and correct copy of

the Listing Agreement[,]" is a one-page, preprinted form, preprinted on both sides of the page.

The document attached as Exhibit 2 to the complaint, and described therein as "[a] true and correct copy of the Amendment[,]" is a one-page, single-sided document.

The document attached to the complaint as Exhibit 3 and referred to in the complaint as "[a] true and correct copy of The Listing Agreement[,]"[2] consists of six pages -- a five-page form, preprinted on one side of each page, entitled "Offer to Purchase[,]" along with an apparently custom-made, one-page, single-sided document adding to and clarifying the Offer.

Defendant Cruisers and the Thuro Defendants filed an answer to the complaint on April 14, 1997. Defendant Cruisers filed a counterclaim for declaratory judgment at the same time.

The answer denied liability and asserted a number of affirmative defenses, among them that Plaintiff had failed "to produce a ready, willing and able buyer whose terms mirrored the offer to sell[.]" The answer also sought attorneys' fees and costs.

The counterclaim prayed for (1) a declaration that the Listing Agreement and Amendment were "void or voidable as a

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[2] Although the complaint refers to its attached Exhibit 3 as "The Listing Agreement," the context of the paragraph containing the reference and the overall context of the complaint leave no doubt that the reference was erroneous and meant to identify the Offer to Purchase instead. On appeal, Plaintiff consistently describes Exhibit 3 as the Offer to Purchase.

matter of law"; or alternatively, (2) a declaration that Plaintiff was in breach of the Listing Agreement and Amendment, an immediate termination of both agreements, and a prohibition against enforcement of any of their provisions. The counterclaim also prayed for attorneys' fees and costs.

The July 20, 1996 Listing Agreement, on what appears to be a preprinted form provided by Plaintiff, granted Plaintiff, as "Broker," "the SOLE AND EXCLUSIVE RIGHT to sell, lease, trade, or otherwise dispose of all or any part of the assets" of Defendant Cruisers, as "Seller." The period of exclusivity extended until midnight on July 20, 1997. The sale did not include the corporate securities of Defendant Cruisers.

Under the Listing Agreement, Defendant Cruisers would pay Plaintiff a commission "in an amount equal to 10% of the PRICE AT WHICH THE Business is actually sold, or a minimum of $12,000 WHICHEVER IS GREATER, immediately upon any one of the following events"; which included, in relevant part:

> a. BROKER procures a purchaser who is ready, willing, and able to purchase the Business on the proposed terms as set forth above, or as modified by a writing signed by SELLER, but SELLER in any way prevents that purchaser from actually purchasing the Business, whether by withholding from BROKER pertinent lease information, financial reports, tax returns, or other relevant data, or otherwise, or
>
> . . . .
>
> c. SELLER withdraws the Business from sale or purports to terminate this listing

> contract prior to the expiration of the Sole and Exclusive Period, or
>
> d. SELLER fails or refuses to complete a sale, lease, trade or other disposition of all or any part of the Business after entering into a written agreement to do so[.]

The total purchase price for the assets of Defendant Cruisers under the Listing Agreement was $1,000,000, consisting of a cash down payment of $400,000 ("includes Broker's fee of $100,000") and a new note to Defendant Cruisers secured by the assets, providing for "[s]ixty monthly payments in the amount of $12,748.23 including 10% interest per annum."

The Listing Agreement included certain financial numbers concerning Defendant Cruisers that were "provided by the Seller and [were not and will not] be verified by" Plaintiff. One of these was an annual pretax profit figure of $400,000.

The Listing Agreement was signed by John Thuro as Vice President of Defendant Cruisers, who was also named therein as the owner of fifty-one percent of the shares of the company. The Listing Agreement recited that it was entered into by Defendant Cruisers "through Jon Thuro, its officer, director and shareholder[.]"

The last paragraph of the Listing Agreement, just above the signature blocks, provided, however, that any signatories, "by signing below, . . . also personally and unconditionally, jointly and severalty (sic) guarantee performance of this

agreement by any corporation, partnership, or other entity on whose behalf we are acting."

Cheryl Thuro did not sign the Listing Agreement. She is listed in the text of the Listing Agreement as the owner of the remaining forty-nine percent of the shares of Defendant Cruisers.

The September 14, 1996 Amendment, signed by Defendant Cruisers, as "Seller," and Plaintiff, as "Broker," read in substance as follows:

> The undersigned Seller and Broker do hereby amend that certain Listing Agreement for Sole and Exclusive Right to sell executed by and between Seller and Broker dated on: Saturday, July 20, 1996 relating to the sale of the Seller's business known as: MAUI MOUNTAIN CRUISERS, FTF, INC., which was to have expired on Saturday, July 20, 1997, however since books and records have not been delivered to Broker to date, and since false and misleading information was provided to Broker as pertains to company earnings, Seller wishes to extend the expiration date of the listing to September 15, 1997.
>
> . . . .
>
> IN THE FOLLOWING RESPECTS ONLY:
>
> Sales Price changed to $849,000
>
> Terms of the new note changed to total financing of $449,000 @ 7% interest payable in 60 equal monthly installments of $5,213.27. If note is not prepaid, this note will carry total interest proceeds of $127,076.81. The note will have a balloon payment clause payable at the 60th month in the amount of $263,280.56.

> The selling price of 849,000 together with earned interest at 60 months, and upon receipt of the balloon payment of $263,280.56 equals = $976,076.81. Down payment is to be $400,000.
>
> "Sole and Exclusive Period" as used in Listing Agreement, extended to 12 o'clock midnight on September 15, 1997.
>
> ALL OTHER TERMS AND CONDITIONS OF THE LISTING AGREEMENT FOR SOLE AND EXCLUSIVE RIGHT TO SELL REFERRED TO HEREIN ABOVE REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT.
>
> Receipt of a copy of this Agreement is hereby acknowledged.

(Various forms of emphasis, other than capital letters, omitted). The Amendment was signed by Cheryl Thuro, as President, and Jon Thuro, as Vice President, of Defendant Cruisers.

The October 31, 1996 Offer matched in all material respects the price and financing terms of the Listing Agreement and Amendment.

The Offer included, however, additional terms not contained in the terms of sale specified in the Listing Agreement and Amendment. The most significant of the variances were listed by Defendant Cruisers in its counterclaim:

> a. requiring that [Defendant Cruisers] provide, without compensation, a period of training to Buyer;
>
> b. requiring that [Defendant Cruisers], without compensation, not compete for up to five years with Buyer;

c. leaving open allocations which would affect the net monies to be received by {Defendant Cruisers];

d. making the "offer" contingent upon financial investigation to Buyer's satisfaction, and other unacceptable conditions; and

e. requiring a first right of refusal on the business known as "Maui Mountain Café".

Numerous other variances may be discerned in the Offer and described as subsumed in the above "allocations" (item c.) and "other unacceptable conditions" (item d.) rubrics.

On July 24, 1998, the Thuro Defendants filed a motion for partial summary judgment under Count II of the complaint on all claims against them as individuals (MPSJ #1). The motion also requested that the judgment prayed for be certified as final pursuant to Rule 54(b) of the Hawai'i Rules of Civil Procedure (HRCP).[3]

The memorandum in support of MPSJ #1 argued that (1) there was no contract between Plaintiff and the Thuro Defendants;

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[3] Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) (1998) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

and (2) there was no basis for disregarding the corporate form because (a) Defendant Cruisers was not undercapitalized, (b) there was no support for a claim of fraud on the part of the Thuro Defendants and (c) Plaintiff did not rely on the credit of the Thuro Defendants so as to make it unjust to preserve the corporate entity.

On August 10, 1998, Plaintiff filed its memorandum in opposition to MPSJ #1. Plaintiff argued that (1) the guarantee language just above the signature blocks of the Listing Agreement bound Jon Thuro individually and, by virtue of reference in the same paragraph to "Addendum hereto, if any," bound Agreement signatory Cheryl Thuro individually as well; and (2) the Thuro Defendants were directly liable to Plaintiff for fraud, as evidenced by the recital in the Agreement that one of the reasons for the Agreement was the "false and misleading information . . . provided to [Plaintiff] as pertains to company earnings[.]"

In their August 17, 1998 reply memorandum, the Thuro Defendants raised another argument against the fraud claims -- that Plaintiff failed to plead its fraud claims with particularity as required by HRCP Rule 9(b).[4]

After an August 20, 1998 hearing, the court on September 11, 1998 entered its order granting MPSJ #1 and,

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[4] HRCP Rule 9(b) (1998) provides, in pertinent part:

> In all averments of fraud . . . , the circumstances constituting fraud . . . shall be stated with particularity.

because it thus disposed of all extant claims against the Thuro Defendants, dismissed them from the case. The court denied their request for HRCP Rule 54(b) certification.

On July 27, 1998, Defendant Cruisers filed its motion for partial summary judgment against all claims for general and punitive damages under Count I (MPSJ #2).

The memorandum in support of MPSJ #2 asserted Hawai'i case law holding that general and punitive damages cannot be awarded upon Plaintiff's bare allegation that "Defendant Cruisers' [breach of contract] is intentional[]" without further allegation and proof thereon that there was such a willful, wanton, or reckless breach so as to result in tortious injury, citing Dold v. Outrigger Hotel, 54 Haw. 18, 501 P.2d 368 (1972) and Amfac, Inc. v. Waikiki Beachcomber Investment Co., 74 Haw. 85, 839 P.2d 10 (1992).

Plaintiff's August 10, 1998 memorandum in opposition to MPSJ #2 was a one-page rebuttal which merely criticized the age of the cases relied upon by Defendant Cruisers and recited the truism that exemplary damages may be awarded in actions for fraud as well as in actions for breach of contract.

MPSJ #2 was heard on August 20, 1998, along with MPSJ #1, and on September 11, 1998 the court granted MPSJ #2.

On September 10, 1998, Defendant Cruisers filed a motion for summary judgment on Count I of the complaint; and on the fourth claim for relief in its counterclaim, which prayed for immediate termination of the Listing Agreement and Amendment and

a declaration that Plaintiff's purported right to a commission for any sale occurring within two years following termination is void and unenforceable (MSJ).

In its memorandum in support of the MSJ, Defendant Cruisers argued that judgment should enter in its favor on "[t]he sole remaining claim" against it, inasmuch as Plaintiff was not entitled to a commission because neither (1) the condition precedent of an actual sale, nor (2) the condition precedent of an offer from a ready, willing and able buyer on Defendant Cruiser's "exact terms[,]" was fulfilled.

Defendant Cruisers also identified variances in the terms of the Offer beyond the variances, quoted above, that were highlighted in its counterclaim. Listed in the memorandum were the following variances, with references to paragraph numbers in the Offer:

> a. requiring that [Defendant Cruisers] provide a minimum amount of inventory or face a reduction in the sale price (¶ 4);
>
> b. requiring that [Defendant Cruisers] provide, without compensation, a month of training to buyer (¶ 16);
>
> c. requiring that [Defendant Cruisers], without compensation, not compete for up to **five years** with buyer (¶ 17);
>
> d. requiring that [Defendant Cruisers] expose itself to liability by making a representation about environmental issues (¶ 21);

e. inserting a self-serving "disclaimer" whereby the brokers sought to insulate themselves from any misrepresentations they may have made (¶ 22);

f. requiring an offset provision that could have reduced the purchase price and failing to state its terms and conditions (¶ 23);

g. failing to specify important allocations of the proposed purchase price which would affect the net monies received by [Defendant Cruisers] (¶ 25);

h. failing to set a firm closing date, and instead leaving the closing date open until all of the contingencies were resolved to buyer's unilateral satisfaction (¶ 28);

i. including numerous contingencies that gave the buyer the right in its sole discretion to refuse to consummate the purchase (i.e., ¶s 11, 32, 33, p.6 - #7);

j. requiring that [Defendant Cruisers] agree to an **unspecified** price reduction if the National Park Service revoked down hill bike permits or if certain natural disasters occurred (p.6, #6); and

k. requiring a first right of refusal on the separate business known as "Maui Mountain Cage", which was owned by Cheryl Thuro, individually (p.6, #9).

(Bold emphases in the original).

In its September 28, 1998 memorandum in opposition to the MSJ, Plaintiff argued that (1) an actual sale was not a condition precedent to payment of its commission; and (2) the

Offer "sufficiently mirrored" the terms of the Listing Agreement and Amendment, in that the variances alleged by Defendant Cruisers "did not significantly alter the terms set out in the listing agreement," such that the only condition precedent to payment of its commission was fulfilled.

As to the latter argument, Plaintiff asserted various reasons why each minor variance cited by Defendant Cruisers was immaterial. As to the major variances, Plaintiff referred -- for the first time in the record -- to a "November 7th Purchase Offer Addendum" (Addendum), which made its first appearance in the record as "Exhibit C" to Plaintiff's memorandum in opposition to the MSJ, and which purported to delete the free training provision, the non-competition clause, the due diligence provisions and the first right of refusal to purchase Cheryl Thuro's Maui Mountain Café. The Addendum did not appear as one of the six pages of the Offer attached as Exhibit 3 to the complaint.

The Addendum was not supported by any affidavit, declaration, verification or certification.

In its September 29, 1998 reply memorandum, Defendant Cruisers reiterated its position supporting a condition precedent of actual sale and asserted various reasons why the variances it pointed out remained material. Defendant Cruisers also spent a considerable part of its memorandum attacking the authenticity of the Addendum.

Following an October 1, 1998 hearing on the MSJ, which neither Plaintiff nor its counsel attended, the court filed an October 8, 1998 order granting the MSJ.

On December 3, 1998, Defendant Cruisers and the Thuro Defendants filed a motion for attorneys' fees and costs. The motion cited the attorneys' fees and costs provision in the Listing Agreement, which provided that "[i]n the event of default and/or a lawsuit arising out of this contract (including a suit by BROKER for commission), the non-defaulting party and/or prevailing party, if a court action is filed, shall be entitled to recover all reasonable costs incurred including reasonable attorney's fees[,]" and was based upon Hawai'i Revised Statutes (HRS) § 607-14[5] relating to attorneys' fees, and HRS § 607-9

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[5] Hawai'i Revised Statutes § (HRS) 607-14 (Supp. 1998) provided, in pertinent part:

> In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.
>
> Where the note or other contract in writing provides for a fee of twenty-five per cent or more, or provides for a reasonable attorney's fee, not more than twenty-five per cent shall be allowed.

relating to costs.

With respect to attorneys' fees, the memorandum in support of the motion explained that as the prevailing parties in the litigation, Defendant Cruisers and the Thuro Defendants were entitled, under HRS § 607-14, to a maximum of twenty-five percent of "the amount sued for," and averred that the attorneys' fees itemized in the declaration of their counsel were reasonable and within the statutory cap.

The defendants requested $53,157.24 in attorneys' fees. Noting that Plaintiff sued for an $84,900.00 commission and "not less than $500,000.00" in punitive damages, or about $600,000 in total damages, the defendants reasoned that the amount of attorneys' fees they were requesting was well within the statutory cap (.25 x $600,000 = $150,000). The defendants also requested $2,243.24 in itemized costs.

Plaintiff filed no opposition to the motion for attorneys' fees and did not appear personally or through counsel at the December 28, 1998 hearing on the motion. On December 28, 1998, the court filed its order granting the motion and the requested attorneys' fees and costs in their entirety.

. . . .

> The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the amount sued for if the defendant obtains judgment.

Issues Presented.

Plaintiff identifies three issues for appeal:

1. That the court erred in granting the Thuro Defendants summary judgment on Count II of the complaint (MPSJ #1) because a genuine issue of material fact existed as to their individual liability for fraud. Plaintiff maintains that the Amendment, containing the reference to "false and misleading information" provided to Plaintiff and signed by the Thuro Defendants, created a genuine issue of material fact as to their individual liability for fraud.

2. That the court erred in granting Defendant Cruisers summary judgment on Count I of the complaint (MSJ) because the Offer "substantially conformed" to the terms of the Listing Agreement and Amendment, raising a genuine issue of material fact as to Plaintiff's satisfaction of the condition precedent to payment of its commission.

3. That the court erred in granting the defendants a total of $55,400.48 in attorneys' fees and costs, because twenty-five percent of the $55,400.48 is only $13,850.12; or alternatively, because the statutory cap percentage should have been applied against the $84,900.00 assumpsit amount prayed for, rather than the $584,900.00 figure derived from addition of the prayer for $500,000.00 in punitive damages.

Standards of Review.

A. Summary Judgment.

On appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Therefore,

> [s]ummary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, summary 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 of material fact and the moving party is entitled to a judgment as a matter of law.

Richard v. Metcalf, 82 Hawai‘i 249, 252, 921 P.2d 169, 172 (1996) (citation omitted). Hiner v. Hoffman, 90 Hawai‘i 188, 190, 977 P.2d 878, 880 (1999).

B. Attorneys' Fees and Costs.

Generally, taxation of costs is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *Bjornen v. State Farm Fire and Cas. Co.*, 81 Hawai‘i 105, 107, 912 P.2d 602, 604 (App. 1996); *Mist v. Westin Hotels, Inc.*, 69 Haw. 192, 200-1, 738 P.2d 85, 92 (1987).

This court "review[s] the circuit court’s denial and granting of attorney’s fees under the abuse of discretion standard." *Weinberg v. Mauch*, 78 Hawai‘i 40, 52-53, 890 P.2d 277, 289-90 (citation, internal quotation marks, and original brackets omitted), *reconsideration denied*, 78 Hawai‘i 421, 895 P.2d 172 (1995).

Eastman v. McGowan, 86 Hawai'i 21, 27, 946 P.2d 1317, 1323 (1997). "An abuse of discretion occurs when the trial court clearly exceeds the bounds of reason or disregards principles of law or practice to the substantial detriment of one of the litigants." Bjornen v. State Farm Fire and Cas. Co., 81 Hawai'i 105, 107, 912 P.2d 602, 604 (App. 1996).

Discussion.

A. MPSJ #2 and Liability of the Thuro Defendants on an Alter Ego Basis.

Plaintiff does not assert as a point or question presented on appeal the court's granting of MPSJ #2, or the liability of the Thuro Defendants on an alter ego basis implied in its complaint, and argued in its memorandum in opposition to MPSJ #1. Nor does Plaintiff include in its opening brief or in its reply brief any argument with respect to these two issues.

We may, therefore, decline to review the two issues. Hawai'i Rules of Appellate Procedure (HRAP) Rules 28(b)(4), 28(b)(6) & 28(b)(7);[6] Weinberg v. Mauch, 78 Hawai'i 40, 49, 890

[6] Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b) (1998) provided, in pertinent part:

> Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
>
> . . . .
>
> (4) A concise statement of the points on which appellant intends to rely, set forth in separate, numbered paragraphs. Each point shall refer to the alleged error committed by the court or agency upon which appellant intends to rely. The point shall show where in the record the alleged error occurred and where it was objected to . . . [.]
>
> . . . .

P.2d 277, 286 (1995)(declining to review an issue where appellants included the issue in their opening brief as one of their points on appeal but did not present argument thereon); State v. McCully, 64 Haw. 407, 408-9, 642 P.2d 933, 935-36 (1982)(declining to review issues not included in opening brief as questions presented for decision); CSEA v. Doe, 88 Hawai'i 159, 180, 963 P.2d 1135, 1156 (App. 1998)(declining to review issue not listed as a point of appeal or argued in opening brief).

In any event, as discussed *infra*, Plaintiff was not entitled to a commission, which completely undercuts Plaintiff's alter ego liability claims and its prayer for general and punitive damages.

B. The MSJ.

It may be profitable at this point to consider the bedrock issue in this case -- Plaintiff's entitlement to a commission.

> Points not presented in accordance with this section will be disregarded, except that the court, at its option, may notice a plain error not presented.
>
> . . . .
>
> (6) A short and concise statement of the question or questions presented for decision by the points specified under (b)(4) of this rule, set forth in the most general terms possible. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Questions not presented in accordance with this paragraph will be disregarded, except that the court, at its option, may notice a plain error not presented.
>
> (7) The argument, exhibiting clearly the points of fact and of law being presented, citing the authorities relied upon. The argument may be preceded by a concise summary.

On a motion for summary judgment, "[t]he judgment sought shall be rendered forthwith 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 a judgment as a matter of law." HRCP Rule 56(e) (1998).

On appeal, Defendant Cruisers and the Thuro Defendants mention but do not develop the argument, contained in their memorandum in support of the MSJ, that Plaintiff was entitled to a commission only if an actual sale was consummated. Though there is some support in the Listing Agreement and Amendment for this view, we need not address the issue because it is evident that Plaintiff did not produce a ready, willing and able buyer with terms that would earn the broker a commission.

Plaintiff's position in the basic debate among the parties is that its commission was earned when it procured an offer that "sufficiently mirrored" the terms of the Listing Agreement and Amendment, minor variances that "did not significantly alter the terms set out in the listing agreement" notwithstanding. Plaintiff on appeal provides a succinct summary of this argument when it uses the phrase "substantially conformed[.]"

Defendant Cruisers and the Thuro Defendants advance the opposing argument that an offer must be on the seller's "exact terms" before the broker is entitled to a commission. They cite

as authority the Hawai‘i Supreme Court in Hamilton v. Funk, 66 Haw. 451, 666 P.2d 582 (1983), in which it was held that:

> As has been stated:
>
> > Where a broker, instead of procuring a person who is ready, able, and willing to accept the terms his principal authorized him to offer at the time of his employment, procures one who makes a counteroffer more or less at variance with that of his employer, the latter is at liberty either to accept the proposed party upon the altered terms or to decline to do so, without giving the broker his reasons for the refusal. If he accepts he is legally obligated to compensate the broker for the services rendered, but if he refuses he incurs no liability therefor. . . .
>
> 12 Am.Jur.2d, *Brokers*, § 185 at 925 (1964). *Accord* 12 C.J.S. *Brokers*, § 156 (1980).
>
> The cases of *Schnack v. Montano*, 16 Haw. 805 (1905) and *Ikeoka v. Kong*, 47 Haw. 220, 386 P.2d 855 (1963) are not contrary to the principle of law just cited.

Id. at 453, 666 P.2d at 583.

Plaintiff, on the other hand, cites no authority whatsoever in support of its interpretation of the law governing entitlement to a commission.

It matters not, however, whether the governing principle is "exact terms" or "substantially conformed." For Plaintiff's claim to a commission is based upon the Offer as allegedly amended by the Addendum. Without the deletion of certain Offer terms purportedly effected by the Addendum, the Offer was clearly at substantial variance with the Listing Agreement and Amendment. And the latter is the basis upon which

Defendant Cruisers and the Thuro Defendants argue no entitlement.

Resolution of this apples-and-oranges debate lies in the question whether the Addendum was properly before the court on the MSJ. Plaintiff merely attached it to the memorandum in opposition to the MSJ and referred to it therein. It was neither supported by affidavit nor authenticated[7] in any way.

The Addendum was, therefore, not properly before the court on the MSJ. Pioneer Mill Co., Ltd. v. Dow, 90 Hawai'i 289, 297-98, 978 P.2d 727, 735-36 (1999)("[d]ocuments that are plainly inadmissible in evidence and are unsworn, not properly sworn to, and/or uncertified cannot be considered upon a summary judgment motion"); HRCP Rule 56(e) (1998)(in pertinent part, "[s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith[]").

In their MSJ, on the other hand, Defendant Cruisers and the Thuro Defendants relied upon the operative documents that were attached to Plaintiff's verified complaint, which included,

[7] Hawai'i Rules of Evidence Rule 901 (1993) provides, in pertinent part, that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

for each of the documents, a statement that the attachment was a true and correct copy of the document and a clear indication that the document was what it purported to be.

The verification was made by the President of Plaintiff, who signed all of the operative documents on its behalf. Hawai‘i Rules of Evidence (HRE) Rule 901(b)(1) (1993)("[b]y way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule: (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be[]"). See also [HRE] Rule 901 Commentary ("[t]he most direct method of authentication of evidence is by testimony of a witness who has some basis extrinsic to the item itself for asserting its authenticity [such as] testimony of a witness who was present at the signing of a document"). Cf. Kam Fui Trust v. Brandhorst, 77 Hawai‘i 320, 325-26, 884 P.2d 383, 388-89 (App. 1994)(testimony of property manager, who was not one of the signatories, that an assignment of lease was part of the file turned over to him when he started management and that he had knowledge of its provisions held sufficient authentication of the assignment of lease).

The operative documents relied upon and identified in an affidavit of counsel for the defendants were the Listing Agreement, the Amendment and the Offer, and these were sufficient in and of themselves to fully frame the commission issue.

Hence the operative documents were properly authenticated by Plaintiff's verification and, by the same token, relevant and therefore admissible.[8]

The documents in and of themselves also contained the required initial, *prima facie* showing that Plaintiff was not entitled to a commission owing to undisputed substantial variances evident between the terms of the Listing Agreement and Amendment on the one hand and the terms of the Offer on the other. See GECC Financial Corp. v. Jaffarian, 79 Hawai'i 516, 521-22, 904 P.2d 534, 535-36 (App. 1995)(moving party has the burden of showing entitlement to judgment as a matter of law upon undisputed facts demonstrating that no genuine issue of material fact exists with respect to the essential elements of a claim which the motion questions).

Whereupon the burden shifted to Plaintiff to "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Id.; HRCP Rule 56(e) (1998)(in pertinent part, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that

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[8] See Island Directory Co., v. Iva's Kinimaka Enters., Inc., 10 Haw. App. 15, 20-22, 859 P.2d 935, 939-40 (1994)(statements constituting offer, acceptance or contractual terms are "operative facts" which are not hearsay).

there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him[]").

Plaintiff attempted to shoulder this burden not by disputing the substantial variances, but by arguing their elimination by the Addendum. As noted, however, the Addendum was not properly before the court on the MSJ. Nor did Plaintiff attempt to cure the authentication problem at the hearing on the MSJ. As previously mentioned, neither Plaintiff nor its counsel appeared at the hearing.

It is on appeal, in its reply brief, that Plaintiff first attempts to salvage authentication of the Addendum. Plaintiff refers us to the declaration of counsel for the defendants that was attached to Defendant Cruiser's reply to Plaintiff's memorandum in opposition to the MSJ.

Plaintiff specifies therein defense counsel's reference to "a true and correct copy of the November 7 Addenda [sic] produced by Plaintiff pursuant to Defendants' discovery requests herein[,]" and his attachment of the copy as Exhibit C to his declaration.

Plaintiff further specifies defense counsel's reference to "a true and correct copy of the communication dated September 14, 1997 from Michael Capuano [broker for the prospective purchaser] to Milton Docktor [President of Plaintiff] produced by Plaintiff pursuant to Defendants' discovery requests herein[,]"

and his attachment of the copy as Exhibit D to his declaration. The communication discusses the Addendum as a "page 7 that was missing[]" from the files of Plaintiff's counsel.

Finally, Plaintiff points to defense counsel's reference to "a true and correct copy of the letter from Edward Mason, Plaintiff's former attorney, to Defendants' counsel, dated September 10, 1997[,]" which was attached to defense counsel's declaration as Exhibit G. The letter opined that the Addendum "removed all objectionable contingencies."

The "combined effect" of the foregoing, Plaintiff argues, "provides abundant authenticating material from which the court could duly have considered the addendum leaving questions of creditability [sic] to purposes of trial."

None of the foregoing amounts, however, to anything resembling authentication of the Addendum.

At most, the "combined effect" of the various references is to establish that the document exists and that it has been discussed by various persons connected with the case. Nothing therein even remotely suggests that the Addendum "is what its proponent claims[,]" HRE Rule 901 (1993); namely, that it was indeed an addendum the prospective purchaser made to the Offer. See also Rule 901 Commentary ("the authentication requirement forces the proponent to prove, usually by means of extrinsic evidence, that an object is the very thing it purports to be[]").

Because the Addendum was Plaintiff's sole basis for opposing the MSJ, and because sans the Addendum Plaintiff was as a matter of law not entitled to a commission, the court was correct in granting the motion.

It is worth reiterating in this connection that the defendants raised serious doubts about the authenticity of the Addendum. It is also passing strange that nowhere in the record is there any indication that attempt was made to have the putative progenitor of the Addendum – the prospective purchaser – authenticate it.

C. The Direct Fraud Claims Addressed in MPSJ #1.

As previously discussed, Plaintiff has in essence abandoned its appeal of the dismissal under MPSJ #1 of its alter ego claims against the Thuro Defendants. Its only remaining grievance on appeal with respect to the order granting MPSJ #1 is the dismissal of the individual fraud claims against the Thuro Defendants. Plaintiff's statement of the question presented on appeal with respect to MPSJ #1 specifies "the personal fraudulent conduct of individual Defendants CHERYL THURO and JON THURO[.]" Accordingly, Plaintiff's arguments against the Thuro Defendants in its opening and reply briefs concern only the personal fraud claims.

A review of the record yields no explication of the fraud claims other than the formulation Plaintiff offers on

appeal: that "the THURO Defendants misrepresented material facts which would affect the marketing and sale of the assets of Defendant CRUISERS." The basis for this allegation is the recital in the Amendment signed by the Thuro Defendants that "false and misleading information was provided to [Plaintiff] as pertains to company earnings[.]"

"The elements of fraud include: 1) false representations made by the defendant; 2) with knowledge of their falsity (or without knowledge of their truth or falsity); 3) in contemplation of plaintiff's reliance upon them; and 4) plaintiff's detrimental reliance." Larsen v. Pacesetter Systems, Inc., 74 Haw. 1, 30, 837 P.2d 1273, 1288 (1992).

HRCP Rule 9(b) (1998) requires that "[i]n all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." The purpose of the rule, as set forth by the Hawai'i Supreme Court, is "to insure the particularized information necessary for a defendant to prepare an effective defense to a claim which embraces a wide variety of potential conduct." Id. "Thus, under Rule 9(b) general allegations of fraud are insufficient because they serve little or no informative function[.]" Id.

The Rule's use of the term "constituting" should be taken seriously, as the case law indicates that the requirement of "particularity" covers at least the material elements of the fraud claim. Id. at 31, 837 P.2d at 1288-89 (upholding trial

court's dismissal of plaintiffs' claim for fraud because "fraud" was never alleged in the complaint and the complaint did not allege detrimental reliance, such that "plaintiffs' [complaint] not only failed to set forth particularized allegations regarding the circumstances constituting fraud, but that it was also flawed at a more basic level. Plaintiff's complaint failed altogether to set forth a distinct claim for relief sounding in fraud"); Wolfer v. Mutual Life Ins. Co. of New York, 3 Haw. App. 65, 69-71, 641 P.2d 1349, 1352-54 (1982)(affirming summary judgment based upon HRCP Rule 9(b) because affidavit in opposition to motion for summary judgment did not aver that the subject representations were false or that the plaintiffs relied upon the representations, such that the affidavit did not "make any averments sufficient to create a genuine issue of material fact as to the necessary elements of fraud[,]" and was thus "insufficient to establish the elements of fraud").

The record in this case reveals similar infirmities. Nowhere in the verified complaint does Plaintiff allege detrimental reliance upon the false and misleading information. Plaintiff's memorandum in opposition to MPSJ #1 attempts to remedy the omission: "PLAINTIFF'S RELIANCE TO HIS DAMAGE: 'As a result . . . Plaintiff suffered such special, general and consequential damages as shall be shown . . .' *Verified Complaint, par 22.*"

But mere reference to the verified complaint's *ad damnum* clause fails to show reliance in addition to damage.

Plaintiff did not attach an affidavit or anything else to its memorandum in opposition to MPSJ #1. Nowhere in the record is there further illumination of Plaintiff's fraud claim.

Hence it would appear that Larsen and Wolfer, supra, cover this case as a matter of law, and that the court did not err in granting MPSJ #1 as to the fraud claims.

Entirely aside from the more technical requirements established by the case law on HRCP Rule 9(b), Plaintiff's fraud claims defy description and common understanding.

The verified complaint states that "[u]pon discovery by Plaintiff of the false and misleading information supplied by The Thuro Defendants, Plaintiff and Defendant Cruisers executed [the Amendment] under which the sales price for the assets of Defendant Cruisers was reduced to $849,000.00 and other terms adjusted accordingly." Remember that it was in the Amendment that the recital regarding false and misleading information occurred.

It would appear then, that although false and misleading information was supplied to Plaintiff by the Thuro Defendants, Plaintiff did discover its nature and neutralized any deleterious effects through the Amendment. It is difficult to

conceive of how Plaintiff was damaged by the false and misleading information when adjustment was made for it in the Amendment.

Further, it is impossible to conceive that Plaintiff relied upon the information when it acknowledges it knew full well the false and misleading nature of the information.

Finally, Plaintiff's illumination of its fraud claim – that "the THURO Defendants misrepresented material facts which would affect the marketing and sale of the assets of Defendant CRUISERS[]" – neither expresses nor implies a comprehensible or specific fraud claim. It only invites endless speculation and does not meet the requirement of "fair notice of a fraud claim" under the particularity requirement of HRCP Rule 9(b). Larsen, 74 Haw. at 31, 837 P.2d at 1288-89 ("[w]e consequently agree with the trial court that plaintiffs' complaint was ambiguous and conclude that their complaint did not give Pacesetter fair notice of a fraud claim with sufficient particularity to satisfy the requirements of Rule 9(b)[]").

D. Award of Attorneys' Fees and Costs.

With respect to the order granting defendants their attorneys' fees and costs, we must first deal with the fact that Plaintiff filed no opposition to the motion for attorneys' fees and costs and did not appear personally or through counsel at the hearing on the motion. The record below does not contain any opposition to the motion or objection to the order.

Remonstrance first appears in Plaintiff's opening brief, and though the defendants vigorously argued the propriety of the award in their answering brief, Plaintiff's reply brief is devoid of any mention of the issue.

We have held that "[t]he general rule is that an issue which was not raised in the lower court will not be considered on appeal. An appellate court will deviate from this rule only when justice so requires." Hong v. Kong, 5 Haw. App. 174, 177, 683 P.2d 833, 837 (1984)(citations omitted).

In exercising such discretion, "an appellate court should determine whether the consideration of the issue requires additional facts, whether the resolution of the question will affect the integrity of the findings of fact of the trial court; and whether the question is of great public import." Fujioka v. Kam, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973)(citations omitted).

Here, the only colorable argument Plaintiff presents on appeal against the award of fees and costs is that the cap on fees contained in HRS § 607-14, twenty-five percent of "the amount sued for if the defendant obtains judgment[,]" should have been calculated solely upon its demand for its commission of $84,900.00, and not upon the amount of the commission plus the minimum $500,000.00 in punitive damages prayed for in its complaint. The defendants, on the other hand, argue the latter.

This being the case, the issue is one of statutory interpretation requiring no additional facts. Moreover, the issue is collateral to the merits of the substantive claims in the case, such that the integrity of the facts underlying the judgment will not be affected. And though it cannot be said that the issue is of the greatest public import, it is nevertheless significant for litigants, potential litigants and the administration of justice.

Our discretion is thus guided toward reviewing this issue first raised on appeal.

Observe also that the amount of fees awarded by the court, $53,157.24, is more than two times the maximum amount of fees that could have been awarded under Plaintiff's interpretation of HRS § 607-14 ($84,900.00 x .25 = $21,225.00). This circumstance, along with the foregoing discretionary analysis, appears to require our consideration of the issue. Wong v. Takeuchi, 88 Hawai'i 46, 50, 961 P.2d 611, 615 (1998)("[b]ecause upholding the circuit court's award of attorneys' fees . . . would entail the validation of an award . . . three times that authorized by statute, we will address this issue" (which was first raised on appeal)).

We encountered much the same issue in a very similar case. Hong, supra.

In Hong, the plaintiff sued the defendants for failure to pay on a promissory note arising out of the plaintiff's sale of a business to the defendants. Hong, 5 Haw. App. at 175, 683 P.2d at 836.

The defendants answered, setting up affirmative defenses of fraud and payment, and also counterclaimed, alleging that the plaintiff had fraudulently induced them to purchase the business by misrepresenting the financial condition of the business. Id.

The defendants prayed for cancellation of the sales agreement, the promissory note and a mortgage securing their obligations under the agreement. The defendants also prayed for an award of general damages in the amount of $89,490.14, punitive damages in the amount of $100,000 and attorneys' fees and costs. Id. at 175-76, 683 P.2d at 836.

The Hong trial court found against the defendants on the complaint and their counterclaim and awarded the plaintiff $5,362 in attorneys' fees under the predecessor statute governing "all actions in the nature of assumpsit[.]" HRS § 607-14 (1976). That law, like the current incarnation of HRS § 607-14 applicable in this case, awarded fees based upon "the amount sued for if the defendant obtains judgment." Id. at 181, 683 P.2d at 839-40.

On appeal in Hong, we construed the counterclaim as a claim seeking (1) general and punitive damages under the common

law tort of fraud; or in the alternative, (2) rescission of the sales agreement and return of monies paid to or for the benefit of the plaintiff under the sales agreement. We also decided that it was only the claim for rescission that sounded in assumpsit. Id. at 182-84, 683 P.2d at 840-41.

Thereupon we held that the assumpsit fee statute should not have been applied to the amount of punitive damages prayed for in addition to the amount of general damages demanded. We remanded with instruction that the fee amount be reduced to the cap amount yielded by the application of the fee statute to the amount of general damages only. We stated:

> The maximum attorney's fees allowable under HRS § 607-14 is the amount obtainable under the schedule set forth in that section. The $5,362 awarded [plaintiff] was based on the schedule applied to the total amount of $189,490.14 claimed in the [defendants'] counterclaim. This was error.
>
> The total amount prayed for in the counterclaim included $100,000 for punitive damages which is not awardable in an action for restitution. Therefore, the maximum attorney's fees allowable under HRS § 607-14 to [plaintiff] on the counterclaim is $2,862.

Id. at 184, 683 P.2d at 841.

Likewise, in this case, the demand for $500,000.00 in punitive damages, if it could be based upon the common law fraud claim asserted by Plaintiff, could not form a basis for an award of attorneys' fees in assumpsit under HRS § 607-14 for the simple reason that the fraud claim did not sound in assumpsit. Observe

in any event that Plaintiff contended the fraud caused it "special, general and consequential damages[,]" but pled no entitlement to punitive damages as a result.

The more interesting question is whether the breach-of-contract claim advanced by Plaintiff could support, as demanded, an award of punitive damages. If so, Hong implies that the amount demanded for punitive damages was properly included in the base amount to which HRS § 607-14 was applied.

Unlike the defendants in Hong, Plaintiff did not make breach-of-contract-related demands for rescission and restitution, neither of which can support an award of punitive damages. Plaintiff claimed breach-of-contract damages instead, and under Dold and Amfac, supra, punitive damages can in certain cases follow on such damages.

But Defendant Cruisers itself argued that this is not one of those cases. In its memorandum in support of MPSJ #2, Defendant Cruisers contended that punitive damages cannot be awarded upon Plaintiff's bare allegation that "Defendant Cruiser's [breach of contract] is intentional[]" without further allegation and proof thereon that the breach was such a willful, wanton or reckless breach that tortious injury resulted. Dold, 54 Haw. at 21-23, 501 P.2d at 371-72; Amfac, 74 Haw. at 137-39, 839 P.2d at 36-37.

The court granted MPSJ #2, defendants argue on appeal that the court was correct in doing so, and we have agreed, supra. Defendants blew hot on the issue in support of MPSJ #2, and cannot now blow cold on the issue when it comes to their attorneys's fees.

Hence under Hong, punitive damages were not awardable on Plaintiff's assumpsit claim, and the amount of punitive damages demanded was not a proper basis for an award of attorneys' fees under HRS § 607-14.

We therefore conclude that the award of attorneys' fees should have been limited in amount to $21,225.00.

Conclusion.

Based upon the foregoing, we vacate the court's award of attorneys' fees of $53,157.24 and remand with instruction that the amount be reduced to $21,225.00. We affirm the judgment in

all other particulars. Hong, 5 Haw. App. at 184, 683 P.2d at 841.

DATED: Honolulu, Hawai‘i, June 14, 2000.

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