NO. 21899

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

SKIP P. DAHLEN, Plaintiff-Appellant, v. GENERAL MOTORS CORPORATION, GMC TRUCK DIVISION, a Delaware corporation, and HAWAII MOTORS, INC., a Hawaii corporation, Defendants-Appellees

APPEAL FROM THE THIRD CIRCUIT COURT
(CIVIL NO. 93-089K)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

Following an unsatisfactory, nonbinding arbitration decision, Plaintiff-Appellant Skip P. Dahlen (Dahlen) filed suit against Defendants-Appellees (Defendants) General Motors Corporation (GMC) and Hawaiʻi Motors, Inc. (HMI), pursuant to Hawaiʻi Revised Statutes (HRS) § 481I-4(d) (1993) -- the "Lemon Law" statute authorizing a trial *de novo* after nonbinding arbitration. In his complaint, Dahlen sought, *inter alia*, damages for Defendants' alleged failure to repair his 1989 Chevy Sierra truck to express warranty standards during the truck's three-year warranty period. Although Dahlen's suit survived, in part, the first of Defendants' summary judgment motions, it fell *in toto* to the second. Consequently, the third circuit court awarded attorneys' fees and costs against Dahlen. He appeals

both summary judgments and the award of attorneys' fees and costs.

I. ISSUES PRESENTED.

Dahlen appeals, in the main, the second summary dismissal that terminated his lawsuit. He contends that Defendants were not entitled to judgment as a matter of law because issues of material fact precluded such judgment. We do not reach his contention, because we first take notice, *sua sponte*, of plain, reversible error. The circuit court offended HRS § 481I-4(d)[1] when it admitted the nonbinding arbitration award into evidence for summary judgment purposes, and thereafter relied upon the award in summarily dismissing Dahlen's action.

We therefore vacate the second summary judgment based upon the circuit court's improper reliance upon inadmissible evidence. Accordingly, we also vacate the award of attorneys' fees and costs against Dahlen. We affirm, however, the court's first summary judgment and hence remand for determination of the sole issue identified hereinbelow, consistent with this opinion.

[1/] Hawai'i Revised Statutes (HRS) § 481I-4(d) (1993) provides:

> The submission of any dispute to arbitration in which the consumer elects nonbinding arbitration shall not limit the right of any party to a subsequent trial de novo upon written demand made upon the opposing party to the arbitration within thirty calendar days after service of the arbitration award, and the award shall not be admissible as evidence at that trial.

(Emphasis added.)

In remanding the case, we address matters of apparent confusion that vexed the proceedings below.

II. BACKGROUND.

Dahlen purchased a new GMC pickup truck from authorized dealer HMI on September 8, 1989. The purchase price included an express warranty by GMC that the truck would be free from manufacturer defect for three years from date of purchase, or the first 50,000 miles, whichever came first.

Dahlen alleges that, almost from the start, the truck had numerous defects, including a broken rear axle, a leaking fuel filter, an inoperative clutch, the tendency of the rear brakes to lock up despite an anti-lock system, a defective stereo, and loose motor mounts resulting in the motor lifting. Thus, during the first two-and-a-half years of ownership, Dahlen took his truck in to HMI for a series of repairs that placed the vehicle out of service, often for days at a time. However, despite the service time, HMI's repairs failed to bring the truck up to express warranty standards.

On June 10, 1992, Dahlen filed a demand for arbitration pursuant to HRS § 490:2-313.2 (Supp. 1988),[2] the "Lemon Law"

[2/] The provisions of HRS § 490:2-313.2 (Supp. 1988) were repealed in 1992, and reenacted with amendments as HRS § 481I-4 by 1992 Haw. Sess. Laws, Act 314. Prior to repeal, HRS § 490:2-313.2 provided, in relevant part:

> (c) If a consumer agrees to participate in, and be bound by, the operation and decision of the state certified arbitration program, then all parties shall also participate in, and be bound by, the operation

(continued...)

arbitration program statute, in which he sought a refund as relief. On July 2, 1992, Dahlen agreed to binding arbitration, and the arbitrator heard his case on that date.

During the hearing, the parties presented extensive evidence, and the arbitrator took Dahlen's truck for a test drive. On July 17, 1992, the arbitrator issued his decision, in which he summarized Dahlen's position as follows:

> Excessive down time [sic] due to repairs. Problems such as motor lifting in turns, fuel filter leaks, clutch inoperative, front axle actuator not working, anti-lock brake system not working, broken rear axle, and many other non-drive train items. This vehicle has been out of service for more than 30 business days. Vehicle plagued with driveline problems. Intermittent clutch operation, rear brakes locking-up, and fuel filter leaking are safety concerns. This vehicle is a lemon and a refund is sought as a remedy.

The arbitrator also summarized GMC's and HMI's defenses. In essence, they argued that Dahlen's failure to approve parts purchases was a major contributor to the excessive downtime, that

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[2/](...continued)

> and decision of the state certified arbitration program. The prevailing party of an arbitration decision made pursuant to this section may be allowed reasonable attorney's fees.
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> (d) The submission of any dispute to the arbitration shall not limit the right [of] any party to a subsequent trial de novo upon written demand made within thirty days after service of the arbitration award, and the award shall not be admissible as evidence at that trial. If the party demanding a trial de novo does not improve its position as a result of the trial by at least twenty-five per cent, then the court shall order that all of the reasonable costs of trial, consultation, and attorney's fees be paid for by the party making the demand.

the rear axle broke as a result of Dahlen's abusive use of the truck (i.e., overloading it), that the truck was in fact repaired, and that the truck was heavily used in Dahlen's farming business, which caused the wear and tear evident on the truck.

The arbitrator thereafter found, in relevant part:

> 2. Three repair orders indicate that either the fuel filter or fuel filter base was replaced due to leaks.
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> 3. The car **was not** out of service due to repairs for 30 or more business days within the term of all applicable express warranties. RO [repair order] #H48152 & H48147 - 1 day; W19109 - 1 day; W20264 - 7 days; W25165 - 3 days; W27285 - 14 days (Dec. 19, 1991 through Jan. 24, 1992 = 24 days plus 3 days delay last week of Jan. = 27 days divided by 2. Thus 14 days each are chargeable to the [Dahlen] and [GMC].[3] Total down time [sic] is 26 days.
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> . . . .
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> 5. At least one problem continues to exist. The tendency of the rear brakes to lock-up (mentioned in the consumer's attorney's letter of 1/30/92) was demonstrated during the test-drive. However, there were [sic] no load on the vehicle and the braking condition was a moderately low speed on level terrain. The intermittent condition of clutch operation did not manifest itself during the test drive.
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> . . . .

[3/] The arbitrator provided the following explanation for his downtime calculation for the period of December 19, 1991 through January 1992:

> The length of time it took to repair the broken rear axle was of an excessive duration, primarily because of the hard-headed stance taken by both parties. Resolution comes only when you forget assumptions and open the lines of communication. This Arbitrator had no choice but to divide the responsibility of the long duration of down-time [sic] equally between [Dahlen] and [GMC].

7. The problem is not the result of the [Dahlen's] abuse[.]

(Bold-face emphasis in the original; underlining emphasis and footnote added.)

Based on these findings, the arbitrator concluded that Dahlen "qualifies for relief under Hawai'i Revised statutes 490:2-313.1 and Hawai'i Session Laws of 1990, Act 238 (The Lemon Law)."[4] The arbitrator thereupon awarded Dahlen, in pertinent

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[4/] HRS § 490:2-313.1 (1985) was repealed in 1992 and reenacted as HRS § 481I-3 by 1992 Haw. Sess. Laws, Act 314, effective October 1, 1992. However, prior to appeal, HRS 490:2-313.1 provided, in relevant part:

> **New motor vehicle; express warranties, return.** (a) If a new motor vehicle does not conform to all applicable express warranties, and the consumer reports the nonconformity in writing to the manufacturer, or at its option, its agent, distributor, or its authorized dealer during the term of such express warranties, then the manufacturer, its agent, distributor, or its authorized dealer shall make such repairs as are necessary to conform the vehicle to such express warranties, notwithstanding the fact that such repairs are made after the expiration of such term.
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> (b) If the manufacturer, its agents, distributor, or authorized dealers are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and market value of the motor vehicle to the consumer after a reasonable number of documented attempts, then the manufacturer shall replace the motor vehicle with a comparable motor vehicle or accept return of the vehicle from the consumer and refund to the consumer the full purchase price including all collateral charges, excluding interest, and less a reasonable allowance for the consumer's use of the vehicle.
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> . . . .
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> (c) It shall be presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties, if (1) the same nonconformity has been subject to repair

(continued...)

part:

> a full repair of the problem(s) brought before this Arbitrator. Therefore, [GMC] is directed to investigate and repair the rear wheel anti-lock brake system if necessary, and ensure that the vehicle is brought to express warranty standards before being released to [Dahlen]. Any repairs done under this decision shall be done at no cost to [Dahlen].

(Emphases added.) Henceforth, this July 17, 1992 decision shall be termed Arbitration Award #1.

The arbitrator, however, did not specify a compliance date as part of the award. Nevertheless, he directed the parties to

> return the enclosed Compliance with Arbitrator's Decision form to the American Arbitration Association upon satisfaction of the terms of the Arbitrator's Decision, but no later than 30 (thirty) days from the date of compliance set forth in this decision.

On August 13, 1992, HMI claimed that, in accordance with the arbitration decision, "[Dahlen's] vehicle has been repaired to meet manufacturer's vehicle standards and to comply with expressed warranty standards." Dahlen, however, disputed

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[4/](...continued)

> three or more times by the manufacturer, its agents, distributor, or authorized dealers within the express warranty term but such nonconformity continues to exist, or (2) the vehicle is out of service by reason of repair for a cumulative total of thirty or more business days during such term.
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> . . . .
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> (f) Any action brought under this section shall be commenced within one year following expiration of the express warranty term.

this claim. On August 14, 1992, Dahlen inspected his truck while it was parked on the HMI lot and found that the motor mounts had not been repaired. Because of HMI's apparent refusal to repair the motor mounts, Dahlen refused to remove his truck from HMI.

On August 22, 1992, thirty-six days after the arbitrator's decision was issued, Dahlen filed his second demand for arbitration under the "Lemon Law" arbitration statute, HRS § 490:2-313.2. Dahlen alleged essentially two grounds for demanding a second arbitration. First, HMI had failed to comply with Arbitration Award #1 by failing to repair, among other things, the motor mounts. Second, he was entitled to a refund because, at the time he filed his demand for a second arbitration, the truck had been out of service for an additional five days (not counting the thirty days from issuance of the arbitration decision), and the truck's downtime conceivably exceeded the thirty-day limit under HRS § 490:2-313.1(c)(2) (1985).

In contrast to his choice in the first arbitration, Dahlen elected nonbinding arbitration in his second demand.

In October 1992, before the second arbitration hearing, Dahlen again visited the HMI parking lot to inspect his truck's motor mounts. He observed that the condition of the motor mounts had not changed since his inspection of August 14, 1992. He also noticed that the truck's seat belt mounting bracket was only partially installed.

GMC moved for the arbitrator to dismiss Dahlen's demand for a second arbitration on the grounds that Arbitration Award #1 was final and binding as to all parties, and that the second arbitration was time-barred. However, notwithstanding GMC's motion, the hearing for the second arbitration was held on December 9, 1992.[5]

After reviewing the parties' "lengthy and complete briefs -- supported by twenty-five (25) exhibits[,]" test driving Dahlen's truck, test driving a new, comparable truck, and inspecting the truck's motor mounts alongside a set of new motor mounts, the arbitrator concluded that Dahlen did not qualify for any relief under the Lemon Law (Arbitration Award #2). The

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[5/] The record indicates that the arbitrator in the second arbitration never ruled on GMC's motion. We note that had the arbitrator ruled on the motion, he would have justifiably found it to be baseless.

First, insofar as Dahlen alleged that GMC, as represented by its dealer, HMI, had failed to comply with the first arbitration by failing to repair the motor mounts, he presented a new issue for arbitration. Second, although GMC alleged in its motion that the warranty on Dahlen's truck expired one year after purchase, Dahlen claimed that the warranty was for three years -- a fact which the first arbitrator implicitly found when he determined that the truck's downtime days included days outside the one-year mark, and when he ruled that Defendants were required to bring the truck to express warranty standards, thus assuming the warranty was still in effect nearly three years after purchase of the truck. Hence, at the very least, the length of the warranty period also raised a factual issue. Therefore, neither Dahlen's demand for a second arbitration nor the arbitration itself was improper.

With respect to the latter issue, we observe that, on appeal, GMC admits that the express warranty was a three-year warranty. GMC's Answering Brief at 1; Dahlen's Opening Brief at 1. Cf. City & County v. Toyama, 61 Haw. 156, 158 n.1, 598 P.2d 168, 170 n.1 (1979) (appellate court may consider certain facts outside the record that the briefs of the parties treat as true).

arbitrator based this conclusion, in pertinent part, on his finding that:

> [t]he car was NOT out of service due to repairs for 30 of [sic] more business days within the term of all applicable express warranties; and
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> . . . .
>
> The nonconformity(s) which still exists does NOT substantially impair the use[,] market value or safety of the car to [Dahlen].

(Capitalization in the original.)

Still, upon test driving both Dahlen's truck and the new, comparable model, the arbitrator had found that the new model's gear shift lever moved, "but not as much as the gear shift handle in [Dahlen's] truck." Further, the rubber cowling on top of the gear box in the new vehicle remained secure during the vehicle's operation, while the cowling in Dahlen's truck jumped when the truck was in first gear and when the truck accelerated. Dahlen had informed the arbitrator that these two conditions led him to believe that the motor mounts were loose.

The arbitrator also found that

> [t]he right front nut and bolt motor mount appeared to be less rusted and dirty as [sic] the other three (3) mounts. It may have been replaced subsequent [sic] to this hearing and after the other mounts were installed. But, this has no effect on the issues before the arbitrator.

The arbitrator issued his decision "for [GMC]" on December 31, 1992. On January 29, 1993, Dahlen made a timely,

written demand for trial *de novo* upon Defendants, as required by HRS § 481I-4(d).

Also, in late January 1993, Dahlen and a licensed mechanic, Steven Snyder (Snyder), inspected his truck, which was still parked at HMI. Snyder reported, in relevant part, that:

> (3) Prior to the vehicle being towed off [HMI's] lot, I did inspect the undercarriage and suspension of the vehicle and did determine that one of the motor mounts didn't match the others.
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> (4) It was obvious that one of the mounts had a bright, shiny new bolt, while the other mounts were rusted and muddy, commensurate with motor mounts which were three to four years old.
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> . . . .
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> (6) After the vehicle was towed to [Dahlen's] residence, I observed the seat belt bracket to be only hanging and not properly tightened down.
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> (7) There is no doubt that the vehicle had been fitted with a new motor mount bolt just prior to my inspection in January and probably within 30 to 45 days before my inspection.

Dahlen filed his complaint in circuit court on April 1, 1993, thereby initiating the instant action. In his complaint, Dahlen alleged, *inter alia*, breach of contract, breach of implied warranty of fitness for the particular purpose, breach of express warranty, breach of safety warranty, failure to repair, consequential damages and negligent infliction of emotional distress.

Thereafter, Dahlen's complaint was the target of two defense summary judgment motions. The complaint survived the first motion, but fell to the second.

GMC filed the first motion on August 25, 1993, joined by HMI on September 13, 1993. By order filed on October 15, 1993, the circuit court granted the first motion in part, and denied it in part. Specifically, the circuit court ruled:

> 1. The motion for summary judgment is GRANTED IN PART, insofar as the Court finds the arbitration held on July 2, 1992, between [Dahlen] and [GMC], under H.R.S. Section 490:2-313, Case No. 78-178-0042, was final and binding as a matter of law.
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> 2. The motion for summary judgment is DENIED IN PART, insofar as the Court finds a disputed issue of material fact exists relating to whether the Defendants have complied with the arbitration award dated July 17, 1992.

Undaunted, GMC filed its second motion for summary judgment on December 19, 1994. On January 6, 1995, HMI moved to join GMC's motion for summary judgment. While the gist of GMC's motion, and HMI's joinder, was that they had complied with the first arbitration award, GMC specifically argued that "[t]he second arbitration decision confirmed Defendants' compliance with [Arbitration Award #1]." Thereupon, GMC cited several findings and conclusions from Arbitration Award #2 in its support memorandum and attached a copy of the award, entitled "Arbitrator's Decision for [GMC]." Hence, Defendants alleged that their compliance with Arbitration Award #1 eliminated what

the circuit court, in its October 15, 1993 order, had determined to be the remaining "disputed issue of material fact[.]"

On March 1, 1995, the circuit court granted the second motion for summary judgment. The circuit court found, in relevant part:

> 12. On December 9, 1992, the second arbitration case was heard before an arbitrator, during which testimony, argument, and exhibits were presented by the parties and the truck was again test-driven with and by the arbitrator. Plaintiff elected "nonbinding" arbitration at this hearing.
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> 13. On December 31, 1992, the second arbitrator issued his decision, denying [Dahlen's] demand for a refund or replacement vehicle, specifically noting that "[p]rior to the hearing [Dahlen] did not agree to be bound by the operation and decision of the State Certified Arbitration Program. Therefore, pursuant to H.R.S. and Hawaii Session Laws of 1992, Act 314 the Arbitrator's decision is not final and binding upon both parties." GMC's motion for dismissal was never ruled on.
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> 14. On January 29, 1993, [Dahlen] filed his demand for trial de novo, appealing the second arbitration decision.
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> . . . .
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> 18. On December 19, 1994, [GMC] moved for summary judgment in its favor on the grounds that the July 17, 1992 Arbitration Award was final and binding as a matter of law and that there was no issue of material fact that the Defendants had complied with said decision. Accordingly, the only issue remaining before this Court was whether the Defendants had complied with the July 17, 1992 arbitration award.
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> . . . .

24. The second arbitration decision confirmed Defendants' compliance with the July 17, 1992 Arbitration Award by August 13, 1992. . . .

25. At the second arbitration hearing, [Dahlen] admitted that "[GMC] has complied with the arbitrator's award dated July 17, 1992 except for the 'motor mounts' which have yet to be fixed."

26. The July 17, 1992 arbitration decision did not identify the motor mounts as one of the defects found in the vehicle and did not order the motor mounts either inspected or repaired by [GMC].

. . . .

29. Since the [second] arbitrator found from [Dahlen's] own testimony that the Defendants had in fact complied with the July 17, 1992 arbitration decision and (from the arbitrator's own inspection and test drive) that any remaining nonconformity in the truck did not substantially impair the vehicle, whether or not the motor mounts had been repaired, indeed, whether or not they had been ordered to be repaired, became a moot issue. Thus, the second arbitration decision confirmed that the Defendants had, in fact, fully complied with the July 17, 1992 arbitration award.

30. These facts were neither disputed nor challenged [Dahlen's] opposing affidavits, and Defendants are entitled to this Court's finding that they have fully complied with the July 17, 1992 arbitration award and for entry of summary judgment and judgment thereon.

[31]. [Dahlen] and his counsel were fully aware that the July 17, 1992 arbitration award was final and binding upon the parties.

[32]. [Dahlen] and his counsel were fully aware that by August 13, 1992, the truck had been repaired pursuant to the arbitration award and was ready for pick up at [HMI].

[33]. Notwithstanding this notice, and [Dahlen's] and his counsel's understanding and awareness of the final and binding nature of the July 17, 1992 arbitration award, [Dahlen]

refused to comply with the arbitration award and refused to reclaim his repaired vehicle.

[34]. The record is clear that the truck was fully repaired and conforming to warranty standards long prior to the November 3, 1992 filing of the second arbitration case.

[35]. Following yet another hearing, yet another vehicle inspection and yet another road test of the vehicle, the second arbitrator also denied [Dahlen's] demand for repurchase of the vehicle. [Dahlen's] own testimony confirmed that Defendants had complied with the arbitration decision. Nevertheless, when the arbitrator again found against [Dahlen], ruling that the condition of the motor mounts was not an issue and any remaining nonconformities did not substantially impair the use, market value or safety of the truck, and finding as a result that [Dahlen] did not qualify for repurchase or replacement under the Lemon Law, [Dahlen] continued to refuse to pick up his vehicle.

[36]. The issues in the second arbitration demand consisted of the "numerous problems per [the first arbitration case]." Nevertheless, in their continuing effort to ignore the original arbitration award and find a more favorable forum for their claims, [Dahlen] and his counsel filed the instant civil action, alleging the same "numerous and various defects," which had already been repaired under the arbitration award and/or found not to substantially impair the use, market value or safety of the vehicle under the second arbitration decision.

[37]. Given the history of this dispute, [Dahlen's] claims having been subjected twice to inspection and decision under two separate arbitrators, this Court's confirmation of the first arbitration decision as being final and binding upon the parties, and the incontrovertible evidence, that was known to [Dahlen] and his counsel, that the Defendants had complied with said arbitration decision, it is clear that [Dahlen's] claims in this matter are entirely without merit and therefore appropriate for summary adjudication.

Accordingly, the circuit court concluded:

> 1. This Court has proper jurisdiction pursuant to Section 603-21.5 and Chapter 658 of the Hawaii Rev. Stat.
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> . . . .
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> 3. The pleadings, affidavits and exhibits filed in the above-captioned matter show that there is no genuine dispute as to any material fact that the Defendants are entitled to judgment as a matter of law, having fully performed under the State-Certified Arbitration Program, as set forth in the supporting affidavits attached to Defendants' motions and exhibits thereto.
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> 4. The arbitration award of December 31, 1992 clearly reflected [Dahlen's] admission that the Defendants have complied with the arbitrator's decision of July 17, 1992, except for the motor mounts. The motor mounts were then found to have no bearing whatsoever on [Dahlen's] demand for relief and his claims were denied on the merits.
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> 5. There is therefore no genuine dispute of material fact concerning the Defendants' compliance with the Arbitration Award of July 17, 1992, and this matter, consistent with the case precedents confirming Chapter 658 arbitration decisions, should be summarily disposed of and judgment entered in favor of Defendants.
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> . . . .
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> 7. Because [Dahlen] has failed and refused, and continues to fail and refuse, to comply with the arbitration decision, the Defendants have been forced to incur wholly unnecessary defense costs in this matter.
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> 8. [Dahlen's] suit is in breach of §§490 and 481, Hawaii Rev. Stat., and his contractual promise that the July 17, 1992 arbitration decision would be "final and binding" as to all claims between the parties.
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> . . . .

> 12. There is no genuine issue as to any material fact regarding Defendants' compliance with the arbitrator's decision of July 17, 1992, as [Dahlen] readily admitted at the arbitration hearing of December 9, 1992.
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> 13. [Dahlen's] claims regarding the motor mounts were denied on the merits, and the arbitrator's decisions are final and binding with regard to all disputed facts and legal questions concerning [Dahlen's] claims in this matter.
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> . . . .
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> 17. Furthermore, judicial review of arbitration decisions has been severely confined under Hawai'i law to the strictest possible limits. An arbitration award may be vacated only on the four grounds specified in § 658-9, and modified and corrected only on the three grounds specified in § 658-10, Hawaii Rev. Stat..
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> 18. In this instance, [Dahlen's] affidavits in opposition to the instant motion do not, as a matter of law, meet any of the threshold requirements of §§ 658-9 and 10, Hawaii Rev. Stat.[.]
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> 19. There being no genuine issue of disputed fact that the Defendants have fully complied with the July 17, 1992 arbitration award in its entirety, Defendants' motion for summary judgment is hereby granted on all grounds.

(Emphasis in the original.) On July 5, 1995, the circuit court awarded attorneys' fees and costs to Defendants.

On March 31, 1995, Dahlen filed a timely notice of appeal from the summary judgment order entered on March 1, 1995. However, on September 11, 1997, this court dismissed the appeal for lack of appellate jurisdiction because the judgment Dahlen appealed from did not resolve the cross-claim HMI had filed

against GMC. After the cross-claim was dismissed, the circuit court entered final judgment for Defendants on August 14, 1998. Dahlen thereafter timely filed this appeal.

III. DISCUSSION.

A. Plain Error -- HRS § 481I-4(d).

In this case, we notice plain error, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (1999).[6] The circuit court's consideration of Arbitration Award #2 in its summary judgment decision adversely affected Dahlen's substantial right to a trial *de novo* free from reference to, and reliance upon, that arbitration decision. See Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Hawai'i 482, 492, 993 P.2d 516, 526 (2000) ("If the substantial rights of a party have been affected adversely, the error will be deemed plain error." (Citations omitted.)); Chung v. Kaonohi Ctr. Co., 62 Haw. 594, 603, 618 P.2d 283, 290 (1980) (appellate court may recognize error not raised by a party on appeal "if the error is plain and may result in a miscarriage of justice").

"'[T]he interpretation of a statute . . . is a question of law reviewable *de novo*.'" Korsak v. Hawai'i Permanente

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[6/] Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (1999) provides, in relevant part:

> Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.

Medical Group, 94 Hawai‘i 297, 303, 12 P.3d 1238, 1244 (2000) (quoting State v. Arceo, 84 Hawai‘i 1, 10, 928 P.2d 843, 852 (1996); other citations omitted). Furthermore, when interpreting statutes, we are required "to give statutory language its plain and obvious meaning in the absence of ambiguity and where a literal reading of the language would not produce a result that is absurd or inconsistent with the purposes of the statute." Woodruff v. Keale, 64 Haw. 85, 90, 637 P.2d 760, 764 (1981) (citations omitted).

HRS § 490:2-313.2(d) provided, in pertinent part, that

> [t]he submission of any dispute to the arbitration shall not limit the right [of] any party to a subsequent trial de novo upon written demand made within thirty days after service of the arbitration award, and the award shall not be admissible as evidence at that trial.

(Emphasis added.) HRS § 481I-4(d) (1993), in relevant part, provides that

> [t]he submission of any dispute to arbitration in which the consumer elects nonbinding arbitration shall not limit the right of any party to a subsequent trial de novo upon written demand made upon the opposing party to the arbitration within thirty calendar days after service of the arbitration award, and the award shall not be admissible as evidence at that trial.

(Emphasis added.) Thus, the statute clearly contemplates a trial *de novo*, or new trial, in which the nonbinding arbitration award[7] is not evidence.

In essence, this statutory prohibition requires that the parties to the trial *de novo* produce evidence anew, and without reference to the nonbinding arbitration award. See 58 Am. Jur. 2d *New Trial* § 590 (1989) ("Generally, at a new trial all of the testimony must be produced anew; the former verdict may not be used or referred to either in evidence or in argument."); cf. Jones v. Keller, 9 Ohio App.2d 210, 212, 223 N.E.2d 657, 659 (Ohio Ct. App. 1966) (in a workers' compensation appeal to the trial court, "any reference at a new trial to the result of a former trial or hearing of the same cause is considered improper" (citing 39 Am. Jur. 208, § 217; other citations omitted)). Thus, in the trial *de novo*, issues are to "be resolved objectively upon the evidence presented in the trial

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[7/] Lest there be any doubt, the Hawai'i Arbitration Rules (HAR) makes it clear that an arbitration award comprises the entirety of an arbitrator's decision, and not merely the particular item awarded or issue resolved. HAR Rule 19, which governs the "Form and Content" of an award, states, in relevant part:

> (A) Awards by the arbitrator shall be in writing, signed and on forms prescribed by the Judicial Arbitration Commission.
>
> (B) The arbitrator shall determine all issues raised by the pleadings that are subject to arbitration under the Program[.]
>
> (C) Findings of Fact and Conclusions of Law are not required.

Hence, an award is the entire written decision of the arbitrator, including the findings of fact and conclusions of law, if any.

court through the exercise of independent judgment and without the overhanging influence of any previous decision." Jones, 9 Ohio App.2d at 212, 223 N.E.2d at 659.

In this case, Dahlen's complaint was disposed of by means of summary judgment and never reached trial *de novo*. However, nothing in this circumstance alters the evidentiary status of the underlying arbitration award. The general evidentiary rules governing a motion for summary judgment support this conclusion.

Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(e) requires that in a summary judgment proceeding, "[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." (Emphasis added.) See, e.g., Hawai‘i Community Federal Credit Union v. Keka, 94 Hawai‘i 213, 221, 11 P.3d 1, 9 (2000) ("[a]n affidavit consisting of inadmissible hearsay cannot serve as a basis for awarding or denying summary judgment." (Citations omitted.)).

In addition, the cognate federal rule, Federal Rules of Civil Procedure (FRCP) Rule 56, permits only "material that would be admissible at trial" in a summary judgment proceeding. Horta v. Sullivan, 4 F.3d 2, 7 (5th Cir. 1993) (citing to Wright, Miller & Kane, 10A Federal Practice and Procedure § 2721, at 40

(2d ed. 1983)). See also Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai‘i 422, 431, 16 P.3d 827, 836 (App. 2000) ("In construing Hawai‘i rules of procedure patterned after federal rules, interpretations of the cognate federal rules by the federal courts are deemed 'highly persuasive' by our appellate courts." (Citing Harada v. Burns, 50 Haw. 528, 532, 445 P.2d 376, 380 (1968).)).

Notwithstanding the prohibition of HRS § 481I-4(d), the record in this case clearly demonstrates that Defendants proffered evidence of Arbitration Award #2 in support of the second motion for summary judgment, that the circuit court failed to strike such evidence, and that the circuit court, in fact, considered and placed extensive and crucial reliance upon the award in reaching its decision.

The court's findings of fact are replete with reference to, and acceptance of, the findings and conclusions contained in Arbitration Award #2. Of the forty findings, fifteen directly reference the inadmissible award. For example:

> 24. The second arbitration decision [Arbitration Award #2] confirmed Defendants' compliance with the July 17, 1992 Arbitration Award by August 13, 1992. . . .
>
> 25. At the second arbitration hearing, [Dahlen] admitted that "[GMC] has complied with the arbitrator's award dated July 17, 1992 except for the 'motor mounts' which have yet to be fixed."
>
> . . . .

> 29. Since the [second] arbitrator found from [Dahlen's] own testimony that the Defendants had in fact complied with the July 17, 1992 arbitration decision and (from the arbitrator's own inspection and test drive) that any remaining nonconformity in the truck did not substantially impair the vehicle, whether or not the motor mounts had been repaired, indeed, whether or not they had been ordered to be repaired, became a moot issue. Thus, the second arbitration decision confirmed that the Defendants had, in fact, fully complied with the July 17, 1992 arbitration award.

Obviously, we cannot say that the circuit court's references to the award were superfluous. They were clearly central to its conclusions. Based upon its findings, the circuit court concluded, *inter alia*, that:

> 4. The arbitration award of December 31, 1992 [Arbitration Award #2] clearly reflected [Dahlen's] admission that the Defendants have complied with the arbitrator's decision of July 17, 1992, except for the motor mounts. The motor mounts were then found to have no bearing whatsoever on [Dahlen's] demand for relief and his claims were denied on the merits.

And, finally, that:

> 19. There being no genuine issue of disputed fact that the Defendants have fully complied with the July 17, 1992 arbitration award in its entirety, Defendants' motion for summary judgment is hereby granted on all grounds.

The circuit court's reliance upon Arbitration Award #2 in its findings worked an obvious and substantial prejudice against Dahlen. The court's material and pointed references to, and crucial reliance upon, Arbitration Award #2 were wholly repugnant to the concept of a trial *de novo*, as contemplated by HRS

§ 481I-4(d). We must therefore vacate the judgement upon the second motion for summary judgment.

B. The Applicable "Lemon Law" Statutory Framework.

In remanding, we note the circuit court's erroneous conclusions that it had "proper jurisdiction pursuant to . . . Chapter 658 of the Hawaii. Rev. Stat.[,]" (emphasis in the original), and that summary dismissal was warranted under the language and authority of that chapter.

In general, HRS Chapter 658 provides the statutory framework for enforcement of arbitration provisions contained in a written contract or agreed to by the parties to a dispute. HRS § 658-1 (1993). Nowhere in the instant action do the parties contend that an agreed-upon arbitration provision underlies their dispute. Instead, Dahlen expressly sought arbitration (in both instances), and brought the instant action, pursuant to HRS §§ 490:2-313.1 and 490:2-313.2 -- the "Lemon Law" statutes then included in Hawai‘i's Uniform Commercial Code. In fact, the standard arbitration demand form Dahlen filed with the American Arbitration Association for both arbitrations contained the following express statement: "In accordance with Hawaii Revised Statute section 490:2-313.2, I (We), the undersigned party(s), hereby demand arbitration."

HRS §§ 490:2-313.1 and 490:2-313.2 were repealed by the 1992 Hawai‘i Session Laws. These statutes were reenacted, with

amendments generally not material to this appeal, by 1992 Hawai‘i Sessions Laws, Act 314, as HRS § 481I-2 and HRS § 481I-4, respectively, effective October 1, 1992.

Hence, the proper authority for the circuit court's jurisdiction over an action brought pursuant to Hawai‘i's "Lemon Law" is HRS Chapter 481I -- the Motor Vehicle Express Warranty Enforcement chapter. Dahlen's action is not an appeal of Arbitration Award #2, as it would be fashioned if HRS Chapter 658 were applicable. Rather, HRS § 490:2-313.2(d) provided, and HRS § 481I-4(d) provides, for a trial *de novo* that, as we concluded above, requires the fact-finder to approach the case with a *tabula rasa*. Thus, unlike an action under HRS Chapter 658, which is predicated upon an arbitration award, the action brought under the "Lemon Law" bars admitting such an award into evidence.

C. Issues of Material Fact.

Although we vacate on other grounds, we remark upon the circuit court's determination that no genuine issues of material fact remained. That determination we would review *de novo*. Keka, 94 Hawai‘i at 221, 11 P.3d at 9. "Consequently, we must determine whether, viewing all the evidence in a light most favorable to the non-moving party, there is no genuine issue as to any material fact and the moving party has clearly demonstrated that it is entitled to judgment as a matter of law." Neilsen v. American Honda Motor Co., Inc., 92 Hawai‘i 180, 184,

989 P.2d 264, 268 (App. 1999) (citing State v. Tradewinds Elec. Serv. and Contracting, Inc., 80 Hawai'i 218, 222, 908 P.2d 1204, 1208 (1995); HRCP Rule 56(c)).

Had the circuit court reviewed the evidence presented by the parties sans Arbitration Award #2, it would have been evident that Defendants failed to make a *prima facie* case for summary judgment. In short, without the bootstrap of evidence of Arbitration Award #2, Defendants failed to demonstrate that they had complied with Arbitration Award #1 within "30 (thirty) days from the date of compliance."[8]

Arbitration Award #1 awarded Dahlen, *inter alia*, "a full repair of the problem(s) brought before this Arbitrator." Included in those problems was the matter of the motor mounts. Nowhere in the record do Defendants explicitly allege that they repaired this particular problem. Apart from evidence of Arbitration Award #2, it cannot be said that Defendants proffered any admissible evidence that the motor mounts were no longer a problem amounting to noncompliance with express warranty. Furthermore, in view of the plain language of Arbitration Award

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[8/] As noted above, Arbitration Award #1 does not include a compliance date. Therefore, Defendants were required to repair Dahlen's truck, as specified by the award, within a "reasonable time" from the issuance of the award. See HRS § 490:1-204(3) (1993), which provides:

> An action is taken "seasonably" when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time.

(Emphasis added.)

#1, we are unimpressed by Defendants' contention that it did not encompass the motor mounts.

The award also ordered Defendants to

> investigate and repair the rear wheel anti-lock brake system if necessary, and ensure that the vehicle is brought to express warranty standards before being released to [Dahlen].

(Emphasis added.) Given the presence of the conjunctive, "and," Defendants were required to satisfy both parts of the this order -- to investigate/repair the rear anti-lock brakes, and to bring Dahlen's truck up to express warranty standards. While Defendants apparently satisfied the first part of the order, it remains to be seen whether their alleged failure to repair, among other things, the motor mounts, puts them at odds with the second part.

The award ordered, however, more than just the repairs. It ordered the repairs be made within a specified period of time. Hence, meeting the deadline set by the award was just as much a condition of compliance as were the required repairs.

We make these remarks not to preclude summary dismissal upon remand, but to address what appear to be misapprehensions in the record regarding the scope and substance of Arbitration Award #1, as expressed in its plain language.

IV. CONCLUSION.

For the foregoing reasons, we vacate the August 14, 1998 judgment of the circuit court and the underlying March 1,

1995 order granting the second motion for summary judgment and remand for further proceedings consistent with this opinion. We affirm, however, the underlying October 15, 1993 order granting in part and denying in part the first motion for summary judgment.

With respect to the October 15, 1993 order, we stress the circuit court's rulings therein: that Arbitration Award #1 is final and binding, and that the only remaining issue in the case is "whether the defendants have complied with the arbitration award dated July 17, 1992." In the first arbitration, Dahlen sought the remedy of refund of the purchase price of the truck. Arbitration Award #1 implicitly denied the remedy of refund and instead awarded the remedy of repair. The form of remedy is therefore final and binding upon the parties.

On remand, then, it matters not whether "the same nonconformity has been subject to repair three or more times[,]" or whether "the vehicle [was] out of service by reason of repair for a cumulative total of thirty or more business days during [the term of the express warranty,]" HRS § 490:2-313.1(c), either of which might underlie a conclusion that Defendants "are unable to conform the motor vehicle to any applicable express warranty by repairing or correcting any defect or condition which substantially impairs the use and market value of the motor vehicle to the consumer[,]" thus entitling Dahlen to the remedy of refund or replacement. HRS § 490:2-313.1(b) The foregoing

issues appear to have occupied much time and attention in the second arbitration and the second motion for summary judgment. Simply put, it was the remedy of repair that was awarded by Arbitration Award #1. That award is final and binding. At this point, and on remand, refund or replacement are simply out of the question.

DATED: Honolulu, Hawaii, May 15, 2001.

On the briefs:

Joseph Fagundes, III, for plaintiff-appellant.

Chief Judge

Wilson M. N. Loo and Shirley M. Cheung (Torkildson, Katz, Fonseca, Jaffe, Moore & Hetherington), for defendant-appellee General Motors Corporation, GMC Truck Division.

Associate Judge

Associate Judge

Derek R. Kobayashi (Goodsill Anderson Quinn & Stifel) for defendant-appellee, Hawaii Motors, Inc.