D

FINANCIAL DISCLOSURE STATEMENT

SUPREME COURT CLERK'S OFFICE
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HONOLULU, HAWAI'I 96813-2912

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SCFD-11-0000179
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Before completing this form please read the instructions for Financial Disclosure Statement, including the text of Supreme Court Rule 15. REMINDER: For all items requiring a monetary amount, the following financial range codes may be used.

A - Less than $1,000
B - At least $1,000 but less than $10,000
C - At least $10,000 but less than $25,000
D - At least $25,000 but less than $50,000
E - At least $50,000 but less than $100,000
F - At least $100,000 but less than $150,000
G - At least $150,000 but less than $250,000
H - At least $250,000 but less than $500,000
I - At least $500,000 but less than $750,000
J - At least $750,000 but less than $1,000,000
K - $1,000,000 *or more*

TO BE FILED BY ALL FULL TIME AND PER DIEM JUDGES.

(Type or Print Clearly)

NAME: Ayabe (LAST) Bert (FIRST) I. (MIDDLE)

OFFICE ADDRESS: 777 Punchbowl Street (NUMBER, STREET)

CITY OR TOWN Honolulu ZIP CODE: 96813

NAME OF SPOUSE OR DOMESTIC PARTNER

Gail Ayabe

No. of Dependent Children:
(Do not include names)

1

JUDICIAL POSITION HELD	DATE OF APPOINTMENT	OFFICE PHONE
Circuit Court Judge	June 10, 2004	539-4580

CALENDAR YEAR COVERED BY THIS DISCLOSURE: 2010

		ANNUAL INCOME
ITEM 1 RSCH 15(d)(1)	JUDICIAL COMPENSATION	F
ITEM 2 RSCH 15(d)(1)	JUDGE'S OTHER INCOME (if income for services rendered exceeds $1,000)	

EMPLOYER/LAW FIRM	BUSINESS ADDRESS	ANNUAL INCOME
None		

ITEM 3 RSCH 15(d)(1)	INCOME OF SPOUSE OR DOMESTIC PARTNER AND DEPENDENT CHILDREN (if income for services rendered exceeds $1,000)	

EMPLOYER	ANNUAL INCOME
Goodsill, Anderson, Quinn & Stifel	G

ITEM 4 RSCH 15(d)(1) ANY OTHER INCOME, FOR SERVICES RENDERED, IN EXCESS OF $1,000 - INCOME DISCLOSED IN ITEMS 1 - 3 NEED NOT BE REPEATED HERE

SOURCE	NATURE OF SERVICES RENDERED	AMOUNT

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 5 RSCH 15(d)(2) EACH OWNERSHIP OR BENEFICIAL INTEREST, HELD IN ANY BUSINESS CARRYING ON BUSINESS IN THE STATE, HAVING A VALUE OF $5,000 OR MORE OR EQUAL TO 10% OF THE OWNERSHIP OF THE BUSINESS.

NAME OF BUSINESS	NATURE OF BUSINESS	NATURE OF INTEREST	ENTER AMOUNT OR NO. OF SHARES
See Exhibit A			

☐ Check here if entry is None ☑ Check here if you have attached additional sheets

ITEM 6 RSCH 15(d)(2) OWNERSHIP OR BENEFICIAL INTEREST UNDER ITEM 5 TRANSFERRED DURING THIS DISCLOSURE PERIOD.

NAME OF BUSINESS	DATE OF TRANSFER	VALUE OF TRANSFER
Honeywell International	November 9, 2010	B
Morgan Stanley Mutual Funds	February 8, 2010	H
Microsoft	February 8, 2010	E

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 7 RSCH 15(d)(3) LIST EACH OFFICERSHIP, DIRECTORSHIP, TRUSTEESHIP OR OTHER FIDUCIARY RELATIONSHIP HELD IN ANY BUSINESS.

NAME OF BUSINESS	TITLE AND TERM OF OFFICE	COMPENSATION (enter amount or NONE)
Goodsill, Anderson, Quinn & Stifel	Partner	None
C&G Apartments	Partner	None

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 8 RSCH 15(d)(4)	LIST CREDITORS, OTHER THAN CREDIT CARD ACCOUNTS, TO WHOM MORE THAN $3,000 WAS OWED DURING THE DISCLOSURE PERIOD. LIST CREDIT CARD DEBT THAT EXCEEDED $10,000 FOR SIX MONTHS OR MORE.		
	NAME AND ADDRESS OF CREDITOR	ORIGINAL AMOUNT OWED	AMOUNT OWED AT END OF YEAR
	Central Pacific Bank P.O. Box 3590 Honolulu, Hawaii 96811	F	D

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 9 RSCH 15(d)(5)	REAL PROPERTY IN THE STATE IN WHICH IS HELD AN INTEREST WITH A FAIR MARKET VALUE OF $10,000 OR MORE.
POSTAL ZIP CODE OF LOCATION	VALUE
96821	K
95814	K

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 10 RSCH 15(d)(5)	REAL PROPERTY, THE FAIR MARKET VALUE OF WHICH EXCEEDS $10,000, ACQUIRED DURING THE DISCLOSURE PERIOD.		
POSTAL ZIP CODE OF LOCATION	NATURE OF INTEREST	NAME AND ADDRESS OF PERSON RECEIVING CONSIDERATION	CONSIDERATION GIVEN

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 11 RSCH 15(d)(5)	REAL PROPERTY, THE FAIR MARKET VALUE OF WHICH EXCEEDS $10,000, TRANSFERRED DURING THE DISCLOSURE PERIOD.	
POSTAL ZIP CODE OF LOCATION	NAME AND ADDRESS OF PERSON FURNISHING CONSIDERATION	CONSIDERATION RECEIVED

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 12 RSCH 15(d)(6)	CREDITOR INTEREST IN INSOLVENT BUSINESS HAVING A VALUE OF $5,000 OR MORE.		
NAME OF BUSINESS	NATURE OF BUSINESS	NATURE OF INTEREST	VALUE

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 13 RSCH 15(d)(7); Rule 3.13 Revised Code of Judicial Conduct	GIFT(S) THAT MUST BE REPORTED UNDER RULE 3.13(c) OF THE HAWAI'I REVISED CODE OF JUDICIAL CONDUCT.	
SOURCE	DESCRIPTION OF GIFT	ESTIMATED VALUE

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 14 RSCH 15(d)(8) & 22(h)	FULL-TIME JUDGES' APPROVED JUDICIAL EDUCATION

I attended 17 hours of Approved Judicial Education during the reporting period.

REMARKS:

☐ See attached sheets.

CERTIFICATION: I hereby certify that the above is a true, correct, and complete statement.

SIGNATURE: Bert L Agan DATE: April 18, 2011

NOTE: This filing is not valid without a signature.

Exhibit A

Item 5 EACH OWNERSHIP OR BENEFICIAL INTEREST, HELD IN ANY BUSINESS CARRYING ON BUSINESS IN THE STATE, HAVING A VALUE OF $5000 OR MORE OR EQUAL TO 10% OF THE OWNERSHIP OF THE BUSINESS

Name of Business	Nature of Business	Nature of Interest	Enter amount or No. of shares
C&G Apartments	Apartment Rental	Partner	50%
Boeing	Airlines	stock	C
Cisco Systems, Inc.	Technology	stock	C
Copart Inc.	Automobile Auction	stock	C
Home Depot Inc.	Home improvement	stock	B
ITT Corp.	Technology	stock	C
Microsoft	Technology	stock	C
Chevron Corp.	Oil	stock	C
International Business Machines	Technology	stock	C
Parker Drilling Co.	Energy	stock	C
Qualcomm Inc.	Technology	stock	C
Pacific Advisors Inc.	Investment brokerage	Mutual fund	E
Hawaii NextGen College Investment Plan	Investment fund	Mutual fund	D
Hawaiian Electric Industries, Inc.	Utilities	stock	C
Bank of Hawaii	Banking	stock	D

Intel Corp.	Technology	stock	C

E

NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of the record on appeal in appellate court case number CAAP-13-0004290, it appears that we do not have jurisdiction over this appeal that Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs (the Appellants) have asserted from the Honorable Gary W.B. Chang's April 19, 2013

judgment, because the Appellants' October 21, 2013 notice of appeal is not timely under Rule 4(a) of the Hawai'i Rules of Appellate Procedure (HRAP).

The circuit court's April 19, 2013 judgment satisfies the requirements for an appealable final judgment under Hawaii Revised Statutes (HRS) 641-1(a) (1993 & Supp. 2015), Rule 58 of the Hawai'i Rules of Civil Procedure (HRCP) and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). Although HRAP Rule 4(a) initially required the Appellants to file their notice of appeal within thirty days after entry of the April 19, 2013 judgment, pursuant to HRAP Rule 4(a)(3), the Appellants extended the initial thirty-day time period when the Appellants timely filed their premature March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment before the ten-day time period after entry of the April 19, 2013 judgment expired, as HRCP Rule 59 requires for the purpose of invoking the tolling provision in HRAP Rule 4(a)(3). See Saranillio v. Silva, 78 Hawai'i 1, 7, 889 P.2d 685, 691 (1995) ("HRCP [Rule] 59 does not require that a motion be served after the entry of judgment; it imposes only an outer [ten-day] time limit on the service of a motion to alter or amend the judgment[.]"). HRAP Rule 4(a)(3) "provides that the court has 90 days to dispose of [the] post-judgment [tolling] motion . . . , regardless of when the notice of appeal is filed." Buscher v. Boning, 114 Hawai'i 202, 221, 159 P.3d 814, 833 (2007). "Although the rule does not address the situation in which a [post-judgment tolling] motion . . . is prematurely filed

prior to the entry of final judgment, [the Supreme Court of Hawai'i] will deem such motion filed immediately after the judgment becomes final for the purpose of calculating the 90-day period." Buscher v. Boning, 114 Hawai'i at 221, 159 P.3d at 833. When "the court fail[s] to issue an order on [the movant]'s [post-judgment tolling] motion by . . . ninety days after [the movant has] filed the [post-judgment tolling] motion, the [post-judgment tolling] motion [i]s deemed denied." County of Hawai'i v. C&J Coupe Family Limited Partnership, 119 Hawai'i 352, 367, 198 P.3d 615, 630 (2008). Nevertheless, "when a timely post-judgment tolling motion is deemed denied, it does not trigger the thirty-day deadline for filing a notice of appeal until entry of the judgment or appealable order pursuant to HRAP Rules 4(a)(1) and 4(a)(3)." Association of Condominium Homeowners of Tropics at Waikele v. Sakuma, 131 Hawai'i 254, 256, 318 P.3d 94, 96 (2013). Consequently, "the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion[.]" HRAP Rule 4(a)(3) (emphasis added). Based on the holding in Sakuma, the event that triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal from the April 19, 2013 judgment was the entry of the August 21, 2013 written order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration of the April 19, 2013 judgment.

The Appellants did not file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order, as HRAP Rule 4(a)(3) requires for a timely appeal. Instead, on Monday, October 21, 2013, the Appellants filed a

motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), which authorized an extension under these circumstances if the Appellants could sufficiently show "excusable neglect":

> (4) Extensions of Time to File the Notice of Appeal.
> (A) . . . .
> (B) Requests for Extensions of Time After Expiration of the Prescribed Time. The court or agency appealed from, upon a showing of excusable neglect, may extend the time for filing the notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by subsections (a)(1) through (a)(3) of this rule. However, no such extension shall exceed 30 days past the prescribed time. Notice of an extension motion filed after the expiration of the prescribed time shall be given to the other parties in accordance with the rules of the court or agency appealed from.

(Emphasis added). The Supreme Court of Hawai'i has defined "excusable neglect" as "some mistake or inadvertence within the control of the movant[.]" Enos v. Pacific Transfer & Warehouse, Inc., 80 Hawai'i 345, 352, 910 P.2d 116 123 (1996). Furthermore, "as a matter of law, only plausible misconstruction, but not mere ignorance, of the law or rules rises to the level of excusable neglect." Hall v. Hall, 95 Hawai'i 318, 320, 22 P.3d 965, 967 (2001) (citation and internal quotation marks omitted); Enos, 80 Hawai'i at 353, 910 P.2d at 124. For example, where an appellant's attorney mistakenly thought that the filing of the notice of entry of a judgment (rather than the entry of the actual judgment) triggered the time period for filing a notice of appeal, the Supreme Court of Hawai'i held that the "trial court abused its discretion by granting [a] motion to extend time for filing a notice of appeal [where] the failure to timely file the appeal was caused by counsel's failure to read and comply with

the plain language of the applicable procedural rules, which cannot constitute 'excusable neglect.'" Enos, 80 Hawai'i at 355, 910 P.2d at 126. In another example, the Supreme Court of Hawai'i held that a trial court abused its discretion by finding excusable neglect where

> the record reveals that the only cause that can be discerned . . . for Hall's failure to timely file the notice of appeal . . . was Hall's counsel's purported confusion or misunderstanding regarding the likely outcome of his ex parte motion for an extension of time. His leap of faith that the ex parte motion would be granted under the rule is analogous to a misinterpretation of a rule when the language is crystal clear, which we held in Enos, 80 Hawai'i at 354, 910 P.2d at 125 to be a failure to follow the plain language of the rule rather than plausible misconstruction. . . . . As the ICA's opinion observed, in light of the express provision in the rule that a court may extend the time for filing a notice of appeal, . . . counsel's belief that his motion for an extension of time would be granted was an unreasonable belief and not excusable. . . . . Accordingly, the family court abused its discretion in construing Hall's counsel's conduct as excusable neglect.

Hall, 95 Hawai'i at 320, 22 P.3d at 967 (citation, internal quotation marks, and original brackets omitted).

In the Appellants' October 21, 2013 motion to extend the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), counsel for the Appellants argued that he had "excusable neglect" for not filing a timely notice of appeal because: "This morning I discovered, while routinely occasionally browsing Ho'ohiki, that this Court had entered on August 21, 2013 an order denying my clients' motion for reconsideration in the above-entitled action." "Unfortunately, no one informed my office, my office has never received a copy of the filed order nor any word from opposing counsel which otherwise has religiously emailed and hand delivered to me immediately every signed order and judgment in

this case, and no notice of entry of such an order was filed or served, suggesting that opposing counsel similarly never received word of the entry of the order either." Nevertheless, under the Hawai'i Rules of Civil Procedure, "[l]ack of notice of the entry by the clerk or failure to make such service [of an order or judgment], does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawaii Rules of Appellate Procedure.". HRCP Rule 77(d). The Supreme Court of Hawai'i interpreted this language in HRCP Rule 77(d) as follows:

> Although HRCP Rule 77(d) specifically refers to HRAP Rule 4(a) as providing the only relief for a party's failure to timely file a notice of appeal, nothing in Rule 77(d) suggests that the failure of the clerk to timely notify the parties of the entry of judgment could excuse a party's neglect. "A party has an independent duty to keep informed and mere failure of the clerk to notify the parties that judgment has been entered does not provide grounds for excusable neglect or warrant an extension of time." Alaska Limestone Corp. v. Hodel, 799 F.2d 1409, 1412 (9th Cir.1986) (citations omitted). This is especially so where, as here, "[appellants] presented no reason for their failure, for example, to send a messenger to court to look up the relevant date, and we see no 'forces beyond their control,'-at least on this record-that prevented them from taking this eminently reasonable step." Virella-Nieves, 53 F.3d at 453.

Enos, 80 Hawai'i at 353, 910 P.2d at 124 (emphasis added); see also Ek v. Boggs, 102 Hawai'i 289, 300, 75 P.3d 1180, 1191 (2003). In Enos, the Supreme Court of Hawai'i dismissed an appeal as untimely, and, therefore, lacking appellate jurisdiction, because the circuit court abused its discretion in finding "excusable neglect" in granting a motion for an extension under HRAP Rule 4(a)(4)(B). Enos, 80 Hawai'i at 355, 910 P.2d at 126 (italics in original).

Despite that the Appellants' reason for failing to file a timely notice of appeal was because, according to their counsel, the other parties and the clerk did not provide notice of entry of the August 21, 2013 order denying reconsideration to counsel for the Appellants, Enos held that a party has an independent duty to keep informed and that failure by the clerk to notify the parties that judgment was entered does not provide grounds for excusable neglect. In this case, Appellants' counsel's declaration establishes that he discovered the August 21, 2013 order had been entered "while routinely occasionally browsing Hoʻohiki." There is nothing to suggest that the August 21, 2013 order could not have been discovered in a more timely manner.

The circuit court appears to have disregarded HRCP Rule 77(d) and the requirements for "excusable neglect" under HRAP Rule 4(a)(4)(B) and the holding in Enos, and, instead, the circuit court expressly found "excusable neglect" and entered the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B). Based on the holding in Enos, it appears that the circuit court abused its discretion in entering the October 21, 2013 order extending the period for filing a notice of appeal pursuant to HRAP Rule 4(a)(4)(B), and, thus, the October 21, 2013 order is invalid. Consequently, the Appellants' failure to file their October 21, 2013 notice of appeal within thirty days after entry of the August 21, 2013 order denying the Appellants' March 19, 2013 HRCP Rule 59 motion for reconsideration violates the thirty-day time limit under HRAP Rule 4(a)(3) for a timely appeal under these circumstances.

The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."); HRAP Rule 26(e) ("The reviewing court for good cause shown may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal."). Accordingly,

IT IS HEREBY ORDERED that appellate court case number CAAP-13-0004290 is dismissed for lack of appellate jurisdiction.

IT IS FURTHER ORDERED that the December 25, 2014 Motion to Consolidate Appeal is denied as moot.

DATED: Honolulu, Hawai'i, March 30, 2016.

Presiding Judge

Associate Judge

Associate Judge

F

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Intermediate Court of Appeals
CAAP-13-0004290
25-NOV-2014
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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

Ke Kailani Development LLC, a Hawaii limited liability company, and Michael J. Fuchs, Plaintiffs-Appellant, vs. Ke Kailani Partners LLC, a Hawaii limited liability company, Hawaii Renaissance Builders LLC, a Delaware limited liability company registered in Hawaii, Bays Deaver Lung Rose & Holma, a Hawaii law partnership, George Van Buren, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and John Does 1-50, Jane Does 1-50, Doe Partnerships 1-50, Doe Corporations 1-50, Doe Limited Liability Companies 1-50, Doe Entities 1-50, and Doe Governmental Units 1-50, Defendants.

NOTICE OF INTERMEDIATE COURT OF APPEALS MERIT PANEL MEMBERS

TO:

Gary V. Dubin
gdubin@dubinlaw.net

Frederick John Arensmeyer
farensmeyer@dubinlaw.net

Terence J. O'Toole
totoole@starnlaw.com

Sharon V. Lovejoy
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Andrew James Lautenbach
alautenbach@starnlaw.com

Lex R. Smith
lsmith@ksglaw.com

George W. Van Buren
gvb@vcshawaii.com

Please take notice that the merit panel members for the above-captioned case are:

Honorable Alexa D. M. Fujise
Honorable Katherine G. Leonard
Honorable Lisa M. Ginoza

DATED: Honolulu, Hawai'i, 25-NOV-2014

/S/ Appellate Clerk

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Intermediate Court of Appeals
CAAP-13-0004290
01-MAR-2016
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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

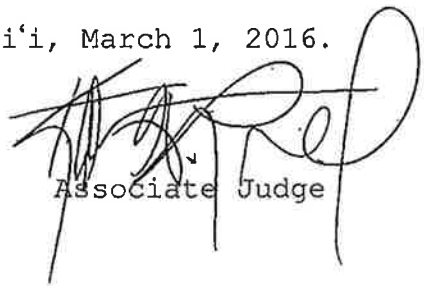
KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

CERTIFICATE OF RECUSAL
(By: Leonard, J.)

I hereby recuse myself from sitting in this case.

DATED: Honolulu, Hawai'i, March 1, 2016.



Associate Judge

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CAAP-13-0004290
01-MAR-2016
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Supreme Court Office of the Chief Clerk THE JUDICIARY STATE OF HAWAI'I
417 SOUTH KING STREET ALI'IOLANI HALE HONOLULU, HAWAI'I 96813-2902 TELEPHONE (808) 539-4919 FAX (808) 539-4928

Mark E. Recktenwald
CHIEF JUSTICE
SUPREME COURT OF HAWAI'I

Craig H. Nakamura
CHIEF JUDGE
INTERMEDIATE COURT OF APPEALS

Rochelle R. T. Kaui
CHIEF CLERK

Evelyn M. Rimando
SUPREME COURT CLERK - SUPREME COURT

Janice T. Matsumoto
SUPREME COURT CLERK - INTERMEDIATE COURT OF APPEALS

NOTICE OF ASSIGNMENT OF SUBSTITUTE JUDGE

TO:

Gary V. Dubin
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Frederick John Arensmeyer
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Terence J. O'Toole
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Lex R. Smith
lsmith@ksglaw.com

George W. Van Buren
gvb@vcshawaii.com

FROM:	Appellate Clerk
DATE:	01-MAR-2016
RE:	No. CAAP-13-0004290 Ke Kailani Development LLC, a Hawaii limited liability company, and Michael J. Fuchs, Plaintiffs-Appellant, vs. Ke Kailani Partners LLC, a Hawaii limited liability company, Hawaii Renaissance Builders LLC, a Delaware limited liability company registered in Hawaii, Bays Deaver Lung Rose &Holma, a Hawaii law partnership, George Van Buren, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and John Does 1-50, Jane Does 1-50, Doe Partnerships 1-50, Doe Corporations 1-50, Doe Limited Liability Companies 1-50, Doe Entities 1-50, and Doe Governmental Units 1-50, Defendants.

Please take notice that the Honorable Chief Judge Craig Nakamura of the Intermediate Court of Appeals, is assigned to the merit panel in place of Associate Judge Katherine Leonard, recused or disqualified.

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Intermediate Court of Appeals
CAAP-13-0004290
14-MAR-2016
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CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC,
a Hawai'i limited liability company;
and MICHAEL J. FUCHS, Plaintiffs-Appellants,

v.

KE KAILANI PARTNERS, LLC, a Hawai'i limited liability company; HAWAII RENAISSANCE BUILDERS, LLC, a Delaware limited liability company registered in Hawai'i; BAYS DEAVER LUNG ROSE & HOLMA, a Hawai'i law partnership; GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees,

and

JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

CERTIFICATE OF RECUSAL
(By: Nakamura, Chief Judge)

I hereby recuse myself from sitting in this case.

DATED: Honolulu, Hawai'i, March 14, 2016.

Craig H. Nakamura

Chief Judge

Electronically Filed
Intermediate Court of Appeals
CAAP-13-0004290
14-MAR-2016
09:10 AM

Supreme Court Office of the Chief Clerk THE JUDICIARY STATE OF HAWAI'I
417 SOUTH KING STREET ALI'IOLANI HALE HONOLULU, HAWAI'I 96813-2902 TELEPHONE (808) 539-4919 FAX (808) 539-4928

Mark E. Recktenwald
CHIEF JUSTICE
SUPREME COURT OF HAWAI'I

Craig H. Nakamura
CHIEF JUDGE
INTERMEDIATE COURT OF APPEALS

Rochelle R. T. Kaui
CHIEF CLERK

Evelyn M. Rimando
SUPREME COURT CLERK - SUPREME COURT

Janice T. Matsumoto
SUPREME COURT CLERK - INTERMEDIATE COURT OF APPEALS

NOTICE OF ASSIGNMENT OF SUBSTITUTE JUDGE

TO:

Gary V. Dubin
gdubin@dubinlaw.net

Frederick John Arensmeyer
farensmeyer@dubinlaw.net

Terence J. O'Toole
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Sharon V. Lovejoy
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Andrew James Lautenbach
alautenbach@starnlaw.com

Lex R. Smith
lsmith@ksglaw.com

George W. Van Buren
gvb@vcshawaii.com

FROM: Appellate Clerk

DATE: 14-MAR-2016

RE: No. CAAP-13-0004290

Ke Kailani Development LLC, a Hawaii limited liability company, and Michael J. Fuchs, Plaintiffs-Appellant, vs. Ke Kailani Partners LLC, a Hawaii limited liability company, Hawaii Renaissance Builders LLC, a Delaware limited liability company registered in Hawaii, Bays Deaver Lung Rose &Holma, a Hawaii law partnership, George Van Buren, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and John Does 1-50, Jane Does 1-50, Doe Partnerships 1-50, Doe Corporations 1-50, Doe Limited Liability Companies 1-50, Doe Entities 1-50, and Doe Governmental Units 1-50, Defendants.

Please take notice that the Honorable Associate Judge Lawrence Reifurth of the Intermediate Court of Appeals, is assigned to the merit panel in place of Chief Judge Craig Nakamura, recused or disqualified.

G

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Supreme Court
SCWC-13-0004290
23-MAY-2016
11:13 PM

No. SCWC-13-0004290

IN THE SUPREME COURT OF THE STATE OF HAWAII

KE KAILANI DEVELOPMENT LLC,
a Hawaii limited liability company, and MICHAEL J. FUCHS,

Plaintiffs-Appellants/Petitioners,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership; GEORGE VAN BUREN, solely in his capacity,

Defendants-Appellees/Respondents,

and

JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; AND DOE GOVERNMENTAL UNITS 1-50,

Defendants.

On Petition for a Writ of Certiorari
To the Intermediate Court of Appeals of the State of Hawaii
Case No. CAAP-13-0004290
(Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

♦♦♦♦♦

APPLICATION FOR WRIT OF CERTIORARI TO REVIEW THE INTERMEDIATE COURT OF APPEALS' MARCH 30, 2016 ORDER DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION AND ITS APRIL 21, 2016 ORDER DENYING RECONSIDERATION

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Attorneys for Petitioners

A. Questions Presented

This is a case of first impression in this State that only this Supreme Court has the power and the responsibility to resolve by reversing pursuant to HRS Section 602-59(b)(1) the following grave error of law committed by the ICA below and pursuant to HRS Section 602-59(b)(2) removing the inconsistencies between how the ICA is interpreting the following procedural rules adopted from the federal system and how those adopted rules have been interpreted by this Court and are being interpreted by federal courts today:

1. Did the ICA commit grave error of law by concluding that the filing of a notice of appeal was untimely, denying it appellate jurisdiction pursuant HRCP Rule 77(d), where the lower court admittedly failed to provide the parties with notice of the entry of an appealable order and judgment, resulting in a party who lacked such knowledge not filing a notice of appeal within 30 days pursuant to HRAP Rule 4(a)(1), notwithstanding the lower court within the additional 60 days provided by HRAP Rule 4(a)(4)(B) having made an express finding of excusable neglect and a notice of appeal was thereafter timely filed within said 60 days?

2. Did the ICA abuse its discretion, dismissing an appeal for lack of appellate jurisdiction, when it overruled the discretion of the lower court which found, pursuant to HRAP Rule 4(1)(4)(B), that a party who lacked knowledge of the entry of an appealable order and judgment who had not filed a notice of appeal within 30 days pursuant to HRAP Rule 4(a)(1) because the lower court had admittedly failed to provide the parties with such notice, had to the satisfaction of the lower court shown excusable neglect following a hearing and credibility assessments, whereas the ICA, the issue not even having been raised or briefed before it, *sua sponte* ignored the finding of the lower court, relying instead upon the strict liability language of HRCP Rule 77(d) that had been adopted in Hawaii *verbatim* from the federal system although subsequently changed by federal courts?

B. Prior Appellate Proceedings

The ICA rejected *sua sponte* Petitioner's appeal on March 3, 2016, upon a finding of a lack of appellate jurisdiction, by Order set forth in Exhibit "A", and subsequently denied Reconsideration on April 21, 2016, by Order set forth in Exhibit "B", even when for the first time being provided with the transcript of proceedings before the lower court where it found excusable neglect and signed a HRAP Rule 4(a)(4)(B) Order permitting a timely appeal.

This Petition is being filed within 30 days following the entry of the Order denying reconsideration, pursuant to HRAP Rule 4(a)(1).

C. Statement of the Case

Petitioners' counsel, upon discovering by routinely checking Ho'ohiki, that the final appealable order had been filed below almost 90 days earlier, immediately moved for a finding of excusable neglect from the lower court to preserve Petitioners' right to appeal pursuant to HRAP Rule 4(a)(4)(B).

Petitioners' motion papers are set forth in Exhibit "C", and at the hearing on shortened time that lower court admitted that there appeared to be some mix-up with its law clerk or the court clerk, failing to provide any of the parties with a copy of its final appealable order denying reconsideration of its dismissal of the case.

In initially dismissing the Appeal for lack of appellate jurisdiction, the ICA did not have the benefit of a complete record before it.

At the October 21, 2013 hearing, for instance, even opposing counsel had no record of ever receiving the lower court's final appealable order and judgment *until the hearing*, despite having had in her law firm substantial regular practices in place for tracking such matters:

> MS. LOVEJOY: Your Honor, I have to say I haven't had the time to look into the situation, but I will tell you this. When I received Mr. Dubin's letter, which was sent to me by my staff by email, and luckily I was able to check it, just for clarification, I was in a mediation, not in an arbitration. So it's just for clarification purposes. I did ask my staff whether we had any record of having received the entry of the order, and my office has no record of it either.
>
> . . . .

THE COURT: All right. I'm going to ask my staff to do the best they – whether they can check if on August 21, 2013, it was the actual order itself or just minutes of the Court's disposition. And my staff will be checking.

But if – all right. My staff has handed to me the original of a document that is file stamped. And this is the order denying the motion for rehearing and reconsideration. It's file-stamped August 21, 2013. So that's not minutes. It's an actual order. And our usual procedure is when the Court executes an order, we then contact the filing party, which in this case is Ms. Lovejoy's office. And the filing party – the party who filed and prepared the order then picks up the – the executed order from my chambers and then takes it to the clerk's office for filing. That's the normal procedure. We do not see anything out of the ordinary in this case. So I'm not sure, Ms. Lovejoy, why you wouldn't have a copy if your office actually filed the order.

MS. LOVEJOY: Your Honor, I don't know either. I can tell you I asked our legal assistant who is handling this case, who's in my experience typically quite good. Could have been a mix-up. I didn't know. I asked specifically whether, as far as we know, did we ever receive information about it. Could have been a mistake. I don't know. I also asked did we have an appeal date calendared, which would have indicated that somebody in the office had accepted the signed order – I mean, had received information about it. The response was no.

I found the Rule 23 letter, which was sent to the Court on July 11. She talked about as soon as orders come in, the usual practice is to scan, put it in a worksite, mail a copy to Mr. Dubin, as well as email a copy to myself as the lead counsel and to the client so we know it came in. I searched all around, found nothing showing this order. I don't have a copy in my pending box. I checked to see if I emailed anything to Mr. Dubin around August 21st, but I see no entry there either

So for whatever purpose we don't appear to have anything that would acknowledge it in our office. Whether that was a mistake in our office, I couldn't say. I don't know the answer to that.

Transcript of Proceedings, 10/1/2013 at 6-9 (see Exhibit "D").

The newly obtained Transcript below further confirmed that Petitioners' counsel had made additional efforts to keep apprised of the status of the case by checking

Ho'ohiki, and that even the lower court was unsure what had happened to its final appealable order and judgment.

Because the basis of the lower court's exercise of its discretion in granting the subject extension was not earlier before the ICA when it dismissed the Appeal, Petitioners sought reconsideration by the ICA and that request was similarly denied based on HRCP Rule 77(d), even though the lower court had entered a HRCP Rule 4(a)(4)(B) Order, set forth in Exhibit "E", granting Petitioners an extension to file their notice of appeal upon their showing of excusable neglect.

Instead the ICA relied almost entirely upon this Court's decision in Enos v. Pacific Transfer & Warehouse, Inc., 80 Haw. 345, 910 P.2d 116 (1996). In Enos, however, this Court not only had a complete record before it, but the issue in Enos to the contrary was whether the Circuit Court abused its discretion in granting an extension to file a notice of appeal was objected to, preserved for appeal, and briefed and presented on appeal. Enos was not a case where an appellate court sua sponte considered an issue under its limited independent authority via the plain error doctrine.

Furthermore, the circumstances of the instant case are substantially different than the facts of Enos.

In Enos, the Appellant's attorney was in fact notified that the judgment had been filed. *Id.* at 353, 910 P.2d at 124. The attorney, however, was confused regarding the plain language of the procedural rules and did not realize that a judgment is "entered" when it is filed. In Enos, 80 Haw. at 355, 910 P.2d at 126, this Court explained:

> The circuit court's grant of a HRAP Rule 4(a)(5) motion will not be reversed absent an abuse of discretion, and, ordinarily, a finding of "excusable neglect" will not be disturbed. In this case, however, the circuit court's conclusion that there was "excusable neglect" is legally and factually insupportable. Nothing in the record indicates that the failure to file a timely notice of appeal was occasioned by anything other than Richards's purported confusion regarding the time that a judgment is deemed "entered," and the court expressed, in no uncertain terms, its disbelief of that reason. The court, instead, pointed to chaos engendered by moving chambers and the HGEA strike as constituting "excusable neglect," but there was no showing that these factors in any way delayed the filing of the notice of appeal. Further, the court placed excessive weight on the

> lack of prejudice to the Enoses. The character of the neglect, rather than the consequences, should be determinative of whether it is "excusable." In this case, the character of the neglect was ignorance of the rules of procedure, which no court has found to be excusable. As Judge Friendly, a member of the Advisory Committee that drafted the Federal Rules of Appellate Procedure, commented in O.P.M. Leasing Services, Inc. v. Far West Federal Savings and Loan Association, 769 F.2d 911, 917 (2d Cir. 1985), affirming the trial court's finding of "excusable neglect" in this case "would convert the 30-day period for appeal provided in [HRAP] Rule 4(a) into a 60-day one-a result clearly not intended by the Rule's framers."
>
> We therefore hold that the trial court abused its discretion by granting the motion to extend time for filing a notice of appeal because the failure to timely file the appeal was caused by counsel's failure to read and comply with the plain language of the applicable procedural rules, which cannot constitute "excusable neglect."

In Petitioners' situation, the newly obtained Transcript demonstrates an independent effort by Petitioners' counsel to check Ho'ohiki, the failure of opposing counsel's office procedures responsible for receiving and processing court orders, and the lower court's own lack of knowledge as to how his staff may have processed or misprocessed the final appealable order.

Here, unlike in Enos, Petitioners' counsel was well aware of the need to comply with the applicable appellate rules. It even is quite possible from a reading of the Transcript that the lower court itself may have filed and misplaced the order, which may not have been logged on Ho'ohiki for several weeks or more after its entry.

In any event, unlike in Enos, the record shows that Petitioners' counsel made independent efforts to stay informed as to the status of the order, and counsel's failure to learn of the entry of the order and file a timely notice of appeal therefrom was a result of matters well outside of his control.

Given the totality of the circumstances, and especially as this matter was not even briefed and argued on appeal before the ICA concluded otherwise, it could not have been determined as the ICA otherwise did solely on the appellate record that the lower court abused its discretion in finding excusable neglect and extending the time to file the notice of appeal.

In another completely flawed effort to re-support its initial position, the ICA in denying reconsideration misconstrued yet another decision of this Court, in Bacon v. Karlin, 68 Haw. 648, 652, 727 P.2d 1127, 1130-1131 (1986), claiming that it held that HRCP Rule 77(d) must be strictly construed even if producing an unfair result if counsel did not know the appealable order or judgment had been entered, which is not what happened in Bacon.

In Bacon, the Appellate Rule at that time allowed for an extension for excusable neglect for 30 days, yet the attorney in Bacon did not seek an extension until "some seventy-nine days later and nineteen days after the deadline," 68 Haw. at 652, 727 P.2d at 1130-1131.

D. Reasons Why Certiorari Should Be Granted

The facts in this case as a necessary backdrop in reviewing this Application should draw the special interest of this Court for several reasons in its supervisory and ethical functions and speak for themselves.

First, Petitioners filed their Jurisdictional Statement on December 23, 2013, set forth in Exhibit "F", clearly explaining what had occurred, yet it was more than two years later before this Appeal was *sua sponte* dismissed, yet all of the jurisdictional facts were fully known for years; and neither did any opposing party since the Appeal was filed in 2013 file a motion to dismiss for lack of appellate jurisdiction.

Second, the underlying facts and the errors appealed, shown in Petitioners' Opening Brief, set forth in Exhibit "G", revolve around a sitting circuit court judge refusing to disqualify himself while presiding over the largest foreclosure calendar in this State failing to disclose his ownership of stock in the initial foreclosing mortgagee, with the judge's self-described good friend, an attorney, one of the principal material Defendants and witnesses in the case.

Third, the ICA Panel was designated on November 25, 2014 (Fujise, Leonard, and Ginoza, JJ.), as set forth in Exhibit "H", yet only several weeks before the Order dismissing the Appeal was entered and after the notice of no oral argument was announced, thus suggesting that an opinion had been prepared, first Judge Leonard recused herself, set forth in Exhibit "I", then minutes later Chief Judge Nakamura took her place, set forth in Exhibit "J", then two weeks later he recused himself, set forth in

Exhibit "K", and Judge Reifurth took his place, set forth in Exhibit "L" – the judicial musical chairs ending two weeks later – giving the impression of a dismissal order searching for sponsors.

Fourth, when one compares our current applicable Hawaii Rules, set forth in Exhibit "M" adopted from the applicable Federal Rules with the Amended Federal Rules in effect today, set forth in Exhibit "N", it is apparent that the federal courts learned the unfairness of the ICA's otherwise draconian and unfair interpretation of its Rules and amended them to take care of this very situation if not by judicial interpretation beforehand, its present Appellate Rule 4(a)(6) allowing 14 days for the filing of a notice of appeal after a reopening order is entered.

Firth, the fact that withholding from parties knowledge of the filing of appealable orders and judgments takes place for whatever reason in other cases in Hawaii is seen in yet another Appeal before the ICA, as set forth in Exhibit "O" indicating that the practice of not informing counsel is no isolated event.

Sixth, this problem will likely continue to trouble our courts and work grave injustice on parties as these Petitioners otherwise similarly denied an adjudication on the merits, as this Court, for instance, has only recently ordered the amendment of HRAP Rule 4, effective July 1, 2016, in another context, that of the timing of appeals regarding the entry of post-judgment motions, set forth in Exhibit "P", which once again will depend on self-enforcement, that is, upon notification of entry by the lower court. If such a draconian misinterpretation of HRCP Rule 77(d) is not corrected by this Court and immediately, in effect appellants and their appeals will continue involuntarily beyond their control to remain exposed to an unfair appellate death penalty

E. Conclusion

For all of the above reasons, this Court is respectfully urged *to accept* review of this Appeal, *to correct* the grave error of law by the ICA herein, *to remove* the misinterpretations given to your earlier Enos and Bacon decisions, *supra*, which misinterpretations were, moreover, entered before the federal courts later codified their more rational and long-standing interpretations of Civil Rule 77(d) and Appellate Rule 4(a)(1)(B), and *to adopt* the applicable Amendments to the Federal Rules.

Finally, your respected review of the merits of this Appeal, *as opposed to an artificial dismissal,* will -- one way or the other -- strength the belief that justice is possible in our Courts no matter whether or not the facts complained of occasionally and thankfully rarely involve allegations of documented unethical judicial misconduct, inadvertent or otherwise, by a sitting, *albeit* highly respected, circuit court judge or arbitrator, in the absence of which these Petitioners will clearly be denied due process of law under both the Hawaii State Constitution and the Constitution of the United States of America.

DATED: Honolulu, Hawaii; May 23, 2016.

GARY VICTOR DUBIN
FREDERICK J. ARENSMEYER
Attorneys for Petitioners
Ke Kailani Development LLC
and Michael J. Fuchs

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SCWC-13-0004290

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company, and MICHAEL J. FUCHS, Petitioners/Plaintiffs-Appellants,

vs.

KE KAILANI PARTNERS LLC, a Hawaii limited liability company, HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company, BAYS LUNG ROSE & HOLMA, a Hawaii law partnership, and GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Respondents/Defendants-Appellees.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0004290; CIV. NO. 11-1-1577-07)

ORDER DISMISSING APPLICATION FOR WRIT OF CERTIORARI
(By: Nakayama, Acting C.J., McKenna, Pollack, and Wilson, JJ., and Circuit Judge Trader, in place of Recktenwald, C.J., recused)

The application for writ of certiorari, filed on May 23, 2016, is hereby dismissed.

DATED: Honolulu, Hawaiʻi, July 7, 2016.

/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Richard W. Pollack
/s/ Michael D. Wilson
/s/ Rom A. Trader

Gary Victor Dubin and Frederick J. Arensmeyer, for petitioners Ke Kailani Development, LLC and Michael J. Fuchs

Terence J. O'Toole, Sharon V. Lovejoy, and Andrew J. Lautenbach, for respondents Ke Kailani Partners, LLC, and Hawaii Renaissance Builders, LLC

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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnership, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER SUSPENDING TIME REQUIREMENT OF HRAP RULE 40(d)
(By: Fujise, J.)

Upon consideration of the April 5, 2016 "Motion for Reconsideration of this Court's March 30, 2016 Order Dismissing Appeal for Lack of Appellate Jurisdiction," the papers in support, and the record and files herein,

IT IS HEREBY ORDERED that pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 2, the time requirement of HRAP Rule 40(d) is hereby suspended, and the time in which this court shall dispose of the motion herein is extended to May 16, 2016.

DATED: Honolulu, Hawai'i, April 12, 2016.

Associate Judge

J

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NO. CAAP-13-0004290

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

KE KAILANI DEVELOPMENT, LLC, a Hawaii limited liability company; and MICHAEL J. FUCHS, Plaintiffs-Appellants, v. KE KAILANI PARTNERS LLC, a Hawaii limited liability company; HAWAII RENAISSANCE BUILDERS LLC, a Delaware limited liability company registered in Hawaii; BAYS DEAVER LUNG ROSE & HOLMA, a Hawaii law partnersip, GEORGE VAN BUREN, solely in his capacity as Foreclosure Commissioner, Defendants-Appellees, and JOHN DOES 1-50; JANE DOES 1-50; DOE PARTNERSHIPS 1-50; DOE CORPORATIONS 1-50; DOE LIMITED LIABILITY COMPANIES 1-50; DOE ENTITIES 1-50; and DOE GOVERNMENTAL UNITS 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 11-1-1577)

ORDER DENYING APRIL 5, 2016 HRAP RULE 40 MOTION
FOR RECONSIDERATION OF MARCH 30, 2016 ORDER
DISMISSING APPEAL FOR LACK OF APPELLATE JURISDICTION
(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Upon review of (1) the March 30, 2016 order dismissing appellate court case number CAAP-13-0004290 for lack of appellate jurisdiction, (2) Plaintiffs-Appellants Ke Kailani Development, LLC, and Michael J. Fuchs's (the Appellants) April 5, 2016 motion to reconsider that March 30, 2016 dismissal order pursuant to Rule 40 of the Hawai'i Rules of Appellate Procedure (HRAP), and (3) the record, it appears that the court did not overlook or misapprehend any points of fact or law when we entered the

March 30, 2016 dismissal order.

Appellants argue that the issue whether the circuit court abused its discretion by granting the HRAP Rule 4(a)(4)(B) extension of time was not properly before the Hawai'i Intermediate Court of Appeals because no party contested the issue of timeliness in any appellate brief. However, the Supreme Court of Hawai'i has consistently held that

> [i]n each appeal, the supreme court is required to determine whether it has jurisdiction. . . . Without jurisdiction, a court is not in a position to consider the case further. . . . An appellant's failure to file a timely notice of appeal is a jurisdictional defect that can neither be waived by the parties nor disregarded by the court in exercise of judicial discretion.

Poe v. Hawai'i Labor Relations Board, 98 Hawai'i 416, 418, 49 P.3d 382, 384 (2002) (citations and internal quotation marks omitted; emphasis added); Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986) ("When we perceive a jurisdictional defect in an appeal, we must, *sua sponte*, dismiss that appeal.") (citation omitted); HRAP Rule 26(b) ("[N]o court or judge or justice is authorized to change the jurisdictional requirements contained in Rule 4 of these rules."); HRAP Rule 26(e) ("The reviewing court for good cause shown may relieve a party from a default occasioned by any failure to comply with these rules, except the failure to give timely notice of appeal."). Therefore, the fact that no party contested the issue of timeliness in any appellate brief is irrelevant. This court clearly had a duty to review the jurisdictional issue whether the Appellants' appeal was timely.

Appellants next argue that it was inappropriate for this court to hold that the circuit court abused its discretion by granting the Appellants' HRAP Rule 4(a)(4)(B) motion for an

extension of time because the transcript of the hearing for the Appellants' HRAP Rule 4(a)(4)(B) motion was not in the record on appeal. However, ensuring that the record on appeal contains all relevant documents is the duty of the appellant.

> It is the responsibility of each appellant to provide a record, as defined in Rule 10 and the Hawai'i Court Records Rules, that is sufficient to review the points asserted and to pursue appropriate proceedings in the court or agency from which the appeal is taken to correct any omission.

HRAP Rule 11(a).

Although the Appellants attached a copy of the hearing transcript to their April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order, the hearing transcript would not have changed our conclusion that the circuit court abused its discretion by finding excusable neglect for the Appellants' untimely appeal. The Supreme Court of Hawai'i has long held that the failure of a circuit court to provide formal notice of entry of an appealable order or appealable judgment does not excuse any aggrieved party from filing a timely notice of appeal. For example, thirty years ago, the Supreme Court of Hawai'i held that, where the appellant had not received prompt notice that an appealable order had been filed, it did not toll the time for appeal and her untimely request to extend the time for appeal barred her appeal. Bacon v. Karlin, 68 Haw. at 652, 727 P.2d at 1130-31.

> Even though she did not receive prompt notice of entry of the order granting summary judgment, Ms. Bacon had advance knowledge that the order would be filed. Her attorney was present when the oral order awarding judgment was issued, and he approved the written order of September 23, 1985 before it was filed. Furthermore, delinquent service of such a notice does not toll the time

> for appeal, for HRCP Rule 77(d) expressly provides that
>
> > [l]ack of notice of the entry by the clerk, or failure to make such service, does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Hawaii Rules of Appellate Procedure.
>
> We are without jurisdiction to hear and decide the appeal, and it is dismissed.

Id. (footnote omitted; emphasis added). Similar to the appellant in Bacon v. Karlin, the record in this case indicates that the Appellants' counsel was present at the relevant June 17, 2013 circuit court hearing when the circuit court announced that it would enter the written post-judgment order that eventually triggered the thirty-day time period under HRAP Rule 4(a)(3) for filing a notice of appeal in the instant case, and, furthermore, the lack of any formal notice of entry of that written post-judgment order does not affect the time to appeal under HRCP Rule 77(d). Therefore,

IT IS HEREBY ORDERED that the Appellants' April 5, 2016 HRAP Rule 40 motion for reconsideration of the March 30, 2016 dismissal order is denied.

DATED: Honolulu, Hawai'i, April 21, 2016.

Presiding Judge

Associate Judge

Associate Judge

K

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Friday Morning, May 11, 2012

HAND DELIVERED

The Honorable Bert I. Ayabe
Judge of the First Circuit Court
Fourth Floor Offices
777 Punchbowl Street
Honolulu, Hawaii 96813

Re: (1) Ke Kailani Partners, LLC v. Ke Kailani Development LLC;
Civil No. 09-1-2523-10 BIA; and
(2) Ke Kailani Development LLC, et al. v. Ke Kailani Partners LLC,
Civil No. 11-1-1577-07 BIA

Dear Judge Ayabe:

As this Court knows, every Member of the Hawaii Bar, once retained, is required pursuant to Rule 1.3 of the Hawaii Rules of Professional Conduct to represent his or her client fully and diligently as required by the facts of every case no matter how potentially unpopular or personally troubling that representation may become.

I now find myself in such a situation, for I received distressing information volunteered to me late yesterday that in the obvious interests of my client I am duty bound to immediately share with Your Honor and with opposing counsel.

As you know, the dispute underlying the above two cases began when in late 2009 the Bank of Hawaii acting on behalf of itself as well as Central Pacific Bank and Finance Factors brought a contested action to foreclose on two multi-million-dollar mortgages executed by my client, Ke Kailani Development LLC, which related promissory notes were guaranteed by Mr. Michael Fuchs, its sole Member.

Subsequently, as you also know, after you granted a foreclosure summary judgment in favor of the Bank of Hawaii and after a subsequent settlement arrangement unraveled, my client Ke Kailani Development LLC went into Chapter 11, and Ke Kailani Partners LLC substituted for the Bank of Hawaii and auctioned the subject properties, which auction sale was confirmed and an approximately $21,600,000 deficiency judgment was recently awarded to Ke Kailani Partners LLC.

In the meantime, my clients brought a separate lawsuit against the Bank of Hawaii, Central Pacific Bank, Finance Factors, Ke Kailani Partners LLC and its predecessor Hawaii Renaissance Builders LLC, and amended that Complaint to include the Bays Law Firm, while dropping the three Banks without prejudice.

Thereafter, my clients appealed the confirmation of sale, the dismissal of our original complaint in the second action, and now pending before Your Honor are our two separate non-hearing motions to have you reconsider the deficiency judgment entered in Civil No. 09-1-2523-10 and to reconsider the dismissal of Ke Kailani Partners LLC and Hawaii Renaissance Builders LLC in our first amended complaint.

Late yesterday afternoon I was more than surprised for the first time to learn, upon receiving a copy of your April 25, 2011 Supreme Court of Hawaii Certified Financial Disclosure Statement, a copy of which is enclosed with this letter, that Your Honor has presided over the above two lawsuits at the same time that you have owned between $25,000 and $50,000 worth of stock in the Bank of Hawaii, which has not only been a principal party to both actions, but its officers material witnesses to this day in both cases.

Rule 2.11(a)(3) of the Hawaii Revised Code of Judicial Conduct mandates that a judge not have "an economic interest" in "a party to the proceeding," and stock ownership in a party is universally considered to be grounds within that prohibition for automatic disqualification in every jurisdiction in the United States, also triggering the Rule 1.2 prohibition against the "appearance of impropriety"; *see, e.g.*, White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E.2d 889 (2000) ("a judge who holds stock in a corporation that is a party to a suit should recuse herself from the case").

It is not considered sufficient for a judge nevertheless to remain in a case by merely claiming that a judge's stock holding is relatively *de minimis*; *see, e.g.*, Huffman v. Arkansas Judicial Discipline and Disability Commission, 344 Ark. 274, 281-282, 42 S.W.3d 386, 344 (2001) ("While there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percentage of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest mentioned in Canon 3E(1)(c) ignores the more basic issue of appearance of impropriety").

See also, Thomson v. McGonagle, 33 Haw. 565, 566 (1935) ("it is settled that a stockholder of a corporation has a 'pecuniary interest' in an action in which the corporation is interested in its individual capacity . . . and it follows that Mr. Justice Peters is disqualified").

Furthermore, the question of the timeliness of raising such an ethical objection does not arise in such a stock holding context, for not only thankfully is it not a part of the lawyering of Hawaii attorneys to investigate the stock holdings of our Judges, it is an additional ethical requirement of Hawaii Judges to make such disclosures themselves *sua sponte.*

And, the failure to move for disqualification before the entry of final judgment in a stock holding context such as this, the United States Supreme Court has concluded is grounds – without there nevertheless being any prior objection – to set aside final judgments already entered; Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 868 (1988) ("if we focus on fairness to the particular litigants, a careful study of Judge Rubin's analysis of the merits of the underlying litigation suggests that there is a greater risk of unfairness in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues").

See also, Office of Disciplinary Counsel v. Au, 107 Haw. 327, 338, 113 P.3d 203 (2005) (timely where "the matters of disqualification are unknown to the party at the time of the proceeding and are newly discovered").

In our two cases, there is no such issue of timeliness, for not only did Your Honor not timely disclose your stock ownership in the Bank of Hawaii, and not only was Your Honor's stock ownership in the Bank of Hawaii only discovered late yesterday afternoon by accident, but Your Honor's confirmation of sale has been timely appealed and Your Honor's foreclosure deficiency judgment and dismissal of Ke Kailani Partners LLC and Hawaii Renaissance Builders LLC from the first amended complaint remains under timely Rule 59(e) review, noted on Ho'ohiki for a June 2012 decision date by your Office, whereas no decision has yet been made with respect to the Bays Law Firm remaining in the first amended complaint.

As a result of the above new circumstances, and given the prior disqualification history of these two cases questioning unsuccessfully your campaign contribution to Mr. Ed Case and your familiarity with Members of the Bays Law Firm, I am requesting on behalf of my clients that Your Honor immediately *sua sponte* set aside all of your prior orders and judgments in both cases, that you recuse yourself, and that these two cases be referred to the Chief Judge of this Circuit, the Honorable Derrick H. M Chan, for his reassignment to another First Circuit Court Judge.

I make this request on the assumption that Your Honor inadvertently forgot that you owned stock in the Bank of Hawaii when these cases began, as I and Members of my law firm have always found Your Honor to attempt to be fair and impartial.

Please know that I suggest and would welcome attending a status conference this afternoon or anytime this coming Monday, if deemed appropriate, with you and with all directly affected opposing counsel, to informally discuss and resolve these important issues in an expedited manner.

Although preferring an informal resolution of this matter, in the absence of such a status conference and/or in the absence of your setting aside all prior orders and judgments, I have understandably been instructed by my clients and on their behalf to file a formal Rule 60(b) motion similar to that filed and approved by the United States Supreme Court in Liljeberg, *supra*.

Finally, two suggestions:

First, in referring these two cases to another Circuit Court Judge, I respectfully submit that the choice of a successor jurist should be made not by you, but by Judge Chan *and* with the mutual agreement of the parties. Your presiding over the foreclosure calendar generally has far exceeded the scholarship of your predecessors in my opinion, and given the complexity of these two cases, the parties should have a new judge who is similarly competent and experienced.

Second, each case currently has a matter on appeal and will shortly otherwise presumably generate more appellate cases. However, upon being notified that Your Honor does intend *sua sponte* to set aside all prior orders and judgments in the two cases, to simply the procedures without requesting an appellate remand, my clients will beforehand immediately dismiss all pending appeals in both cases, returning overall jurisdiction to Your Honor.

Very truly yours,

Gary Victor Dubin

GVD/*o/enclosure*

copies with enclosure to all counsel of record in both cases, Civil No. 09-1-2523-10 BIA and Civil No. 11-1-1577-07 BIA:

Terence J. O'Toole, Esq.
Sharon V. Lovejoy, Esq.
Richard J. Wallsgrove, Esq.
Nicholas C. Dreher, Esq.
Colin O. Miwa, Esq.
Lex R. Smith, Esq.
Shelby Anne Floyd, Esq.
David Higgins, Esq.
Christian P. Porter, Esq.
R. Laree McGuire, Esq.
George W. Van Buren, Esq.

FINANCIAL DISCLOSURE STATEMENT

SUPREME COURT CLERK'S OFFICE
417 SOUTH KING STREET
HONOLULU, HAWAI'I 96813-2912

THIS SPACE FOR OFFICE USE ONLY

Electronically Filed
Supreme Court
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25-APR-2011
05:56 PM

Before completing this form please read the instructions for Financial Disclosure Statement, including the text of Supreme Court Rule 15. REMINDER: For all items requiring a monetary amount, the following financial range codes may be used.

A - Less than $1,000
B - At least $1,000 but less than $10,000
C - At least $10,000 but less than $25,000
D - At least $25,000 but less than $50,000
E - At least $50,000 but less than $100,000
F - At least $100,000 but less than $150,000
G - At least $150,000 but less than $250,000
H - At least $250,000 but less than $500,000
I - At least $500,000 but less than $750,000
J - At least $750,000 but less than $1,000,000
K - $1,000,000 *or more*

TO BE FILED BY ALL FULL TIME AND PER DIEM JUDGES.

(Type or Print Clearly)

NAME: Ayabe (LAST) Bert (FIRST) I. (MIDDLE)

NAME OF SPOUSE OR DOMESTIC PARTNER: Gail Ayabe

OFFICE ADDRESS: 777 Punchbowl Street (NUMBER, STREET)

CITY OR TOWN: Honolulu ZIP CODE: 96813

No. of Dependent Children: (Do not include names) 1

JUDICIAL POSITION HELD	DATE OF APPOINTMENT	OFFICE PHONE
Circuit Court Judge	June 10, 2004	539-4580

CALENDAR YEAR COVERED BY THIS DISCLOSURE: 2010

		ANNUAL INCOME
ITEM 1 RSCH 15(d)(1)	JUDICIAL COMPENSATION	F
ITEM 2 RSCH 15(d)(1)	JUDGE'S OTHER INCOME (if income for services rendered exceeds $1,000)	

EMPLOYER/LAW FIRM	BUSINESS ADDRESS	ANNUAL INCOME
None		

ITEM 3 RSCH 15(d)(1)	INCOME OF SPOUSE OR DOMESTIC PARTNER AND DEPENDENT CHILDREN (if income for services rendered exceeds $1,000)

EMPLOYER	ANNUAL INCOME
Goodsill, Anderson, Quinn & Stifel	G

ITEM 4 RSCH 15(d)(1) — ANY OTHER INCOME, FOR SERVICES RENDERED, IN EXCESS OF $1,000 - INCOME DISCLOSED IN ITEMS 1 - 3 NEED NOT BE REPEATED HERE

SOURCE	NATURE OF SERVICES RENDERED	AMOUNT

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 5 RSCH 15(d)(2) — EACH OWNERSHIP OR BENEFICIAL INTEREST, HELD IN ANY BUSINESS CARRYING ON BUSINESS IN THE STATE, HAVING A VALUE OF $5,000 OR MORE OR EQUAL TO 10% OF THE OWNERSHIP OF THE BUSINESS.

NAME OF BUSINESS	NATURE OF BUSINESS	NATURE OF INTEREST	ENTER AMOUNT OR NO. OF SHARES
See Exhibit A			

☐ Check here if entry is None ☑ Check here if you have attached additional sheets

ITEM 6 RSCH 15(d)(2) — OWNERSHIP OR BENEFICIAL INTEREST UNDER ITEM 5 TRANSFERRED DURING THIS DISCLOSURE PERIOD.

NAME OF BUSINESS	DATE OF TRANSFER	VALUE OF TRANSFER
Honeywell International	November 9, 2010	B
Morgan Stanley Mutual Funds	February 8, 2010	H
Microsoft	February 8, 2010	E

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 7 RSCH 15(d)(3) — LIST EACH OFFICERSHIP, DIRECTORSHIP, TRUSTEESHIP OR OTHER FIDUCIARY RELATIONSHIP HELD IN ANY BUSINESS.

NAME OF BUSINESS	TITLE AND TERM OF OFFICE	COMPENSATION (enter amount or NONE)
Goodsill, Anderson, Quinn & Stifel	Partner	None
C&G Apartments	Partner	None

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 8 RSCH 15(d)(4)	LIST CREDITORS, OTHER THAN CREDIT CARD ACCOUNTS, TO WHOM MORE THAN $3,000 WAS OWED DURING THE DISCLOSURE PERIOD. LIST CREDIT CARD DEBT THAT EXCEEDED $10,000 FOR SIX MONTHS OR MORE.

NAME AND ADDRESS OF CREDITOR	ORIGINAL AMOUNT OWED	AMOUNT OWED AT END OF YEAR
Central Pacific Bank P.O. Box 3590 Honolulu, Hawaii 96811	F	D

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 9 RSCH 15(d)(5)	REAL PROPERTY IN THE STATE IN WHICH IS HELD AN INTEREST WITH A FAIR MARKET VALUE OF $10,000 OR MORE.

POSTAL ZIP CODE OF LOCATION	VALUE
96821	K
95814	K

☐ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 10 RSCH 15(d)(5)	REAL PROPERTY, THE FAIR MARKET VALUE OF WHICH EXCEEDS $10,000, ACQUIRED DURING THE DISCLOSURE PERIOD.

POSTAL ZIP CODE OF LOCATION	NATURE OF INTEREST	NAME AND ADDRESS OF PERSON RECEIVING CONSIDERATION	CONSIDERATION GIVEN

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 11 RSCH 15(d)(5)	REAL PROPERTY, THE FAIR MARKET VALUE OF WHICH EXCEEDS $10,000, TRANSFERRED DURING THE DISCLOSURE PERIOD.

POSTAL ZIP CODE OF LOCATION	NAME AND ADDRESS OF PERSON FURNISHING CONSIDERATION	CONSIDERATION RECEIVED

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 12 RSCH 15(d)(6)	CREDITOR INTEREST IN INSOLVENT BUSINESS HAVING A VALUE OF $5,000 OR MORE.

NAME OF BUSINESS	NATURE OF BUSINESS	NATURE OF INTEREST	VALUE

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 13 RSCH 15(d)(7); Rule 3.13 Revised Code of Judicial Conduct	GIFT(S) THAT MUST BE REPORTED UNDER RULE 3.13(c) OF THE HAWAI'I REVISED CODE OF JUDICIAL CONDUCT.

SOURCE	DESCRIPTION OF GIFT	ESTIMATED VALUE

☑ Check here if entry is None ☐ Check here if you have attached additional sheets

ITEM 14 RSCH 15(d)(8) & 22(h)	FULL-TIME JUDGES' APPROVED JUDICIAL EDUCATION

I attended 17 hours of Approved Judicial Education during the reporting period.

REMARKS:

☐ See attached sheets.

CERTIFICATION: I hereby certify that the above is a true, correct, and complete statement.

SIGNATURE: Bert L Agan DATE: April 18, 2011

NOTE: This filing is not valid without a signature.

Exhibit A

Item 5 — EACH OWNERSHIP OR BENEFICIAL INTEREST, HELD IN ANY BUSINESS CARRYING ON BUSINESS IN THE STATE, HAVING A VALUE OF $5000 OR MORE OR EQUAL TO 10% OF THE OWNERSHIP OF THE BUSINESS

Name of Business	Nature of Business	Nature of Interest	Enter amount or No. of shares
C&G Apartments	Apartment Rental	Partner	50%
Boeing	Airlines	stock	C
Cisco Systems, Inc.	Technology	stock	C
Copart Inc.	Automobile Auction	stock	C
Home Depot Inc.	Home improvement	stock	B
ITT Corp.	Technology	stock	C
Microsoft	Technology	stock	C
Chevron Corp.	Oil	stock	C
International Business Machines	Technology	stock	C
Parker Drilling Co.	Energy	stock	C
Qualcomm Inc.	Technology	stock	C
Pacific Advisors Inc.	Investment brokerage	Mutual fund	E
Hawaii NextGen College Investment Plan	Investment fund	Mutual fund	D
Hawaiian Electric Industries, Inc.	Utilities	stock	C
Bank of Hawaii	Banking	stock	D

Intel Corp.	Technology	stock	C

HAWAII REVISED STATUTES

§601-7 Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice. (a) No person shall sit as a judge in any case in which:

(1) The judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly or through such relative, a more than de minimis pecuniary interest; or

(2) The judge has been of counsel or on an appeal from any decision or judgment rendered by the judge;

provided that no interests held by mutual or common funds, the investment or divestment of which are not subject to the direction of the judge, shall be considered pecuniary interests for purposes of this section; and after full disclosure on the record, parties may waive disqualification due to any pecuniary interest.

(b) Whenever a party to any suit, action, or proceeding, civil or criminal, makes and files an affidavit that the judge before whom the action or proceeding is to be tried or heard has a personal bias or prejudice either against the party or in favor of any opposite party to the suit, the judge shall be disqualified from proceeding therein. Every such affidavit shall state the facts and the reasons for the belief that bias or prejudice exists and shall be filed before the trial or hearing of the action or proceeding, or good cause shall be shown for the failure to file it within such time. No party shall be entitled in any case to file more than one affidavit; and no affidavit shall be filed unless accompanied by a certificate of counsel of record that the affidavit is made in good faith. Any judge may disqualify oneself by filing with the clerk of the court of which the judge is a judge a certificate that the judge deems oneself unable for any reason to preside with absolute impartiality in the pending suit or action. [L 1931, c 292, §1; RL 1935, §3572; RL 1945, §9573; RL 1955, §213-3; am L Sp 1959 1st, c 5, §1(b); HRS §601-7; am L 1972, c 88, §1(c); gen ch 1985; am L 2004, c 5, §1]

L

Dubin Law Offices

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Writer's E-Mail: gdubin@dubinlaw.net
www.dubinlaw.net

August 31, 2012

BY HAND DELIVERY

HAND DELIVERED

Office of the Clerk
Hawaii Appellate Courts
417 South King Street
Honolulu, Hawaii 96813

Re: Three New Notices of Appeal; Civil Nos. 09-1-2523, 11-1-1577 & 11-1-314K

Ladies and Gentlemen:

Enclosed please find the originals and copies of each of three new Notices of Appeal for filing, together with the filing fee for each.

Yesterday I went through the tedious task at the end of the day of filling out the JEFS' intake form (see attached) for the first voluminous one, only to learn after almost two hours fooling with the JEFS System after you had closed that it was hopelessly malfunctioning, not allowing me to add Mr. Fuchs' name nor that of Judge Ayabe, and hence preventing me from submitting it for filing.

Very truly yours,

Gary Victor Dubin

GVD/o

attachment
enclosures

Judiciary Internet You are logged in as WEBU6789. Home Logout

Case Initiation
JUDICIARY INFORMATION MANAGEMENT SYSTEM

You are creating a State of Hawai'i Intermediate Court of Appeals Case

Case Information

Case Type AP Appeal

Trial Court/Agency 1st Circuit Circuit Court

Trial Court/Agency Case Type Civil

Confidential

Short Case Title* Ke Kailani Partners v Ke Kailani Development

Extended Case Title* KE KAILANI PARTNERS, LLC, a Hawaii limited liability company,

Trial Court Information

Trial Court Judge

Trial/Agency Case Id

09-1-2523-10 BIA Remove

Authorizing Statute(s)

Authorizing Statute HRS § 641-1(a) - Final Judgments, Orders or Decrees

HRS § 602-57 - Courts of Appeal

WOULD NOT ADD JUDGE'S NAME OR FUCHI AS DEFENDANT-APPELLANT

Party Information *

Add all parties

Add Add Me

Appellee-Plaintiff Ke Kailani Partners Llc
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Attorney **Terence J. O'Toole**
[Edit] [Remove] Pacific Guardian Ctr , Makai T
Honolulu, HI 96813

Attorney **Sharon V. Lovejoy**
[Edit] [Remove] Pacific Guardian Ctr , Makai T
Honolulu, HI 96813

Attorney **Richard John Wallsgrove**
[Edit] [Remove] Pacific Guardian Ctr , Makai T
Honolulu, HI 96813

Appellant-Defendant Ke Kailani Development LLC
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Attorney **Gary V. Dubin**
[Edit] [Remove] Harbor Ct
Honolulu, HI 96813

Attorney **Frederick John Arensmeyer**
[Edit] [Remove] Harbor Ct
Honolulu, HI 96813

Other **Ke Kailani Community Association**
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Attorney **Christian P. Porter**
[Edit] [Remove] Davies Pacific Ctr
Honolulu, HI 96813

Other **The Association Of Villa Owners Of Ke Kailani**
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Attorney **Ramona Laree Mcguire**
[Edit] [Remove] Davies Pacific Ctr
Honolulu, HI 96813

Other **Mauna Lani Resort Association**
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Appellee-Plaintiff Bank Of Hawaii
[Edit] [Remove] NO ADDRESS ON FILE
NO CITY,

Appellee-Plaintiff Finance Factors, Limited
[Edit] [Remove] NO ADDRESS ON FILE

NO CITY,

Appellee-Plaintiff Central Pacific Bank
[Edit] [Remove] P O Box 3590
Honolulu, HI 96811

Other **County of Hawaii**
[Edit] [Remove] 101 Aupuni Street
Hilo, HI 96720

Attorney **George W. Van Buren**
[Edit] [Remove] Topa Financial Ctr., Fort St
Honolulu, HI 96813

Ke Kailani Development LLC Appellant DFT - Defendant Update Cancel

Documents Information *

Only PDF files may be submitted. Documents may take a moment to upload, especially for larger documents, so please wait until you see the file name you uploaded before selecting Add. Check the "sealed" box only if the case is a public case and

1. *the court has granted your motion to seal the document, or*
2. *the document is one that may be submitted under seal without an order of the court*

Document Category* Document Type*

In Response To None Filing Parties* None

Attach Document Browse...

Upload File

Notes

Add Reset

1 - Notice of Appeal 09-2523-0110,efiling notice of appeal,8,30,12.pdf Lead Document In Camera Seal

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Judiciary Home Page eCourt Kōkua eFiling and Service System Frequently Asked Questions Training ADA Disability Accommodations Coordinators

NO. 12226

Date. 8/30/12

TO AMCO

FOR PARKING SIGNS

DEPOSITS

TOTAL		
AMOUNT THIS CHECK	100	00
BALANCE		

NO. 12227

Date. 8/30/12

TO H APP. CTS

FOR NOA # FUCHS KKP

DEPOSITS

TOTAL		
AMOUNT THIS CHECK	300	00
BALANCE		

TAB CM-2136 (REV. 9/01/06)

NO. 12228

Date. 8/30/12

TO H APP CTS

FOR NOA # FUCHS KKP

DEPOSITS

TOTAL		
AMOUNT THIS CHECK	300	00
BALANCE		

M

Dockets for CAAP-12-0000758

Dkt. #	Dkt. Code	Description	Filing Date	Filing Time	Filing Party	Sealed	In Camera
1	NA	Notice of Appeal Filed OTC due to tech problems in JEFS	31-AUG-2012	15:45:31	Ke Kailani Development Llc (@1793517), Fuchs, Michael (@179352...		

N

Sostaric v. Marshall

Supreme Court of Appeals of West Virginia

October 14, 2014, Submitted; November 12, 2014, Filed

No. 14-0143

Reporter
234 W. Va. 449; 766 S.E.2d 396; 2014 W. Va. LEXIS 1192

NANCY SOSTARIC and STJEPAN SOSTARIC, Defendants Below, Petitioners v. SALLY MARSHALL, Plaintiff Below, Respondent

Subsequent History: [***1] Dissenting Opinion by Justice Davis Filed November 14, 2014.

Prior History: Appeal from the Circuit Court of Morgan County. The Honorable Michael D. Lorensen, Judge. Civil Action No. 12-C-160.

Disposition: REVERSED AND REMANDED.

Core Terms

fair market value, *deficiency judgment*, foreclosure sale, trust deed, trustee sale, grantor, foreclosure, real property, default, mortgage, real estate, sale price, promissory note, notice, requires, lender, foreclosed property, foreclosed, doctrine of stare decisis, Borrowers, summary *judgment*, cure, common law principle, fair value, sale date, deviation, trustee's, statutes, deed, prior decision

Case Summary

Overview

ISSUE: Whether summary *judgment* was properly granted to the lender in a lawsuit for a *deficiency judgment*, following a trust deed foreclosure sale under *W. Va. Code § 38-1-3* (1923), to recover the unpaid balance of the borrowers' promissory note. HOLDINGS: [1]-The borrowers were entitled to assert, as a defense, that the amount of the *deficiency judgment* awarded was too high and that it should have been adjusted to reflect the fair market value of the subject property. If the circuit court determined that the fair market value of the property was greater than the foreclosure sale price, the borrowers were entitled to an offset against the *deficiency* in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeded the sale price.

Outcome
Judgment reversed, and case remanded for further proceedings.

LexisNexis® Headnotes

Civil Procedure > ... > Summary *Judgment* > Entitlement as Matter of Law > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Appeals > Summary *Judgment* Review > Standards of Review

HN1 A motion for summary *judgment* should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. An appellate court will afford a plenary review to a lower court's order awarding summary *judgment*. A circuit court's entry of summary *judgment* is reviewed de novo.

Real Property Law > Financing > Foreclosures > *Deficiency Judgments*

HN2 A *deficiency judgment* is an imposition of personal liability upon a mortgagor for an unpaid balance of a secured obligation after foreclosure of the mortgage has failed to yield the full amount of the underlying debt.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Financing > Mortgages & Other Security Instruments > Mortgagee's Interests

HN3 Courts use the terms deed of trust (trust deed) and mortgage interchangeably. A deed of trust is, in effect, a mortgage. Both instruments secure payment of a debt. The primary difference is that the holder of a trust deed does not have to apply to a court in order to foreclose, whereas the holder of a mortgage is required to apply to a court in order to foreclose.

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN4 In West Virginia, the West Virginia Legislature has provided for two types of real property foreclosure sales: judicial sales and trustee sales.

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN5 See *W. Va. Code § 38-1-3* (1923).

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN6 The provisions of W. Va. Code ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the trust deed, do not violate the public policy of the State of West Virginia.

Governments > Courts > Judicial Precedent

HN7 An appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law. Uniformity and predictability are important in the formulation and application of the rules of property. Under the doctrine of stare decisis, a rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice.

Governments > Courts > Judicial Precedent

HN8 No prior decision is to be reversed without good and sufficient cause; yet the rule is not in any sense ironclad, and the future and permanent good to the public is to be considered, rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases when it is plainly the duty of a court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well-settled principle of law can be violated by any decision or any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. When vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected. The reason that the rule of stare decisis was promulgated was on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it. Much, not only of legislation, but of judicial decision, is based upon the broad ground of public policy, and this latter must not be lost sight of.

Real Property Law > Financing > Foreclosures > ***Deficiency Judgments***

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

HN9 West Virginia allows a defendant to assert, as a defense in a ***deficiency judgment*** proceeding, that the fair market value of real property was not obtained at a trustee foreclosure sale.

Civil Procedure > Preliminary Considerations > Equity > Relief

Real Property Law > Financing > Foreclosures > Judicial Foreclosures

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN10 West Virginia cases have applied common law principles of equity to permit an action to set aside a foreclosure sale.

Real Property Law > Financing > Foreclosures > ***Deficiency Judgments***

Governments > Courts > Judicial Precedent

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > General Overview

Real Property Law > Financing > Foreclosures > Private Power of Sale Foreclosure

HN11 A trust deed grantor may assert, as a defense in

a lawsuit seeking a ***deficiency judgment***, that the fair market value of the secured real property was not obtained at a trust deed foreclosure sale. In view of this holding, Syllabus Point 4 of *Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)* is overruled. Additionally, a fair market value determination in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale must be asserted by the ***deficiency*** defendant. Unless the ***deficiency*** defendant requests such a determination, the foreclosure sale price, rather than the property's fair market value, will be used to compute the ***deficiency***. Finally, if a circuit court in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale determines that the fair market value of the foreclosed property is greater than the foreclosure sale price, the ***deficiency*** defendant is entitled to an offset against the ***deficiency*** in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

Syllabus

[*450] [397]** BY THE COURT

1. A trust deed grantor may assert, as a defense in a lawsuit seeking a ***deficiency judgment***, that the fair market value of the secured real property was not obtained at a trust deed foreclosure sale. In view of this holding, Syllabus Point 4 of *Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)* is overruled.

2. A fair market value determination in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale must be asserted by the ***deficiency*** defendant. Unless the ***deficiency*** defendant requests such a determination, the foreclosure sale price, rather than the property's fair market value, will be used to compute the ***deficiency***.

3. If a circuit court in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale determines that the fair market value of the foreclosed property is greater than the foreclosure sale price, the ***deficiency*** defendant is entitled to an offset against the ***deficiency*** in the amount by which the fair market value, less the amount of any liens on the real estate that were **[***2]** not extinguished by the foreclosure, exceeds the sale price.

Counsel: Nancy Sostaric, Pro se, Falls Church, Virginia.

Stjepan Sostaric, Pro se, Falls Church, Virginia.

Sally Marshall, Pro se, Berkeley Springs, West Virginia.

Judges: JUSTICE KETCHUM delivered the Opinion of the Court. CHIEF JUSTICE DAVIS dissents.

Opinion by: Ketchum

Opinion

Justice Ketchum:

Petitioners, Nancy Sostaric and Stjepan Sostaric ("Mr. and Mrs. Sostaric"),[1] who are appearing *pro se*, appeal from an order entered January 16, 2014, by the Circuit Court of Morgan County. The circuit court granted summary ***judgment*** to respondent, Sally Marshall ("Ms. Marshall"), who is also appearing *pro se*, awarding her a ***deficiency judgment*** against Mr. and Mrs. Sostaric and attorney's fees.[2]

On appeal, Mr. and Mrs. Sostaric contend that summary ***judgment*** was improper because there exist genuine **[***3]** issues of material fact. They contend that the amount of the ***deficiency judgment*** awarded was too high and that it should have been adjusted to reflect the fair market value of their property when it was sold at the trust deed sale. They argue the property was sold for less than its fair market value at the trustee's foreclosure sale.

Upon review, we find that Mr. and Mrs. Sostaric may assert, as a defense in the lawsuit seeking a ***deficiency judgment***, that the property was sold for less than its fair market value at the trust deed foreclosure sale. In so finding, we overrule Syllabus Point 4 of *Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)*. We therefore reverse the circuit court's summary ***judgment*** order and remand this matter for further proceedings consistent with this Opinion.

I.

---

[1] At the time of the underlying proceedings, it appears that Mr. and Mrs. Sostaric were in the midst of divorce proceedings. Nevertheless, to maintain consistency with the record in this case, we will continue to refer to them as "Mr. and Mrs. Sostaric."

[2] Ms. Marshall initially was represented by counsel when she filed the lawsuit seeking the ***deficiency judgment*** against Mr. and Mrs. Sostaric.

FACTUAL AND PROCEDURAL BACKGROUND

Mr. and Mrs. Sostaric signed a "Secured Balloon Promissory Note" on December 26, **[*451]** **[**398]** 2006, whereby Ms. Marshall lent them $200,000.00. The loan was "secured by a first deed of trust on real property owned by Borrowers [Mr. and Mrs. Sostaric]" in Berkeley Springs, West Virginia.[3] The note's payment terms required that

> [t]he full amount of the note is due and payable December 30, 2013. Interest only payments will be made on a monthly **[***4]** basis. The first interest only payment of $1208.00 will be due on January 30, 2007 and will continue to be paid monthly thereafter. The full payment of Two Hundred Thousand Dollars ($200,000.00) will be due on December 31, 2013.

Additionally, the note included a "DEFAULT AND ACCELERATION CLAUSE," which provided:

> If Borrowers [Mr. and Mrs. Sostaric] default in the payment of this Note or in the performance of any obligation, and the default is not cured within fifteen days after Lender [Ms. Marshall] has given to Borrowers written notice of the default and time to cure, then Lender may declare the unpaid principal balance and earned interest on this Note immediately due. Borrowers and each surety, endorser, and guarantor waive all demands for payment, presentation for payment, notices of intentions to accelerate maturity, protests and notices of protest, to the extent permitted by law.

Finally, the note allowed for the recovery of attorney's fees incurred in the collection or enforcement of the note:

> If this Note **[***5]** is given to an attorney for collection or enforcement, or if suit is brought for cancellation or enforcement, or if it is collected or enforced through probate, bankruptcy or other judicial proceeding, then Borrowers [Mr. and Mrs. Sostaric] shall pay to Lender [Ms. Marshall] all costs of collection and enforcement, including reasonable attorneys fees and court costs in addition to other amounts due.

While Mr. and Mrs. Sostaric made the required monthly interest payments for a period of time after signing the promissory note, they stopped making their monthly payments in October 2010 and subsequently defaulted on their obligation. On July 17, 2012, Ms. Marshall sent Mrs. Sostaric[5] a "NOTICE OF RIGHT TO CURE DEFAULT," which "serve[d] as formal notice that the default outline[d] below must be satisfied within thirty (30) days. Failure to cure the default by the date indicated shall result in the acceleration of the balance owing on the deed of trust and sale of collateral involved." The property sought to be sold was the residence of Mr. and Mrs. Sostaric that had served as collateral for the promissory note. The notice further provided:

> **YOU HAVE THE RIGHT TO CURE THE FOLLOWING DEFAULT:**
>
> Total amount of payments **[***6]** in default (including all charges): $25,911.00 and any other payments or fees that may become due prior to the curing of the default.
>
> Other Required Performance Which is in Default: Show proof that 2011 real estate taxes have been paid. ($1,050.73 if paid by July 31, 2012)
>
> **Date by which payment must be made or other required performance accomplished in order to cure the default: August 17th, 2012.**

(Emphasis in original.)

Despite this notice, Mr. and Mrs. Sostaric did not cure their default. Therefore, on September 21, 2012, counsel for Ms. Marshall sent Mrs. Sostaric[6] notice of a trustee's sale of the property securing their promissory note. The notice served to

> 1. Accelerate and declare all sums secured by said Deed of Trust to be **immediately** due and payable without further demand, subject to the terms of said deed of trust and applicable law; and
>
> **[*452]** **[**399]** 2. Invoke the power given by said Deed of Trust to sell the above-described real

[3] It appears from the record that the property securing the promissory note was the primary residence of Mr. and Mrs. Sostaric, which they had purchased in March 2006 for $155,900.

[5] It is unclear why Mr. Sostaric's name was not also included on the right to cure notice.

[6] **[***7]** It also is unclear why Mr. Sostaric's name was not included on the correspondence providing notice of the trustee's sale.

> estate at public auction on Wednesday, October 17, 2012, at 11:36 AM, at the front door of the Morgan County Courthouse, Berkeley Springs, West Virginia.

(Emphasis in original.)

On October 17, 2012, Ms. Marshall purchased the subject property at the trustee's sale for $60,000.00. Of this amount, $58,260.75[7] was distributed to "Sally Marshall, the holder and owner of the note secured by said deed of trust to apply on principal and interest of said note[8] and obligations set forth in said deed of trust," while the remaining sum of $1,739.25 was applied to the costs of the sale. (Footnote added.)

Thereafter, on December 13, 2012, Ms. Marshall, by counsel, filed the instant lawsuit against Mr. and Mrs. Sostaric seeking a ***deficiency judgment*** for the unpaid balance of their promissory note. By order entered January 16, 2014, the circuit court awarded summary ***judgment*** to Ms. Marshall, ruling as follows:

> The Plaintiff [Ms. Marshall] has set forth evidence, by way of a **[***8]** sworn affidavit, of an outstanding debt in the amount of $175,407.45, the collection of which is supported by an exhibit to the Complaint, the Secured Balloon Promissory Note. Further, the Plaintiff has set forth evidence, by way of a sworn affidavit, of attorneys' fees in the amount of $1,749.25, the collection of which is supported by an exhibit to the Complaint, the Secured Balloon Promissory Note.

The court also awarded Ms. Marshall post-***judgment*** interest on this award. From this adverse ruling, Mr. and Mrs. Sostaric now appeal to this Court.[9]

II.

STANDARD OF REVIEW

Mr. and Mrs. Sostaric appeal from the circuit court's order granting summary ***judgment***. We previously have held that ***HN1*** "[a] motion for summary ***judgment*** should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. pt. 3, *Aetna Cas. & Sur. Co. v. Fed. Ins. Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)*. We afford a plenary review **[***9]** to a lower court's order awarding summary ***judgment***: "[a] circuit court's entry of summary ***judgment*** is reviewed de novo." Syl. pt. 1, *Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755 (1994)*.

III.

ANALYSIS

This case involves a ***deficiency judgment***. ***HN2*** A ***deficiency judgment*** "is an imposition of personal liability upon a mortgagor for an unpaid balance of a secured obligation after foreclosure of the mortgage has failed to yield the full amount of the underlying debt." Lawrence R. Ahern, III, *The Law of Debtors and Creditors*, § 8:20 (2014).[10]

In this appeal, Mr. and Mrs. Sostaric contend that the circuit court's award of summary ***judgment*** to Ms. Marshall was improper because the ***deficiency judgment*** award was not adjusted to reflect the fair market value of the property securing the debt. In addressing whether a defendant may challenge the sale price of foreclosed **[***10]** property in **[*453]** **[**400]** a ***deficiency judgment*** lawsuit and assert that the property was sold for less than its fair market value, we will examine and consider: (1) the majority view of other jurisdictions that permit the sale price of foreclosed property to be challenged in a ***deficiency judgment*** lawsuit; and (2) West Virginia's statutory law on trust deed foreclosure sales, as well as this Court's ruling in *Fayette County. National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)*.

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[7] The "TRUSTEE'S REPORT OF SALE UNDER DEED OF TRUST" indicates that $58,250.75 of the sales proceeds was applied to reduce the indebtedness under the promissory note.

[8] The "Disclosure Form Trustee Report of Sale" indicated that the "Total Secured Indebtedness at Foreclosure [was] 231,660.68."

[9] There is no contention that the trust deed sale was invalid or defective. Our review of the record reveals that the foreclosure procedure and trustee's sale complied with our law and that title to the foreclosed property was legally conveyed to Ms. Marshall.

[10] ***HN3*** We use the terms deed of trust (trust deed) and mortgage interchangeably. A deed of trust is, in effect, a mortgage. Both instruments secure payment of a debt. The primary difference is that the holder of a trust deed does not have to apply to a court in order to foreclose, whereas the holder of a mortgage is required to apply to a court in order to foreclose. For a more detailed explanation see *Arnold v. Palmer, 224 W.Va. 495, 503 fn. 10, 686 S.E.2d 725, 733 fn.10 (2009)*.

A. The Majority Rule

Our Court has recognized that "a majority of jurisdictions permit the sale price of foreclosed property to be challenged in a ***deficiency judgment*** proceeding[.]" *Fayette Cnty. Nat'l Bank v. Lilly, 199 W.Va. at 356, 484 S.E.2d at 239*. Whether by judicial decision or by statute,[11] the majority view "afford[s] the ***deficiency*** defendant the right to insist that the greater of the fair market value of the real estate or the foreclosure sale price be used in calculating the ***deficiency***." *Restatement (Third) of Property: Mortgages, § 8.4 cmt. a* (1997).

In one such judicial decision, the Montana Supreme Court determined that its real property foreclosure statute was silent on whether the fair market value of the property could be raised in a ***deficiency judgment*** proceeding. Because the statute was silent, the court used its inherent equitable powers to require that the fair market value of the foreclosed property be determined and form the basis of any ***deficiency judgment*** award. *See Trustees of the Wash.-Idaho-Mont.-Carpenters-Emplrs. Ret. Trust Fund v. Galleria P'ship, 239 Mont. 250, 265, 780 P.2d 608, 617 (1989)* ("Courts sitting in equity are empowered **[***12]** to determine all the questions involved in the case and to do complete justice; this includes the power to fashion an equitable remedy. . . . In the exercise of our equity jurisdiction, therefore, we deem it proper to remand to the District Court to determine the fair market value of the property[.]").

A number of other states have also adopted the majority rule through judicial decision. *See, e.g., First Union Nat'l Bank of Fla. v. Goodwin Beach P'ship, 644 So. 2d 1361 (Fla.Dist.Ct.App. 1994)* (In Florida, a party seeking ***deficiency judgment*** must present competent evidence that the mortgage indebtedness exceeds the fair market value of the property.); *Shutze v. Credithrift of Am., 607 So. 2d 55, 65 (Miss. 1992)* (In Mississippi, in a ***deficiency*** proceeding, the mortgagee "must give the debtor fair credit for the commercially reasonable value of the collateral."); and *Licursi v. Sweeney, 156 Vt. 418, 594 A.2d 396, 398 (Vt. 1991)* (Vermont requires that the value of the foreclosed real estate be applied to the mortgage obligation.).

The *Restatement (Third) of Property: Mortgages, § 8.4 cmt. a* (1997), agrees with the majority rule and has adopted the

> widely held view that when the foreclosure process does not fully satisfy the mortgage obligation, the mortgagee may obtain a ***deficiency judgment*** against any person who is personally liable on that obligation. Thus, this section rejects the approach of **[*454]** **[**401]** those states that **[***13]** prohibit a ***deficiency judgment*** after foreclosure of a purchase money mortgage, or that prohibit ***deficiency judgments*** after a foreclosure by power of sale. On the other hand, it also rejects the traditional view that the amount realized at the foreclosure sale is automatically applied to the mortgage obligation and that the mortgagee is entitled to a ***judgment*** for the balance. Instead, **it adopts the position of the substantial number of states that, by legislation or judicial decision, afford the *deficiency* defendant the right to insist that the greater of the fair market value of the real estate or the foreclosure sale price be used in calculating the *deficiency***. This approach enables the mortgagee to be made whole where the mortgaged real estate is insufficient to satisfy the mortgage obligation, but at the same time protects against the mortgagee purchasing the property at a deflated price, obtaining a ***deficiency***

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[11] Statutes that define the ***deficiency*** as the difference between the mortgage obligation and the "fair value" of the foreclosed real estate include the following: *Ariz. Rev. Stat. § 33-814* ("fair market value" as of the date of sale); West's Ann. *Cal. Code Civ. Proc. §§ 580a* ("fair market value" as of date of sale in power of sale foreclosure), *726(b)* ("fair value" as of sale date in judicial **[***11]** foreclosure); *Colo. Rev. Stat. Ann. § 38-38-106* ("fair market value"); *Conn. Gen. Stat. Ann. § 49-14(a)* ("actual value" as of date title vested in mortgagee in strict foreclosure); *Ga. Code Ann. § 44-14-161* ("true market value" as of sale date); *Idaho Code § 6-108* ("reasonable value"); *Kan. Stat. Ann. § 60-2415* ("fair value"); *Me. Rev. Stat. Ann. tit. 14, § 6324* ("fair market value" at time of sale); *Mich. Comp. Laws Ann. § 600.3280* ("true value" at time of sale); *Minn. Stat. Ann. § 582.30, subd. 5(a)* ("fair market value"); *Neb. Rev. Stat. § 76-1013* ("fair market value" as of sale date); *Nev. Rev. Stat. §§ 40.455-40.457* ("fair market value" as of sale date); *N.J. Rev. Stat. § 2A:50-3* ("fair market value"); *N.Y. Real Prop. Acts. § 1371* ("fair and reasonable market value" as of sale date); *N.C. Gen. Stat. § 45-21.36* ("true value" as of sale date); *N.D. Cent. Code §§ 32-19-06*, *32-19-06.1* ("fair value"); *Okla. Stat. Ann. tit. 12, § 686* ("fair and reasonable market value" as of sale date); *Pa. Stat. Ann. tit. 42, § 8103* ("fair market value"); *S.C. Code Ann. § 29-3-700 et seq.* ("true value"); *S.D. Codified Laws Ann. § 21-47-16* ("fair and reasonable value"); *Tex. Prop. Code Ann. § 51.003* ("fair market value" as of sale date); *Utah Code Ann. § 57-1-32* ("fair market value"); *Wash. Rev. Code Ann. § 61.12.060* ("fair value"); *Wis. Stat. Ann. § 846.165* ("fair value").

> ***judgment*** and, by reselling the real estate at a profit, achieving a recovery that exceeds the obligation. Thus, it is aimed primarily at preventing the unjust enrichment of the mortgagee. This section also protects the mortgagor from the harsh consequences of suffering both **[***14]** the loss of the real estate and the burden of a ***deficiency judgment*** that does not fairly recognize the value of that real estate.

(Emphasis added.) Based on its view that a ***deficiency*** defendant has the right to insist that the fair market value of the real estate be used in calculating the ***deficiency***, *section 8.4 of the Restatement* provides:

> (a) If the foreclosure sale price is less than the unpaid balance of the mortgage obligation, an action may be brought to recover a ***deficiency judgment*** against any person who is personally liable on the mortgage obligation in accordance with the provisions of this section.
>
> (b) Subject to Subsections (c) and (d) of this section, the ***deficiency judgment*** is for the amount by which the mortgage obligation exceeds the foreclosure sale price.
>
> (c) *Any person against whom such a recovery is sought may request in the proceeding in which the action for a* ***deficiency*** *is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale.*
>
> (d) If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the ***deficiency*** is sought are entitled to an offset against the ***deficiency*** in **[***15]** the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

(Emphasis added.)

One final note on *section 8.4 of the Restatement*—it requires a defendant in a ***deficiency*** proceeding to request that a fair market value determination be made: "The fair market value determination of this section is not self-executing. Unless the ***deficiency*** defendant affirmatively requests such a determination, the foreclosure sale price, rather than the property's fair market value, will be used to compute the ***deficiency***." *supra* at *§ 8.4 cmt. b*.[12]

B. West Virginia Rule

HN4 In West Virginia, the Legislature has provided for two types of real property foreclosure sales: judicial sales[13] and trustee sales. The present issue concerns a trustee foreclosure sale, which is set forth in *W.Va. Code § 38-1-3* [1923]. It provides:

> ***HN5*** The trustee in any trust deed **[***16]** given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or **[*455]** **[**402]** surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have been made in the payment thereof, or any part thereof, by the grantor or other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale as prescribed in the following section.

The issue of whether the value of foreclosed real property may be challenged in a ***deficiency judgment*** lawsuit is not addressed by our trustee foreclosure sale statutes—*W.Va. Code § 38-1-3* neither permits nor forbids such a challenge.[14]

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[12] In many jurisdictions, the court must conduct a hearing as to value and apply the "fair value" amount in computing a ***deficiency*** even though the ***deficiency*** defendant fails to request it. *See, e.g.*, *Idaho Code Ann. § 6-108*; *Neb. Rev. Stat. § 76-1013*; *Nev. Rev. Stat. § 40.457*; *Okla. Stat. Ann. tit. 12, § 686*; *Pa. Stat. Ann. tit. 42, § 8103*. Other states place the burden on the ***deficiency*** defendant to raise the "fair value" defense. *See, e.g.*, *Kan. Stat. Ann. § 60-2415*; *Me. Rev. Stat. Ann. tit. 14, § 6324*; *Mich. Comp. Laws Ann. § 600.3280*; *N.C. Gen. Stat. § 45-21.36*; *N.J. Rev. Stat. § 2A:50-3*; and *Tex. Prop. Code Ann. § 51.003*.

[13] The statutory provisions for judicial sales are found in *W.Va. Code § 55-12-1 et seq.* [1994].

[14] In Syllabus Point 2 of *Dennison v. Jack, 172 W.Va. 147, 304 S.E.2d 300 (1983)*, this Court held, ***HN6*** "[t]he provisions of W.Va. Code, ch. 38, art. 1, which permit, pursuant to the terms of a trust deed, a public sale of property by a trustee upon the default of the grantor of the **[***17]** trust deed, do not violate the public policy of this State."

This Court has previously considered whether the value of foreclosed real property may be challenged in a ***deficiency judgment*** lawsuit. In *Lilly, supra*, a divorcing couple defaulted on a promissory note that was secured by a deed of trust. The holder of the note, a bank, purchased the property at a trustee's sale and then sued the grantors of the note to recover a ***deficiency judgment*** for the balance of the amount due under the note. The grantors contended, however, that the ***deficiency judgment*** sought should be offset by the fair market value of the property securing the loan, which, they claimed, had been sold for less than its true value. The Court rejected this argument, concluding that the subject sale had complied with *W.Va. Code § 38-1-3*, and reasoned that

> [u]nder the current real property foreclosure scheme there is a conclusive presumption that, at the point of a ***deficiency judgment*** proceeding, the property sold was sold for a fair market value. The Lillys [grantors] now seek to have this Court redefine that presumption so that it becomes rebuttable. This we refuse to do.

Lilly, 199 W. Va. at 357, 484 S.E.2d at 240.

The Court in *Lilly* acknowledged that a "majority of jurisdictions permit **[***18]** the sale price of foreclosed property to be challenged in a ***deficiency judgment*** proceeding," and that "our cases have applied common law principles of equity to permit an action to set aside a foreclosure sale." *199 W.Va. at 356-57, 484 S.E.2d at 239-40*. Despite its recognition that this Court had previously applied common law principles of equity in cases involving trustee foreclosure sales, the Court in *Lilly* refused to allow the ***deficiency*** defendant to assert that the foreclosed real property was sold for less than its fair market value.

Lilly offered two main reasons for declining to follow the majority of jurisdictions that permit the sale price of foreclosed real property to be challenged: (1) West Virginia's "trustee foreclosure laws would be unsettled were we to allow grantors to challenge the value of real property at a ***deficiency judgment*** proceeding," *199 W.Va. at 357, 484 S.E.2d at 240*; and (2) the Legislature has addressed the issue in the area of consumer goods, therefore, it is up to the Legislature to address the issue in the context of a trustee's foreclosure sale of real property. *199 W.Va. at 357-58, 484 S.E.2d at 240-41*. Based on this reasoning, the Court held, "A grantor may not assert, as a defense in a ***deficiency judgment*** proceeding, that the fair market value of real property **[***19]** was not obtained at a trustee foreclosure sale." *Syllabus Point 4, Lilly.*

The issue raised in the present case requires us to revisit our holding in *Lilly*. In Syllabus Point 2 of *Dailey v. Bechtel Corp., 157 W.Va. 1023, 207 S.E.2d 169 (1974)*, we held that ***HN7*** "[a]n appellate court should not overrule a previous decision recently rendered without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law." This Court has also observed that "uniformity and predictability are important in the formulation and application of our rules of property. Under the **[*456]** **[**403]** doctrine of stare decisis, a rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice." *Faith United Methodist Church and Cemetery of Terra Alta v. Morgan, 231 W.Va. 423, 437, 745 S.E.2d 461, 475 (2013)* (internal citation and quotation omitted). Similarly, this Court has stated:

> ***HN8*** No prior decision is to be reversed without good and sufficient cause; yet the rule is not in any sense ironclad, and the future and permanent good to the public is to be considered, rather than any particular case or interest. Even if the decision affects real-estate interests and titles, there may be cases **[***20]** where it is plainly the duty of the court to interfere and overrule a bad decision. Precedent should not have an overwhelming or despotic influence in shaping legal decisions. No elementary or well-settled principle of law can be violated by any decision or any length of time. The benefit to the public in the future is of greater moment than any incorrect decision in the past. Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty as well as the right of the court to consider them carefully, and to allow no previous error to continue, if it can be corrected. The reason that the rule of stare decisis was promulgated was on the ground of public policy, and it would be an egregious mistake to allow more harm than good to accrue from it. Much, not only of legislation, but of judicial decision, is based upon the broad ground of public policy, and this latter must not be lost sight of.

Adkins v. St. Francis Hosp., 149 W.Va. 705, 719, 143 S.E.2d 154, 163 (1965) (internal citation and quotation

omitted).

With these considerations in mind, we find "good and sufficient cause" to depart from the Court's holding in Syllabus Point 4 of Lilly, which denies a grantor [***21] the right to assert, as a defense in a ***deficiency judgment*** proceeding, that the fair market value of real property was not obtained at a trustee foreclosure sale. We conclude that the better and more legally sound approach is to follow section 8.4 of the Restatement, as well as the majority of other states, and ***HN9*** allow a defendant to assert, as a defense in a ***deficiency judgment*** proceeding, that the fair market value of real property was not obtained at a trustee foreclosure sale. We arrive at this conclusion for the following reasons.

First, our trustee foreclosure statutes, including W.Va. Code § 38-1-3, neither permit nor forbid a trust deed grantor from challenging the value of real property at a ***deficiency judgment*** proceeding. While the statute is silent on this issue, this Court has previously applied common law principles of equity to permit an action to set aside a trustee's foreclosure sale. As the Court noted in *Lilly*,

> merely because the legislature has failed to provide by statute a mechanism for challenging the value of real property obtained from a foreclosure sale, does not necessarily mean that this Court may not resolve the matter. Our trustee sale statutes do not address the issue of setting aside a foreclosure [***22] sale. But, *our cases have applied common law principles of equity to permit an action to set aside a foreclosure sale.*

199 W.Va. at 357, 484 S.E.2d at 240. (Emphasis added.)[15] We agree with the reasoning of the Montana Supreme Court who, also faced with a statute that neither permitted nor forbade such a challenge, used its inherent equitable powers to require that the fair market value of the foreclosed property be determined and form the basis of any ***deficiency judgment*** award. *See* Trustees of the Wash.-Idaho-Mont.-Carpenters-Emplrs. Ret. Trust Fund v. Galleria P'ship, supra.

[15] *See* Syllabus Point 2, Corrothers v. Harris, 23 W.Va. 177 (1883) ("A sale under a trust-deed will not be set aside unless for weighty reasons."). *See also* Syllabus Point 12, Atkinson v. Washington and Jefferson College, 54 W.Va. 32, 46 S.E. 253 (1903) (In part: "Such sale will not be set aside, on the ground of inadequacy of price . . . [where] the evidence as to the value of the land does not clearly show that the price for which it sold is so inadequate as to shock the conscience[.]").

[*457] [**404] Further, we find that the Court's ruling in *Lilly* creates the potential for a creditor to receive a windfall at the expense of an already financially distressed trust deed grantor. Under Syllabus Point 4 of Lilly, the holder of the promissory note may purchase the foreclosed property at a deflated price, [***23] receive a deed to the property, and thereafter, obtain a ***deficiency judgment*** which is not subject to a fair market value challenge. Then, by reselling the real estate at its fair market value, the holder of the promissory note will achieve a double recovery that far exceeds the amount owed by the trust deed grantor. This scenario results in the unjust enrichment of the holder of the promissory note and forces the trust deed grantor to suffer both the loss of their real estate and the burden of a ***deficiency judgment*** that does not fairly recognize the value of that real estate.[16]

Next, we find no authority or data demonstrating that our trustee foreclosure laws would be unsettled were we to allow a trust deed grantor to challenge the value of real property at a ***deficiency judgment*** proceeding. A

[16] The Missouri Supreme Court considered this issue and, like *Lilly*, followed the minority rule that does not permit a ***deficiency*** defendant to assert a fair market value challenge following a foreclosure sale. Missouri Chief Justice Richard B. Teitelman dissented to the court's ruling and discussed why denying a ***deficiency*** defendant the opportunity to present a fair market value challenge is inconsistent with the general purpose underlying a damage award:

> The purpose of a damage award is to make the injured party whole without creating a windfall. Accordingly, in nearly every context in which a party sustains damage [***24] to or the loss of a property or business interest, Missouri law measures damages by reference to fair market value. Yet in the foreclosure context, Missouri law ignores the fair market value of the foreclosed property and, instead, measures the lender's damages with reference to the foreclosure sale price. Rather than making the injured party whole, this anomaly in the law of damages, in many cases, will require the defaulting party to subsidize a substantial windfall to the lender. Aside from the fact that this anomaly long has been a part of Missouri law, there is no other compelling reason for continued adherence to a measure of damages that too often enriches one party at the expense of another. Consequently, I would hold that damages in a ***deficiency*** action should be measured by reference to the fair market value of the foreclosed property.

First Bank v. Fischer & Frichtel, Inc., 364 S.W.3d 216, 224-25 (Mo., 2012) (C.J. Teitelman, dissenting).

majority of states allow grantors to challenge the value of real property at a ***deficiency judgment*** **[***25]** proceeding. We have found no authority suggesting that the states that follow the majority rule suffer from unsettled foreclosure laws, nor have we found any data demonstrating that the banking institutions in those states have been negatively affected as a result of their jurisdictions adhering to the majority rule.[17]

Additionally, *Lilly* noted that the Legislature has addressed a debtor's right to challenge the sale price of consumer goods in a ***deficiency judgment*** proceeding. In Syllabus Point 4 of *Bank of Chapmanville v. Workman, 185 W.Va. 161, 406 S.E.2d 58 (1991)*, the Court held:

> When a secured creditor is found to have sold collateral in a commercially unreasonable manner, the fair market value of the collateral is rebuttably presumed to be equal to the amount of the remaining debt; to recover a ***deficiency***, the secured **[*458]** **[**405]** creditor must prove that the debt exceeded the fair market value of the collateral.

The Court in *Lilly* stated that "[o]ur holding in *syllabus point 4 of Bank of Chapmanville* was premised upon the statutory right of a debtor to challenge the sale price of goods at a ***deficiency judgment*** proceeding." *199 W.Va. at 358, 484 S.E.2d at 241*. The Court then concluded in *Lilly* that because the Legislature addressed the issue in **[***27]** the area of consumer goods, it is up to the Legislature, and not the Court, to address whether a trust deed grantor may challenge the sale price of real property in a ***deficiency judgment*** proceeding following a trustee's foreclosure sale. We disagree.

The fact that the Legislature has addressed (and permitted) a debtor to challenge the sale price of consumer goods in a ***deficiency judgment*** proceeding does not vest the Legislature with the *sole* authority to permit a trust deed grantor to undertake a similar challenge following a trustee's foreclosure sale of real property. The Legislature's silence on the issue does not foreclose this Court from applying our common law principles of equity and fairness to allow a grantor to challenge the sale price of real property following a trustee's foreclosure sale. Indeed, this Court recognized in *Lilly* that ***HN10*** "our cases have applied common law principles of equity to permit an action to set aside a foreclosure sale[.]" *199 W.Va. at 357, 484 S.E.2d at 240*. The *Restatement* also concludes that a court may apply common law principles of equity to allow a defendant to assert a fair market value challenge in a ***deficiency judgment*** proceeding. *See Restatement, supra § 8.4 cmt. a*.

Further, under the Court's **[***28]** holding in *Lilly*, a defendant may not assert a fair market value challenge following a trustee's foreclosure sale of real property. However, under the Court's ruling in *Bank of Chapmanville*, a defendant may assert a fair market value challenge in a ***deficiency judgment*** proceeding following a foreclosure sale involving a mobile home.[18] We find no justification for this result and find that it produces an absurdity: a mobile home owning defendant may present a fair market value challenge in a ***deficiency*** proceeding, but a real property owning defendant may not. This peculiar juxtaposition illustrates why we feel compelled to depart from the Court's holding in *Syllabus Point 4 of Lilly*.

Based on all of the foregoing, we now hold that ***HN11*** a

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[17] In response to a bank's argument that allowing a defendant to present a fair market value challenge in a ***deficiency judgment*** proceeding could negatively affect banking institutions, one court noted:

> First Bank argues that changing to the fair market value approach will place all the risk in the foreclosure process onto the lender. This argument is not persuasive. By focusing only on the foreclosure process, First Bank deflects consideration of the risk management techniques available to lenders when the loan is made. A lender compensates for risk by charging an interest rate that is set both by the financial markets and by the lender's assessment of the borrower's creditworthiness. The lender also manages risk by appraising the fair market value of the property to ensure that the loan is adequately secured. Changing to a fair market value approach certainly would lessen **[***26]** the lender's chance of a large windfall and would mean only that First Bank, like the borrower, is losing or gaining money based on fair market value of property. The risk of loss is part of the risk of lending. That risk of loss should not be borne solely by the borrower and then amplified by measuring the ***deficiency*** by reference to the foreclosure sale price.

First Bank, 364 S.W.3d at 228 fn. 5 (C.J. Teitelman, dissenting).

[18] "A mobile home that a person uses as a private residence is a 'consumer good.'" *Bank of Chapmanville, 185 W.Va. at 168, 406 S.E.2d at 65*.

trust deed grantor may assert, as a defense in a lawsuit seeking a ***deficiency judgment***, that the fair market value of the secured real property was not obtained at a trust deed foreclosure sale. In view of this holding, Syllabus Point 4 of *Fayette County National Bank v. Lilly, 199 W.Va. 349, 484 S.E.2d 232 (1997)* is overruled. Additionally, we hold that a fair market value determination in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale must **[***29]** be asserted by the ***deficiency*** defendant. Unless the ***deficiency*** defendant requests such a determination, the foreclosure sale price, rather than the property's fair market value, will be used to compute the ***deficiency***. Finally, we hold that if a circuit court in a lawsuit seeking a ***deficiency judgment*** following a trust deed foreclosure sale determines that the fair market value of the foreclosed property is greater than the foreclosure sale price, the ***deficiency*** defendant is entitled to an offset against the ***deficiency*** in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.

Our ruling herein is consistent with the majority view of other jurisdictions, with *section 8.4 of the Restatement*, and with prior decisions from this Court that have applied common law principles of equity to permit an action to set aside a real property foreclosure sale. Our ruling will also prevent a creditor from receiving a windfall and being unjustly enriched at the expense of an already financially distressed grantor. In sum, we are on solid legal ground revisiting and overruling *Syllabus Point 4 of Lilly*.[19]

[*459] **[**406]** Applying this holding to the present case, we find that Mr. and Mrs. Sostaric may assert, as a defense, that the amount of the ***deficiency judgment*** awarded was too high and that it should be adjusted to reflect the fair market value of the subject property. If the circuit court determines that the fair market value of the property is greater than the foreclosure sale price, Mr. and Mrs. Sostaric are entitled to an offset against the ***deficiency*** in the amount by which the fair market value, less the amount of any liens on the real estate that were not extinguished by the foreclosure, exceeds the sale price.[20]

IV.

CONCLUSION

The circuit court's January 16, 2014, summary ***judgment*** order is reversed and this case is remanded for further proceedings consistent with this Opinion.

Reversed and Remanded.

Dissent by: Davis

Dissent

Davis, Chief Justice, dissenting:

The sole issue presented **[***31]** for the Court's resolution in this case is whether, in a case to recover a ***deficiency judgment***, the grantor of a deed of trust may assert as a defense that the grantee of the deed of trust paid less than fair market value for the secured property when she purchased it at the trustee sale. In 1997, this Court held, in a *unanimous* decision, that "[a] grantor may not assert, as a defense in a ***deficiency judgment*** proceeding, that the fair market value of real property was not obtained at a trustee foreclosure sale." Syl. pt. 4, *Fayette Cnty. Nat'l Bank v. Lilly, 199 W. Va. 349, 484 S.E.2d 232 (1997)*. A key factor in the Court's decision in *Lilly* was the Court's express recognition that "[t]he issue of permitting a grantor to challenge the sale price of foreclosed real property at a ***deficiency judgment*** proceeding is a *legislative matter*." *Lilly, 199 W. Va. at 358, 484 S.E.2d at 241* (emphasis added). Thus, the decision of the case *sub judice* should have been a straightforward application of this definitive statement of the law to the facts presently before the Court. However, this is not the approach adopted by the majority of this Court despite the fact that the law of ***deficiency judgments***, *vis-a-vis* trustee sales, is the same now as it was when *Lilly* was decided.

Since the Court's issuance of the *Lilly* decision, **[***32]** nothing has changed. This Court has not identified a change in the governing law or statute sufficient to alter the holding of *Lilly*. The Legislature has declined this Court's explicit invitation in *Lilly* to revisit the statute

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[19] The Court in *Lilly* also held that "a **[***30]** circuit court's order granting summary ***judgment*** must set out factual findings sufficient to permit meaningful appellate review." *Syllabus Point 3*, in part. This holding remains good law.

[20] Upon remand, the circuit court's order must set forth a detailed calculation describing how it arrives at any ***deficiency judgment*** award. *See Syllabus Point 3, Lilly, supra.*

governing trustee sales, *i.e.*, W. Va. Code § 38-1-3,[1] instead choosing to leave in place the statutory law that has been in effect since 1923. Finally, no arguments have been made in this case to support a good faith basis for changing the law in this regard. Nevertheless, based upon what can only be described as a mere whim, the majority of this Court has refused to abide by the doctrine of *stare decisis* and has infringed upon the exclusive authority of the Legislature without articulating a sound reason for doing so. Accordingly, I dissent from the majority's ill-advised and unsupported decision in this case.

A. The Doctrine of Stare Decisis Requires Allegiance to this Court's Prior Opinions

When this Court issues an opinion in a case, this Court is bound to follow that decision **[*460]** **[**407]** in subsequent cases. This allegiance to prior rulings is known as *stare decisis*. "[T]he doctrine of *stare decisis* requires this Court to follow its prior opinions." State Farm Mut. Auto. Ins. Co. v. Rutherford, 229 W. Va. 73, 83, 726 S.E.2d 41, 51 (2011) (per curiam) (Davis, J., concurring, in part, and dissenting, in part).

> *Stare decisis* . . . is a matter of judicial policy. . . . It is a policy which promotes certainty, stability and uniformity in the law. *It should be deviated from only when urgent reason requires deviation.* . . . In the rare case when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from **[***34]** that policy is warranted.

Woodrum v. Johnson, 210 W. Va. 762, 766 n.8, 559 S.E.2d 908, 912 n.8 (2001) (emphasis added; internal quotations and citations omitted). Thus, *stare decisis* dictates that "[a]n appellate court should not overrule a previous decision recently rendered without *evidence of changing conditions or serious judicial error in interpretation* sufficient to compel deviation from the basic policy of the doctrine of *stare decisis*, which is to promote certainty, stability, and uniformity in the law." Syl. pt. 2, Dailey v. Bechtel Corp., 157 W. Va. 1023, 207 S.E.2d 169 (1974) (emphasis added). *Accord* Hilton v. South Carolina Pub. Rys. Comm'n, 502 U.S. 197, 202, 112 S. Ct. 560, 564, 116 L. Ed. 2d 560 (1991) ("[W]e will not depart from the doctrine of *stare decisis* without some compelling justification." (citation omitted)); Rutherford, 229 W. Va. at 83, 726 S.E.2d at 51 (Davis, J., concurring, in part, and dissenting, in part) ("Absent *some compelling justification for deviation*, such as a change in the law or a distinguishable fact pattern, the doctrine of *stare decisis* requires this Court to follow its prior opinions." (emphasis added)).

When a prior decision of this Court involves a statute, this Court has found the need to comport with prior decisions to be even more compelling. "Once this Court determines a statute's clear meaning, we will adhere to that determination under the doctrine of *stare decisis*." Appalachian Power Co. v. State Tax Dep't of West Virginia, 195 W. Va. 573, 588 n.17, 466 S.E.2d 424, 439 n.17 (1995). *Accord* Master Mech. Insulation, Inc. v. Simmons, 232 W. Va. 581, 591, 753 S.E.2d 79, 89 (2013) (Davis, J., dissenting) ("[W]e have explained that **[***35]** our allegiance to our prior decisions is most compelling in matters involving statutory interpretation."). In this regard, the United States Supreme Court has expressly recognized that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated . . . ." Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S. Ct. 2363, 2370, 105 L. Ed. 2d 132 (1989) (citations omitted), *superseded by statute on other grounds as stated in* Landgraf v. USI Film Prods., 511 U.S. 244, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994).

"Mere disagreement as to how a case was decided is not a sufficient reason to deviate from [*stare decisis*]." Dailey, 157 W. Va. at 1029, 207 S.E.2d at 173. Yet this is exactly how the majority reached its decision to depart from established precedent and statutory law to achieve its desired result in the case *sub judice*. In its opinion, the majority points to no clear "error [that] has

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[1] W. Va. Code § 38-1-3 (1923) (Repl. Vol. 2011) provides, in full:

> The trustee in any trust deed given as security shall, whenever required by any creditor secured or any surety indemnified by the deed, or the assignee or personal representative of any such creditor or surety, after the debt due to such creditor or for which such surety may be liable shall have become payable and default shall have **[***33]** been made in the payment thereof, or any part thereof, by the grantor or any other person owing such debt, and if all other conditions precedent to sale by the trustee, as expressed in the trust deed, shall have happened, sell the property conveyed by the deed, or so much thereof as may be necessary, at public auction, having first given notice of such sale as prescribed in the following section [§ 38-1-4].

been made" or "outmoded rule" that would require this Court to depart from its prior decision in Lilly. Woodrum v. Johnson, 210 W. Va. at 766 n.8, 559 S.E.2d at 912 n.8. See, e.g., Murphy v. Eastern American Energy Corp., 224 W. Va. 95, 101, 680 S.E.2d 110, 116 (2009) (observing that while "this Court is loathe to overturn a decision so recently rendered, it is preferable to do so where a prior decision was not a correct statement of law"). The sole authority upon which the majority bases its decision is a passage from the *Restatement (Third) of Property: Mortgages* ***[***36]***, that was published the same year that *Lilly* was decided, and opinions from other states' courts that were issued *before* the Court issued its opinion in *Lilly*.[2] Neither of these **[*461] [**408]** resources demonstrates either a marked shift in the law from that which was in existence when a unanimous Court issued the *Lilly* decision or other changes in the law in this State sufficient to warrant a departure from this Court's prior ruling.[3] Indeed, the majority's desire to depart from *Lilly* satisfies none of the criteria that *stare decisis* requires to support the abandonment of sound precedent.

B. A Change of the Prevailing Law Requires Legislative, Not Judicial, Action

In *Lilly*, this Court expressly recognized that "any deviation from existing laws requires *legislative involvement*. The issue of permitting a grantor to challenge the sale price of foreclosed real property at a ***deficiency judgment*** proceeding is a *legislative* ***[***38]*** *matter*." 199 W. Va. at 358, 484 S.E.2d at 241 (emphasis added). Despite this clear statement by a unified Court, the majority inexplicably has now determined that the subject at hand is reposed in the breast of this branch of government. In its zeal to change the accepted way that trustee sales are conducted and ***deficiency judgments*** are awarded, the majority has impermissibly trammeled upon the Legislature's authority to determine the manner in which trustee sales are to be conducted.

As is evident from the facts of the case *sub judice*, if a deed of trust grantee receives less than the full amount of the outstanding loan balance from proceeds of a trustee sale of the secured property, he/she likely will seek to recover the remaining balance due from the grantor as a ***deficiency judgment***. Such a proceeding is a conceivable consequence that is inextricably linked to the amount paid to purchase property at a trustee sale, which sale is governed by the provisions of W. Va. Code § 38-1-3. While the failure to obtain the full amount of the outstanding loan balance through a trustee sale of the secured property is certainly not an unforeseen consequence, it is nevertheless one that has not yet been addressed by the Legislature. This Court previously **[***39]** has acknowledged that "[i]f the Legislature has promulgated statutes to govern a specific situation yet is silent as to other related but unanticipated corresponding situations, *it is for the Legislature to ultimately determine how its enactments should apply to the latter scenarios*." Soulsby v. Soulsby, 222 W. Va. 236, 247, 664 S.E.2d 121, 132 (2008) (emphasis added). Similarly,

> [w]hen specific statutory language produces a result argued to be unforeseen by the Legislature, *the remedy lies with the Legislature, whose action produced it, and not with the courts*. The question of dealing with the situation in a more satisfactory or desirable manner is a matter of policy which calls for legislative, not judicial, action.

Worley v. Beckley Mech., Inc., 220 W. Va. 633, 643, 648 S.E.2d 620, 630 (2007) (Benjamin, J., dissenting) (emphasis added; internal quotations and citations omitted). *See also* VanKirk v. Young, 180 W. Va. 18, 20, 375 S.E.2d 196, 198 (1988) ("While it is unfortunate that the legislature did not foresee the situation now before

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[2] The majority has cited two other sources of authority, neither of which provides the compelling justification required to abandon the doctrine of *stare decisis*: statutes promulgated by other states' legislatures and the case of First Bank v. Fischer & Frichtel, Inc., 364 S.W.3d 216 (Mo. 2012). First, to the extent this Court recognized in *Lilly* that "the particular issue presented in this case should be resolved by the legislature," 199 W. Va. at 357, 484 S.E.2d at 240, it goes without saying that the legislature contemplated to resolve the issue presented under West Virginia law in *Lilly* would be the *West Virginia* Legislature and not that of another state. Furthermore, as aptly noted, the opinion of *Fischer & Frichtel* ***[***37]*** reaches the same result as did this Court in *Lilly*; the majority cites this case solely for its dissent. Nevertheless, a change in the law of trustee sales that has a corresponding impact upon the law of ***deficiency judgments*** is, as this Court has noted, a matter for *legislative* contemplation, *not* judicial tinkering.

[3] I would be remiss if I did not also mention that no legal argument to support the change in the law achieved by the majority's opinion herein has been advanced in this case. Both of the parties in the instant matter are appearing *pro se*. While both of these individuals competently presented their arguments to the Court and contributed significantly to its understanding of the case *sub judice*, neither of them has identified a definite shift in the prevailing law such as would warrant the result obtained by the majority in its decision of this matter.

us, we cannot rewrite the statute so as to provide relief . . ., nor can we interpret the statute in a manner inconsistent with the plain meaning of the words."). Thus, to the extent that the prevailing **[*462]** **[**409]** statute, W. Va. Code § 38-1-3, addresses the manner in which trustee sales are to be conducted, but is silent as to what should be done when the trustee sale proceeds are not sufficient **[***40]** to fulfill the balance of the remaining indebtedness, it is for the Legislature to address this consequence — not this Court.

In *Lilly*, this Court recognized the deference due the Legislature in this area of the law. To that end, this Court's holding in *Lilly* merely reiterated the status quo process of allowing a deed of trust grantee to maintain an action for a ***deficiency judgment*** against the grantor irrespective of whether the property sold at the trustee sale obtained its fair market value. Recognizing that this is a matter for legislative resolution, this Court specifically invited the Legislature to revisit the governing statute to address and adopt the position advocated by the majority in the instant case. Given that "the legislature may alter or amend the common law,"[4] it may be presumed that the Legislature agreed with this Court's interpretation of the governing law in *Lilly* insofar as it declined this Court's invitation to amend the governing statutory law which has been in place for the past ninety-one years.

As the plain language of W. Va. Code § 38-1-3 demonstrates, the Legislature has not imposed a requirement that there be a certain minimum bid for property sold at a trustee sale or that such property may not be sold unless it fetches the property's fair market value or some other minimum sales price. *See also* W. Va. Code § 38-1-5 (1923) (Repl. Vol. 2011) (defining terms of trustee sale). Yet the majority effectively has now imposed these requirements upon the statutory procedure for the conduction of a trustee sale, because, if the property does not sell for its fair market value, the trust grantee's recovery in subsequent ***deficiency judgment*** proceedings will undoubtedly be reduced accordingly.[5] "It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted." *Banker v. Banker*, 196 W. Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (citations omitted). *Accord* Syl. pt. 1, *Consumer Advocate Div. of Public Serv. Comm'n of West Virginia v. Public Serv. Comm'n of West Virginia*, 182 W. Va. 152, **[*463]** **[**410]** 386 S.E.2d 650 (1989) ("A statute, or an administrative rule, may not, under the guise of 'interpretation,' be modified, revised, amended or rewritten."). **[***42]** Neither may

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[4] *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 874, 253 S.E.2d 666, 675 (1979). *See also* Syl. pt. 2, *Smith v. West Virginia State Bd. of Educ.*, 170 W. Va. 593, 295 S.E.2d 680 (1982) ("One of the axioms of statutory construction is that a statute will be read in context with the common law *unless it clearly appears from the* **[***41]** *statute that the purpose of the statute was to change the common law.*" (emphasis added)).

[5] In its consideration and resolution of this case, the majority has been quite concerned by what it perceives to have been a "low ball" bid by the trust grantee at the trustee sale. However, focusing on just this one piece of the puzzle does not accurately portray all the nuances of this financial transaction in its entirety.

Mr. and Mrs. Sostaric purchased the subject property, which has been described as a townhouse, in March 2006 for $155,900. Thereafter, in December 2006, they obtained a loan from Ms. Marshall for $200,000; it is not apparent from the record what the fair market value of the property was at the time of the loan, but it is clear that the amount of the loan was *more* than what the Sostarics **[***43]** had paid for the real property they offered as collateral therefor. After obtaining their $200,000 loan, the Sostarics defaulted by ceasing to make payments thereon in October 2010 despite their obligation to repay the money that they had borrowed. At the time of the trustee sale, the Sostarics were in arrears by nearly $232,000, which sum includes the unpaid loan principal and accrued interest.

On the day of the trustee sale, Ms. Marshall was the *only* person to offer a bid to buy the subject property. During oral argument, Ms. Marshall represented that she did not arrive at the amount of her $60,000 bid blindly, but rather decided upon this figure only after she consulted with a foreclosure attorney, sought the advice of several real estate professionals, and considered the recent sales prices of comparable properties on the *same street*. To date, Ms. Marshall avers that the real estate market has declined so drastically in recent years that she has been unable to sell this property *at any price* despite repeated showings and expressions of interest by potential purchasers.

While the tenor of the majority's opinion suggests that the Sostarics have been taken advantage of by an unscrupulous **[***44]** lender, they overlook the fact that Ms. Marshall has been the unfortunate benefactor of individuals who have obtained a loan that possibly could have been worth more than the security they provided for it and who then reneged on their promise to repay the money that they borrowed from her.

"the judiciary . . . sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines." *Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 692, 408 S.E.2d 634, 642 (1991)* (citation omitted). *Accord Subcarrier Commc'ns, Inc. v. Nield, 218 W. Va. 292, 299 n.10, 624 S.E.2d 729, 736 n.10 (2005)* ("It is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten." (internal quotations and citations omitted)).

The result obtained by the majority in this case blatantly ignores the deference due the Legislature in the definition of the requirements and parameters of a trustee sale and imposes upon the process additional criteria that clearly are not consistent with the express indicia of legislative intent. On an issue governed by statute, this Court simply cannot substitute its own ideology for that of the Legislature. Because the Court refuses to follow this Court's prior precedent and flagrantly scorns the deference to be accorded to the Legislature in this area of the law, I respectfully dissent from the majority's ill-advised and unsupported opinion in this case.

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