

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

DASON UDAC and GWENDOLYN N. UDAC, Trustee for the Alfredo Udac Revocable Living Trust,

Plaintiffs-Appellees/  
Cross-Appellants,

vs.

TAKATA CORPORATION,

Defendant-Appellant/  
Cross-Appellee,

HAWAII MOTORS, INC.; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; DOE ENTITIES 1-10; ROE "NON-PROFIT" CORPORATIONS; and DOE GOVERNMENTAL AGENCIES 1-10,

Defendants.

) CIVIL NO. 02-1-0260  
)  
) DEFENDANT TAKATA CORPORATION'S  
) APPEAL FROM 1) JUDGMENT *FILED ON*  
) *APRIL 19, 2006*; 2) FIRST AMENDED  
) JUDGMENT *FILED ON MAY 31, 2006*; 3)  
) ORDER DENYING DEFENDANT TAKATA  
) CORPORATION'S RENEWED MOTION FOR  
) JUDGMENT AS A MATTER OF LAW  
) AND/OR FOR NEW TRIAL AND/OR FOR  
) REMITTITUR, FILED APRIL 28, 2006, *FILED*  
) *ON JUNE 8, 2006*; 4) COURT'S FINDINGS  
) ON DEFENDANT TAKATA  
) CORPORATION'S CLAIM THAT THE JURY  
) VERDICT ON PUNITIVE DAMAGES IS  
) UNCONSTITUTIONALLY EXCESSIVE,  
) *FILED ON JULY 20, 2006*; AND 5) SECOND  
) AMENDED JUDGMENT *FILED ON*  
) *NOVEMBER 28, 2006*  
)  
) PLAINTIFFS DASON UDAC and  
) GWENDOLYN N. UDAC, Trustee for the  
) Alfredo Udac Revocable Living Trust's CROSS-  
) APPEAL FROM 1) ORDER GRANTING IN  
) PART AND DENYING IN PART  
) PLAINTIFFS' MOTION FOR AWARD OF  
) COSTS AND PREJUDGMENT INTEREST  
) AND FOR FORM OF JUDGMENT FILED ON  
) JANUARY 27, 2006, *FILED ON APRIL 19,*  
) *2006*; AND 2) SECOND AMENDED  
) JUDGMENT *FILED ON NOVEMBER 28, 2006*  
)  
) THIRD CIRCUIT COURT  
)  
) HONORABLE RIKI MAY AMANO  
) HONORABLE TERENCE T. YOSHIOKA  
) HONORABLE GLENN S. HARA  
) HONORABLE GREG K. NAKAMURA  
) Judges  
)  
)

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**ANSWERING BRIEF OF DEFENDANT-APPELLANT/  
CROSS-APPELLEE TAKATA CORPORATION**

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## STATEMENT OF THE CASE

On October 8, 2000, Dason Udac (“Udac”) was severely injured when he fell asleep at the wheel of his mother’s 1987 Nissan Pathfinder, crashed at high speed into a lava outcropping on Highway 11 (Hawai`i Belt Road), and was ejected from the vehicle as it rolled over. Within weeks of his accident, Udac and his father, Alfredo Udac, retained counsel. *See* RA, V.8 at 37, 66. Shortly thereafter, the Udacs hired an accident reconstruction expert, William Otto, who traveled to Hawai`i to inspect the subject vehicle on December 1, 2000, less than two months after the accident. *See id.* at 37, 68-69; TP, 11/22/05 at 27, 30-31, 58. Notwithstanding the early involvement of counsel and Mr. Otto, plaintiffs did not file their complaint until July 29, 2002, almost two years later. RA, V.1 at 1-14. Even then, plaintiffs did not serve Takata with the complaint until February 5, 2003. RA, V.1 at 164-65, 168-69, 171-72.

Notwithstanding the two-year and four-month delay between the accident (and retention of counsel) and service of the complaint, plaintiffs moved *ex parte* for an additional six-month extension of time to file their Pretrial Statement. RA, V.1 at 152-58. The circuit court granted plaintiffs’ motion over Takata’s objection. *See id.* at 143-47, 156. As a consequence of plaintiffs’ consistent delays, the first Rule 16 conference in this case did not occur until January 16, 2004, three years and three months after Udac’s accident. RA, V.2 at 184. At this conference, the court suggested that the parties consider alternative dispute resolution. *See* RA, V.21 at 142.

At a subsequent Rule 16 conference, on July 16, 2004, Takata proposed an aggressive schedule for the proceedings, including an October 1, 2004, deadline for plaintiffs’ final disclosure of expert witnesses and opinions; a March 16, 2005, discovery cut-off; and a proposed trial date of May 16, 2005. RA, V.3 at 342-45. The court declined to adopt this schedule and instead set a November 1, 2004, deadline for disclosure of plaintiffs’ expert witnesses and final opinions; a May 11, 2005, discovery cut-off; and a July 11, 2005, trial date. RA, V.3 at 362-65. Plaintiffs failed to disclose their damages experts and opinions by the court’s extended deadline. *See* RA, V.4 at 226-44. This in turn caused delay of other expert discovery and court-ordered deadlines. *See also id.* at 10-12.

At the July 16, 2004 Rule 16 conference, the court ordered mediation and a December 2004 mediation was agreed upon. *See* RA, V.3 at 362. Because plaintiffs took no action to arrange the mediation, Takata made all arrangements and the mediation was held on December

15, 2004. *See* RA, V.21 at 142-43, 160-172; V.23 at 68, 75-77. Only a few days before the December 15, 2004, mediation, plaintiffs belatedly produced two damages expert reports (one and one-half months after the court-ordered deadline), and made a \$20.1 million settlement demand. *See* RA, V.20 at 603-04. Although the mediation was not successful, the mediator indicated that she would be willing to try again after the parties had conducted more discovery. *See* RA, V.21 at 143.

The next Rule 16 conference was held on January 24, 2005. *See* RA, V.4 at 247-50. During that conference, plaintiffs for the first time requested the court's permission to remove the seatbelt from Udac's vehicle and transport it to Arkansas for inspection. *See id.* at 245-46, 249-50; V.21 at 143. Even though Mr. Otto originally had inspected the seatbelt in December 2000, plaintiffs offered no explanation for their decision to wait more than four years to conduct this further investigation, six months before the scheduled trial date. To accommodate plaintiffs' late request, the court held another Rule 16 conference on February 7, 2005, pushed back all deadlines by another four months, and rescheduled the trial for November 14, 2005. *See* RA, V.4 at 245-46, 247-53, 303-09; V.21 at 143.

On May 13, 2005, plaintiffs' counsel unexpectedly left before the conclusion of the deposition of their expert, David Renfroe, and plaintiffs subsequently refused to produce Dr. Renfroe for the completion of his deposition. *See* RA, V.5 at 126-77. Only after Takata filed a motion to compel the completion of his deposition and for sanctions did plaintiffs stipulate to producing Dr. Renfroe. *See id.* at 215-19.

On July 26, 2005, Takata raised the possibility of another mediation with plaintiffs. Plaintiffs' counsel advised that he wanted to wait until plaintiffs had received all of Takata's expert reports and requested that the mediation be scheduled for the latter part of August 2005. Takata made all arrangements for the mediation, which occurred on August 31, 2005. At the mediation, plaintiffs made the same settlement demand that they made in December 2004—\$20.1 million—and the mediator declared an impasse. *See* RA, V.21 at 144, 174.

The circuit court held a status conference on September 16, 2005, during which it suggested that the parties consider another mediation with a technically-knowledgeable neutral mediator who would listen to the technical issues presented by the parties and make recommendations as to possible settlement amounts. RA, V.8 at 253. Both Takata and plaintiffs were agreeable to this approach. During September and October 2005, Takata attempted to

arrange this mediation and proposed a mediator to plaintiffs. Plaintiffs, however, did not respond to Takata's proposal. Instead, at the October 24, 2005, status conference convened by the court specifically to discuss the appointment of a technically-knowledgeable mediator, plaintiffs' counsel indicated that plaintiffs no longer were interested in pursuing another mediation. RA, V.21 at 144; V.23 at 68, 75-77.

On October 14, 2005, plaintiffs moved once again to continue the trial date, which Takata vigorously opposed. The court denied plaintiffs' motion. RA, V.8 (Plaintiffs' Motion to Continue Trial, sealed); V.8 at 32-242; V.20 at 174-75.

On October 26, 2005, pursuant to HRCP 68 and HRE 408, Takata made a confidential offer of settlement to plaintiffs. *See* RA, V. 23 at 68, 75-77. Plaintiffs rejected this offer without making a counteroffer and the case proceeded to trial on November 14, 2005. After a six-week trial, the jury found in favor of plaintiffs but also found that Udac was 35 percent at fault. It awarded Udac special damages of \$3,700,000 and general damages of \$2,500,000, and awarded Alfredo Udac general damages of \$650,000 for his negligent infliction of emotional distress (NIED) and loss of consortium claims. Finally, the jury awarded Udac \$12,500,000 in punitive damages. RA, V.20 at 76-79. In the final judgment, the compensatory damages were reduced by Udac's comparative fault, resulting in awards of \$2,405,000 in special damages and \$1,625,000 in general damages to Udac and \$422,500 in general damages to Alfredo Udac. RA, V.24 at 504.

Before the entry of judgment, plaintiffs moved for an award of prejudgment interest, starting from the date of Udac's accident, on both the compensatory and punitive damages. RA, V.20 at 226-27. On April 19, 2006, the circuit court denied plaintiffs' motion with respect to the punitive damages and awarded prejudgment interest on the compensatory damages from the date of the jury's verdict, but only "if under the statute on post judgment interest, the period of interest commences from the *entry* of judgment versus the date when the jury verdict is rendered." RA, V.22 at 241; *see also* RA, V.24 at 504.

### **STANDARD OF REVIEW**

A trial court's denial of prejudgment interest is reviewed for abuse of discretion. *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 137, 839 P.2d 10, 36 (1992). "Generally, to constitute an abuse of discretion it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party

litigant.” *Schmidt v. Bd. of Dirs. of the Ass’n of Apartment Owners of the Marco Polo Apartments*, 73 Haw. 526, 533, 836 P.2d 479, 483 (1992).

### SUMMARY OF ARGUMENT

Contrary to plaintiffs’ insinuation, an award of prejudgment interest is not a matter of right. Both the relevant statute, Hawai`i Revised Statutes (“HRS”) § 636-16, and long-standing judicial precedent emphasize that prejudgment interest is a matter that is vested *solely* within the discretion of the trial court. Plaintiffs have identified the reasons that trial courts *can* award prejudgment interest, but even if those reasons *could* support an award of prejudgment interest in this case, that would not show that the trial court abused its discretion by refusing such an award. Plaintiffs have failed to address any of the recognized grounds for refusing to award prejudgment interest. Accordingly, plaintiffs’ argument, by its very nature, cannot show that the circuit court “clearly exceeded the bounds of reason” by concluding that an award of prejudgment interest would be inappropriate on the facts of this case.

The Hawai`i Supreme Court has held that circuit courts have discretion to deny prejudgment interest where: (1) the moving party caused or contributed to delay in bringing the action to trial; (2) the nonmoving party’s conduct did not cause any delay in the proceedings; or (3) an extraordinary damages award already has adequately compensated the moving party. *See, e.g., Roxas v. Marcos*, 89 Hawai`i 91, 154, 969 P.2d 1209, 1272 (1998). Here, all three bases for refusing to award prejudgment interest are present. It was far from an abuse of discretion to conclude that plaintiffs were solely responsible for the delay in reaching a final judgment on their claims and that it would thus be inequitable to saddle Takata with interest on the judgment that plaintiffs delayed for so long. It also was far from an abuse of discretion to conclude that the extraordinary damages awarded in this case adequately compensated the Udacs and make an additional award of prejudgment interest unnecessary to achieve full compensation.

As to plaintiffs’ request for prejudgment interest on the award of punitive damages, plaintiffs admit that it is settled law in Hawai`i that courts *cannot* award prejudgment interest on punitive damages. Plaintiffs’ argument for a change in the law is meritless. Nearly every other state that has considered the issue, like Hawai`i, prohibits prejudgment interest on punitive damages. Moreover, changing the law in Hawai`i, and departing from the mainstream of American jurisprudence, would contravene the purposes of HRS § 636-16, by using a statute

designed to ensure full compensation for the plaintiff to, instead, arbitrarily amplify the jury's assessment of the amount of money necessary to punish the defendant and deter others.

## **ARGUMENT**

### **I. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PREJUDGMENT INTEREST ON PLAINTIFFS' COMPENSATORY DAMAGES FROM THE DATE OF THE ACCIDENT.**

The award of prejudgment interest is not a matter of right but is vested "solely within the discretion of the trial court." *Azer v. Myers*, 8 Haw. App. 86, 90, 793 P.2d 1189, 1197 (1990), *rev'd in part on other grounds*, 71 Haw. 506, 795 P.2d 853 (1990). "In awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the *circumstances of each case*." HRS § 636-16 (emphasis added). While "the *earliest* commencement date in cases arising in tort may be the date when the injury first occurred," the trial court has discretion to select any later date that it concludes is appropriate. *See, e.g., id.*; Sen. Conf. Comm. Rep. No. 67, in 1979 Senate Journal, at 984 ("The purpose of this bill is to more clearly define the trial judge's discretion in awarding interest in civil cases.").

Indeed, the Hawai'i Supreme Court has recognized three circumstances where "it is clearly within the discretion of the circuit court to deny prejudgment interest." *Roxas*, 89 Hawai'i at 153, 969 P.2d at 1271. An award of prejudgment interest is appropriately denied where: (1) the plaintiff caused or contributed to delay in bringing the action to trial; (2) the defendant's conduct did not cause any delay in the proceedings; or (3) an extraordinary damages award has already adequately compensated the plaintiff. *See id.*

Here, each of the three grounds recognized in *Roxas* applies. Accordingly, it was "clearly within the discretion of the circuit court to deny prejudgment interest."

#### **A. Plaintiffs caused the delay in bringing this case to trial.**

The circuit court is vested with the discretion to award prejudgment interest where issuance of the judgment was "greatly delayed," regardless of the cause of that delay. *See Tri-S Corp. v. W. World Ins. Co.*, 110 Hawai'i 473, 498, 135 P.3d 82, 107 (2006). However, plaintiffs' contention that a court abuses its discretion in refusing to award prejudgment interest whenever there is a delay is flatly wrong.

On the contrary, even where there is substantial delay, “if fault is found on the part of the party seeking interest, denial of interest will not be considered an abuse of discretion.”<sup>1</sup> *Id.* Indeed, “a trial court can and probably *should* deny prejudgment interest if the moving party was responsible for the delay.” *Id.*; *see also Roxas*, 89 Hawai`i at 153, 969 P.2d at 1271 (holding that it was not an abuse of discretion to deny interest where “the plaintiff himself has caused or contributed to the delay in bringing the action to trial”); *Schmidt*, 73 Haw. at 534 & n.6, 836 P.2d at 484 & n.6 (holding that it was not an abuse of discretion to deny interest where plaintiffs delayed the filing of their pretrial statement); *Page v. Domino’s Pizza, Inc.*, 80 Hawai`i 204, 209, 908 P.2d 552, 557 (App. 1995) (“[a] trial court’s denial of prejudgment interest is usually affirmed” if the requesting party caused the delay or the opposing party did not cause the delay); *Locricchio v. Legal Servs. Corp.*, 833 F.2d 1352, 1360 (9th Cir. 1987) (holding that it was not an abuse of discretion under Hawai`i law to deny interest where plaintiff’s dilatory actions accounted for much of the delay in rendering of judgment).

Here, the record clearly shows that any delay in bringing the case to trial was attributable to plaintiffs and not to Takata. For example, plaintiffs waited almost two years after Udac’s accident to file the complaint, even though they had retained counsel within weeks of the accident and hired a mainland expert who traveled to Hawai`i to inspect Udac’s vehicle within two months of the accident. *See* RA, V.1 at 1-14; V.8 at 37, 66, 68-69. Even after finally filing suit, plaintiffs did not serve the complaint on Takata for another seven months. *See* RA, V.1 at 164-65, 168-69, 171-72. And after finally serving the complaint on Takata, plaintiffs again delayed the case by requesting a six-month extension of time to file their Pretrial Statement. *See* RA, V.1 at 152-58.

During the discovery period, plaintiffs took actions that further delayed the case, including failing to disclose their damages experts and opinions by the court-imposed deadline, and abruptly terminating the deposition of their seatbelt expert and refusing to produce him for a continued deposition until Takata filed a motion to compel. *See* RA, V.4 at 226-44; V.5 at 126-77, 215-19. Moreover, after plaintiffs agreed to the circuit court’s suggestion of a third

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<sup>1</sup> Moreover, as we explain below (at pages 11-12), even if it is the non-moving party who caused the delay, a court does not necessarily abuse its discretion when it declines to award prejudgment interest. “[T]here may be reasons separate and apart from whether the defendant was responsible for delay that may enter into the calculus relating to the allowance of prejudgment interest.” *Roxas*, 89 Hawai`i at 154, 969 P.2d at 1272.

mediation with a technically-knowledgeable mediator, they then waited over a month (and after Takata had researched and proposed a mediator) to inform the court and Takata that they no longer were interested in another mediation. *See* RA, V.8 at 253; V.21 at 144; V.23 at 68, 75-77. Finally, a year after discovery was fully underway and six months before the original trial date (and more than four years after plaintiffs' expert had inspected the subject seatbelt), plaintiffs requested additional time to remove the seatbelt from the vehicle and transport it to Arkansas for examination by another expert, resulting in yet another four-month delay in the trial. *See* RA, V.4 at 245-46, 249-50; V.21 at 143.<sup>2</sup>

In light of plaintiffs' dilatory actions in bringing this case to trial, the court plainly had discretion to deny their claim for prejudgment interest from the date of Udac's accident.

Plaintiffs' reliance on *Ditto v. McCurdy*, 86 Hawai'i 93, 947 P.2d 961 (App.), *aff'd in part, rev'd in part on other grounds*, 86 Hawai'i 84, 947 P.2d 952 (1997), and *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778, 791 (D. Haw. 1993), *overruling on other grounds recognized by McClenahan v. Paradise Cruises, Ltd.*, 888 F.Supp. 120, 123 (D. Haw. 1995), is misplaced. Those cases do not involve a moving party that substantially caused or contributed to the delay in judgment. Furthermore, the issue faced by the Court in *Ditto* was whether an award of prejudgment interest requires a finding that the *non-moving* party caused the delay. Answering this question in the negative, the court explained that because "one of the purposes of prejudgment interest is to cut delays in litigation and to undo substantial injustice caused by such delays," "[a]llowing the trial judge to designate the commencement date will permit more equitable results." 86 Hawai'i at 114, 947 P.2d at 982. Where the *moving* party—like the plaintiffs here—caused the delay in the case, rewarding that dilatory conduct with an award of prejudgment interest would undermine those expressed purposes of HRS § 636-16—to "cut delays," "undo substantial injustice," and reach "more equitable results."

Plaintiffs' responsibility for the delay in prosecuting this case is sufficient basis for the circuit court's ruling.

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<sup>2</sup> One month before this new trial date, plaintiffs again attempted to delay the trial—over Takata's objections—by seeking a continuance, which the circuit court denied. *See* RA, V.8 at 32-242; V.20 at 174-75.

**B. Takata did not cause the delay in getting to trial.**

Even if plaintiffs' actions during the course of litigation did not constitute delay, "where no fault is found on either side, the trial court may still \* \* \* deny prejudgment interest in its discretion." *Tri-S Corp.*, 110 Hawai'i at 498, 135 P.3d at 107; *see Page*, 80 Hawai'i at 210, 908 P.2d at 558 (holding "that the trial court did not exceed the bounds of reason or disregard rules or principles of law or practice" where there is no evidence that any delays in the proceedings were attributable to the parties). Although plaintiffs make no mention of their own dilatory actions (apart from their two-year delay in filing the complaint), they go to great lengths to characterize the parties' failed attempts to reach a settlement as reason to fault Takata for causing the delay in resolving plaintiffs' claims. Plaintiffs' contention that Takata's mediation and settlement efforts warrant an award of prejudgment interest misstates the law and twists the facts.

This Court explained in *Page*—a case cited by plaintiffs—that "although settlement provides a quick resolution of a case, which is consistent with [HRS § 636-16]'s purpose, it does not necessarily follow from this that the legislature intended the statute to achieve settlements." 80 Hawai'i at 209 n.6; 908 P.2d at 557 n.6. While early settlement of cases is a laudable goal, a litigant may not be penalized for failing to settle a case. *See Kamaunu v. Kaaea*, 99 Hawai'i 432, 442, 56 P.3d 734, 744 (App. 2002), *aff'd*, 99 Hawai'i 503, 57 P.3d 428 (2002). That is because "parties may have valid and principled reasons for not wishing to settle particular cases." *Id.* (quoting *Dawson v. United States*, 68 F.3d 886, 897 (5th Cir.1995)). In addition to a party's confidence in the merits of its position or perceived value of the plaintiff's claims, a party legitimately may choose not to settle a case because of "the effect that a settlement might have on other pending or threatened litigation." *Id.*

In *Page*, the Court rejected the plaintiff's argument that he was entitled to prejudgment interest because the defendant offered only \$25,000 to settle claims that resulted in an \$840,000 judgment. 80 Hawai'i at 209; 908 P.2d at 557. The Court held that it was within the trial court's discretion to deny interest because, given the "totality of the case," the defendant's offer "was not unreasonable in light of its belief regarding disputed issues on liability and apportionment of damages." *Id.* at 210, 908 P.2d at 558.

*Page* is dispositive here. In this case, as in *Page*, liability was hotly contested. The buckle at issue in this litigation, the TK-821, far exceeds all government safety standards, has unfailingly passed extensive industry-standard testing for safe operation over the years, and has

operated safely for decades in millions of vehicles around the world without a single verified report of the buckle's failure. *See* Hideo Kitamura Dep. V.I at 29-32, 47-49, 56-58, 69-71, 78-79, 88, 93-94, 99-100; V.II at 150-51; V.III at 324-27; Exh. 1499.<sup>3</sup> Moreover, during discovery Takata's experts found conclusive evidence proving that Udac was not wearing his seatbelt at the time of the accident (evidence that the trial court ultimately and erroneously excluded—an issue in Takata's appeal of the judgment). *See* Takata's Revised Opening Brief, at 19-27. Considering the “totality of the case,” Takata's offer was entirely reasonable given its justified confidence in the safety of its buckle and its belief that Udac had not even been wearing his seatbelt at the time of the accident.

Rather than examine the “totality of the case,” plaintiffs focus *solely* on the ratio between the settlement offer and the judgment award to determine whether Takata made a good-faith effort to settle the case. *See* Plaintiffs' Opening Brief, at 9-10. But this single-minded focus on the ratio is not supported by any authority, including the cases cited by plaintiffs. The first case plaintiffs cite held that an award of prejudgment interest was *not* warranted because the defendants *had* “made good faith efforts to settle the claims.” *Azer*, 8 Haw. App. at 121, 793 P.2d at 1211.<sup>4</sup> Obviously *Azer* does not support plaintiffs' contention that “when a defendant fails to make ‘good faith efforts to settle the claims,’ the trial court *should* award prejudgment interest.” Plaintiffs' Opening Brief, at 9 (emphasis added).

In plaintiffs' second case, the circuit court found that the defendants' settlement offer of \$2050 per plaintiff was “no more than ‘nuisance value’” because the figure was not based on the individual circumstances of the plaintiffs' cases. *In re Asbestos Cases*, 847 F.2d 523, 527 (9th Cir. 1992). Rather, it was derived from defendants' offer to settle 141 cases (including the plaintiffs') as part of a global settlement agreement. Moreover, the court found that one of the defendants had reduced its settlement offer to an even lower amount than would have been

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<sup>3</sup> Mr. Kitamura, one of the Takata engineers responsible for the TK-821 design, testified at trial through designated deposition excerpts that were read to the jury but not transcribed. Plaintiffs marked the original three volumes of Mr. Kitamura's deposition with highlighted line numbers, highlighted text, handwritten changes and other notations to denote those portions to be read at trial (*see* TP, 11/23/05 a.m. at 5-9). These transcripts were filed under seal as part of the Record on Appeal. References to Mr. Kitamura's deposition transcripts in this brief are to those designated portions that were read at trial.

<sup>4</sup> Plaintiffs incorrectly cite this case as *SGM Partners v. The Profit Co.* *See* Plaintiffs' Opening Brief, at 9.

required by that global settlement. *Id.* Here, Takata’s settlement offer was based on its assessment of plaintiffs’ individual claims and its justified belief in the merits of its position.

Plaintiffs’ final case also does not support their position. In *Wiegand*, the plaintiff brought a wrongful-death claim against the motorist who killed a pedestrian who was walking in or near a crosswalk. The plaintiff repeatedly offered to settle the claim for the motorist’s insurance-policy limit of \$25,000. *See Wiegand v. Colbert*, 68 Haw. 472, 718 P.2d 1080 (1986). Even though the motorist had “made other statements in connection with the accident which certainly indicated a substantial likelihood of her being held liable to some degree,” the motorist’s insurance company refused to settle the case for the policy limit. *Id.* at 478, 718 P.2d at 1084-85. Under those circumstances, the court found that the “[a]cceptance of any of the three offers to settle for the policy limits of \$25,000 would certainly have more speedily resolved the case” and that prejudgment interest thus was warranted. *Id.* at 478, 718 P.2d at 1085. Unlike the defendant in *Wiegand*, Takata did not reject a settlement offer that was almost certain to greatly understate its liability at trial. Moreover, this case does not possess the dynamics unique to the third-party insurance context, where the insurer, whose liability is capped at the policy limits, has a perverse incentive to try even a weak case on the off-chance that it might prevail rather than settle the case for the policy limits.

In any event, the circuit court reasonably could conclude that if anyone failed to make a good-faith effort to resolve this case before trial, it was plaintiffs and not Takata. Plaintiffs made no effort to arrange any of the mediations—it was Takata that diligently pursued those arrangements. And plaintiffs refused the court’s suggestion that the parties appear before a technically-knowledgeable mediator who could propose settlement amounts based on an understanding of the merits of plaintiffs’ claims. Although plaintiffs contend that they made multiple attempts to settle this case, they neglect to mention that both of their “multiple” settlement demands were identical (\$20,100,000) and well above the ultimate amount of the compensatory award (\$4,452,500), or even to the total damages award, including punitive damages (\$16,952,500).

Because Takata did not contribute to the delay in resolving this case, the circuit court clearly had discretion to deny plaintiffs’ motion for prejudgment interest. *See Amfac*, 74 Haw. at 136, 839 P.2d at 36 (no abuse of discretion to deny prejudgment interest where there was “no

evidence in the record that any of [the non-moving party's] conduct unduly delayed the proceedings").

**C. The jury award compensated the Udacs for any loss of interest.**

The plaintiffs also are not entitled to prejudgment interest because the circuit court reasonably could conclude that the \$6.85 million that the jury awarded for compensatory damages already compensates them for any loss of interest. *See Roxas*, 89 Hawai`i at 153, 969 P.2d at 1271 ("it is clearly within the discretion of the circuit court to deny prejudgment where \* \* an extraordinary damage award has already adequately compensated the plaintiff").

In *Roxas*, the Hawai`i Supreme Court held that, even though the defendant "was clearly responsible" for the delay in the adjudication of the plaintiffs' claims, the circuit court had discretion to deny prejudgment interest based on its determination that the jury may already have incorporated the equivalent of prejudgment interest into its damages award. 89 Hawai`i at 154, 969 P.2d at 1272. Although the jury had not been specifically instructed to include interest in its damages award, the Court found that plaintiffs "invited the jury to tailor its damages award to include any delay in compensation." *Id.* In reaching this conclusion, the Court noted that, during closing argument, counsel for the plaintiffs urged the jury to award "compensation for the pain, the suffering and the anxiety and the fears which [Roxas] endured" from the date of the first act giving rise to plaintiffs' claims. *Id.* The Court also noted that the special verdict form directed the jury to "state the amount of actual damages, if any, to be awarded" to Roxas' estate "to compensate it for *any injuries or damages suffered during his lifetime* as a result of his false imprisonment and/or battery." *Id.*

In the present case, plaintiffs also invited the jury to tailor its award to include any delay in compensation. During closing argument, Udac's counsel not only requested compensation from the date of the accident, but also characterized plaintiffs' request for damages as a "debt" owed to Plaintiffs by Takata as of that date:

When that buckle failed it created a debt. Takata Corporation owed him a debt when he got hurt. We're not here asking for a—a windfall. We're—what we're here is we're just trying to collect that debt from that corporation that they created with this family. So I ask that, you know, I ask that you make things right. Give them a full cup of justice.

TP, 12/12/05 at 44. As in *Roxas*, it was reasonable for the circuit court to infer that the jury factored prejudgment interest into its compensatory award because plaintiffs characterized their request for damages as a “debt” arising from the date of Udac’s accident.

Additionally, just as in *Roxas*, the jury in this case was asked to determine Udac’s total compensatory damages for plaintiffs’ lifetimes. The special verdict form asked the jury “What are Plaintiff Dason Udac’s total damages?” (RA, V.20 at 75-79) and the jury instructions defined general damages as “those damages which *fairly and adequately compensate the Plaintiffs for any past*, present, and reasonably probable future [injuries]” (TP, 12/20/05 a.m. at 90-91 (emphasis added)).

Given plaintiffs’ counsel’s exhortation that the jury should view the compensatory award as the repayment of a debt that Takata owed the Udacs from the date of the accident and the wording of the special verdict form and jury instructions, the circuit court did not abuse its discretion in denying prejudgment interest.

## **II. THE CIRCUIT COURT DID NOT ABUSE ITS DISCRETION IN DENYING PREJUDGMENT INTEREST ON THE PUNITIVE DAMAGES**

Plaintiffs argue that this Court should reverse longstanding Hawai`i precedent and authorize the imposition of prejudgment interest on punitive damages. Their contention is wholly without merit. It has been settled for over a decade in Hawai`i that “a litigant is not entitled to prejudgment interest on the punitive damages portion of a judgment.” *Calleon v. Miyagi*, 76 Hawai`i 310, 322, 876 P.2d 1278, 1290 (1994) (quotation marks omitted); *Ditto*, 86 Hawai`i at 114, 947 P.2d at 982 (stating that this is “[t]he clear, succinct, and nearly universal rule of law”).

As *Ditto* observed and Takata’s research has confirmed, this is the “nearly universal rule of law” in every state. *See, e.g., Haskins v. Sheldon*, 558 P.2d 487, 495 (Alaska 1976); *Wheeler Motor Co. v. Roth*, 315 Ark. 318, 330, 867 S.W.2d 446, 452 (1993); *Lakin v. Watkins Associated Indus.*, 6 Cal. 4th 644, 663, 25 Cal. Rptr. 2d 109, 122, 863 P.2d 179, 191 (1993) (applying CAL. CIV. CODE § 3291); *Nielsen v. Wisniewski*, 32 Conn. App. 133, 140, 628 A.2d 25, 29 (Conn. App. Ct. 1993); *Seaward Constr. Co. v. Bradley*, 817 P.2d 971, 973 (Colo. 1991) (applying 6A COLO. REV. STAT. § 13-21-101 (1987)); *Peters v. Hyatt Legal Servs.*, 220 Ga. App. 398, 401, 469 S.E.2d 481, 485 (Ga. Ct. App. 1996) (applying GA. CODE ANN. § 51-12-14(a)); *New York, C. & St. L. Ry. Co. v. Roper*, 176 Ind. 497, 96 N.E. 468, 471 (1911); *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 731 (Iowa 1999); *Jordan v. Intercontinental Bulktank Corp.*, 621 So.2d 1141, 1158

(La. Ct. App. 1993); *Makino, USA Inc. v. Metlife Capital Credit Corp.*, 25 Mass. App. Ct. 302, 320-21, 518 N.E.2d 519, 529-30 (Mass. Ct. App. 1998) (applying MASS. GEN. LAWS Ch. 231 § 6(B)); *Wirig v. Kinney Shoe Corp.*, 448 N.W.2d 526, 535 (Minn. Ct. App. 1989), *rev'd on other grounds*, 461 N.W.2d 374 (Minn. 1990) (applying MINN. STAT. § 549.09, subd. 1(b) (1990)); *Dees v. Am. Nat'l Fire Ins. Co.*, 260 Mont. 431, 447, 861 P.2d 141, 151 (1993) (applying MONT. CODE ANN. § 21-1-211); *Ramada Inns, Inc. v. Sharp*, 101 Nev. 824, 826, 711 P.2d 1, 2 (Nev. 1985); *Maynard v. Mine Hill Twp.*, 244 N.J. Super. 298, 303, 582 A.2d 315, 318 (N.J. Sup. Ct. App. Div. 1990) (applying N.J. REV. STAT 4:42-11(b)); *Weidler v. Big J Enter., Inc.*, 124 N.M. 591, 604, 953 P.2d 1089, 1102 (Ct. App. 1997) (applying N.M. STAT. ANN. 1978 § 56-8-4(B) (1993)); *Delulio v. 320-57 Corp.*, 472 N.Y.S.2d 379, 99 A.D.2d 253, 254 (N.Y. App. Div. 1984) (applying N.Y. C.P.L.R. 5001); *Digital & Analog Design Corp. v. North Supply Co.*, 630 Ohio St. 3d 657, 590 N.E.2d 737 (Ohio 1992), *overruled on other grounds by Zoppo v. Homestead Ins. Co.*, 71 Ohio St. 3d 552, 644 N.E.2d 397 (Ohio 1994); *Rexnord, Inc. v. Ferris*, 69 Or. App. 146, 150, 684 P.2d 26, 28 (Or. Ct. App. 1984); *Colodonato v. Consol. Rail Corp.*, 504 Pa. 80, 86, 470 A.2d 475, 478 (1983) (applying PA. R. CIV. P. 238); *Murphy v. United Steelworkers of Am. Local No. 5705*, 507 A.2d 1342, 1346 (R.I. 1986) (applying R.I. GEN. LAWS 1956 (1985 Re-enactment) § 9-21-10); *Wagner v. Brownlee*, 713 N.W.2d 592, 599 n.6 (S.D. 2006) (applying S.D. CODIFIED LAWS § 21-1-13.1); *Ellis County State Bank v. Kever*, 888 S.W.2d 790, 798 (Tex. 1994) (applying TEX. CIV. PRAC. & REM. § 41.006); *First Sec. Bank of Utah, N.A. v. J.B.J. Feedyards, Inc.*, 83 Wis. 2d 378, 653 P.2d 591, 600 (Utah 1982); *Turcotte v. Estate of LaRose*, 153 Vt. 196, 199, 569 A.2d 1086, 1088 (1989); *Blake v. Grant*, 65 Wash.2d 410, 413, 397 P.2d 843, 844-45 (1964); *Klug & Smith Co. v. Sommer*, 265 N.W.2d 269 (Wis. 1978); *Bagley v. Iowa Beef Processors, Inc.*, 755 F.2d 1300, 1319-1320 (8th Cir.1985) (applying IOWA CODE ANN. § 535.3 (West Supp.1984-1985)), *cert. denied*, 479 U.S. 1088 (1987); *Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622, 625 (10th Cir. 1977) (applying OKLA. STAT. ANN. § 727(2)); Cal. Rule of Court 3.1802 (interest on a punitive award runs from the date of the judgment); *see also United States v. Reul*, 959 F.2d 1572, 1578 (Fed. Cir. 1992) (applying federal common law); RESTATEMENT (SECOND) OF TORTS § 913 cmt. d (1965).<sup>5</sup>

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<sup>5</sup> Plaintiffs do not cite any case in which prejudgment interest was awarded on punitive damages. To our knowledge, the only cases doing so are *Latham Seed Co. v. Nickerson Am. Plant Breeders, Inc.*, 978 F.2d 1493, 1501-02 (8th Cir. 1992); *Werremeyer v. K.C. Auto Salvage*

Plaintiffs urge this Court to disregard *Calleon*, overrule *Ditto*, and depart from the mainstream of American jurisprudence because, plaintiffs contend, *Calleon* and *Ditto* “inappropriately narrowed the scope of [HRS § 636-16] without any suggestion from the legislature.” Plaintiffs’ Opening Brief, at 13-14. But whether or not those decisions were “suggested” by the legislature at the time, they now have been on the books for over a decade and the legislature has not taken any steps to “correct” them or specify that prejudgment interest can be awarded on punitive damages. That creates a strong presumption that the rule announced by *Calleon* and *Ditto* is consistent with legislative intent and should not be disturbed. *See, e.g., Honolulu Star Bulletin Ltd. v. Burns*, 50 Haw. 603, 607, 446 P.2d 171, 173-74 (1968) (“Since the pertinent statute was construed by the court \* \* \* the legislature has had abundant opportunity to give the statute a different meaning. Its failure to do so amounts to legislative approval of such judicial construction giving it the effect of legislation.”).

In any event, contrary to plaintiffs’ contention, changing the law to allow prejudgment interest on an award of punitive damages would be completely inconsistent with the purposes of HRS § 636-16.

As plaintiffs state in their brief, prejudgment interest is *compensatory* in nature and, where appropriate, “serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the

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*Co., Inc.*, 134 S.W.3d 633 (Mo. 2004); and *Haworth v. Feigon*, 623 A.2d 150, 159-160 (Me. 1993). *Latham* interpreted a Michigan statute (MICH. COMP. LAWS ANN. § 600.6013 (West 1992)) to permit prejudgment interest on punitive damages because the statute allowed interest on “a money judgment” and Michigan courts allow prejudgment interest on treble-damages money judgments (*see Meehan v. Mich. Bell Tel. Co.*, 174 Mich. App. 538, 573, 436 N.W.2d 711, 728 (1989)). The text of HRS § 636-16 is not as broad as the Michigan statute and Hawai`i does not allow prejudgment interest on treble damages (*see Leibert v. Finance Factors, Ltd.*, 71 Haw. 285, 293, 788 P.2d 833, 838 (1990)). *Werremeyer* allowed prejudgment interest on punitive damages because Missouri’s statute authorizes interest on “*all* money due upon any judgment or order of any court,” which “means the entire judgment—whether compensatory or punitive.” 134 S.W.3d at 636 (emphasis added). That language obviously is much broader than the text of HRS § 636-16. Finally, *Haworth* held that prejudgment interest on the entire judgment must be awarded from the date that the complaint was filed because the statute specifies that “[i]n *all* civil actions \* \* \* prejudgment interest *shall* be assessed” and “*shall* accrue” from that date (14 ME. REV. STAT. ANN. § 1602(4) (Supp. 1992) (emphasis added)). 623 A.2d at 159-60. HRS § 636-16 obviously does not contain such compulsory language.

injury those damages are intended to redress.” Plaintiffs’ Opening Brief, at 6-7 (quoting *Kalawaia v. AIG Hawai`i Ins. Co.*, 90 Hawai`i 167, 172, 977 P.2d 175 (1999)).<sup>6</sup>

The purpose of punitive damages, on the other hand, “is **not compensation** of the plaintiff, but rather **punishment and deterrence**.” *Amfac*, 74 Haw. at 139 n.23, 839 P.2d at 37 n.23. In fact, the plaintiff has no right to receive punitive damages, which are purely a windfall to him or her. See, e.g., *Masaki v. Gen. Motors Corp.*, 71 Haw. 1, 8 n.3, 780 P.2d 566, 571 n.3 (1989) (noting that punitive damages “constitute a ‘windfall’ to the plaintiff, who ought to receive no more than compensation for his injuries”); *Hawkins v. United States*, 30 F.3d 1077, 1083-84 (9th Cir. 1994) (punitive damages are “a pure windfall, as much an accession to wealth as a successful lottery ticket”). Thus, awarding prejudgment interest on punitive damages would not result in “full compensation” but in an automatic and arbitrary additur to the jury’s assessment of the amount of money necessary to punish the defendant and deter others. See, e.g., *Seaward Constr. Co.*, 817 P.2d at 975-76 (“Prejudgment interest on punitive damages, therefore, would serve merely as an additional penalty and is not necessary to make the injured party whole.”).

Moreover, the goals of punishment and deterrence “are fully accomplished, if at all, at the time punitive damages are awarded.” *Digital & Analog Design Corp.* 63 Ohio St. 3d at 600, 590 N.E.2d at 741. And “[t]he amount of punitive damages is **not fixed at the time the tort occurs**, but rather **accrues only after a reasoned determination by a jury** of an amount that fairly punishes the tortfeasor for his malicious or malevolent acts and that will deter others from similar conduct.” *Id.* (emphasis added, citation and quotation marks omitted).<sup>7</sup> Thus, plaintiffs’

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<sup>6</sup> See also *Molinar v. Schweizer*, 95 Hawai`i 331, 335, 22 P.3d 978, 982 (2001) (prejudgment interest is “expressly intended to represent an essential element of plaintiff’s full compensable damages”); *Kalawaia*, 90 Hawai`i at 172, 977 P.2d at 180 (“[p]rejudgment interest is an element of complete compensation”); *Roxas*, 89 Hawai`i at 155, 969 P.2d at 1273 (recognizing the Supreme Court’s “oft-repeated characterization of prejudgment interest as ‘compensatory’”); *Sussel v. Civil Serv. Comm’n*, 74 Haw. 599, 618, 851 P.2d 311, 321 (1993) (prejudgment interest is “essentially compensatory in nature”).

<sup>7</sup> See also *Seaward Constr. Co.*, 817 P.2d at 975 (noting that “the right to punitive damages does not arise” until the trier of fact exercises its discretion to award it); *Dees*, 260 Mont. at 447, 861 P.2d at 151 (“Because punitive damages must be reviewed by the trial court, they neither vest nor are capable of being made certain until the trial court completes its review and issues a final judgment.”).

suggestion that they have suffered a loss of use of the monies awarded as punitive damages from the time of the injury until judgment misconstrues the very nature of punitive damages.

In sum, awarding prejudgment interest on punitive damages would be inconsistent with the purposes of HRS § 636-16 because it would have nothing to do with achieving full compensation but, instead, would improperly inflate the jury's assessment of the amount of money necessary to punish the defendant and deter others. *Calleon* and *Ditto* (and the host of other cases considering this issue across the country) were not "wrongly decided" (Plaintiffs' Opening Brief, at 6) and there is no reason for this Court to change longstanding Hawai'i law.

### CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's denial of prejudgment interest on both the compensatory and punitive damages awards starting from the date of Udac's accident.

DATED: Honolulu, Hawai'i, July 5, 2007.

Respectfully submitted,

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## **STATEMENT OF RELATED CASES**

Defendant-Appellant/Cross-Appellee is not aware of any cases in Hawai'i courts or agencies that are related within the meaning of Haw. R. App. P. 28(b)(11).