NO. 28854

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

PILAʻA 400, LLC, a Hawaiʻi limited liability company,
Plaintiff/Counterclaim Defendant-Appellant,
v.
CARLOS LAWRENCE ANDRADE and MAKALII SUN CHIANG ANDRADE,
Defendants/Counterclaimants-Appellees,
and
JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10;
DOE CORPORATIONS 1-10; DOE "NON-PROFIT" CORPORATIONS
1-10; and DOE GOVERNMENTAL ENTITIES 1-10;
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 04-1-0099)

MEMORANDUM OPINION
(By: Foley, Presiding J., Fujise and Reifurth, JJ.)

Plaintiff/Counterclaim Defendant-Appellant Pilaʻa 400, LLC (Pilaʻa 400) appeals from the Final Judgment Under Rule 54(b) as to the April 12, 2007 Findings of Fact, Conclusions of Law, Order (Judgment) filed on January 25, 2008 in the Circuit Court of the Fifth Circuit (circuit court).[1] The Judgment was issued pursuant to the circuit court's Findings of Fact; Conclusions of Law; Order (FOF/COL/Order) filed on April 12, 2007, and Order Denying Plaintiff Pilaʻa 400, LLC's Motion for Approval of Supersedeas Bond and for Stay Pending Appeal and Granting Rule 54(b) Certification filed on January 3, 2008. The circuit court

[1] The Honorable Kathleen N.A. Watanabe presided.

entered judgment in favor of Defendant/Counterclaimant-Appellee Carlos Lawrence Andrade (Andrade) and against Pilaʻa 400.

On appeal, Pilaʻa 400 contends:

(1) The circuit court erred in granting Andrade's[2] Motion for Summary Judgment (Andrade's MSJ) and ordering Pilaʻa 400 to execute and record a formal grant of easement (easement) in favor of Andrade over Pilaʻa 400's property (alternatively, Pilaʻa 400's Property or its property). Related to this argument is Pila'a 400's contention that Conclusion of Law (COL) 17 is wrong;

(2) The circuit court abused its discretion and issued clearly erroneous Findings of Fact (FOFs) 43-44, 48-51, 53-58, 60-61, 63 (part), 67, 69-70, 76-79, 85-88, and 91 and wrong COLs 32-42, 54-61, and 63-75 when it granted Andrade's Motion for Preliminary Injunction" (Andrade's Preliminary Injunction Motion) with respect to Andrade's entitlement to maintain a water diversion and distribution system (alternatively, auwai[3] or water system).

(3) The circuit court erred in its "Order Granting in Part and Denying in Part [Andrade's] Motion to Enforce and for Contempt Filed July 16, 2007" (Order Grant/Deny Andrade's Enforce/Contempt Motion) by (a) imposing a $1,000-per-day sanction against Pilaʻa 400 without finding Pilaʻa 400 was in contempt and (b) ordering Pilaʻa 400 to pay Andrade's attorneys' fees and costs.

Pilaʻa 400 asks this court to reverse the Order Grant/Deny Andrade's Enforce/Contempt Motion and the Judgment on the FOF/COL/Order.

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[2] Andrade's MSJ was filed by Andrade and Makalii Sun Chiang Andrade (Makalii) on June 22, 2006. On July 27, 2006, the parties stipulated to dismiss all of Pilaʻa 400's claims against Makalii and Makalii's counterclaims against Pilaʻa 400. For the sake of simplicity, in our discussion of the early background of the case we will refer to Andrade and Makalii collectively as "Andrade."

[3] An "auwai" is a "ditch" or "canal." Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* at 33 (1986). At the evidentiary hearing, Andrade testified that an auwai is a "ditch that leads water from the source of the water to the land at the elevation that you desire . . . [to provide] water for the field system that you have in place."

I. BACKGROUND

This case involves a dispute between Pilaʻa 400 and Andrade over the scope of Andrade's rights to enter onto and through Pilaʻa 400's Property to access water from its property. Andrade has an ownership interest in parcels of land designated as TMKs 5-1-00-004-025 (the loʻi[4] parcel) and 5-1-00-004-026(4) (the pa hale[5] parcel), which are part of one kuleana (the Banana Patch Kuleana[6]), and TMKs 5-1-00-04-017 and 5-1-00-04-019(4), which are part of another kuleana (the Waterfall Kuleana) (collectively, Andrade's Property or his property). Andrade's Property is located wholly within Pilaʻa 400's Property, designated as Parcels 8 and 37, TMK (4)-5-1-04, at Pilaʻa, Hanalei, Kauai.[7]

On August 19, 2004, Pilaʻa 400 filed a Complaint against Andrade. Pilaʻa 400 claimed that in May and June 2004, Andrade entered onto Pilaʻa 400's property and chopped down live trees, left debris, and "placed fraudulent boundary pins, markers and monuments" on Pilaʻa 400's property without Pilaʻa 400's permission. Pilaʻa 400 alleged that Andrade committed trespass, nuisance, waste, conversion, encroachment, and slander of title.

On September 27, 2004, Andrade filed an answer to the Complaint and a counterclaim. Andrade admitted that he had regularly entered onto and traversed portions of Pilaʻa 400's Property. However, he claimed he did so pursuant to his rights as a kuleana land owner and his status as a Native Hawaiian tenant of the ahupuaʻa in which Pilaʻa 400's Property is located

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[4] A "loʻi" is an "irrigated terrace, especially for taro." Pukui & Elbert, supra, at 209.

[5] A "pa hale" is a "[h]ouse lot, yard, fence." Pukui & Elbert, supra, at 299.

[6] A "kuleana" is "a small piece of property, as within an ahupuaʻa." Pukui & Elbert, supra, at 179. An "ahupuaʻa" is a "[l]and division usually extending from the uplands to the sea." Id. at 9.

[7] The Pilaʻa 400 Property is part of a 383-acre parcel of land owned by Pilaʻa 400. The 383-acre parcel was conveyed to Pilaʻa 400 by James Pflueger, owner of Pflueger Properties, after Pflueger Properties acquired it by Limited Warranty Deed from Paul Richard Cassiday and James H. Pflueger, Successor Trustees under the Will and of the Estate of Mary N. Lucas, deceased, and T.G. Exchange, Inc.

"to engage in the exercise of constitutionally protected native Hawaiian rights." Andrade also admitted that in May and June 2004, he had trimmed and cut down trees on Pilaʻa 400's Property, but argued he had done so because the trees had presented a health and safety hazard to his property and/or because he needed to clear, repair, restore, and utilize taro loʻi on his property. He maintained that the trees were not wholly located on or within Pilaʻa 400's Property boundary.

Andrade counterclaimed that Pilaʻa 400[8] had

(1) denied him reasonable access to his property and the land and water adjacent thereto so he could exercise his "constitutionally protected traditional and customary native Hawaiian rights for subsistence, cultural and religious purposes" (First Counterclaim -– Violation of Constitutionally Protected Traditional and Customary Native Hawaiian Rights);

(2) trespassed upon the Waterfall Kuleana (Second Counterclaim -– Trespass);

(3) damaged a portion of the Waterfall Kuleana (Third Counterclaim –- Property Damage);

(4) converted his property rights and common law rights and interests in adjacent land and waters associated with the Waterfall Kuleana (Fourth Counterclaim -– Conversion); and

(5) encroached upon the Waterfall Kuleana (Fifth Counterclaim -– Encroachment).

Andrade requested a judgment (1) declaring that Pilaʻa 400's conduct had violated his constitutional rights; (2) enjoining Pilaʻa 400 from abridging or denying his constitutional rights to engage in traditional, customary Native Hawaiian subsistence, cultural, and religious practices in, on, and around his property; (3) enjoining Pilaʻa 400 from entering on or exercising any control or authority over any portion of his property; and (4) awarding him attorney's fees and costs.

[8] In the counterclaim, Andrade actually referred to "[Pilaʻa 400] and its managers, employees, and/or agents." However, for the sake of simplicity, where the circuit court or parties refer to Pilaʻa 400 and/or its managers, employees, agents, representatives, assigns, lessees, sublessees, and the like, we substitute "Pilaʻa 400."

On October 28, 2004, Pilaʻa 400 filed a reply to Andrade's counterclaims and asserted various affirmative defenses.

On June 22, 2006, Andrade filed Andrade's MSJ. He sought an order of summary judgment against Pilaʻa 400 and an order permanently enjoining Pilaʻa 400 from denying him access to the Waterfall Kuleana and his constitutional and statutory right to engage in traditional and customary Native Hawaiian practices within Pilaʻa 400's property. He claimed that there were no genuine issues of material fact regarding whether he had the right to access into and through Pilaʻa 400's property for that purpose.

On July 26, 2006, Pilaʻa 400 filed a memorandum in opposition to Andrade's MSJ. Pilaʻa 400 argued that the circuit court should not grant Andrade's MSJ because when viewed in the light most favorable to Pilaʻa 400, the facts of the case showed that Andrade did not have the access rights he claimed. Pilaʻa 400 contended that there were genuine issues of material fact regarding the historic location of access routes from Andrade's Property through Pilaʻa 400's Property, the scope and nature of such routes, and what constituted reasonable use of the routes. Pilaʻa 400 maintained that before the circuit court could determine a kuleana owner's rights of ingress and egress, the court had to hold an evidentiary hearing. On July 31, 2006, Andrade filed a reply memorandum.

At the August 3, 2006 hearing on Andrade's MSJ, the circuit court orally granted summary judgment in favor of Andrade and against Pilaʻa 400 with respect to Pilaʻa 400's slander of title claim. The circuit court denied the remainder of the MSJ on the basis that the court had to hold an evidentiary hearing before rendering a judgment on those issues. On September 15, 2006, the circuit court filed an order granting in part and denying in part Andrade's MSJ (Order Grant/Deny Andrade's MSJ), which memorialized the court's oral rulings.

On September 27, 2006, the circuit court granted an ex parte motion for temporary restraining order (TRO) filed by

Andrade. The TRO enjoined Pilaʻa 400 from (1) interfering with or destroying Andrade's Banana Patch auwai, (2) denying Andrade access to the auwai so he could repair it, and (3) harassing or attempting to intimidate Andrade or his family in their use and enjoyment of Andrade's property.

On September 27, 2006, Andrade also filed Andrade's Preliminary Injunction Motion. Andrade requested an order from the circuit court restraining and enjoining Pilaʻa 400 from damaging, dismantling, destroying, or otherwise interfering with Andrade's "auwai which takes water from Wailoli Stream for domestic use and taro irrigation" on the loʻi parcel of the Banana Patch Kuleana. Andrade claimed that the auwai was currently the Banana Patch Kuleana's sole water source. He also requested that the circuit court prevent and restrain Pilaʻa 400 from harassing and attempting to intimidate Andrade and his family in their use and enjoyment of Andrade's Property.

On November 20, 2006, Pilaʻa 400 filed a memorandum in opposition to Andrade's Preliminary Injunction Motion. Pilaʻa 400 admitted that it had removed part of Andrade's water system, which diverted water from an area on Pilaʻa 400's Property to Andrade's Property, but claimed that Andrade's water system was illegal and constituted a nuisance and an ongoing trespass onto Pilaʻa 400's Property.

Andrade filed a reply memorandum. Andrade argued that he had the right to use his water system for domestic and agricultural purposes, according to Hawaii Revised Statutes (HRS) § 1-1 (2009 Repl.) and § 7-1 (2009 Repl.), the doctrine of appurtenant kuleana rights, and article XII, section 7 of the Hawaiʻi Constitution.

After December 8, 2006, January 26, 2007, and March 2, 2007 evidentiary hearings on Andrade's MSJ and Andrade's Preliminary Injunction Motion, the circuit court filed its FOF/COL/Order, which provided:

ORDER

> The Court therefore hereby grants [Andrade's MSJ] . . . with respect to an easement by necessity for the Waterfall [K]uleana and enters an Order (1) Granting an Easement by Necessity to the Waterfall Kuleana over and

> through [Pilaʻa 400's Property], (2) Defining the Easement, and (3) Enjoining and Restraining [Pilaʻa 400] From Interfering With, Blocking Or Otherwise Making [Andrade's] Access Unreasonable or Unsafe. [Andrade] shall present to [Pilaʻa 400], and [Pilaʻ 400] shall execute and record a Non Exclusive Grant of Easement in favor of [Andrade] for the Waterfall [K]uleana.
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> The Court also hereby grants [Andrade's Preliminary Injunction Motion] . . . and enters an Order Permanently Enjoining and Restraining [Pilaʻa 400] From Interfering With, Dismantling, Damaging And/Or Destroying [Andrade's] Water Delivery System Which Delivers Water from Wailoli Stream To Both The Loʻi Parcel And House Parcel [pa hale parcel] of Banana Patch Kuleana.

On July 16, 2007, Andrade filed a Motion to Enforce and for Contempt (Andrade's Enforce/Contempt Motion). He sought an order from the circuit court (1) compelling Pilaʻa 400 to comply with the portion of the FOF/COL/Order in which the court found and defined an easement by necessity to the Waterfall Kuleana in favor of Andrade and instructed Pilaʻa 400 to execute and record an easement to the Waterfall Kuleana through Pilaʻa 400's property, and (2) finding Pilaʻa 400 in contempt for its failure to execute and record the easement, as required by the FOF/COL/Order.

On September 25, 2007, Pilaʻa filed a responsive memorandum regarding its efforts to comply with the FOF/COL/Order. Pilaʻa 400 argued that the circuit court should not sanction Pilaʻa 400, even though Pilaʻa 400 had not executed an easement in favor of Andrade. Pilaʻa 400 maintained that its efforts to execute the easement had stalled due to remediation work Pilaʻa 400 was doing on its property pursuant to a consent decree (consent decree) Pilaʻa 400 had entered into in United States of America & Department of Health, State of Hawaii, et al. v. James H. Pflueger, Pflueger Properties, and Pilaʻa 400 LLC, United States District Court for the District of Hawaii, Civil No. 06-00140 SPK-BMK. Pilaʻa 400 also maintained that its day-to-day administrator, Gordon Rosa (Rosa), had fallen ill. On October 15, 2007, Andrade filed a reply memorandum.

On October 19, 2007, the circuit court held a hearing on the motion. The circuit court filed the Order Grant/Deny Andrade's Enforce/Contempt Motion on November 7, 2007. The circuit court ordered Pilaʻa 400 to take any and all steps

necessary to execute and record an easement in favor of Andrade by December 19, 2007. The court imposed a $1,000 sanction for each day after December 19, 2007 that Pilaʻa 400 failed to execute and record an easement and ordered Pilaʻa 400 to pay $15,509.29 in attorneys' fees and costs to Andrade for having to file and litigate Andrade's Enforce/Contempt Motion. The circuit court specifically denied Andrade's Enforce/Contempt Motion insofar as it asked the court "to find PILAʻA 400 in civil contempt arising out of and connected with the [FOF/COL/Order]."

On November 19, 2007, Pilaʻa 400 filed a notice of appeal from the Order Grant/Deny Andrade's Enforce/Contempt Motion. On November 21, 2007, Pilaʻa 400 filed a Motion for Approval of Supersedeas Bond and for Stay Pending Appeal or, in the Alternative, for Rule 54(b) Certification. Pilaʻa 400 requested approval of a supersedeas bond and a stay of enforcement of the Order Grant/Deny Andrade's Enforce/Contempt Motion, pending Pilaʻa 400's appeal of the order. In case the circuit court found that the Order Grant/Enforce Andrade's Enforce/Contempt Motion was not appealable, Pilaʻa 400 requested alternatively that the court enter an Hawaii Rules of Civil Procedure (HRCP) Rule 54(b)[9] final judgment as to the issues in the FOF/COL/Order. Andrade filed a memorandum in opposition, and Pilaʻa 400 filed a reply. The circuit court held a hearing on the motion, and on January 3, 2008, the court filed its Order Denying Plaintiff Pilaʻa 400, LLC's Motion for Approval of Supersedeas Bond and for Stay Pending Appeal and Granting Rule 54(b) Certification.

The court filed the Judgment on January 25, 2008, and Pilaʻa 400 timely appealed.

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[9] HRCP Rule 54(b) provides in relevant part:

> **Rule 54. Judgments; costs; attorneys' fees.**
> . . . .
>
> (**b) Judgments on multiple claims or involving multiple parties.** When more than one claim for relief is presented in an action, whether as a claim . . . [or] counterclaim, . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims[.]

II. STANDARDS OF REVIEW

A. SUMMARY JUDGMENT

"We review the circuit court's grant or denial of summary judgment de novo." Querubin v. Thronas, 107 Hawaiʻi 48, 56, 109 P.3d 689, 697 (2005) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawaiʻi 490, 501, 100 P.3d 60, 71 (2004)). The Hawaiʻi Supreme Court has often articulated that

> summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Querubin, 107 Hawaiʻi at 56, 109 P.3d at 697 (quoting Durette, 105 Hawaiʻi at 501, 100 P.3d at 71).

HRCP Rule 56(e) provides in relevant part:

> Rule 56. Summary judgment.
> . . . .
>
> (e) Form of affidavits; further testimony; defense required . . . . When a motion for summary judgment [(MSJ)] is made . . . ., an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, "a party opposing a[n] [MSJ] cannot discharge his or her burden by alleging conclusions, nor is the party entitled to a trial on the basis of a hope that the party can produce some evidence at that time." Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (internal quotation marks, citations, and brackets in original omitted).

B. INJUNCTIVE RELIEF

> Generally, the granting or denying of injunctive relief rests with the sound discretion of the trial court and the trial court's decision will be sustained absent a showing of a manifest abuse of discretion. Abuse of discretion may be found where the trial court lacked jurisdiction to grant the relief, or where the trial court based its decision on an unsound proposition of law.

Sierra Club v. Dep't of Transp., 120 Hawaiʻi 181, 197, 202 P.3d 1226, 1242 (2009) (quoting Hawaiʻi Pub. Employment Relations Bd. v. United Pub. Workers, Local 646, AFSCME, AFL-CIO, 66 Haw. 461, 467-68, 667 P.2d 783, 788 (1983)).

C. EQUITABLE RELIEF

"The relief granted by a court in equity is discretionary and will not be overturned on review unless the circuit court abused its discretion by issuing a decision that clearly exceeds the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of the appellant." Aickin v. Ocean View Invs. Co., Inc., 84 Hawaiʻi 447, 453, 935 P.2d 992, 998 (1997) (internal quotation marks, citation, and brackets omitted).

D. FOFs AND COLs

"In this jurisdiction, a trial court's FOFs are subject to the clearly erroneous standard of review. An FOF is clearly erroneous when, despite evidence to support the finding, the appellate court is left with the definite and firm conviction in reviewing the entire evidence that a mistake has been committed." Chun v. Bd. of Trs. of the Employees' Ret. Sys. of the State of Hawaiʻi, 106 Hawaiʻi 416, 430, 106 P.3d 339, 353 (2005) (internal quotation marks, citations, and ellipses omitted) (quoting Allstate Ins. Co. v. Ponce, 105 Hawaiʻi 445, 453, 99 P.3d 96, 104 (2004)). "An FOF is also clearly erroneous when the record lacks substantial evidence to support the finding. We have defined substantial evidence as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Leslie v. Estate of Tavares, 91 Hawaiʻi 394, 399, 984 P.2d 1220, 1225 (1999) (internal quotation marks and citations omitted) (quoting State v. Kotis, 91 Hawaiʻi 319, 328, 984 P.2d 78, 87 (1999)).

> A COL is not binding upon an appellate court and is freely reviewable for its correctness. This court ordinarily reviews COLs under the right/wrong standard. Thus, a COL that is supported by the trial court's FOFs and that reflects an application of the correct rule of law will not be overturned. However, a COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are

> dependent upon the facts and circumstances of each individual case.

Chun, 106 Hawaiʻi at 430, 106 P.3d at 353 (internal quotation marks, citations, and brackets in original omitted) (quoting Ponce, 105 Hawaiʻi at 453, 99 P.3d at 104).

E. HARMLESS ERROR

Hawaii Rules of Evidence Rule 103(a) provides in relevant part: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]"

F. STATUTORY CONSTRUCTION

> When construing a statute, . . . [this court is] guided by several well-established principles of statutory construction:
>
> > First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning. Moreover, the courts may resort to extrinsic aids in determining the legislative intent. One avenue is the use of legislative history as an interpretive tool.

Hui Malama I Na Kupuna O Nei v. Wal-Mart, 122 Hawaiʻi 171, 178, 223 P.3d 236, 243 (App. 2009), cert. rejected, No. 28477, 2010 WL 1973594 (May 17, 2010) (quoting Peterson v. Hawaii Elec. Light Co., 85 Hawaiʻi 322, 327-28, 944 P.2d 1265, 1270-71 (1997), superseded on other grounds by HRS § 269-15.5 (Supp. 1999)).

G. ATTORNEYS' FEES AND COSTS

> As a general rule, each party is responsible for paying his or her own litigation expenses. This American Rule is subject to several exceptions that allow fee-shifting wherein the losing party pays the fees of the prevailing party when so authorized by statute, rule of court, agreement, stipulation, or precedent.

Taomae v. Lingle, 110 Hawaiʻi 327, 331, 132 P.3d 1238, 1242 (2006) (internal quotation marks and citations omitted). "The

trial court's grant or denial of attorney's fees and costs is reviewed under the abuse of discretion standard." Sierra Club v. Dep't of Transp., 120 Hawaiʻi at 197, 202 P.3d at 1242 (internal quotation marks, citation, and brackets omitted).

H. SANCTIONS

This court reviews a trial court's order imposing sanctions pursuant to the trial court's inherent powers under the abuse of discretion standard. Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawaiʻi 452, 459 n.7, 903 P.2d 1273, 1280 n.7 (1995).

III. DISCUSSION

A. ANDRADE'S MSJ

Pilaʻa 400 contends the circuit court erred in its FOF/COL/Order when it ordered Pilaʻa 400 to execute and record an easement over its property in favor of Andrade. Pilaʻa 400 argues that (1) the circuit court lacked authority to require such recordation; (2) the court had previously denied Andrade's MSJ with regard to his easement rights, and such rights were no longer in issue at the time the court filed its FOF/COL/Order; and (3) to the extent that the recordation requirement can be construed as injunctive relief, it was an abuse of discretion. Related to this argument is Pilaʻa 400's contention that COL 17 is wrong. COL 17 provides that "[n]on-exclusive easements to both the Waterfall [K]uleana and the Banana Patch [K]uleana shall be recorded."

In Andrade's MSJ, Andrade argued that there was no genuine issue of material fact regarding whether he had the right to access into and through Pilaʻa 400's Property for the purpose of engaging in traditional and customary Native Hawaiian practices. In Pilaʻa 400's memorandum in opposition, Pilaʻa contended that there were genuine issues of material fact regarding the historic location of access routes from Andrade's Property through Pilaʻa 400's Property, the scope and nature of such routes, and what constituted reasonable use of the routes. At the August 3, 2006 hearing on Andrade's MSJ, the circuit court orally granted Andrade's MSJ with regard to Pilaʻa 400's slander of title claim. The circuit court found that although Andrade

had rights of ingress and egress across Pilaʻa 400's Property for the purpose of accessing the Waterfall Kuleana, there were genuine issues of material fact as to the scope and nature of Andrade's access rights. The circuit court orally denied the remainder of Andrade's MSJ on that basis and stated that the court had to hold an evidentiary hearing before it could rule on those issues. Neither party objected. The circuit court later filed its Order Grant/Deny Andrade's MSJ, in which the court generally denied Andrade's MSJ on all but the slander of title claim.

The circuit court held a hearing on Andrade's MSJ and Andrade's Preliminary Injunction Motion combined, at which hearing Pilaʻa 400 and Andrade called various witnesses to testify regarding, among other things, Andrade's rights of ingress and egress onto and through Pilaʻa 400's Property. On March 2, 2007, the circuit court conducted a site inspection. On March 23, 2007, Andrade filed his Written Closing Argument, in which he requested a recorded easement for the first time. On April 12, 2007, the circuit court issued the FOF/COL/Order, in which it ordered Pilaʻa 400 to record a non-exclusive grant of easement in Andrade's favor.

HRCP Rule 56(c) provides that a court shall grant an MSJ "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCP Rule 56(d) provides:

> **(d) Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

If, upon an MSJ, the trial court finds a genuine issue of material fact, it should either set the case for trial or at least hold an evidentiary hearing to address the issue. Miller v. Manuel, 9 Haw. App. 56, 64, 828 P.2d 286, 292 (1991). See also Gilmartin v. Abastillas, 10 Haw. App. 283, 296, 869 P.2d 1346, 1352 (1994) (An MSJ "should not be granted where there is a factual question as to the existence, validity, and terms of the alleged settlement agreement, and where such a dispute exists, a trial or an evidentiary hearing to resolve the dispute is required.") (citing to Miller, 9 Haw. App. at 64, 828 P.2d at 292).

We fail to understand why the circuit court in this case granted Andrade's MSJ on the issue of Andrade's access into and through Pilaʻa 400's Property to the Waterfall Kuleana after the court had denied Andrade's MSJ with respect to all but the slander of title claim in Pilaʻa 400's Complaint. On appeal, however, Pilaʻa 400 only contests the portion of the order granting Andrade's MSJ requiring recordation. For the first time, Andrade asserted in his Written Closing Argument that he was "entitled to a non-exclusive recorded easement of reasonable vehicular access to the Waterfall [K]uleana." He provided no authority or further argument for this assertion. This relief had not been requested in Andrade's counterclaim, his MSJ, or his motion for a preliminary injunction. Neither the circuit court nor Andrade cited to any authority to support the recordation requirement, and we find none. COL 17 is wrong, and the circuit court erroneously required recordation. Our holding does not concern the remainder of the Order Grant/Deny Andrade's MSJ because Pilaʻa 400 does not contest the remainder of the order as it relates to the MSJ.

B. ANDRADE'S PRELIMINARY INJUNCTION MOTION

Pilaʻa 400 contends the circuit court abused its discretion and issued various clearly erroneous FOFs and wrong COLs when it granted Andrade's Preliminary Injunction Motion with respect to Andrade's entitlement to maintain the water system.

Andrade diverted water from a portion of Wailoli Stream located on Pilaʻa 400's Property to Andrade's Property.

1. Appurtenant water rights

Pilaʻa 400 argues that the circuit court erred in ruling contrary to the evidence presented that Andrade's water system constitutes the revitalization of an ancient and historic source of water to the loʻi parcel such that Andrade has appurtenant rights to the water. Alternatively, Pilaʻa 400 argues that even if Andrade established appurtenant water rights to the loʻi parcel, Andrade's rights do not extend to the pa hale parcel. Related to these arguments is Pilaʻa 400's contention that in the FOF/COL/Order, FOFs 48-51, 60-61, 77-79, and 91 and a portion of FOF 63 are clearly erroneous and COLs 54-59 are wrong.

COLs 54-59 provide:

> 54. In the instant case, it is clear that both parcels of the Banana Patch Kuleana were utilized for taro cultivation and domestic purposes as demonstrated by the language of LCA [Land Commission Award] 6640,[10] and the native and foreign testimonies related to LCA 6640.
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> 55. In addition, the traditional water system that Andrade uses to service both parcels of the Banana Patch [K]uleana, is a restoration of what appeared to be an ancient ditch system in place since time immemorial, when Andrade first entered the Banana Patch [K]uleana and its adjoining areas.
>
> 56. Andrade is utilizing the loʻi parcel of the Banana Patch [K]uleana to cultivate traditional products by means approximating those utilized at the time of the Mahele.
>
> 57. This traditional water system is also the primary means of domestic water for the pa hale parcel.
>
> 58. As such, Andrade, through this traditional water system, is entitled to an appurtenant right to provide water to his kuleana for agricultural and domestic purposes.
>
> 59. Further, because Andrade has clearly demonstrated that he is utilizing the loʻi parcel of the Banana Patch [K]uleana to cultivate traditional products by means approximating those utilized at the time of the Mahele, he is therefore entitled to the quantity and flow of water which was utilized on this parcel to irrigate six taro loʻi, kula land, land for noni, and domestic uses.

[10] The circuit court found that a "Limited Warranty Deed was made subject to the rights of access and utility in favor of certain kuleana located within the perimeter of [Pilaʻa], including . . . the "Banana Patch Kuleana" which is identified at page 3 of the Deed as Royal Patent Number (None) Land Commission Award Number 6640, Apana 1 and 2 to Nika[.]"

a. Quantity of water to which Andrade is entitled

Contrary to Pilaʻa 400's contention on appeal, the circuit court's finding that Andrade's water system constituted the revitalization of an ancient and historic source of water to the loʻi parcel is not relevant to whether Andrade has appurtenant rights to the water, but the amount of water to which he is entitled. COLs 52 and 59 provide:

> 52. When the same parcels of land are being utilized to cultivate traditional products by means approximating those utilized at the time of the Mahele, there is sufficient evidence to establish a presumption that the amount of water diverted for such cultivation adequately approximates the quantity of the appurtenant water rights to which that land is entitled. [*Reppun v. Bd. of Water Supply*, 65 Haw. 531, 564 (1982)].
>
> . . . .
>
> 59. . . . [B]ecause Andrade has clearly demonstrated that he is utilizing the loʻi parcel of the Banana Patch [K]uleana to cultivate traditional products by means approximating those utilized at the time of the Mahele, he is therefore entitled to the quantity and flow of water which was utilized on this parcel to irrigate six taro loʻi, kula land, land for noni, and domestic uses.

COLs 54-59 are based in part on FOFs 48-51 and 60-61, which summarize and refer to Andrade's testimony; FOFs 77-79, which describe the testimony of Joseph O'Hagan (O'Hagan); and FOF 91, which describes the testimony of Brian Lansing (Lansing). Pilaʻa 400 claims, but does not actually argue, that FOFs 48-51, 60-61, 77, and 79 are clearly erroneous.[11] Rather, Pilaʻa 400 maintains that a portion of FOF 63 is clearly erroneous to the extent that it is based on FOF 78, and FOF 78 is clearly erroneous because it does not accurately reflect O'Hagan's

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[11] Pilaʻa 400 also contends that FOF 67 is erroneous. FOF 67 provides:

> 67. The ram pump is not able to pump water up to parcel 26 from parcel 25, unless it is fed by water from a higher elevation. Water drawn from the traditional auwai provides sufficient elevation, by which gravity, lends enough weight to provide the pressure needed to pump it to a higher location occupied by the [the pa hale parcel].

(Record reference omitted.) It is unclear why Pilaʻa 400 contests this FOF, but we infer that Pilaʻa 400 objects to the circuit court's characterization of the auwai as "traditional" insofar as it suggests that Andrade had revitalized an ancient and historic source of water.

testimony. Pilaʻa 400 also argues that FOF 91 is clearly erroneous because it misrepresents Lansing's testimony.

(i) O'Hagan's testimony

The portion of FOF 63 Pilaʻa 400 disputes provides: "In order to provide water to this dwelling [on the Banana Patch Kuleana], Andrade, in or around 1975-1976, installed a pipe system from the traditional ʻauwai system he restored, and pumped it through a pipe system, through the use of a hydraulic ram pump (powered by gravity and the weight of falling water)."

FOFs 77-79 provide:

> 77. On January 26, 2007, [O'Hagan] testified on behalf of Pilaʻa 400. [O'Hagan] testified that the pond where the manowai[12] exists as part of Andrade's water system was constructed by Andrade in 1999, when [O'Hagan] erected his house in the area.
>
> 78. Although [O'Hagan] claims that Andrade constructed the dam and pond in 1999, [O'Hagan's] testimony is consistent and corroborates the testimony of Andrade that the water system had been in place from the 1970's. In the late 1970's, O'Hagan testified that he was on the Banana Patch [K]uleana and observed that a ram[] pump was in place on the [the loʻi parcel] and was connected to a pipe which carried water through [the loʻi parcel], and then from [the loʻi parcel] up to [the pa hale parcel]. In addition, [O'Hagan] testified that the pump was fed with water from an area higher in elevation, upstream from the loʻi parcel, where he observed a large old cement brim used for a cesspool. Water would come up from the ground like an artesian well, an apparatus would catch the water, and then it would flow down to the loʻi parcel.
>
> 79. [O'Hagan's] testimony is also consistent with Andrade's testimony that the manowai and dam had to be restored and redredged through the years due to various adverse factors.

(Record references omitted.)

On appeal, Pilaʻa 400 argues that FOF 78 is clearly erroneous because O'Hagan

> did not testify that he observed at the time the O'Hagan Pond[13] or dam located on Pilaʻa 400 Property at issue in this case. Rather, [O'Hagan] unequivocally testified that the O'Hagan pond and the water diversion and delivery system

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[12] At the evidentiary hearing, Andrade testified that a "manowai" is a dam.

[13] In its memorandum in opposition to Andrade's Preliminary Injunction Motion, Pilaʻa 400 argued that Andrade did not actually construct his water system until 1999, when he created a pond on Pilaʻa 400 property (the "O'Hagan Area Pond") and installed an elaborate water diversion system that ran from the O'Hagan Area Pond to the loʻi parcel and the pa hale parcel.

> that transported water to the loʻi parcel were created in or about 1999. He further stated that when he observed the ram pump in 1979, it was not getting water from the water diversion system at issue here.

(Emphasis in original; record references omitted.)

At the evidentiary hearing, Andrade testified that when he moved onto his property in or around 1975 or 1976, he discovered the remnants of a traditional auwai system that ran water from Wailoli Stream to the loʻi parcel for taro farming. Andrade restored the poʻai[14] and manowai and installed a pipeline in the auwai. He then ran the pipes uphill from the loʻi parcel to the pa hale parcel and pumped water up to his house using a hydraulic ram pump. At one time, O'Hagan lived on Pilaʻa 400's property, 150 or 200 yards upstream of the Banana Patch Kuleana, twenty or thirty yards away from Wailoli Stream, and about twenty yards upstream of the manowai and poʻai. When Andrade was asked on cross-examination if there was a pond in the area of O'Hagan's house, Andrade testified that when the stream water backed up behind the manowai, it expanded and formed a pond, or reservoir, there. Over the years, Andrade had cleaned out the pond several times, using a backhoe. He had taken soil that filled up in the stream and used it to build and maintain the manowai.

O'Hagan testified that he lived on Pilaʻa 400 Property for about twenty-three years, beginning in 1969. In 1979, Andrade caught water from something like an artesian well that brought the water up into a "cement type brim like you use for a cesspool." Andrade had made some type of apparatus to catch the water and take it across Pilaʻa 400's Property. O'Hagan observed a pipe that ran stream water through a ram pump located on the edge of Pilaʻa 400's Property and Andrade's Property onto Andrade's Property and to Andrade's house and loʻi parcel. Andrade also obtained water for his house via a catchment system

[14] Andrade testified that a "poʻai" is an "intake," "depression in the ground in the bank of the stream," and "the head waters or the initial place where the water begins to flow into." He testified that when water backed up behind the manowai, the poʻai diverted the overflow into the auwai, which then carried the water to the loʻi parcel.

attached to the roof of his house. After 1982, O'Hagan moved off of Pilaʻa 400's Property for about three or four years.

OʻHagan testified that in about 1999, he moved back onto Pilaʻa 400's Property, near a little stream by Andrade's house in the pa hale parcel. O'Hagan did not see a pond or dam near Andrade's house. Two or three months after O'Hagan moved back, Andrade dug a pond in front of O'Hagan's house using a backhoe. There was a pipe in the pond. Prior to 1999, O'Hagan had been on the loʻi parcel and had not seen a water system there similar to the one Andrade built in 1999.

FOF 78 is not clearly erroneous. Based on FOF 78 and O'Hagan's testimony, the circuit court could have reasonably and rationally determined that O'Hagan's observations actually supported Andrade's testimony. "It is well settled that the . . . the trier of fact[] is free to make all reasonable and rational inferences under the facts in evidence." Estate of Klink ex rel. Klink v. State, 113 Hawaiʻi 332, 352, 152 P.3d 504, 524 (2007) (internal quotation marks and citation omitted). Further, to the extent the circuit court discredited Andrade's conclusion that the water system was created in 1999, it is well-settled that "the credibility of witnesses and the weight to be given their testimony are within the province of the trier of fact and, generally, will not be disturbed on appeal." Tamashiro v. Control Specialist, Inc., 97 Hawaiʻi 86, 92, 34 P.3d 16, 22 (2001).

(ii) Lansing's testimony

FOFs 89-91 provide:

> 89. On March 2, 2007, [Lansing] testified as a rebuttal witness for Andrade to refute the testimony of [O'Hagan] and [Rosa]. [Lansing] represented that he is the owner of an excavation company. He also stated that he was an acquaintance of Andrade, occasionally seeing him while surfing, and was not being paid by Andrade to testify.
>
> 90. [Lansing] testified that he met Andrade sometime in 1978 while surfing and was asked by Andrade to perform some work on Andrade's water system which provided water to the Banana Patch [K]uleana. [Lansing] further testified that the work he performed for Andrade was sometime around 1979-1980.
>
> 91. [Lansing's] testimony corroborates and supports the testimony of Andrade that the water system was restored, maintained, and in existence in the late 1970's. [Lansing]

> identified Andrade's Exhibits 1-I and 1-E, as the pond he worked on. [Lansing] testified that the pond was in existence at the time he entered the property, and he took a crawler loader to dig out debris and silt from it. In addition, [Lansing] also observed a ram pump which took water through a pipe and transferred it to a little cottage where Andrade and his family were residing. [Lansing] further testified that the ram pump was less than a football field away from the pond he worked on and that there was a pipe from the dam in the pond that headed downward towards the ram pump.

(Record references omitted.)

Pilaʻa 400 argues that FOF 91 is clearly erroneous because (1) Lansing worked on the "Ram Pump Pond," which was the only one he saw that day; (2) at the evidentiary hearing, Lansing testified that Exhibit 1-E depicted a picture of "the O'Hagan Pond," but then testified that the pipe in the pond he had worked on was horizontal, not vertical like the one depicted in the exhibit; and (3) Lansing admitted on cross-examination that he was unsure that the pond shown in Exhibit 1-E was the one he dredged.

At the evidentiary hearing, Lansing testified that he did work in Pilaʻa for Andrade in 1979 or 1980. Andrade asked him to remove silt from a pond. Lansing could not testify regarding whose property the pond was on. Andrade showed Lansing a ram pump, which transferred water to a little cottage in which Andrade was staying. Lansing cleared out an inlet and some lantana "growing on the driveway to the pump and around his house." When Lansing dredged the inlet, he noticed a three- or four-inch pipe, which he saw "headed towards the ram pump." Andrade's counsel showed Lansing Andrade's Exhibits 1I and 1E, which Lansing stated accurately depicted the pond that he worked on, with one difference –- Exhibit 1E depicted the pipe coming into the pond vertically, whereas it actually "came into the pond horizontally."

On cross-examination, Lansing testified that he thought the pond he worked on was less than a football field away from the ram pump. When Pilaʻa 400's counsel asked Lansing "[b]ut you're not sure, right?" if the pond depicted in Exhibit 1I was the one he had worked on, Lansing responded "[t]hat's true -– 30 years." When asked if the pipe in the pond was horizontally

placed at the time he worked on the pond, Lansing responded, "At that time I believe it was" and agreed that Andrade "might have done a lot of things," including taking "off an end fitting or something."

The circuit court's findings in FOF 91 are not clearly erroneous. Lansing testified that although the pipe as depicted in Exhibit 1E came into the pond vertically, rather than horizontally as he remembered, it was possible that Andrade had altered the pipe since Lansing worked on the pond. Further, although Lansing testified that he was not "sure" that the pond depicted in Exhibit 1I was the one he worked on because it had been thirty years since he did the work, the finding that Lansing "identified" the pond as the one he worked on was not clearly erroneous because he testified that he thought it was the same pond.

b. Water to pa hale parcel

Alternatively, Pilaʻa 400 contends that even if Andrade established appurtenant water rights to the loʻi parcel, Andrade's rights do not extend to the pa hale parcel because

> Andrade does not purport to allege that his ram pump approximates an ancient mechanical device that historically pumped water from the *loʻi parcel* to the *pa hale* parcel to prove water for a dwelling. Nor does Andrade assert that there was an ancient pipe system that historically provided the *pa hale* parcel with a source of water. In fact, Andrade testified that there was no water source of the *pa hale* parcel when he first entered upon the kuleana in or about 1975.

(Emphasis in original.)

The circuit court concluded that the Banana Patch Kuleana enjoyed appurtenant water rights for domestic use. In COL 58, under the heading "*Appurtenant Water Rights*," the circuit court concluded that "Andrade, through this traditional water system, is entitled to an appurtenant right to provide water to his kuleana for agricultural and domestic purposes." The circuit court does not specifically mention Andrade's right to water for

domestic use under the headings "*Riparian Water Rights*"[15] or "*Traditional and Customary Water Rights*."[16]

The circuit court granted Andrade's Preliminary Injunction Motion, permanently enjoining and restraining Pilaʻa 400 from interfering with, dismantling, damaging, and/or destroying Andrade's water system that delivers water to the loʻi and pa hale parcels.

HRS § 7-1 provides in relevant part: "The people shall also have a right to drinking water, and running water . . . . The springs of water . . . [and] running water . . . shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use."

In In re Water Use Permit Applications, 94 Hawaiʻi 97, 137, 9 P.3d 409, 449 (2000) (internal quotation marks and citations omitted), the Hawaiʻi Supreme Court stated:

> Whether under riparian or prior appropriation systems, common law or statute, states have uniformly recognized domestic uses, particularly drinking, as among the highest uses of water resources. This jurisdiction presents no exception. In granting individuals fee simple title to land in the Kuleana Act, the kingdom expressly guaranteed: "The people shall . . . have a right to drinking water, and running water . . . ." And although this provision and others, including the reservation of sovereign prerogatives, evidently originated out of concern for the rights of native tenants in particular[.]
>
> . . . [R]eview of the early law of the kingdom reveals the specific objective of preserving the rights of native tenants during the transition to a western system of private property. Before the Māhele, the law "Respecting Water for Irrigation" assured native tenants "their equal proportion" of water. Subsequently, the aforementioned Kuleana Act provision ensured tenants' rights to essential incidents of land beyond their own kuleana, including water, in recognition that a little bit of land even with allodial

[15] Under this heading, the circuit court concluded that "Andrade is . . . entitled to use the waters of Wailoli Stream for the cultivation of his riparian lands at a quantity and flow that approximates that which was historically used to cultivate taro and other crops on the Banana Patch [K]uleana."

[16] Under this heading, the circuit court concluded that "Andrade, though the use of his traditional water system, enjoys native Hawaiian traditional and customary rights protected under the Hawaii State Constitution and the [HRS]" and "[s]ince Andrade exercises his traditional and customary rights through the use of this traditional water system he need not retain a permit pursuant to HRS § 174C-101(c)[.]"

> title, if they be cut off from all other privileges would be of very little value[.]

In Territory of Hawaii v. Gay, 31 Haw. 376 (Haw. Terr. 1930), the Supreme Court of the Territory of Hawaiʻi stated:

> Whenever it has appeared that a kuleana or perhaps other piece of land was, immediately prior to the grant of an award by the land commission, enjoying the use of water for the cultivation of taro or for garden purposes or for domestic purposes, that land has been held to have had appurtenant to it the right to use the quantity of water which it had been customarily using at the time named. In some instances a mere reference to the land in the award or in the records of the land commission as "taro land" ("aina kalo" or "loi kalo") or as "cultivated land" ("aina mahi") has sufficed to lead to and to support an adjudication that that land was entitled to use water for agricultural purposes. Sometimes the testimony of witnesses who appeared before the land commission in the hearings leading up to the award that the land was taro land or cultivated land, or other statements substantially to that effect, have sufficed to support a similar adjudication.

Id. at 383 (emphases added). The supreme court further stated that

> [i]f any of the lands were entitled to water by immemorial usage, this right was included in the conveyance as an appurtenance. An easement appurtenant to land will pass by a grant of the land, without mention being made of the easement or the appurtenances. But if lands had no such rights, and no additional grant of water rights was made, it certainly could take nothing by having been a portion of the ahupuaa.

Id. at 386.

"[A]ppurtenant water rights are rights to the use of water utilized by parcels of land at the time of their original conversion into fee simple land." Reppun v. Bd. of Water Supply, 65 Haw. 531, 551, 656 P.2d 57, 71 (1982), *declined to follow on other grounds by* In re Water Use Applications, supra. "[T]he use of water acquired as appurtenant rights may only be used in connection with that particular parcel of land to which the right is appurtenant[.]" McBryde Sugar Co. v. Robinson, 54 Haw. 174, 191, 504 P.2d 1330, 1341 (1973).

The circuit court's conclusion that Andrade had appurtenant water rights for domestic use was based in part on COL 50, which provides that

> water used for domestic purposes on kuleana lands has clearly been protected as an appurtenant water right. Gay, 31 Haw. at 395-396 (finding that water for domestic purposes for every kuleana was assured under Hawaiian law, and that if it was demonstrated that people dwelt, at the time of the

> land commission award, on the kuleana, it would be easily found that appurtenant rights for domestic uses would attach to the kuleana.)

The portion of Gay to which the court cited in COL 50 provides:

> Water for domestic purposes on a lower ahupuaa is in any event assured under Hawaiian law. Every portion of land, large or small, ahupuaa, ili or kuleana, upon which people dwelt was, under the ancient Hawaiian system whose retention should, in my opinion, continue unqualifiedly, entitled to drinking water for its human occupants and for their animals and was entitled to water for other domestic purposes. At no time in Hawaii's judicial history has this been denied. Whenever it is proven that people dwelt, at the time of the award of the land commission, upon a piece of land awarded, it will be easily found and adjudicated that that piece of land was and is entitled to water for all domestic purposes. Under similar circumstances lands of the king or of any other konohiki which have remained unawarded would be similarly treated. These rights to water for drinking purposes and for other domestic uses are included in the ancient appurtenant rights hereinabove referred to.

Gay, 31 Haw. at 395 (emphases added).

In FOFs 39-41, which Pilaʻa 400 does not dispute, the circuit court found:

> 39. Andrade's Exhibit 3 is a Land Comission Award 6640 for the Banana Patch Kuleana comprised of two parcels. Apana 1 was used for taro cultivation and Apana 2 was used for a house lot.
>
> 40. Andrade's Exhibit 4 contains the Native Register for Land Commission Award 6640, which confirms that Nika, the original claimant for this kuleana, testified that it was comprised of six taro loʻi and a house lot.
>
> 41. Andrade's Exhibit 4 also contains Foreign and Native Testimony which corroborates Nika's claim of six taro loʻi and a house lot.

(Record references omitted.) The circuit court's findings are based on and accurately reflect Andrade's testimony at the evidentiary hearing. The Supreme Court has held that "findings of fact . . . that are not challenged on appeal are binding on the appellate court." Bremer v. Weeks, 104 Hawaiʻi 43, 63, 85 P.3d 150, 170 (2004) (internal quotation marks, citation, and brackets). Andrade also testified that the presence of a house lot on the kuleana indicates that water was used for domestic purposes there: "People have to wash and bathe and do all the things they do at home with water." The circuit court's findings are also based on and accurately reflect the testimony of Teresa Marie Gomes (Gomes), a title and genealogy researcher at Native

Hawaiian Legal Corporation. The parties stipulated and the court qualified Gomes to testify as an expert in Hawaiian land title. Gomes testified that she researched records related to Andrade's property, and the Land Commission Award 6640 indicated that the "Nika" lot included a house lot.

Given the testimony of Andrade and Gomes, the circuit court did not err in finding that the Banana Patch Kuleana has appurtenant water rights for domestic use.

c. Result

The circuit court did not err by finding that the Banana Patch Kuleana has appurtenant water rights; FOFs 48-51, 60-61, 63 (part), 67, 77-79, 91 are not clearly erroneous; and COLs 54-59 are not wrong.

2. Riparian water rights to pa hale parcel

Pilaʻa 400 argues that the circuit court erred in ruling that the pa hale parcel of the Banana Patch Kuleana has riparian water rights because the parcel does not adjoin a natural water course. Related to this argument is Pilaʻa 400's contention that COLs 32-42 are wrong. As we have stated, the circuit court found that the Banana Patch Kuleana's rights to domestic water are appurtenant, not riparian. See Part III.B.1.b. Given our holding that the circuit court did not err by finding that the Banana Patch Kuleana has appurtenant water rights for domestic use, we need not address this point.

3. Permit

Pilaʻa argues that the circuit court erred in ruling that Andrade was entitled to maintain and operate his water system without permit for the system, which is required by HRS Chapter 174C ("State Water Code"), specifically HRS §§ 174C-3 (1993), 174C-91 (1993), 174C-92 (1993), and 174C-93 (1993). Related to this argument is Pilaʻa 400's contention that FOF 70 is clearly erroneous and COLs 60-61 are wrong.

Section 174C-3 defines "stream diversion" as "the act of removing water from a stream into a channel, pipeline, or other conduit." Section 174C-91 defines "stream diversion works" as "any artificial or natural structure emplaced within the

stream for the purpose of diverting stream water." Section 174C-92 provides in relevant part that "[a]ny person owning or operating a stream diversion works within or outside of a water management area shall register such work with the commission." Section 174C-93 states in relevant part that "[n]o person shall construct or alter a stream diversion works, other than in the course of normal maintenance, without first obtaining a permit from the commission." On appeal, Pilaʻa 400 argues that Andrade is required to obtain a permit for his water system because it constitutes "stream diversion works."

In FOFs 69 and 70, the circuit court found:

> 69. Pursuant to the enactment of the State of Hawaii Water Code, Andrade in 1989 registered the Banana Patch [K]uleana loʻi and domestic water source and declared his resulting water use with the Commission on Water Resource Management.
>
> 70. Traditional uses of water for domestic uses and taro loʻi, however, do not need use permits from the State of Hawaii Commission on Water Resource Management.

(Record references omitted.) COLs 60-61 provide:

> 60. Because Andrade enjoys appurtenant water rights to the Banana Patch [K]uleana through his traditional water system, he need not retain a permit for such use pursuant to HRS § 174C-101(d) which provides:
>
> > The appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter.
>
> 61. Also, Andrade is accessing water through his system for domestic purposes, he is further exempted by HRS § 174C-48, which states, in pertinent part:
>
> > (a) No person shall make any withdrawal, diversion, impoundment or consumptive use of water in any designated water management area without first obtaining a permit from the commission. *However, no permit shall be required for domestic consumption of water by individual users, and no permit shall be required for the use of a catchment system to gather water.* (emphasis added)
>
> 62. "Domestic use" under the State Water Code is defined as "any use of water for individual personal needs and for household purposes such as drinking, bathing, heating, cooking, noncommercial gardening, and sanitation." HRS § 174-3.

HRS § 174C-101(d) (1993) provides that "[t]he appurtenant water rights of kuleana and taro lands, along with those traditional and customary rights assured in this section, shall not be diminished or extinguished by a failure to apply for or to receive a permit under this chapter." HRS § 174C-48 (1993) provides in part that "no permit shall be required for domestic consumption of water by individual users." As we have already discussed, the circuit court did not err by finding that the Banana Patch Kuleana has an appurtenant right to water for domestic purposes and Pilaʻa 400 does not contest the court's finding that Andrade has an appurtenant right to water for agricultural uses. See Part III.B.1. Pursuant to the plain language of HRS § 174C-101(d), Andrade is not required to obtain a permit for his water system. FOF 70 is not clearly erroneous and COLs 60-61 are not wrong.

4. Native Hawaiian rights

Pilaʻa 400 argues that the circuit court erred by basing its decision on Andrade's water rights as a Native Hawaiian, but depriving Pilaʻa 400 of the opportunity to address the matter:

> Although Andrade's first counterclaim alleges a violation of traditional and customary Native Hawaiian rights, Andrade never requested summary judgment on this claim in 2006 or 2007. To the extent that Andrade's [MSJ] dated June 22, 2006, can be construed as requesting summary judgment on this claim, such request was nevertheless denied by the court's [Order Grant/Deny Andrade's MSJ], which granted in part Andrade's [MSJ] with respect to an unrelated claim, but denied Andrade's [MSJ] with respect to all of the remaining claims in the Complaint and Counterclaim. Moreover, as discussed above, the evidentiary hearing . . . was expressly limited to exclude discussion of Native Hawaiian rights.

(Internal quotation marks, record references, brackets, and footnote omitted; emphasis in original.) In a footnote, Pilaʻa 400 maintains that Andrade first requested summary judgment on a violation of traditional and customary Native Hawaiian rights on April 2, 2008. Related to this argument is Pilaʻa 400's contention that FOFs 43-44 are clearly erroneous and COLs 63-75 are wrong.

Pilaʻa 400 apparently refers to the portion of the FOF/COL/Order under the heading, "*Traditional and Customary Water*

Rights." In that section, the circuit court refers to Andrade's enjoyment of Native Hawaiian traditional and customary rights protected under article XII, section 7 of the Hawaiʻi Constitution and HRS § 1-1 to support the court's finding in COL 73 that "[s]ince Andrade exercises his traditional and customary rights through the use of this traditional water system he need not retain a permit pursuant to HRS § 174C-101(c)." HRS § 174C-101(c) (1993) provides:

> **§174C-101 Native Hawaiian water rights.**
> . . . .
>
> (c) Traditional and customary rights of ahupuaʻa tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778 shall not be abridged or denied by this chapter. Such traditional and customary rights shall include, but not be limited to, the cultivation or propagation of taro on one's own kuleana and the gathering of hihiwai, opae, oʻopu, limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural, and religious purposes.

COL 73 is based in part on FOFs 43-44, which provide:

> 43. As a native Hawaiian, Andrade engages in various traditional and customary practices in the ahupuaʻa of Pilaʻa and more generally on the island of Kauai. More specifically, Andrade is a practioner of mahiʻai, meaning cultivator of the soil, and cultivates taro and other types of agriculture. In addition, Andrade considers himself and is in fact, as a result of his long tenancy in Pilaʻa, a *hoaʻaina*, meaning companion or caretaker of the land.
>
> 44. Through the cultivation of taro, Andrade engages in a native Hawaiian traditional and customary practice. Taro is considered to be the elder sibling of the Hawaiian people and one of the mainstays of Hawaiian cultivators.

(Record references omitted.)

Because, as we have already held, Andrade is not required to obtain a permit for his water system, we need not address this point. FOFs 43-44 are not clearly erroneous and COLs 63-75 are not wrong.

5. Andrade's request inadequate

Pilaʻa 400 argues that insofar as the order granting Andrade's Preliminary Injunction Motion constitutes a permanent injunction, the circuit court exceeded its authority because Andrade's two-page request in Andrade's MSJ failed to adequately request the order. Pilaʻa 400 cites to the standard set forth in Office of Hawaiian Affairs v. Housing & Community Development

Corp. of Hawaii, 117 Hawaiʻi 174, 212, 177 P.3d 884, 922 (2008): "[T]he appropriate test in this jurisdiction for determining whether a permanent injunction is proper is: (1) whether the plaintiff has prevailed on the merits; (2) whether the balance of irreparable damage favors the issuance of a permanent injunction; and (3) whether the public interest supports granting such an injunction."

In Andrade's Preliminary Injunction Motion, Andrade cited to and provided arguments for each of the factors in the above standard. Andrade devoted about two pages applying the first factor, a little over one page applying the second factor, and about a half page applying the third factor. With regard to the first factor, Andrade argued that he was not only clearly likely to succeed on the merits as a kuleana owner entitled to access and water rights, but should succeed.[17] With regard to the second factor, Andrade argued that unless Pilaʻa 400 was restrained and enjoined from preventing Andrade from repairing his water source and water system, Andrade and his son would likely continue to suffer immediate and irreparable harm including de facto evacuation from their home, damage to their crops, loss of peace of mind, and the peaceful, secure, and quiet enjoyment and use of their property. With regard to the third factor, he argued that granting Andrade's Preliminary Injunction Motion would be consistent with the public policy to preserve and protect Native Hawaiian rights to practice their traditions and customs, pursuant to article XII, section 7 of the Hawaiʻi Constitution and HRS §§ 1-1 and 7-1. Andrade provided legal authority and described the relevant background facts with regard to each element of the standard.

6. Result

The circuit court did not err by granting Andrade's Preliminary Injunction Motion; FOFs 43-44, 48-51, 53-58, 60-61,

[17] Andrade did in fact succeed on the merits as a kuleana owner entitled to access and water rights. Although it is not clear when the circuit court treated Andrade's motion as one for a permanent injunction, the only explanation is that it was considered along with Andrade's MSJ.

63 (part), 67, 69-70, 76-79, 85-88, and 91 are not clearly erroneous; and COLs 32-42, 54-61, and 63-75 are not wrong.

C. JUDICIAL TAKING

Pilaʻa 400 argues that

> [t]he circuit court's order requiring a recordable easement, recognizing unlimited water rights and enjoining the removal of the water diversion and pipe system, pursuant to HRS section 7-1 and despite the facts of this case, is a departure from settled law governing kuleana rights and effects an unconstitutional judicial taking. . . . Here, the circuit court's order effects a taking because it is not based upon preexisting principles of state property law, but is instead a substantial and unsupported departure from those principles.

In Public Access Shoreline Hawaii v. Hawaiʻi County Planning Comm'n, 79 Hawaiʻi 425, 903 P.2d 1246 (1995), cert. denied, 517 U.S. 1163, 116 S. Ct. 1559 (1996), the Hawaiʻi Supreme Court stated:

> Under the judicial taking theory, when a judicial decision alters property rights, the decision may amount to an unconstitutional taking of property. However, the judicial taking theory is by no means a settled issue of law. Assuming, without deciding, that the theory is viable, a judicial decision would only constitute an unconstitutional taking of private property if it involved retroactive alteration of state law such as would constitute an unconstitutional taking of private property.

Id. at 451, 903 P.2d at 1272 (internal quotation marks, citations, and brackets omitted).

First, as we have already discussed, in this case, the circuit court erred by ordering Pilaʻa 400 to record the easement in Andrade's favor without giving Pilaʻa 400 an adequate opportunity to respond to Andrade's assertion that he is entitled to a recorded easement. See Part III.A.2.a. Second, the circuit court did not "recognize unlimited water rights" on the part of the Banana Patch Kuleana. As we have discussed, the circuit court concluded that the Banana Patch Kuleana was entitled to "the quantity and flow of water which was [historically] utilized on this parcel to irrigate six taro loʻi, kula land, land for noni, and domestic uses." See Part III.B.1.a. Third, as we have discussed, based on Hawaiʻi statutes and case law, the circuit court was not wrong to conclude that the Banana Patch Kuleana enjoys appurtenant water rights for domestic purposes in a quantity equivalent to that which was utilized historically. See

Part III.B. In support of its findings and conclusions on this point, the circuit court cites to numerous Hawaiʻi cases and statutes. On appeal, Pilaʻa 400 does not elaborate upon its assertion that the circuit court's findings constitute "a substantial and unsupported departure from" "principles of state property law" and we fail to see how that is the case. The circuit court's rulings in this case do not constitute a judicial taking.

D. ATTORNEYS' FEES AND COSTS

Pilaʻa 400 argues that the circuit court, in its Order Grant/Deny Andrade's Enforce/Contempt Motion, erroneously ordered Pilaʻa 400 to pay Andrade's attorneys' fees and costs. In Andrade's Enforce/Contempt Motion, Andrade sought an order from the circuit court (1) compelling Pilaʻa 400 to comply with the portion of the FOF/COL/Order in which the court found and defined an easement by necessity to Andrade's property in favor of Andrade and instructed Pilaʻa 400 to execute and record an easement to Andrade's property, and (2) finding Pilaʻa 400 in contempt for its failure to execute and record Andrade's easement to Andrade's property, as required by the FOF/COL/Order. The circuit court ordered Pilaʻa 400 to pay Andrade $15,509.29 for attorneys' fees and costs he incurred in filing and litigating Andrade's Enforce/Contempt Motion.

To the extent the circuit court ordered Pilaʻa 400 to pay Andrade attorneys' fees and costs associated with the portion of Andrade's Enforce/Contempt Motion regarding Pilaʻa 400's failure to record an easement in Andrade's favor, the court abused its discretion because, as we have already discussed, the court should not have ordered Pilaʻa 400 to record the easement. See Part III.A.

With regard to the circuit court's award of attorneys' fees in general, Pilaʻa 400 argues that there is no authority for the court's award and Andrade failed to file a motion for attorneys' fees and costs pursuant to HRCP Rule 54(d)(2) or request such in Andrade's Enforce/Contempt Motion. Andrade argues that the circuit court was authorized to award Andrade

attorneys' fees and costs pursuant to the court's inherent powers. "[A]n award of attorney's fees must be based upon either statute, agreement, stipulation or precedent[.]" LeMay v. Leander, 92 Hawaiʻi 614, 626, 994 P.2d 546, 558 (2000). HRS § 603-21.9 (1993) provides that "[t]he several circuit courts shall have power . . . (6) [t]o make and award such judgments, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to them by law or for the promotion of justice in matters pending before them." In United States v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, 948 F.2d 1338, 1345 (2d Cir. 1991), the United States Court of Appeals for the Second Circuit stated:

> [A] court has a third means at its disposal for sanctioning improper conduct: its inherent power. This power stems from the very nature of courts and their need to be able "'to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S. Ct. 2123, 2132, 115 L. Ed. 2d 27 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, 1388-89, 8 L. Ed. 2d 734 (1962)). One component of a court's inherent power is the power to assess costs and attorneys' fees against either the client or his attorney where a party has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59, 95 S. Ct. 1612, 1622-23, 44 L. Ed. 2d 141 (1975) (quoting *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 2165, 40 L. Ed. 2d 703 (1974)).

"Although the trial court possesses inherent power to do those things necessary for the proper administration of justice, . . . because inherent powers are shielded from direct democratic controls, they must be exercised with restraint and discretion." Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., 6 Haw. App. 431, 436, 726 P.2d 268, 271-72 (1986) (internal quotation marks, citations, and brackets omitted).

In the instant case, the Order Granting in Part Andrade's Enforce/Contempt Motion is in the nature of a civil contempt order, although the circuit court did not find Pilaʻa 400 in contempt or otherwise find that Pilaʻa 400 had acted in

bad faith. The circuit court provided no legal basis for its award of attorneys' fees and costs, and we find none. Given the foregoing, the circuit court abused its discretion when it ordered Pilaʻa 400 to pay Andrade $15,509.29 for attorneys' fees and costs Andrade had incurred in filing and litigating Andrade's Enforce/Contempt Motion. We need not address Pilaʻa 400's remaining arguments with regard to this point.[18]

E. SANCTION

Pilaʻa 400 argues that the circuit court in its Order Grant/Deny Andrade's Enforce/Contempt Motion erroneously imposed a $1000-per-day sanction against Pilaʻa 400 because the court erroneously required Pilaʻa 400 to record the easement. We agree to the extent that the circuit court imposed the sanction against Pilaʻa 400 for not recording the easement, given our holding that the court erred by requiring Pilaʻa 400 to record the easement. See Part III.A.2.a.

F. REMAINING POINTS RE FOFs

Pilaʻa 400 claims that FOFs 76 and 85-88 are clearly erroneous. However, Pilaʻa 400 does not actually argue these points, and we therefore decline to address them. See Hawaiʻi Rules of Appellate Procedure Rule 28(b)(4) and (7) (stating that points not argued may be deemed waived).

IV. CONCLUSION

The portions of the "Final Judgment Under Rule 54(b) as to the April 12, 2007 Findings of Fact, Conclusions of Law, Order" filed on January 25, 2008 in the Circuit Court of the Fifth Circuit ordering Pilaʻa 400 to record a "Non Exclusive Grant of Easement in favor of [Andrade]" and ordering Pilaʻa 400 to pay Andrade's attorneys' fees and costs incurred in filing and litigating Andrade's July 16, 2007 Motion to Enforce and for Contempt are vacated and remanded for proceedings consistent with this opinion. The remainder of the "Final Judgment Under Rule

[18] Pilaʻa 400 argues that the circuit court erred by ordering it to pay Andrade's attorneys' fees and costs associated with filing Andrade's Preliminary Injunction Motion because Andrade did not file a motion for attorneys' fees and costs, Andrade requested reimbursements that are unawardable, and the award is excessive and unreasonable.

54(b) as to the April 12, 2007 Findings of Fact, Conclusions of Law, Order" is affirmed.

DATED: Honolulu, Hawaiʻi, November 30, 2010.

David J. Minkin
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and Donna E. Richards (Richards
and Zenger) and William C. Presiding Judge
McCorriston and Becky T.
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him on the briefs) for
Plaintiff/Counterclaim
Defendant-Appellant.

Associate Judge

Moses K.N. Haia III
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(Native Hawaiian Legal Corporation)
for Defendant/Counterclaimant-
Appellee Carlos Lawrence
Andrade. Associate Judge