NO. 29032

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

MAUNA KEA ANAINA HOU; ROYAL ORDER OF KAMEHAMEHA I;
SIERRA CLUB, HAWAIʻI CHAPTER; and CLARENCE CHING,
Plaintiffs/Appellants-Appellees/Cross-Appellants,
v.
UNIVERSITY OF HAWAIʻI INSTITUTE FOR ASTRONOMY,
Defendant/Appellee-Appellant/Cross-Appellee,
and
BOARD OF LAND AND NATURAL RESOURCES; HARRY FERGESTROM;
and HAWAIʻI ISLAND ECONOMIC DEVELOPMENT BOARD, INC.,
Defendants/Appellees-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 04-1-0397)

MEMORANDUM OPINION
(By: Foley, Presiding J., Circuit Judges Perkins and Lee,
in place of Nakamura, C.J., Fujise, Leonard, Reifurth,
and Ginoza, JJ., all recused)

Plaintiffs/Appellants-Appellees/Cross-Appellants Mauna Kea Anaina Hou; Royal Order of Kamehameha I; Sierra Club, Hawaiʻi Chapter; and Clarence Ching (collectively, Appellants) cross-appeal from the "Final Judgment *in Favor of* Appellants Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawaiʻi Chapter, and Clarence Ching and *Against* Appellees Board of Land and Natural Resources, State of Hawaiʻi, University of Hawaiʻi Institute for Astronomy, Harry Fergestrom, and Hawaiʻi Island

Economic Development Board, Inc." (Final Judgment) filed on January 29, 2008 in the Circuit Court of the Third Circuit[1] (circuit court). The Final Judgment

(1) incorporated the September 13, 2007 "Order Denying Appellants' Motion for Award of Attorneys' Fees and Taxation of Costs Filed on June 21, 2007" (Order Denying Fees/Costs), in which the circuit court denied attorneys' fees and costs to Appellants arising out of their appeal from the grant by the Board of Land and Natural Resources (BLNR) of a conservation-district use permit to Defendant/Appellee-Appellant/Cross-Appellee University of Hawaiʻi Institute for Astronomy (UHIFA); and

(2) reversed in part and affirmed in part BLNR's decision regarding the conservation-district use permit and related management plan.

The only issue before this court on appeal is the circuit court's denial of Appellants' attorneys' fees and costs, and Appellants contend the circuit court in its Order Denying Fees/Costs erred in finding as follows:

(1) "Even assuming arguendo that the [private attorney general] doctrine has been adopted in this State, the Court finds no basis for applying it to the particular circumstances of this case."

(2) "The Court further finds that Appellants' [Motion for Award of Attorneys' Fees and Taxation of Costs (Motion for Fees/Costs)] is not supported by any statute, rule of court, bad faith, agreement, or precedent."

I. BACKGROUND

Some of the facts set forth in this section are from the circuit court's January 19, 2007 "Decision and Order: (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea

[1] The Honorable Glenn S. Hara presided.

Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision and Order for Management Plan Dated October 29, 2004." The circuit court's findings are not challenged on appeal and are therefore binding on this court. Hui Kakoʻo Aina Hoʻopulapula v. Bd. of Land & Natural Res., 112 Hawaiʻi 28, 40, 143 P.3d 1230, 1242 (2006).

The summit of Mauna Kea is public land owned by the State of Hawaiʻi (State) under the jurisdiction of the BLNR and located in the Conservation District, in a Resource Subzone. In 1968, BLNR leased the Mauna Kea Science Reserve, located at the summit, to the University of Hawaiʻi (UH). The following year, UHIFA was established and "eventually assumed responsibility within the UH system for Mauna Kea."

UHIFA has addressed the development of astronomical research facilities at the summit in a number of planning documents, not all of which were approved by BLNR. UHIFA's 1985 Master Plan, approved by BLNR, included a "General Description of Planned Astronomy Development" for the reserve that included thirteen steel-framed, domed telescope facilities, including two 10-meter telescopes comprising the William M. Keck Observatory (Keck Observatory). In 1995, BLNR adopted a "Revised Management Plan," which superceded the 1985 plan, but "did not provide for the same scope or coverage" as the 1985 Master Plan. The 1995 plan was "virtually silent on the matter of future development of astronomy facilities on Mauna Kea." In 2000, UHIFA developed the Mauna Kea Science Reserve Master Plan (2000 Master Plan), which was adopted by the UH Board of Regents, but not approved by BLNR.

In 2001, UHIFA filed a Conservation-District Use Permit Application with BLNR to construct and operate up to six Outrigger Telescopes, adjacent to the Keck Observatory telescopes (Outrigger Telescopes Project). Initially, UHIFA did not submit a management plan that would support the project, but later

submitted a "project specific management plan" covering approximately five acres near the Keck Observatory.

Appellants and other parties requested a contested case hearing. Following the hearing, BLNR granted a permit to the Outrigger Telescopes Project and approved the management plan (Outrigger Management Plan) on October 29, 2004.

On November 29, 2004, Appellants filed an appeal with the circuit court contesting (1) BLNR's October 29, 2004, decision granting the conservation-district use permit (CDUP); (2) BLNR's October 29, 2004 Findings of Fact, Conclusions of Law and Decision and Order; (3) BLNR's October 29, 2004 Findings of Fact, Conclusions of Law and Decision and Order for Management Plan; and (4) all orders and rulings incorporated in these documents. Appellants contended: (1) BLNR erred by accepting UHIFA's conservation-district use permit application as complete where it lacked an environmental impact statement or environmental assessment and an "approved management plan"; (2) BLNR denied Appellants due process where it did not adequately notify interested parties that UHIFA sought approval of a management plan; (3) BLNR's notice of the contested case hearing did not adequately inform interested parties; (4) UHIFA's environmental assessments "failed to fully assess impacts of the UHIFA's Management Plan Drafts"; (5) BLNR erred by approving UHIFA's planning documents because they "were not comprehensive management plans designed to address long term 'cumulative land use proposals'" as required by Chapter 13 of the Hawaii Administrative Rules (HAR); (6) BLNR erroneously approved the CDUP; (7) BLNR failed to "properly evaluate and protect [Appellants'] PASH[2] rights to the extent feasible as required by Article XII, Section 7 of the Hawaiʻi Constitution"; (8) BLNR violated its public trust duties; (9) Appellants were denied due process when BLNR and its hearing officer did not allow

[2] Public Access Shoreline Hawaii v. Hawaiʻi Cnty. Planning Comm'n, 79 Hawaiʻi 425, 903 P.2d 1246 (1995) (holding that Native Hawaiians retained right, with regard to undeveloped land, to pursue traditional activities).

Appellants to present testimony regarding deficiencies in UHIFA's 2000 Master Plan; (10) BLNR denied Appellants due process by excluding Appellants' expert's testimony regarding the National Historic Preservation Act; and (11) BLNR failed "to collect fair market value lease rent from third-party non-state entities," in breach of trust and in violation of Hawaii Revised Statutes (HRS) Chapter 171.

The circuit court ruled in favor of Appellants and made the following conclusions of law, which are relevant to this appeal:

> 18. The plain meaning of the term "comprehensive management plan" and the DLNR's [Department of Land and Natural Resources'] own past interpretation of that term support the conclusion that, as a matter of law, DLNR Administrative Rule [HAR] § 13-5-24, for the R-3 Resource Subzone requires a management plan which covers multiple land uses within the larger overall area that UHIFA controls at the top of Mauna Kea in the conservation district.
>
> 19. The Outrigger Management Plan covers only a single project, *not* the comprehensive "multiple land uses" and large land area required by the definition of "management plan" in [HAR] § 13-5-2.
>
> 20. Thus, the Outrigger Management Plan does *not* qualify as a "management plan" under [HAR] § 13-5-24.
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> 21. A "management plan" under [HAR] § 13-5-24 is a precondition to granting a CDUP for the R3 Resource Subzone land use at issue here.
>
> 22. Although a Court will normally give deference to an agency's expertise and experience in its particular field, the agency's decision must be consistent with the legislative purpose in its own authorizing statute. In this instance, BLNR's decision approving the Outrigger Management Plan involves a mixed question of law and fact. However, BLNR's interpretation is not consistent with the Legislature's stated purpose in managing the Conservation District. [HRS] § 183C-1 expressly provides:
>
> > The legislature finds that lands within the state land use conservation district contain important natural resources essential to the preservation of the State's fragile natural ecosystems and the sustainability of the State's water supply. It is therefore, the intent of the legislature to conserve, protect and preserve the important natural resources of the State through **appropriate management** and use to promote their **long-term sustainability** and the public health, safety and welfare.
>
> [HRS] § 183C-1 (2005 Supp.) (emphasis added).

> 23. The resource that needs to be conserved, protected and preserved is the summit area of Mauna Kea, *not* just the area of the Outrigger Telescopes Project.
>
> 24. Allowing management plans on a project by project basis would result in foreseeable contradictory management conditions for each project or the imposition of special conditions on some projects and not others.
>
> 25. The consequence would be projects within a management area that do *not* conform to a comprehensive management plan.
>
> 26. This result would *not* be consistent with the purposes of appropriate management nor the promotion of long-term sustainability of protected resources required by [HRS] § 183-1.
>
> 27. The Court concludes that BLNR *failed* to follow the provisions of [HAR] § 13-5-24.
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> 28. [Appellants'] substantial rights have been prejudiced by the BLNR's approval of CDUP for UHIFA's Outrigger Telescopes Project and approval [of] the Outrigger Management Plan without an approved comprehensive management plan.
>
> 29. Because these legal determinations are dispositive, the Court does not need to reach any other legal or factual issues.

(Emphasis in original.)

On June 21, 2007, Appellants filed the Motion for Fees/Costs, requesting $218,895.99 in fees and $3,277.38 in costs. Appellants cited the private attorney general doctrine as the sole basis for an award of attorneys' fees.

UHIFA and BLNR filed opposition memoranda to the motion, and the Hawaiʻi Island Economic Development Board, Inc., filed a joinder in their memoranda.

The circuit court heard arguments on the motion on August 22, 2007. In support of the motion, Appellants' attorney stated that he had spent more than 700 hours working on the case, forgoing other work during that time, and that without the ability to recoup some attorneys' fees under the doctrine, fewer attorneys would be likely to take public-interest cases such as this in the future. Appellants' attorney also argued that the complex issues involved here could not be handled by pro se litigants. BLNR's attorney argued that the private attorney

general doctrine "should not be applied to BLNR when it acts a tribunal."

The parties argued over the applicability of a three-prong test set forth in In re Water Use Permit Applications, 96 Hawaiʻi 27, 29, 25 P.3d 802, 804 (2001) (Waiahole II). The circuit court denied Appellants' Motion for Fees/Costs, stating:

> [A]s to prong 2 [of Waiahole II], the Court basically is focusing on the aspect of . . . requiring that the government completely abandon the activity opposed by [Appellants].
>
> In this case it doesn't appear to the Court that the BLNR -- BLNR abandoned its responsibilities as opposed to, um interpreting the administrative rules and the applicable statutes in a manner that was adverse to [Appellants]. And the Court's view is that in that scenario it's not abandoning its role in the area as much as interpreting it in a manner that [Appellants] find not acceptable to them.

The circuit court acknowledged being sympathetic to attorneys working pro bono, but then stated:

> [O]n the other hand, um, I really have a problem about awarding fees in this type of a case. And I just can not [sic] see where there would be a logical limitation as to when fees would not be imposed any time there is an agency decision which involves some interpretation that affects, um, whatever we might want to put a spin on that involves public policy.

On September 13, 2007, the circuit court issued its Order Denying Fees/Costs, which provided in part:

> While the Supreme Court of Hawaii has reviewed the background of the [private attorney general] doctrine, it has never applied it. Even assuming arguendo that the doctrine has been adopted in this State, the Court finds no basis for applying it to the particular circumstances of this case. The Court further finds that the Appellants' motion is not supported by any statute, rule of court, bad faith, agreement, or precedent.

On January 29, 2008, the circuit court entered the Final Judgment, which provided:

> In accordance with Rules 54(b), 72(k) and 58 of the Hawaiʻi Rules of Civil Procedure [HRCP]; and
>
> Pursuant to the *Decision and Order: (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision*

> *and Order for Management Plan Dated October 29, 2004*, filed January 19, 2007 in this Court; and
>
> Pursuant to the *Order Denying Appellants' Motion for Award of Attorneys' Fees and Taxation of Costs Filed on June 21, 2007* filed September 13, 2007.
>
> All claims were resolved and no further claims remain in this case.
>
> There is no just reason for delay in entry of this Judgment.
>
> Therefore, JUDGMENT IS HEREBY EXPRESSLY ENTERED: (1) IN FAVOR OF Appellants MAUNA KEA ANAINA HOU, ROYAL ORDER OF KAMEHAMEHA I, SIERRA CLUB, HAWAIʻI CHAPTER, and CLARENCE CHING (collectively "Mauna Kea Appellants"), and AGAINST Appellees the BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAIʻI ("BLNR"), the UNIVERSITY OF HAWAIʻI INSTITUTE FOR ASTRONOMY ("UHIFA"), HARRY FERGESTROM, and the HAWAIʻI ISLAND ECONOMIC DEVELOPMENT BOARD, INC. on the claims adjudicated by this Court's January 19, 2007 Decision and Order; and (2) AGAINST Mauna Kea Appellants on their Motion for Attorneys' Fees pursuant to this Court's Order filed September 13, 2007.

UHIFA filed its notice of appeal on February 26, 2008, but subsequently moved to dismiss the appeal, which was approved by this court.[3] Appellants timely filed their notice of cross-appeal on February 28, 2008.

II. STANDARD OF REVIEW

"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. of State of Hawaiʻi, 120 Hawaiʻi 181, 197, 202 P.3d 1226, 1242 (2009) (Sierra Club II)[4] (internal quotation marks, citation, and brackets omitted). "An abuse of discretion occurs if the trial court has clearly exceeded the bounds of reason or has disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawaiʻi, 106

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[3] On August 8, 2008, UHIFA filed a motion to dismiss its appeal, which this court granted on September 2, 2008. Mauna Kea Anaina Hou, et al., v. Univ. of Hawaiʻi Inst. for Astronomy, 2008 WL 4147581 (Haw. App. Sept. 2, 2008).

[4] In this opinion, we will refer to Sierra Club v. Dep't of Transp. of State of Hawaiʻi, 120 Hawaiʻi 181, 202 P.3d 1226 (2009), as Sierra Club II; Sierra Club v. Dep't of Transp. of State of Hawaiʻi, 115 Hawaiʻi 299, 167 P.3d 292 (2007), as Sierra Club I; and both cases collectively as Sierra Club.

Hawaiʻi 416, 431, 106 P.3d 339, 354 (2005) (internal quotation marks and citation omitted).

III. DISCUSSION

A. JURISDICTION

In its Answering Brief, UHIFA argues that this court lacks jurisdiction because the Final Judgment was not a final, appealable judgment under Jenkins v. Cades Schutte Fleming & Wright, 76 Hawaiʻi 115, 869 P.2d 1334 (1994).

Pursuant to HRS § 91-15 (1993), "[r]eview of any final judgment of the circuit court under this chapter shall be governed by chapter 602." HRS § 602-57(1) (Supp. 2010) provides that this court has jurisdiction "[t]o hear and determine appeals from any court or agency when appeals are allowed by law." HRS § 641-1(a) (Supp. 2010) authorizes appeals to this court from "final judgments, orders, or decrees of circuit . . . courts." Appeals "shall be taken in the manner . . . provided by the rules of court." HRS § 641-1(c) (1993).

In Jenkins, the Hawaiʻi Supreme Court held:

> (1) An appeal may be taken from circuit court orders resolving claims against parties only after the orders have been reduced to a judgment and the judgment has been entered in favor of and against the appropriate parties pursuant to HRCP 58; (2) if a judgment purports to be the final judgment in a case involving multiple claims or multiple parties, the judgment (a) must specifically identify the party or parties for and against whom the judgment is entered, and (b) must (i) identify the claims for which it is entered, and (ii) dismiss any claims not specifically identified; (3) if the judgment resolves fewer than all claims against all parties, or reserves any claim for later action by the court, an appeal may be taken only if the judgment contains the language necessary for certification under HRCP 54(b); and (4) an appeal from any judgment will be dismissed as premature if the judgment does not, *on its face*, either resolve all claims against all parties or contain the finding necessary for certification under HRCP 54(b).
>
> . . . .
>
> . . . If claims are resolved by a series of orders, a final judgment upon all the claims must be entered. The "judgment shall not contain a recital of the pleadings," HRCP 54(a), but it must, *on its face*, show finality as to all claims against all parties. An appeal from an order that is not reduced to a judgment in favor of or against the party by the time the record is filed in the supreme court will be dismissed. If a judgment purports to be certified under HRCP 54(b), the necessary finding of no just reason for delay must be included in the judgment.

76 Hawaiʻi at 119-20, 869 P.2d at 1338-39 (citation and footnote omitted; emphasis in original).

HRCP Rule 72(k) requires that, upon a circuit court's determination of an administrative appeal, "the court having jurisdiction shall enter judgment." The requirements of Jenkins apply to circuit court judgments entered in appeals from agency decisions. Raquinio v. Nakanelua, 77 Hawaiʻi 499, 500, 889 P.2d 76, 77 (App. 1995) (applying Jenkins in an appeal from a decision by the Director of Labor and Industrial Relations).

The Final Judgment complies with the separate document rule of HRCP Rule 58, incorporating the "Decision and Order (1) Reversing BLNR's Decision Granting Conservation District Use Permit for the Construction and Operation of Six 1.8 Meter Outrigger Telescopes Within the Summit Area of the Mauna Kea Science Reserve Dated October 29, 2004; (2) Reversing BLNR's Finding[s] of Fact, Conclusions of Law and Decision and Order Dated October 29, 2004; and (3) Affirming in Part BLNR's Finding[s] of Fact, Conclusion[s] of Law and Decision and Order for Management Plan Dated October 29, 2004" and the Order Denying Fees/Costs. Moreover, the Final Judgment enters judgment as to all parties in the case and states that "[a]ll claims were resolved and no further claims remain in this case." The Final Judgment did not, however, address the eleven "claims for relief" or "counts" listed by Appellants in their statement of the case.

Nevertheless, the Final Judgment did contain an express finding that there was "no just reason for delay in entry of this Judgment." Thus, the Final Judgment contains the certification required by HRCP Rule 54(b) and Jenkins and is appealable.

Appellants' notice of cross-appeal was filed on February 28, 2008 -- two days following the filing of UHIFA's notice of appeal. Under Hawaiʻi Rules of Appellate Procedure Rule 4.1(b)(1), the notice of cross-appeal was timely. Therefore, we have jurisdiction to consider Appellants' appeal.

B. PRIVATE ATTORNEY GENERAL DOCTRINE

The sole issue on appeal is whether the circuit court erred in declining to award attorneys' fees to Appellants, undisputedly the prevailing party below. "Normally, pursuant to the 'American Rule,' each party is responsible for paying his or her own litigation expenses. This general rule, however, is subject to a number of exceptions: attorney's fees are chargeable against the opposing party when so authorized by statute, rule of court, agreement, stipulation, or precedent." Waiahole II, 96 Hawaiʻi at 29, 25 P.3d at 804 (internal quotation marks and citation omitted).

As a judicially-created exception to the American Rule, the private attorney general doctrine is "an equitable rule that allows courts in their discretion to award attorneys' fees to plaintiffs who have 'vindicated important public rights.'" Id. (internal quotation marks and citation omitted). At the time of the circuit court's decision, the doctrine had been discussed, but not expressly adopted, in two Hawaiʻi Supreme Court cases: Waiahole II and Maui Tomorrow v. State of Hawaiʻi Bd. of Land & Natural Res., 110 Hawaiʻi 234, 131 P.3d 517 (2006). During the pendency of the instant appeal, the Hawaiʻi Supreme Court expressly adopted the private attorney general doctrine and awarded attorneys' fees against the State of Hawaiʻi Department of Transportation (DOT) and Hawaii Superferry, Inc. (Superferry), a private company, based on the doctrine. Sierra Club II, 120 Hawaiʻi at 225, 202 P.3d at 1270.

In evaluating whether a party is entitled to attorney's fees under the doctrine, Hawaiʻi adopted the three-prong approach enunciated by the California Supreme Court.[5] Id. at 218, 202

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[5] The California Supreme Court adopted the doctrine in response to Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 95 S. Ct. 1612 (1975), which rejected the doctrine in federal courts. See Serrano v. Priest, 569 P.2d 1303, 1313 (Cal. 1977) (en banc); Ann K. Wooster, Annotation, Private Attorney General Doctrine -- State Cases, 106 A.L.R.5th 523, 557 (2003). The United States Supreme Court cautioned that the doctrine would allow courts to encroach "on a policy matter that Congress has reserved for
(continued...)

P.3d at 1263; see also Waiahole II, 96 Hawaiʻi at 29, 25 P.3d at 804. The three factors that the court considers when applying the doctrine are: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision." Sierra Club II, 120 Hawaiʻi at 218, 202 P.3d at 1263 (quoting Maui Tomorrow, 110 Hawaiʻi at 244, 131 P.3d at 527); see also Serrano v. Priest, 569 P.2d 1303, 1314 (Cal. 1977) (en banc).

C. APPLICATION OF THE THREE-PRONG TEST OF THE PRIVATE ATTORNEY GENERAL DOCTRINE

1. First Prong: Strength or Societal Importance of the Public Policy Vindicated by the Litigation

In the three Hawaiʻi Supreme Court cases discussing the private attorney general doctrine, the court concluded that the first prong was met in cases that involved "constitutional rights of profound significance," Waiahole II, 96 Hawaiʻi at 31, 25 P.3d at 806 (water rights case "involved constitutional rights of profound significance"); involved a provision of the Hawaiʻi Constitution, Maui Tomorrow, 110 Hawaiʻi at 244-45, 131 P.3d at 527-28; and established "the principle of procedural standing in environmental law," Sierra Club II, 120 Hawaiʻi at 220, 202 P.3d 1265.

In the instant case, the circuit court held that BLNR had failed to apply an administrative regulation: HAR § 13-5-24 (promulgated pursuant to HRS § 183C-3). Clearly, this was not a

(...continued)
itself," and leave courts "to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases." Alyeska, 421 U.S. at 269. The Supreme Court held that federal courts could not grant attorney's fees without statutory authorization and, in doing so, "invited Congress to instruct the courts as to which fee-shifting policies Congress wished the courts to enforce." David Shub, Private Attorneys General, Prevailing Parties, and Public Benefit: Attorney's Fees Awards for Civil Rights Plaintiffs, 42 Duke L.J. 706, 710 (1992).

case involving "constitutional rights of profound significance." However, the circuit court did not expressly address this first prong.

2. Second Prong: Necessity of Private Enforcement and the Magnitude of the Resultant Burden on the Plaintiff

The circuit court, in its oral findings, held that Appellants had not demonstrated their entitlement to attorneys' fees under the second prong of the test ("the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff"). This prong was not met by the plaintiffs in Waiahole II and Maui Tomorrow, but was satisfied by the plaintiffs in Sierra Club II. In Sierra Club II, the Hawaiʻi Supreme Court concluded that the State agency "wholly abandoned" its duty to the public, 120 Hawaiʻi at 221, 202 P.3d at 1266, and the plaintiffs were "solely responsible" for challenging DOT's interpretation of its duties. Id. at 220, 202 P.3d at 1265.

a. Waiahole II

Waiahole II was the second in a series of Hawaiʻi Supreme Court opinions concerning the "extended dispute over the water distributed by the Waiahole Ditch System, a major irrigation infrastructure on the island of Oʻahu supplying the island's leeward side with water diverted from its windward side." In re Water Use Permit Applications, 94 Hawaiʻi 97, 110, 9 P.3d 409, 422 (2000) (Waiahole I). Out of the twenty-five parties that had participated in the contested case hearing, id. at 113, 9 P.3 at 425, four parties (Windward Parties) requested attorneys' fees under the private attorney general doctrine. Waiahole II, 96 Hawaiʻi at 28, 25 P.3d at 803. The supreme court held that if it "were to embrace the doctrine as a general matter," the doctrine did not apply "to the particular circumstances" presented. Id. at 31, 25 P.3d at 806. In particular, the supreme court noted that "'the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff,' is less convincing" than cases applying the

doctrine. Id. (citing to Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 783 (Utah 1994); Serrano, 569 P.2d at 1315 n.20; Montanans for Responsible Use of Sch. Trust v. Montana ex rel. Bd. of Land Comm'rs., 989 P.2d 800, 812 (Mont. 1999)). The supreme court stated that in the other cases, the plaintiffs had "served as the sole representative of the vindicated public interest" and "[t]he government either completely abandoned, or actively opposed, the plaintiff's cause." Waiahole II, 96 Hawaiʻi at 31, 25 P.3d at 806. The supreme court further stated that the Windward Parties, on the other hand, "represented one of many competing public and private interests in an adversarial proceeding before the governmental body designated by constitution and statute as the primary representative of the people with respect to water resources." Id. The supreme court concluded:

> The relevant point, of course, is not the extent of the Windward Parties' success on appeal, but, rather, the role played by the government. In sum, unlike other cases, in which the plaintiffs single-handedly challenged a previously established government law or policy, in this case, the Windward Parties challenged the decision of a tribunal in an adversarial proceeding not contesting any action or policy of the government. The Windward Parties cite no case in which attorneys' fees were awarded in an adversarial proceeding against a tribunal and the losing parties and in favor of the prevailing party, based on the reversal of the tribunal's decision on appeal. Nor does such a rule appear prudent from a policy standpoint, where public tribunals in adversarial settings must invariably consider and weigh various "public interests." Therefore, we hold that this case does not qualify for an award of attorneys' fees under the conventional application of the private attorney general doctrine.

Id. at 32, 25 P.3d at 807. The court in Waiahole II reasoned that because there were so many parties to the contested case advocating for different positions, an attorney's fee award was an unnecessary incentive for the litigants.

b. Maui Tomorrow

In Maui Tomorrow, the Hawaiʻi Supreme Court found in favor of the opponents as to the second prong to the extent the opponents contested "a policy of the BLNR to lease water rights without performing the required analysis," but found that the

second prong was not satisfied because the State "did not 'abandon' or 'actively oppose' [the opponents'] cause." 110 Hawai'i at 245, 131 P.3d at 528. The court reasoned that BLNR "recognized the State's 'duty to protect'" Hawaiian traditional and customary rights "to the extent feasible," but acted upon the belief that another agency "was the appropriate agency to fulfill the State's duty." Id.

c. Sierra Club

In Sierra Club II, the Hawai'i Supreme Court quoted from its opinion in Maui Tomorrow, mentioning that the court had been "careful to note . . . that the policy [challenged by the opponents in Maui Tomorrow] was the result of an 'erroneous' understanding between two state agencies, rather than actions by the State to abandon or actively oppose the [opponents'] cause." Sierra Club II, 120 Hawai'i at 220, 202 P.3d at 1265. In contrast to the BLNR in the Maui Tomorrow case, the supreme court held that DOT "wholly abandoned [its] duty" under HRS Chapter 343 to get an environmental assessment by "issuing an erroneous exemption to Superferry." Sierra Club II, 120 Hawai'i at 221, 202 P.3d at 1266. The court held that by exempting the Superferry from the standard environmental review process, DOT "simply did not recognize its duty to consider both the primary and secondary impacts of the Superferry project on the environment." Id.

d. Mauna Kea

The instant case is similar to Sierra Club in that Sierra Club II "clarified DOT's responsibilities under HRS [C]hapter 343," 120 Hawai'i at 221, 202 P.3d at 1266, and the instant case clarified BLNR's duties under HAR § 13-5-24. Appellants rely on this clarification as evidence that BLNR "wholly abandoned" its responsibilities for managing conservation-district land. Appellants argue that "[a]s in Sierra Club, the State Defendants simply did not recognize their duty and refused to carry it out." However, the instant case is

distinguishable from Sierra Club in factual and procedural respects.

First, DOT's grant of an exemption from the preparation of an environmental assessment at issue in Sierra Club differs from the grant of a permit and approval of the management plan here. DOT's February 2005 exemption determination was made "[f]ollowing discussions with Hawaii Superferry and consultation with State and County agencies regarding the intended use of the [Kahalui] harbor facility and in consideration of the provisions in Chapter 343, [HRS] and Chapter 11-20 [HAR]." Sierra Club I, 115 Hawaiʻi at 310, 167 P.3d at 303. In contrast, BLNR's decision was made following a contested case hearing, in which six non-State parties participated in hearings over eight days.[6]

Second, Sierra Club followed a direct action in the circuit court. Sierra Club I, 115 Hawaiʻi at 311, 167 P.3d at 304 (Sierra Club and other environmental groups filed a complaint "for declaratory, injunctive and other relief" against, inter alia, DOT and Superferry). As in Waiahole II and Maui Tomorrow, the instant case stems from an appeal from an agency decision.

In Sierra Club I, the supreme court stated:

> Contrary to the expressly stated purpose and intent of [the Hawaiʻi Environmental Policy Act], the public was prevented from participating in an environmental review process for the Superferry project by DOT's grant of an exemption to the requirements of HRS [C]hapter 343. . . . "All parties involved and society as a whole" would have benefitted had the public been allowed to participate in the review process of the Superferry project, as was envisioned by the legislature when it enacted the Hawaiʻi Environmental Policy Act.

115 Hawaiʻi at 343, 167 P.3d at 336. In contrast to the Superferry case where public participation was cut off by DOT's abandonment of its duties, Appellants participated in the agency proceedings below.

In Waiahole II, the supreme court suggested that it was inclined to adopt a rule that forbids attorney's fees in all

[6] Although Appellants complain of defects in notice provided prior to the contested case hearing, the circuit court made no determination regarding the adequacy of the notice provided.

appeals from contested cases when it asserted that "such a rule" awarding fees "in an adversarial proceeding against a tribunal and the losing parties and in favor of the prevailing party, based on the reversal of the tribunal's decision on appeal" would not be "prudent from a policy standpoint." 96 Hawaiʻi at 32, 25 P.3d at 807.

Given the foregoing, we cannot conclude the circuit court abused its discretion to the extent it held Appellants did not satisfy this second prong.

3. Third Prong: The number of people standing to benefit from the decision

Because Appellants did not satisfy the second prong, there is no need to address the number of people standing to benefit from the decision, as required by the third prong. In Waiahole II, the supreme court held that the private attorney general doctrine did not apply because although the plaintiffs met the "first and third prongs of the doctrine's three-prong test," they failed to satisfy the second prong. 96 Hawaiʻi at 31, 25 P.3d at 806.

Therefore, we conclude the circuit court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to Appellants' substantial detriment.

D. SOVEREIGN IMMUNITY

Because we are affirming the Final Judgment of the circuit court based on its holding that Appellants failed to satisfy the three prongs of the private attorney general doctrine, there is no need to address the parties' arguments concerning the applicability of sovereign immunity.

IV. CONCLUSION

The "Final Judgment *in Favor of* Appellants Mauna Kea Anaina Hou, Royal Order of Kamehameha I, Sierra Club, Hawaiʻi Chapter, and Clarence Ching and *Against* Appellees Board of Land and Natural Resources, State of Hawaiʻi, University of Hawaiʻi

Institute for Astronomy, Harry Fergestrom, and Hawaiʻi Island Economic Development Board, Inc." filed on January 29, 2008 in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, May 24, 2011.

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