NO. CAAP-15-0000519

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

GARY T. OTA, Trustee of the Revocable Trust
of Gary T. Ota Dated November 29, 1999,
Plaintiff/Appellee/Cross-Appellant,
v.
EDWINA K. LLANES, NORA K. KAHAKUA, MARY ANN P. TREMAINE,
Defendants/Appellants/Cross-Appellees,
and
DOREEN L. LABATTE,
Defendant/Appellee/Cross-Appellant,
and
KAIWI, HEIRS AND ASSIGNS OF KAIWI; HEIRS AND ASSIGNS OF CHRISTIAN CASTENDYK; KAUKO, HEIRS AND ASSIGNS OF KAUKO; PAAOAO (aka POOKAI PAAOAO, aka P. PAAOAO), HEIRS AND ASSIGNS OF PAAOAO; MELEANA KAAILEHUA (aka MARIANA KAAILEHUA, aka MARIANNE KAAILEHUA, aka MAY ANN KAAILEHUA), HEIRS AND ASSIGNS OF KAAILEHUA; HEIRS AND ASSIGNS OF JESSE ANDRE (aka JESSE PAAOAO); MILDRED T. FIELDS, HEIRS AND ASSIGNS OF MILDRED T. FIELDS; HEIRS AND ASSIGNS OF JOHN K. PAAOAO (aka JOHN KALUHIWA PAAOAO); HEIRS AND ASSIGNS OF KAILIENA KALUHIWA (w) (aka LILY KAILIENA KALUHIWA); JOHN K. NAPULOU; KAHUE 2, HEIRS AND ASSIGNS OF KAHUE 2; PIALAE, KAHOOKANO, Z. WAIAU, UMIOKALANI (w), HAWAII (w), HIKA, and THEIR RESPECTIVE HEIRS AND ASSIGNS; KALIAI, HEIRS AND ASSIGNS OF KALIAI; HOOLAPA, HEIRS AND ASSIGNS OF HOOLAPA; OFFICE OF HAWAIIAN AFFAIRS; STATE OF HAWAIʻI; COUNTY OF HAWAIʻI; KAHUE 1, HEIRS AND ASSIGNS OF KAHUE 1; HAWAII ELECTRIC AND LIGHT COMPANY, INC.; HAWAIIAN TELCOM, INC.; KAZUO OTA; GENE OTA; LYDIA C. OTA (aka LYDIA C. GANIR); RONALD OTA; ISAAC OTA; LORRAINE KAWANO; GEORGE OTA and SUMIYE OTA; and the following owners or occupants of adjoining lands, MARTHA E. FORFELD, TRUSTEE; BRIAN JENKINS; CRAVAT LEI JENKINS; JAMES I. JENKINS; JOHN GOODELL; MATTHEW N. BOLTON; STEPHANIE C. BOLTEN; KAZUO FUKUMITSU; JOANNA T. FUKUMITSU, TRUSTEE; RAYMOND I. FUKUMITSU, TRUSTEE; KENJI FUKUMITSU; THOMAS T. FUKUMITSU, TRUSTEE; JEAN R. FUKUMITSU, TRUSTEE; YASUO FUKUMITSU;
Defendants/Appellees/Cross-Appellees,
and
JOHN DOES 1-50; JANE DOES 1-50; JOHN DOE ENTITIES 1-50,
Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 13-1-205K)

SUMMARY DISPOSITION ORDER
(By: Foley, Presiding J., Fujise and Ginoza, JJ.)

Defendants/Appellants/Cross-Appellees Edwina K. Llanes (**Llanes**), Nora K. Kahakua (**Kahakua**), and Mary Ann P. Tremaine (**Tremaine**) (collectively, **Defendants**) appeal pro se,[1] and Defendant/Appellee/Cross-Appellant Doreen Labatte (**Labatte**) cross-appeals pro se separately, from the "Findings of Fact, Conclusions of Law and Order" (**Count Five FOF/COL**) entered on June 10, 2015 in the Circuit Court of the Third Circuit[2] (**circuit court**). Plaintiff/Appellee/Cross-Appellant Gary T. Ota, Trustee of the Revocable Trust of Gary T. Ota Dated November 29, 1999 (**Gary**) cross-appeals from the "Rule 54(b), HRCP Judgment" (**Judgment**) entered on September 3, 2015 in the circuit court.[3]

On appeal, Defendants contend the circuit court erred

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[1] We note that Defendants' notice of appeal also lists "Plaintiff's Motion for Taxation of Costs Against Defendants Edwina K. Llanes et al. (Count Five LCA 8149: 1 & 2)" filed on June 26, 2015 and "Plaintiff's Motion for Taxation of Costs Against Defendants Edwina K. Llanes, et al. (Count Eight, Grant 1636)" filed on June 26, 2015. Appeals in civil matters may only be from "final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate appellate court[.]" Hawaii Revised Statutes § 641-1(a) (Supp. 2015).

[2] The Honorable Melvin Fujino presided.

[3] Defendants' notice of appeal and Labatte's notice of cross-appeal fail to designate the circuit court's September 3, 2015 Judgment in their appeal. This, however, is not fatal to their arguments on appeal because Hawaiʻi Rules of Appellate Procedure (**HRAP**) Rule 3(c)(2) provides, "[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal." Hawaiʻi appellate courts have generally interpreted HRAP Rule 3(c)(2) to mean that "a mistake in designating the judgment should not result in loss of the appeal as long as the intention to appeal from a specific judgment can be fairly inferred from the notice and the appellee is not misled by the mistake." Ek v. Boggs, 102 Hawaiʻi 289, 294, 75 P.3d 1180, 1185 (2003) (ellipsis omitted) (quoting State v. Graybeard, 93 Hawaiʻi 513, 516, 6 P.3d 385, 388 (App. 2000)). Here, no party has been misled by the mistake in designation and we can fairly infer from the notices that Defendants and Labatte seek appellate review of the circuit court's Judgment, which would give this Court appellate jurisdiction over all of the circuit court's preliminary rulings challenged in this appeal. See Weinberg v. Mauch, 78 Hawaiʻi 40, 46, 890 P.2d 277, 283 (1995) ("[W]hen an order is properly certified pursuant to [Hawaiʻi Rules of Civil Procedure (**HRCP**)] Rule 54(b), the certification 'necessarily renders every preliminary ruling upon which it was predicated final and appealable as well.'" (brackets omitted) (quoting S. Utsunomiya Enters., Inc., v. Moomuku Country Club, 75 Haw. 480, 495, 866 P.2d 951, 960 (1994)).

by (1) determining that Gary adversely possessed the property at issue in its Count Five FOF/COL; (2) denying Defendants' right to a jury trial; (3) determining that Gary proved color of title; (4) denying the admission of some of Defendants' telephone directory exhibits; and (5) entering its Count Five FOF/COL when Gary failed to give proper notice to other interested parties.

Related to the circuit court's Count Five FOF/COL, Gary contends "[t]he [circuit] court erred in allowing Defendant [Llanes] to testify that her great-grandfather Lui Louis Walawala Hoolapa was the son of the awardee of Land Commission Award 8149 (Hoolapa) and in admitting the Defendants' Exhibit M-17 in evidence at trial to that effect."

Labatte contends the circuit court failed to apply the applicable summary judgment standard when it granted summary judgment in Gary's favor as to Count Two of Gary's complaint and "committed reversible error when it prematurely dismissed counts seven and nine of [Gary's] complaint, without first affording [Labatte] the right to challenge the dismissal."

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve the various points of error as follows:

I. Adverse Possession

Defendants argue that "[Gary] did not prove by clear and positive proof that [Gary, his father, Kazuo Ota (**Kazuo**), and his grandfather, Isamu Ota (**Isamu**) (collectively, **Otas**)] adversely possessed . . . Hoolapa's Property as a matter of law." Specifically, Defendants argue that Gary did not adversely possess "Land Commission Award 8149: 1 & 2 to Hoolapa, Royal Patent 3969" (**LCA 8149**) because Gary and Kazuo "testified under oath they did not know the location of either apana[4] 1 or 2 [of

[4] In Hawaiian, ʻāpana means "section, segment, installment, part, land parcel, lot[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary at 28 (1986). "A kuleana, land division, may consist of several ʻāpana[.]" Id.

LCA 8149.]"

> In order to establish title to real property by adverse possession, a claimant "'must bear the burden of proving by clear and positive proof each element of actual, open, notorious, hostile, continuous, and exclusive possession for the statutory period.'" Petran[v. Allencastre, 91 Hawaiʻi 545, 556–57, 985 P.2d 1112, 1123–24 (1999)]. Actual, open, and notorious possession is established where a claimant shows "'use of the land to such an extent and in such a manner as to put the world on notice' by means 'so notorious as to attract the attention of every adverse claimant.'" Morinoue[v. Roy, 86 Hawaiʻi 76, 82, 947 P.2d 944, 950 (1997)]. "The element of hostility is satisfied by showing possession for oneself under a claim of right," and "such possession must import a denial of the owner's title." Petran, 91 Hawaiʻi at 557, 985 P.2d at 1124. Continuity and exclusivity of possession require that the "adverse possessor's use of a disputed area rise to that level which would characterize an average owner's use of similar property." Id.

Wailuku Agribusiness Co. v. Ah Sam, 114 Hawaiʻi 24, 33-34, 155 P.3d 1125, 1134-35 (2007) (brackets, footnote, and parentheticals omitted).

Whether Gary and Kazuo were aware of the legal boundaries of LCA 8149 is irrelevant to Gary's adverse possession claim. See Hustace v. Jones, 2 Haw. App. 234, 235-36, 629 P.2d 1151, 1152 (1981) (holding that plaintiff adversely possessed land up to the fence line where he mistakenly believed the fence was the boundary to his property and where he satisfied other elements of adverse possession); see also Booth v. Beckley, 11 Haw. 518, 523 (Haw. Rep. 1898) ("When a person enters land under color of title or under a mistake as to description and holds adversely continuously, openly and notoriously for the statutory period, a title by limitation may be acquired by him.").

Gary and Kazuo testified that they each did not know that they were working on Apana 1 and 2 of LCA 8149. The circuit court found since 1941 the Otas had made use of the land that constituted Apana 1 and 2 of LCA 8149 by building roads and walls, planting vegetables, grazing cattle, and clearing trees. The circuit court further found that the Otas referred to the land in LCA 8149 as "our land" and "[a]t no time did anyone approach [the Otas] to claim that [Kazuo or Gary] were not the owners of Apana 1 or Apana 2 or to demand that [Kazuo or Gary] surrender Apana 1 or Apana 2 to others."

Defendants do not challenge any of the circuit court's relevant findings of fact and, therefore, they are binding on this court. See Okada Trucking Co. v. Bd. of Water Supply, 97 Hawaiʻi 450, 459, 40 P.3d 73, 82 (2002) ("[U]nchallenged factual findings are deemed to be binding on appeal, which is to say no more than that an appellate court cannot, under the auspices of plain error, sua sponte revisit a finding of fact that neither party has challenged on appeal."). The circuit court concluded that the Otas' use of LCA 8149 was actual, open, exclusive, continuous, and under a claim of right for more than seventy years satisfy the elements of adverse possession. Based on its undisputed findings of fact, the circuit court's conclusion that the Otas proved adverse possession was not erroneous. See Wailuku Agribusiness Co., 114 Hawaiʻi at 33-34, 155 P.3d at 1134-35.

II. Jury Trial

Defendants mention the circuit court's denial of their request for a jury trial in their points of appeal, stating, "Did the lower court erred [sic] denying appellant right to trial by jury[?]" Defendants, however, provide no argument to support their challenge and provide no citation to the record to support their point of appeal. Therefore, we deem Defendants' jury trial argument waived. See HRAP Rule 28(b)(4).[5]

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[5] HRAP Rule 28(b)(4) mandates that opening briefs contain:

> **Rule 28. BRIEFS.**
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> **(b) Opening brief.** Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
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> . . . .
>
> (4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . .

(continued...)

III. Color of Title

Defendants argue that Gary failed to demonstrate that the grantors named in a warranty deed executed in 1896 had an interest in LCA 8149 conveying interest in the land to F.W. Bartels (**Bartels**).[6] LCA 8149 was, according to land commission records, originally awarded to Awardee Hoolapa. A review of the record indicates that in 1896 six named individuals, Kahanakumole, Pilipo, Mele, Kawai, Manamana, and Wailea Kaliai (collectively, **1896 Grantors**) conveyed Apana 1 and 2 of LCA 8149 to Bartels through a warranty deed (**1896 Warranty Deed**). The 1896 Warranty Deed stated:

> All that certain piece or parcel of land situate at Lanihau, N. Kona, in said Island of Hawaii containing an area of 2 acres 83/100, 2 pieces, and being the same more particularly described in Royal Pat No. 3969, Kuleana No. 8149 awarded to Hoolapa (k) - also that certain kuleana awarded to Kaliai Royal Pat. No. 3970, Kuleana No. 7476, containing 1 90/100 acres[.] The above mentioned and described parcels of land were inherited by us from our father Kaliai and our uncle Hoolapa, the latter having no issue of his own.

(Emphasis in original omitted.) (Emphasis added.)

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[5](...continued)

. . . .

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

(Emphases added.)

[6] Defendants also claim that "if there was no valid conveyance of the real property from Hoolapa, or by his son Lui Hoolapa before their deaths by [the] 1920's, their interest in the Property passed outside of probate as a matter of law to [Defendants]." The circuit court, however, considered the evidence that Defendants presented to support their assertions that Defendants' ancestors inherited or owned LCA 8149, and determined that Defendants' assertion "lack[ed] reliability and trustworthiness because it is at odds with the beliefs of their own elders and because the Defendants do not have personal knowledge of the facts that they wish to substitute for their elders' belief and did not produce any document to support their assertion." (Footnote omitted). "An appellate court will not pass upon issues dependent upon credibility of witnesses and the weight of the evidence; this is the province of the trial judge." Nani Koolau Co. v. K & M Const., Inc., 5 Haw. App. 137, 140, 681 P.2d 580, 584 (1984) (quoting Shannon v. Murphy, 49 Haw. 661, 667, 426 P.2d 816, 820 (1967)). Therefore, the circuit court's credibility determination must remain undisturbed.

Hawaii Rules of Evidence (**HRE**) Rule 803(b)(15) (1993)[7] provides that statements in documents affecting an interest in property may be introduced for the truth of the matter asserted if the statement is relevant to the purpose of the document and the circumstances do not indicate a lack of trustworthiness. See Maui Land & Pineapple Co. v. Infiesto, 76 Hawaiʻi 402, 406-07, 879 P.2d 507, 511-12 (1994) (holding that, pursuant to HRE Rule 803(b)(15), the circuit court did not err in considering a deed's recital that a property was "lawfully seized in fee simple" and "clear and free of all encumbrances" where there was no question as to trustworthiness of the deed); see also Apo v. Dillingham Inv. Corp., 57 Haw. 64, 67-68, 549 P.2d 740, 743 (1976) (providing that a declaration in a deed about family history or pedigree are admissible under HRE Rule 803(15) and are among the oldest exceptions to the hearsay rule). The 1896 Grantors' recital that they inherited LCA 8149 from "[their] father Kaliai and [their] uncle Hoolapa, the latter having no issue of his own" is relevant to show the 1896 Grantors' interest in the land and is, therefore, admissible hearsay. See HRE Rule 803(b)(15). Nothing in the record indicates, nor do the Defendants allege, that the 1896 Warranty Deed or the Grantors' recital in the deed lack trustworthiness.

The circuit court found that Defendants' ancestors did not question or challenge the 1896 Warranty Deed, nor did the Defendants' ancestors challenge Bartel's occupancy and status as

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[7] HRE Rule 803(b)(15) provides:

> **Rule 803 Hearsay exceptions; availability of declarant immaterial.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
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> . . . .
>
> (b) Other exceptions.
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> . . . .
>
> (15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless the circumstances indicate lack of trustworthiness.

record taxpayer of LCA 8149, even though they had constructive knowledge of the 1896 Warranty Deed. In addition, the circuit court found that Defendants' ancestors made no reference to LCA 8149 at all when taking inventory of family members' estates. Defendants do not challenge theses factual determinations in this appeal. Therefore, based on the circuit court's unchallenged findings of fact, the circuit court's determination that the 1896 Grantors were the heirs of Awardee Hoolapa and conveyed their interest in LCA 8149 to Bartels was not erroneous.

IV. Telephone Directory Exhibits

Defendants contend the circuit court erred by not allowing them to admit copies of the Hawaiʻi County telephone directory as exhibits during trial. Defendants do not indicate where in the record this alleged error occurred. See HRAP Rule 28(b)(4)(ii). Based on our review of the record, the circuit court admitted the copies of the telephone directory to show that Kazuo and Christian Castendyk were "in the phone book for Hawaii County" without any objections from Defendants. Defendants' argument is, therefore, without merit.

V. Sufficiency of Summons

On appeal, Defendants appear to argue that the circuit court's Count Five FOF/COL is void because Gary did not include Kamahiai's name in the summons and, therefore, failed to give timely notice to Defendants and Tremaine's spouse, who is allegedly a descendent of Kamahiai.[8] Defendants argue that because of the insufficient notice, Defendants could not file a timely response to the Complaint and Tremaine's spouse could not participate in the quiet title proceedings.

"'[T]he requirements of standing to appeal are: (1) the person must first have been a party to the action; (2) the person seeking modification of the order or judgment must have had

[8] We note that Kamahiai's land interest relates to "portions of Grant 1636 to Kamahiai," as indicated in Count Eight of Gary's Complaint, not LCA 8149, which was the land interest at issue in the circuit court's Count Five FOF/COL. Defendants argue that Grant 1636 is related to this point on appeal because Gary's "complaint to quiet title and partition and surveys does [sic] mentions Grant 1636 and testified by [Gary] during trial."

standing to oppose it in the trial court; and (3) such person must be aggrieved by the ruling,' i.e., the person must be 'one who is affected or prejudiced by the appealable order.'" Kepoʻo v. Watson, 87 Hawaiʻi 91, 95, 952 P.2d 379, 383 (1998) (brackets omitted) (quoting Waikiki Malia Hotel, Inc. v. Kinkai Props., Ltd. P'ship, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993)). After the circuit court heard arguments at its January 17, 2014 hearing on Gary's December 10, 2013 Motion for Summary Judgment (**MSJ**), including Tremaine's arguments that Gary's summons gave insufficient notice to Kamahiai's heirs, the circuit court granted the Defendants a continuance and permitted all interested parties to file written positions on Count Five and Count Eight of Gary's Complaint. Tremaine's husband did not file a written position with the court, nor did he file a motion to intervene, and therefore Tremaine's spouse does not have standing in this appeal to challenge the circuit court's Count Five FOF/COL. See Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawaiʻi 438, 506, 164 P.3d 696, 764 (2007) (holding that former employees did not have standing to appeal various lower court orders where former employees were not parties to underlying foreclosure action and where they failed to intervene pursuant to HRCP Rule 24).

Furthermore, even assuming arguendo Gary's summons was insufficient and that the insufficient summons prevented Defendants from filing timely responses, Defendants fail to demonstrate how they were harmed by the alleged error given that the circuit court gave Defendants several opportunities to raise defenses against Gary's Complaint. First, the circuit court accepted Tremaine's and Kahakua's initial response as timely, without objection by Gary. Second, at the January 17, 2014 MSJ hearing, the circuit court granted Defendants leave to file written positions as to Count Five and Count Eight of Gary's Complaint. Defendants then filed their position statements with the court , as well as other oppositions to Count Five and Count Eight, and submitted evidence in support of their oppositions. Defendants had ample opportunity to oppose Gary's Complaint and motions for summary judgment. Any potential errors in Gary's

summons, as it relates to Count Five and Count Eight of Gary's Complaint, were therefore harmless. See Bank of Hawaii v. Shinn, 120 Hawaiʻi 1, 3, 200 P.3d 370, 372 (2008) ("[A]lthough the failure to provide notice . . . to a party in default is error, such error was harmless under the circumstances of this case."); see also Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawaiʻi 217, 245, 953 P.2d 1315, 1343 (1998) ("A constitutional error is harmless so long as 'the court is able to declare a belief that it was harmless beyond a reasonable doubt.'" (ellipsis and brackets omitted) (quoting Chapman v. California, 386 U.S. 18, 24 (1966))).

VI. Hoolapa Family Chart Exhibit

Gary contends the circuit court erred by "allowing the Defendant [Llanes] to testify that her great-grandfather Lui Louis Walawala Hoolapa was the son of the awardee of [LCA] 8149 (Hoolapa) and in admitting the Defendants' Exhibit M-17 in evidence at trial to that effect." Exhibit M-17 was entitled "Hoolapa Family Chart" and contained several government documents that Llanes relied upon to prove her relationship to Awardee Hoolapa, including a birth certificate of Llanes' great-grandfather, Lui Hoolapa, listing his father's name as "Hoolapa". During trial, Llanes testified that Awardee Hoolapa was her great-great grandfather and cited to the documents in Exhibit M-17 as the basis of her testimony. The circuit court determined that Llanes established a sufficient foundation for her testimony and received Exhibit M-17 into evidence.

Notwithstanding Llanes testimony and exhibit M-17, the circuit court found in its Count Five FOF/COL that "(a) Awardee Hoolapa died without children of his own and (b) the grantors were the Awardee Hoolapa's nephews and nieces who by intestacy were his heirs as law." The circuit court ultimately determined that Gary "is the owner of the land covered by [LCA] 8149, Apana 1 and Apana 2, in fee simple[.]" Thus, even if the circuit court erroneously admitted Llanes' testimony and Exhibit M-17, such an

error was harmless. See HRCP Rule 61.[9]

VII. Summary Judgment

Labatte argues that the circuit court erred in granting summary judgment in Gary's favor as to Count Two concerning "Land Commission Award 7367: 1 to Kauko, Royal Patent 3971" (**LCA 7367**). Specifically, Labatte contends that Gary "FAILED to meet his burden of showing how his title to the real property in this action was SUPERIOR to that of [Labatte]" because (1) there was not "any evidence that Kane and Kaluhiwa were even related to [Awardee] Kauko, or that they were the 'sole heirs of [Awardee] Kauko, either lineally or collaterally'" and (2) "[t]he paying of land taxes, in and of itself, is NOT sufficient to establish SUPERIORITY OF TITLE." (Emphases in original.).

> In an action to quiet title, the burden is on the plaintiff to prove title in and to the land in dispute, and, absent such proof, it is unnecessary for the defendant to make any showing. State v. Zimring, 58 Haw. 106, 110, 566 P.2d 725, 729 (1977) (citations omitted). The plaintiff has the burden to prove either that he has paper title to the property or that he holds title by adverse possession. Hustace v. Jones, 2 Haw. App. 234, 629 P.2d 1151 (1981); see also Harrison v. Davis, 22 Haw. 51, 54 (1914). While it is not necessary for the plaintiff to have perfect title to establish a prima facie case, he must at least prove that he has a substantial interest in the property and that his title is superior to that of the defendants. Shilts v. Young, 643 P.2d 686, 689 (Alaska 1981). Accord Rohner v. Neville, 230 Or. 31, 35, 365 P.2d 614, 618 (1961), reh'g denied, 230 Or. 31, 368 P.2d 391 (1962).

Maui Land & Pineapple Co., 76 Hawaiʻi at 407–8, 879 P.2d at 512–13; Makila Land Co., LLC v. Kapu, 114 Hawaiʻi 56, 58, 156 P.3d 482, 484 (App. 2006).

The circuit court found that Gary received title to

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[9] HRCP Rule 61 states:

> **Rule 61. HARMLESS ERROR.**
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> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Apana 1 of LCA 7367 through a chain of title starting from Awardee Kauko, which passed directly to Awardee Kauko's daughter, Kane, "by descent." Although Labatte argues on appeal that the facts were insufficient to establish that Kane was related to Awardee Kauko, this issue was undisputed below and in fact we must note that Labatte also claims ownership to Awardee Kauko's LCA 7367 through Kane. In fact, the circuit court cited to a genealogical statement that Labette filed with the court to establish that Kane was the daughter of Awardee Kauko. See HRE Rule 803(b)(19).[10] The circuit court found:

> 5. Based on the submissions filed by the parties herein, it is undisputed that Kauko, the original awardee of LCA 7367, had a lineal descendant whose name appears in publicly recorded documents as "Kane."
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> 6. According to the genealogical statements filed herein by Defendant [Labatte], this person called Kane in publically recorded documents was the daughter of Kauko.
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> 7. According to [Labatte] Kane's traditional name is "Kana" (w) or "Kana Kalahuaihaihaipuaani."

(Emphases added and footnote omitted.) The circuit court concluded:

> 3. All of the parties trace their respective claims to Kane, who is their common source of title.
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> a. [Gary's] claim is based on Kane's 1898 deed to F.W. Bartels and then through mesne conveyances made by F.W. Bartels, his successors and assigns.
>
> b. The other parties' claims are based on descent and on the assumption that Kane's 1898 deed to F.W. Bartels is invalid and failed to convey Kauko's land to F.W. Bartels (Apana 1 of LCA 7367, Royal Patent 3971).

(Emphasis added.)

Labatte provides no argument as to how the circuit court erred in its factual findings. The circuit court did not

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[10] HRE Rule 803(b)(19) provides a hearsay exception for:

> (19) [r]eputation concerning personal or family history. Reputation among members of the person's family by blood, adoption, or marriage, or among the person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of the person's personal or family history.

err in finding that Kane was a lineal descendant of Awardee Kauko. See Querubin v. Thronas, 107 Hawaiʻi 48, 56, 109 P.3d 689, 697 (2005) ("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." (brackets omitted) (quoting Hawaii Community Federal Credit Union v. Keka, 94 Hawaiʻi 213, 221, 11 P.3d 1, 9 (2000))).

Labatte also argues Gary failed to show that he had a superior interest in LCA 7367 because "[t]he paying of land taxes, in and of itself, is NOT sufficient to establish SUPERIORITY OF TITLE." While the circuit court did mention the LCA 7367's property tax records in its findings of fact, the circuit court did not determine that Gary's title to LCA 7367 was based solely on the property's tax records, as Labatte contends. See Lai v. Kukahiko, 58 Haw. 362, 368, 569 P.2d 352, 356 (1977) ("Although nonpayment of taxes for a long period of time detracts from the strength of appellees' present claim of ownership, it has never been held to be a controlling factor." (citation, internal quotation marks, ellipses, and parentheses omitted)). Instead, the circuit court concluded:

> 9. By an unbroken chain of title, the ownership of Apana 1 of LCA 7367, Royal Patent 3971, located at Lanihau, North Kona passed as follows:
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> a. From Kauko to Kane by descent;
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> b. From Kane to F.W. Bartels by deed;
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> c. From F.W. Bartels to C. Castendyk by deed;
>
> d. From C. Castendyk to Mataichi Nakamura by deed;
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> e. From Mataichi Nakamura to Isamu Ota by deed;
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> f. From Isamu Ota to Kazuo and Yukie Ota by deed;
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> g. From Kazuo and Yukie Ota, individually and as trustees of their respective trusts, to [Gary].

(Citations to exhibits omitted.)

Gary's May 1, 2014 Motion for Summary Judgment (**2nd MSJ**) on Count Two of his Complaint incorporated by reference the

arguments raised in his original MSJ and cited to the original MSJ's exhibits in support of his 2nd MSJ. Gary attached as exhibits to his original MSJ copies of deeds conveying LCA 7367[11] from Kane to Bartels, from Bartels to C. Castendyk, from C. Castendyk to Mataichi Nakamura, from Mataichi Nakamura to Isamu, from Isamu to Kazuo and Yukie Ota, and from Kazuo and Yukie Ota to Gary. The circuit court cited to these exhibits in support of its conclusion that Gary was the owner of Apana 1 of LCA 7367.

Based on the record before us, there was no genuine issue of material fact related to Count Two and Gary met his burden of showing that his interest in Apana 1 of LCA 7367 was superior to Labatte's. See Maui Land & Pineapple Co., 76 Hawaiʻi at 407-08, 879 P.2d at 512-13. Therefore, Labatte's argument is without merit.

VIII. Dismissal of Count Seven and Count Nine

Labatte also argues that the circuit court erred in dismissing Count Seven and Count Nine of Gary's Complaint because, by doing so, Labatte was "blind-sided" and precluded from arguing that the evidence that the court relied upon was fraudulent. On July 16, 2015, Gary filed a motion requesting the circuit court (1) certify a judgment under HRCP Rule 54(b) and (2) dismiss Count Seven and Count Nine of his Complaint as moot. On July 30, 2015, Labatte stipulated to Gary's motion and requested that the circuit court grant Gary's motion. Having failed to object to Gary's request to dismiss Count Seven and Count Nine, Labatte cannot now challenge the dismissal on appeal. We deem Labatte's argument waived. See HRAP Rule 28(b)(4); see

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[11] The deeds purport to convey "interest in the name of Kauko, parcel 1, R.P. 3971 L.C.A. 7369, containing 1 acre situate at Lanihau, N. Kona, Hawaii." (Emphasis added.) The circuit court determined:

> 8. These deeds, read on their face and in the context of the record and the parties' conduct, indicate that the respective grantor in each of the deeds in question intend to convey and did convey to their respective grantees, by and through their respective deeds, Apana 1 of LCA 7367, Royal Patent 3971, located at Lanihau, North Kona.

(Emphasis added.) Labatte does not challenge the circuit court's conclusion that the grantors intended to convey interest in LCA 7367, nor does she challenge the findings of fact relevant to this conclusion.

also State v. Moses, 102 Hawaiʻi 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases.").

Therefore,

IT IS HEREBY ORDERED that the "Rule 54(b), HRCP Judgment" entered on September 3, 2015 in the Circuit Court of the Third Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, July 14, 2016.

On the briefs:

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Presiding Judge

Doreen Labatte
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Associate Judge

Michael J. Matsukawa
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