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NO. CAAP-25-0000097

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

CHARLES DAVID WAGNER, TRUSTEE OF
THE CHARLES DAVID WAGNER TRUST DATED FEBRUARY 16, 1995
and JILL ABIGAIL WAGNER, TRUSTEE OF
THE JILL ABIGAIL WAGNER TRUST DATED FEBRUARY 16, 1995,
Plaintiffs/Counterclaim Defendants-Appellants, v.
GUIDO GIACOMETTI; SUSAN TIUS,
Defendants/Counterclaim Plaintiffs-Appellees,
and DOES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3CC15100083K)

SUMMARY DISPOSITION ORDER

(By: Leonard, Presiding Judge, Hiraoka and Wadsworth, JJ.)

Charles David **Wagner** and Jill Abigail **Wagner** appeal from the ***Final Judgment Pursuant to HRCP Rule 54(b)*** entered by the Circuit Court of the Third Circuit.¹ They challenge the order granting summary judgment for Guido **Giacometti**² and Susan **Tius**. We affirm, because the restrictive covenants at issue are ambiguous and unenforceable against Giacometti and Tius.

The Anekona Estates Community Association was formed in 1990. Giacometti and Tius purchased property in Anekona Estates in 1993. Between 1993 and 1995 they planted trees on their property. The Anekona Estates Community Association's **Design**

¹ The Honorable Wendy M. DeWeese presided.

² Giacometti died while the action was pending in circuit court. Tius filed a timely motion to substitute Giacometti's estate as a party. The record does not contain an order on the motion.

Committee approved their house plans in 1993. They built their house in 1994. They later submitted plans for a garage; the plans showed their trees. The Design Committee approved those plans in 2003.

The Wagners bought property in Anekona Estates, next to Giacometti and Tius's property, in 2000. Charles Wagner read the *Declaration of Protective Covenants, Conditions and Restrictions for Anekona Estates (CC&R)* before the purchase. He "probably" saw the trees on Giacometti and Tius's property before the purchase. The Wagners began building their house in 2002 and began living there in 2004.

The Wagners sued Giacometti and Tius on March 3, 2015. By that time, the CC&R had been restated, and the restated CC&R had been amended twice. The Wagners' complaint alleged Giacometti and Tius breached the CC&R. The Wagners sought a mandatory injunction requiring that Giacometti and Tius "remove their hedges and windbreaks, [and] remove prohibited improvements placed within their lot setback areas and metal fencing[.]" They also sought specific performance by Giacometti and Tius of obligations under the CC&R.

Giacometti and Tius counterclaimed, alleging tortious interference with contractual and other relations, nuisance, and abuse of process.

Giacometti and Tius moved for summary judgment on the Wagners' complaint. An order granting the motion was entered on July 1, 2024. Giacometti and Tius moved for attorney fees and costs. An order granting the motion was entered on January 7, 2025.³ The Final Judgment was entered on January 21, 2025. It did not resolve the counterclaim, but it contained the language required under Hawai'i Rules of Civil Procedure (**HRC**P) Rule 54(b) and Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119-20, 869 P.2d 1334, 1338-39 (1994). This appeal followed.

The Wagners state five points of error. They contend the circuit court erred by: (1) ruling that Giacometti and Tius did not breach the CC&R; (2) finding that the Design Committee's

³ The Wagners do not challenge the award of attorney fees and costs.

approval of Giacometti and Tius's plans satisfied the CC&R requirements; (3) not allowing them to depose Giacometti before deciding Giacometti and Tius's motion for summary judgment; (4) not considering Giacometti and Tius's continuing breach of the CC&R in determining whether their claims were barred by the statute of limitations; and (5) applying the doctrine of laches.

We review a grant of summary judgment *de novo* using the same standard applied by the circuit court. Hiner v. Hoffman, 90 Hawai'i 188, 190, 977 P.2d 878, 880 (1999). Summary judgment is appropriate when the moving party shows, by admissible evidence, that the material facts are uncontroverted and it is entitled to judgment as a matter of law. Id.

(1) The Wagners' complaint alleged that Giacometti and Tius violated "Articles 1.27, 4.1, and 6.2" of the CC&R because they "failed to maintain hedges and windbreaks growing on their real property so as not to interfere with WAGNERS' rights to light, air and view, including WAGNERS' view plane." Paragraph 1.27 of the CC&R defined the phrase "Visible from Neighboring Property." Paragraph 4.1 concerned the "right of an Owner to construct, reconstruct, refinish, alter or maintain any Improvement upon, under, or above any Lot[.]" Paragraph 6.2 pertained to membership in the Anekona Estates Community Association.

Giacometti and Tius's motion for summary judgment argued their trees and fence did not violate the original CC&R, which they contended was ambiguous. They pointed out that CC&R paragraph 4.1(b)(2) stated "No Improvements shall be constructed upon or over any portion of any Lot which is designed as a setback area;[⁴] provided that walks, fences, walls, driveways and mail, newspaper and garbage receptacle enclosures may be so constructed if not in violation of any other restriction of this Declaration or County ordinance." CC&R paragraph 1.13 defined "Improvement" as "any building, outbuilding, road, driveway, parking area, fence, retaining wall, stair, deck, hedge,

⁴ Giacometti and Tius did not contest that their trees and fence are in their property's setback area.

landscaping, windbreak, pole, mailbox, exterior light fixture, sign and any other structure of any type of kind on or within the Real Property or a Lot."

Giacometti and Tius argued paragraph "1.13 does not mention 'trees' as an 'Improvement.'" They acknowledged that paragraph 1.13 included "generic references to 'landscaping' and 'windbreak.'" But they argued those terms were not defined, and paragraph 1.13 also referenced "hedge," which was redundant with "landscaping" and could also be redundant with "windbreak." And they argued that paragraph 4.1(b)(2) prohibited only Improvements that were "constructed," and they did not construct their trees; the trees were planted, and paragraph 1.13 did not prohibit planting trees.

As to their fence, Giacometti and Tius argued that although paragraph 1.13 included a "fence" in the definition of "Improvement," paragraph 4.1(b)(2) allowed fences that were "not in violation of any other restriction of this Declaration or County ordinance," and paragraph 4.1(b)(3) of the 2009 amendment to the restated CC&R allowed fencing "along Lot boundaries . . . constructed of wood and/or metal posts and no metal fencing of any type other than woven wire shall be permitted upon any Lot if the same shall be visible from an adjoining Road or neighboring property." Their fence, they stated, was made of metal posts and woven wire, and they submitted pictures as evidence.

The Wagners' opposition memorandum argued that Giacometti and Tius "constructed a windbreak by the planting of trees." They attached a copy of Giacometti's deposition transcript from another case, in which he testified he planted the trees "principally for wind protection" and agreed it would be fair to characterize them as a "windbreak." They did not respond to Giacometti and Tius's argument that their fence did not violate the CC&R. They presented no argument about their "rights to light, air and view," or their "view plane."

Giacometti and Tius's reply memorandum argued that the 2014 amendment to the restated CC&R added the word "landscaping" to paragraph 4.1(b)(2), which then read:

No improvements [sic] shall be constructed upon or over any portion of any Lot which is designated as a setback area; provided that landscaping, walks, driveways and mail, newspaper and garbage receptacle enclosures may be so constructed if not in violation of any other restrictions of this Declaration or County ordinance.

"The preliminary question of whether a covenant is ambiguous is a question of law that may be resolved on summary judgment." Hiner, 90 Hawai'i at 190, 977 P.2d at 880. A restrictive covenant "is ambiguous when its terms are reasonably susceptible to more than one meaning." Moloaa Farms LLC v. Green Energy Team LLC, 157 Hawai'i 175, 189, 575 P.3d 808, 822 (2025).

We conclude CC&R paragraphs 1.13 and 4.1(b), read together, are ambiguous because they are reasonably susceptible to more than one meaning. Giacometti and Tius planting trees and building a fence in the setback area could be both prohibited and allowed, even without Design Committee approval, under the CC&R in effect when the Wagners' lawsuit was filed. Accordingly, we conclude the ambiguous restrictive covenants at issue are unenforceable against Giacometti and Tius under the circumstances of this case.

(2) Because we hold that the restrictive covenants are unenforceable against Giacometti and Tius, we need not decide whether the Design Committee's approval of Giacometti and Tius's plans in 2003 satisfied CC&R requirements.

(3) The Wagners contend the circuit court erred by not allowing them to depose Giacometti before deciding Giacometti and Tius's motion for summary judgment. Neither their point of error nor their argument cite to the record showing they moved for relief under HRCF Rule 56(f), or where an affidavit or declaration supporting the motion can be found. See Hawai'i Rules of Appellate Procedure Rule 28(b)(4) and (7) (requiring citations to the record). We are not obligated to search the record for information that should have been provided by the Wagners. Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 480, 164 P.3d 696, 738 (2007). We decline to address their point of error.

(4) and (5) Because we hold that the restrictive covenants are unenforceable against Giacometti and Tius, the statute of limitations and laches issues presented by their motion for summary judgment are moot.

The January 21, 2025 *Final Judgment Pursuant to HRCP Rule 54(b)* is affirmed.

DATED: Honolulu, Hawai'i, October 22, 2026.

On the briefs:

Patrick K. Wong,
Carina I. Fasi,
Matthew T. Shimabukuro,
for Plaintiffs/Counterclaim
Defendants-Appellants.

Bruce H. Wakuzawa,
for Defendants/
Counterclaimants-Appellees
Guido Giacometti
and Susan Tius.

/s/ Katherine G. Leonard
Presiding Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Clyde J. Wadsworth
Associate Judge