SCWC-19-0000776

IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

MAUNALUA BAY BEACH OHANA 28, a Hawai‘i Non-Profit Corporation; MAUNALUA BAY BEACH OHANA 29, a Hawai‘i Non-Profit Corporation; and MAUNALUA BAY BEACH OHANA 38, a Hawai‘i Non-Profit Corporation, individually and on behalf of all others similarly situated,

Petitioners/Plaintiffs-Appellants/Cross-Appellees,

v.

STATE OF HAWAI‘I,

Respondent/Defendant-Appellee/Cross-Appellant.

CIVIL NO. 05-1-0904-05 JCM
(Inverse Condemnation)

APPEAL FROM THE:
FINAL JUDGMENT, filed October 2, 2019
CROSS-APPEAL FROM THE:

(1) FINAL JUDGMENT, filed October 2, 2019;

(2) FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION AND ORDER, filed November 28, 2018; and

(3) ORDER DENYING DEFENDANT STATE OF HAWAII’S MOTION FOR SUMMARY JUDGMENT BECAUSE PLAINTIFFS’ ACCRETED LAND, IF ANY, ACCRETED BEFORE JUNE 4, 1985, filed November 12, 2014

CIRCUIT COURT OF THE FIRST CIRCUIT, STATE OF HAWAI‘I

HON. EDEN E. HIFO
HON. VIRGINIA LEA CRANDALL
HON. JAMES C. MCWHINNIE

STATE OF HAWAII'S RESPONSE TO APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

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INTRODUCTION

Petitioners/Plaintiffs-Appellants Maunalua Bay Beach Ohana 28, Maunalua Bay Beach Ohana 29, and Maunalua Bay Beach Ohana 38's ("Appellants") Application for Writ of Certiorari should be rejected, as it presents no claims that warrant this Court's review.

First, the Intermediate Court of Appeals ("ICA") correctly upheld the Circuit Court's award of $0 in just compensation for Appellants' accreted lands. Appellants stipulated that just compensation would be determined by the land's fair market rental value. The Circuit Court found that Appellants' witness on this topic was not credible, and that the only credible expert was the State's witness, who opined that the fair rental value of the accreted lands was $0. The ICA correctly concluded that it could not second-guess the Circuit Court's credibility determination, and that the Circuit Court's award of $0 in just compensation was supported by substantial evidence and was not clearly erroneous. Appellants now complain about the lack of an award of severance damages, but they waived that argument by failing to raise it, or present any evidence in its support, before the Circuit Court or even the ICA.

Second, the ICA correctly held that Appellants were not entitled to nominal damages. Nominal damages are small sums awarded as compensation for the technical violation of a legal right. But the taking of property by the State, in itself, is not a legal injury, only an entitlement to just compensation. *DW Aina Le'a Dev., LLC v. State Land Use Comm'n*, 148 Hawai'i 396, 404, 477 P.3d 836, 844 (2020)). And because the Circuit Court found that the value of Appellants' land was $0, they were not entitled to more than $0 in just compensation.

Third, the ICA correctly held that Appellants were not entitled to attorneys' fees. There must be a clear waiver of sovereign immunity before damages, including attorneys' fees, can be awarded against the State. *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 226, 202 P.3d 1226, 1271 (2009). Appellants did not prevail on any claim that would waive the State's sovereign immunity for damages, including fees. And even if they had, they failed to meet the three factors necessary to award fees under the private attorney general doctrine.

For these reasons, as explained fully herein, this Court should deny the Application.[1]

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[1] Appellants challenge the ICA's decision as to just compensation and attorneys' fees, but abandon all other points of error raised in the ICA. Below, the State filed a protective cross-appeal putting forth alternative bases on which to affirm the Circuit Court's judgment. *See* ICA Dkt. 104. That the ICA's judgment could be affirmed on these additional bases is another reason why certiorari is unwarranted here.

COUNTERSTATEMENT OF THE CASE AND PRIOR PROCEEDINGS

The background facts of this case are set forth in the ICA's two decisions, *Maunalua Bay Beach Ohana 28 v. State*, 122 Hawai'i 34, 222 P.3d 441 (App. 2009) ("*Maunalua Bay I*") and *Maunalua Bay Beach Ohana 28 v. State*, 154 Hawai'i 144, 547 P.3d 1174 (App. 2024) ("*Maunalua Bay II*"). The following is a concise summary.

This case concerns three parcels of land in Portlock which are referred to as the "beach reserve lots" and are owned by Appellants. ROA Dkt. 201 at PDF 3-5 (FOF 2-15).[2] Appellants are domestic non-profit corporations created to own the beach reserve lots. *Id.* at PDF 4-5 (FOF 15). Mauka, or landward, of the beach reserve lots are "littoral home lots." *Id.* at PDF 4 (FOF 7-8). The littoral home lot owners created the Appellant entities, but the Appellant entities do not own the littoral home lots. *Id.* at PDF 4-5 (FOF 15); *see also Maunalua Bay I*, 122 Hawai'i at 35 n.1, 222 P.3d at 442 n.1. Each beach reserve lot consists of two parts. The first part, immediately makai or seaward of the littoral home lots, consists of the "original beach reserve lots," which were created when the land was subdivided in the 1930s. ROA Dkt. 185 at PDF 6 (¶¶16-20). The second part, immediately makai of the original beach reserve lots, is land that accreted before 1985, known as the "makai lands." *Id.* at PDF 7 (¶30).

In 2003, the State enacted Act 73, which provided that owners of oceanfront lands could no longer register or quiet title to accreted lands (unless the accretion restored previously eroded land), and that accreted lands not otherwise awarded were public lands. 2003 Haw. Sess. Laws Act 73; *Maunalua Bay I*, 122 Hawai'i at 50, 222 P.3d at 457. In 2005, *after Act 73 was passed*, Appellants purchased the beach reserve lots for $1,000 each. *Maunalua Bay II*, 154 Hawai'i at 149, 547 P.3d at 1179. Appellants then filed this inverse condemnation lawsuit, claiming that Act 73 constituted a taking of accreted lands, and asserting claims for declaratory and injunctive relief and millions of dollars in just compensation. ROA Dkt. 1; *Maunalua Bay II*, 153 Hawai'i at 154, 547 P.3d at 1184 (noting that Appellants sought compensation of more than $6 million).

In 2006, the Circuit Court granted Appellants partial summary judgment on their declaratory relief claim. *Maunalua Bay I*, 122 Hawai'i at 51-52, 222 P.3d at 458-59. On interlocutory appeal, the ICA held that "Act 73 effectuated a permanent taking of littoral owners' ownership rights to existing accretions to the owners' oceanfront properties[.]" *Id.* at 57, 222

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[2] Citations to the Record on Appeal in the Circuit Court will be written as ROA Dkt. X at PDF Y, where X is the JEFS docket entry of the document and Y is the PDF page number.

P.3d at 464. The ICA remanded for a determination of whether Appellants owned any accreted lands which were taken, and if so, for a determination of damages. *Id.*

In 2012, the State enacted Act 56. Haw. Sess. Laws 2012, Act 56. Under Act 56, only land that accreted after the effective date of Act 73 is public land. *Id.*

On remand, the parties stipulated that the makai lands accreted before the effective date of Act 73 (ROA Dkt. 185 at PDF 7 (¶30)), and that "[j]ust compensation, if any, shall be based on the fair rental value of the accreted land as of May 19, 2003, but taking into account restrictions on plaintiffs' use of the property, if appropriate." *Id.* at PDF 5 (¶7).

Following a bench trial, the Circuit Court reaffirmed that Act 73 effected a temporary taking of the makai lands, which was ended by Act 56. ROA Dkt. 210 at PDF 27 (COL 11). It found that the fair market rental value of the makai lands was $0. *Id.* at PDF 16 (FOF 100). The Circuit Court found that the conclusions of the State's valuation expert were "credible, logical, and well founded." *Id.* at PDF 17 (FOF 111). The Court rejected the testimony of Appellants' expert, finding her not credible. *Id.* (FOF 112). The Court entered final judgment in favor of the State on all claims on October 2, 2019. ROA Dkt. 226.

Appellants appealed to the ICA. The ICA affirmed the final judgment, upheld the $0 just compensation award, and concluded that Appellants were not entitled to attorneys' fees. *Maunalua Bay II*, 154 Hawai'i at 156, 547 P.3d at 1186.

ARGUMENT

A. The ICA did not err in upholding the award of $0 in just compensation.

Appellants contend that the ICA grievously erred in upholding the Circuit Court's award of $0 in just compensation, but conspicuously fail to mention that their sole expert witness on fair rental value—the basis for just compensation Appellants stipulated to (ROA Dkt. 185 at PDF 5)—was deemed not to be a credible witness. It is black letter law that "an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence," *LC v. MG & Child Support Enf't Agency*, 143 Hawai'i 302, 311, 430 P.3d 400, 409 (2018) (cleaned up), and that appellate courts give particular deference to credibility determinations involving experts, *Kaho'ohanohano v. Dep't of Human Servs.*, 117 Hawai'i 262, 301, 178 P.3d 538, 577 (2008). The ICA, accordingly, correctly explained that it would not second-guess the Circuit Court's determination that the State's expert—Craig Leong—was credible and Appellants' expert—Stephany Sofos—was not. *Maunalua Bay II*, 154 Hawai'i at 151, 547 P.3d

at 1181.

In determining the fair rental value of the makai lands, the Circuit Court credited and gave "full weight" to Leong's testimony, which concluded that there was "$0 market rent attributable to the land with a retrospective date of 2003." ROA Dkt. 210 at PDF 16-17 (FOF 101, 110). The Circuit Court agreed with Leong's conclusion that:

> Given the highly irregular, and narrow property characteristics of the accreted land, and after consideration of the restricted street access to the property, and perhaps, more importantly, as both government and private land use regulations and covenants restrict the legally permissible use of the accreted land area to public access, customary beach activities, and related recreational and community purposes, the appraiser concludes that no known market buyer exists for the subject accreted land.

Id. at PDF 17 (FOF 109).

On the other hand, the Circuit Court did not find Appellants' expert to be credible and gave "no weight" to her testimony. *Id.* at PDF 17 (FOF 112). Sofos used a formula referred to as the "Kaneohe Bay methodology" to calculate the annual rental value of the entire *beach reserve lots*, instead of the makai lands. *Id.* at PDF 18 (FOF 118). This methodology was gleaned from a formula used by the Department of Land and Natural Resources to calculate lease rent for piers at Kaneohe Bay. *Id.* at PDF 18 (FOF 117). The Circuit Court explained at length why Sofos' calculations based on this methodology were not reliable and not credible. ROA Dkt. 210 at PDF 18-24 (FOF 116-168). It found that "Ms. Sofos fundamentally misunderstood the nature of DLNR's valuation methods," "the Kane‘ohe Bay methodology was not intended to and does not replicate fair market value," "[t]he Kane‘ohe Bay methodology does not produce a fair-market rental value," and "Ms. Sofos . . . was unaware that it was not intended to produce fair market values." *Id.* at PDF 20, 22 (FOF 136, 137, 149, 150). And although the Circuit Court calculated *hypothetical* nominal values for the makai lands using Sofos' methodology, it only did so to demonstrate why Sofos' calculations using her own formula were "incredible on their face." *Id.* at PDF 18-20 (FOF 117-135) ("Ultimately, the use of Ms. Sofos' proposed formula is not even reliable for calculating these nominal rental values.").

It was the exclusive province of the Circuit Court, as trier of fact, to weigh the competing expert testimony. *See Territory by Sharpless v. Adelmeyer*, 45 Haw. 144, 148, 363 P.2d 979, 982-83 (1961) (where the sole issue was the market value of the lands taken, and various witnesses gave their opinion as to market value, "[t]he only question, then, is one of competency

of the witnesses and of their testimony[,]" and "the question of competency is one for the trial court and on appeal will be reversed only on a showing of abuse of discretion."). Moreover, a trial court's findings of fact are upheld unless they are clearly erroneous. *State ex rel. Shikada v. Bristol-Myers Squibb Co.*, 152 Hawai'i 418, 448, 526 P.3d 395, 425 (2023). Here, the ICA held that substantial evidence in the record supported the award of $0 in just compensation. *Maunalua Bay II*, 154 Hawai'i at 152, 547 P.3d at 1182. In addition to assessing the credibility of the competing experts, the Circuit Court made numerous findings supporting the conclusion that the fair rental value of the makai lands was $0. Among other things, the court found that the makai lands had no developmental or economic use, and were subject to a restrictive covenant that required them to be used for public access. ROA Dkt. 210 at PDF 11-13 (FOF 64-82). Given that the parties stipulated that just compensation would be based on fair rental value, that the Circuit Court determined that only Leong's fair rental calculation of $0 was credible, and that substantial evidence supported the Circuit Court's conclusion, the ICA clearly did not err by upholding the Circuit Court's $0 award.

The ICA also found that while Appellants' points of error challenged the findings crediting Leong over Sofos, "their opening brief presents no argument about why they were clearly erroneous[,]" and thus, deemed those challenges waived. *Id.* at 152, 547 P.3d at 1182. This was correct. Appellants' Opening Brief does not mention Leong's testimony *at all*, let alone allege why crediting it was clearly erroneous. *See* ICA Dkt. 106 ("MB Op. Br.") at PDF 10-12, 20-21. "Where an appellant raises a point of error but fails to present any accompanying argument, the point is deemed waived." *Kia'i Wai v. Dep't of Water*, 151 Hawai'i 442, 466 n.49, 517 P.3d 725, 749 n.49 (2022) (cleaned up).

In addition to finding that the fair market rental value of the makai lands was $0, the Circuit Court also alternatively concluded that, under the doctrine of recoupment, *even if* the makai lands had any rental value, it would be offset by the value of Appellants' continued use of the lands. ROA Dkt. 210 at PDF 24, 36 (FOF 169-70, COL 80). The ICA did not rely on this conclusion to uphold the $0 award. *Maunalua Bay II*, 154 Hawai'i at 151-52, 547 P.3d at 1181-82. In any case, there is no dispute that, notwithstanding Act 73, Appellants could continue to use the makai lands as they always had—to enjoy unrestricted access to the beach from the beach reserve lots. ROA Dkt. 210 at PDF 14 (FOF 83-86). The Circuit Court also found that "[o]wnership of the beach reserve lots was historically a potential liability." *Id.* at PDF 6 (FOF

29). By relieving Appellants of ownership of the makai lands, the State also relieved Appellants of potential liabilities of ownership. Thus, the Circuit Court's finding that *even if* the State owed rent to Appellants, it was offset by the value Appellants received, is not clearly erroneous.

Finally, Appellants argue that the Circuit Court erred by only analyzing the lost value of the makai lands, and not the loss in value of the beach reserve lots. App. at PDF 12. They argue they were entitled to severance damages because "[a]s a result of Act 73, the Ohanas lost one of the two portions of their beach reserve lot (the Makai Land) and were left with the original beach reserve lots." *Id.* But Appellants stipulated that just compensation would be measured *solely* by the fair market rent of the makai lands. ROA Dkt. 185 at PDF 5; *State v. Woodhall*, 129 Hawai'i 397, 405, 301 P.3d 607, 615 (2013) ("The facts within a stipulation are taken to be conclusive and binding upon the parties, the trial judge, and the appellate court." (cleaned up)).

And critically, Appellants waived any argument that they were entitled to severance damages by failing to raise it below or introduce any evidence of severance damages into the record.[3] *Kekona v. Bornemann*, 135 Hawai'i 254, 265, 349 P.3d 361, 372 (2015) ("If a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal." (cleaned up)). In their Proposed Findings of Fact and Conclusions of Law, Appellants only alleged that they were entitled to just compensation in the amount of the fair rental value of the makai lands. ROA Dkt. 205 at PDF 21 (Proposed FOF 77-80). "[A] litigant cannot prevail on an appeal by asserting a different claim for relief than that asserted at trial." *Mehau v. Reed*, 76 Hawai'i 101, 114, 869 P.2d 1320, 1333 (1994) (cleaned up). Nor did Appellants argue to the ICA that the Circuit Court should have awarded severance damages. They did not challenge the Circuit Court's finding that "Plaintiffs are seeking just compensation for the temporary taking of the makai land only, not the original beach reserve lots." ROA Dkt. 210 at PDF 5 (FOF 18).

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[3] Appellants contend that the Circuit Court rejected analyses that "took into account fair market and tax assessed values of upland properties and the beach reserve lots." App. at PDF 12 (citing FOF 118-135). But neither of these "analyses" calculated the diminution in value to the beach reserve lots, if any, that resulted from their severance with the makai lands. In the first cited "analysis," Sofos calculated the *entire* annual rental value of the beach reserve lots, based on the faulty premise that both the makai lands *and* the beach reserve lots were taken. ROA Dkt. 210 at PDF 18-19 (FOF 118-121). The Circuit Court found this calculation to be incredible on its face. *Id.* at PDF 18 (FOF 119). In the second analysis, as already described, the Circuit Court calculated *hypothetical* values for the *makai lands* using Sofos' methodology, but it ultimately held that Sofos' proposed formula was not reliable. *Id.* at PDF 18-20 (FOF 117-135). Neither of these "analyses" purported to calculate any diminution in value of the original beach reserve lots.

Appellants solely pointed to Sofos' testimony regarding fair rental value, citing no calculation of the diminution in value to the beach reserve lots. MB Op. Br. at PDF 20-21. Failure to raise an argument before the ICA waives the issue on appeal. *Lahaina Fashions, Inc. v. Bank of Hawaii*, 131 Hawai'i 437, 457, 319 P.3d 356, 376 (2014). Because Appellants never raised the argument at all, neither the Circuit Court nor the ICA erred by failing to award severance damages.

In sum, because the parties stipulated that just compensation would be based on fair rental value, the Circuit Court determined that only Leong's fair rental calculation of $0 was credible, and Appellants presented no evidence or argument in support of severance damages, the ICA clearly did not err by upholding the $0 just compensation award.

B. **The ICA did not err in declining to award nominal damages.**

Appellants also seek this Court's review because the ICA did not award them nominal damages.[4] Nominal damages are "a small and trivial sum awarded for a technical injury due to a violation of some legal right and as a consequence of which some damages must be awarded to determine the right." *Kanahele v. Han*, 125 Hawai'i 446, 457-58, 263 P.3d 726, 737-38 (2011) (cleaned up). The ICA correctly concluded that nominal damages were not warranted.

In their Application, Appellants assume, without discussion, that they suffered a "violation of some legal right" because of the temporary taking. App. at PDF 13. But they fail to cite to any authority to contradict the ICA's holding that "a taking ***is not a legal injury***, but rather an entitlement to just compensation." *Id.* (quoting *DW Aina Le'a*, 148 Hawai'i at 404, 477 P.3d at 844 (2020)).[5] As this Court has held, "[a] takings claim seeks compensation for

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[4] Appellants presumably seek nominal damages to try to obtain prevailing party status for attorneys' fees and costs, but as discussed below, Appellants are not entitled to fees in any event. And as the ICA noted, and Appellants do not dispute, they would not be entitled to costs because they rejected the State's HRCP Rule 68 offer of settlement. *Maunalua Bay II*, 154 Hawai'i at 156, 547 P.3d at 1186. Thus, whether Appellants were entitled to a trivial sum or $0 is ultimately of very little consequence here.

[5] Instead, Appellants cite to a case where the U.S. Supreme Court held that "the denial of *procedural due process* should be actionable for nominal damages without proof of actual injury" because "the right to procedural due process is 'absolute[.]'" *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978) (emphasis added). However, as discussed herein, when it comes to takings claims, the U.S. Supreme Court has held that there is no violation when what is "taken" has no value. *Brown v. Legal Found. of Washington*, 538 U.S. 216, 240 (2003). Appellants also cite to an unreported decision by a federal trial court which merely agreed with a *condemnor* that a landowner was only entitled to nominal damages; it does not stand for the proposition that nominal damages must *always* be awarded, especially when a condemnor successfully proves

something the government is entitled to do[.]" *DW Aina Le'a*, 148 Hawai'i at 404, 477 P.3d at 844. And as the U.S. Supreme Court has said, the text of the Takings Clause "makes plain" that it "***does not prohibit the taking of private property***, but instead places a condition on the exercise of that power." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005) (emphasis added; cleaned up). "***[A] mere technical taking does not give rise to an obligation to pay compensation***[.]" *Brown*, 538 U.S. 216, 236 (2003) (emphasis added). When "nothing of value was taken," "nothing [is] recoverable as just compensation." *Id.* Indeed, an essential element of any takings claim is that property was taken *without just compensation*. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1500 (9th Cir. 1990). Thus, there can be no claim at all if just compensation is not owed. 29A C.J.S. Eminent Domain § 67 ("The Fifth Amendment of the United States Constitution does not proscribe the taking of property; it proscribes a taking without just compensation.").

Appellants were therefore only entitled to just compensation in the amount of what was taken, and if their "net loss was zero, the compensation that is due is also zero." *Brown*, 538 U.S. at 236-37. Here, Appellants stipulated that just compensation would be based on the fair rental value of the makai lands, the Court found that the fair rental value was $0, and substantial evidence in the record supports that conclusion. An award of $0 is thus all that is due. *Id.* at 236 (a private party whose property is taken "must be made whole but is not entitled to more" (cleaned up)). Therefore, neither the Circuit Court nor the ICA erred in awarding $0, not nominal damages, as just compensation.

C. **Appellants were not entitled to attorneys' fees.**

1. Sovereign immunity bars attorneys' fees in this case.

The ICA correctly concluded that Appellants' request for attorneys' fees under the private attorney general doctrine was barred by the State's sovereign immunity. *Maunalua Bay II*, 154 Hawai'i at 152-53, 547 P.3d at 1182-83. "[R]elief that is tantamount to an award of damages for a past violation of law, even though styled as something else, is barred by sovereign immunity." *Sierra Club*, 120 Hawai'i at 226, 202 P.3d at 1271 (cleaned up). And because "an award of costs and fees to a prevailing party is inherently in the nature of a damage award[,] . . .

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that the property taken was worth $0. *Columbia Gas Transmission, LLC v. An Easement to Construct, Operate, and maintain a 20-Inch Gas Transmission Pipeline Across Properties in Allegheny County, Pennsylvania*, 2018 WL 348844 at *5 (W.D. Pa. Jan. 10, 2018).

to properly award attorney's fees . . . there must be a 'clear relinquishment' of the State's immunity[.]" *Id.* (cleaned up).

The ICA found that the only claim Appellants partially prevailed on was their declaratory claim that Act 73 constituted a temporary taking.[6] *Maunalua Bay II*, 154 Hawai'i at 152, 547 P.3d at 1182. But as the ICA correctly held, and as this Court has reasoned,

> the ability to sue the state [for declaratory relief] does not stem from a waiver of sovereign immunity, but from the fact that sovereign immunity does not bar the suit in the first place. Therefore, ***no clear statutory waiver that could be extended to attorney's fees is present when the underlying claim is for declaratory and/or injunctive relief.***

Id. (emphasis in original) (quoting *Nelson v. Hawaiian Homes Comm'n*, 130 Hawai'i 162, 170, 307 P.3d 142, 150 (2013)). Thus, even if a party obtains declaratory relief against the State, because such claims do not entail a waiver of sovereign immunity, attorneys' fees are not awardable. *Nelson*, 130 Hawai'i at 173, 307 P.3d at 153; *Kaleikini v. Yoshioka*, 129 Hawai'i 454, 468, 304 P.3d 252, 266 (2013).

Appellants argue that because they also sought monetary damages in the form of just compensation, and because sovereign immunity does not bar such claims, they can also seek damages in the form of attorneys' fees. App. at PDF 16. They brush aside the fact that they did not prevail on their claim for just compensation by asserting that "the private attorney general doctrine has no 'prevailing party' requirement." *Id.* at PDF 15. But this Court's precedent clearly demonstrates that fees under the private attorney general doctrine can only be awarded to a prevailing party. In *Sierra Club*, this Court stated that before turning to whether the plaintiff was entitled to fees under the private attorney general doctrine, "***[t]he first issue that must be determined regarding the fee and cost award is whether [plaintiff] was the prevailing party***." 120 Hawai'i at 215, 202 P.3d at 1260 (emphasis added). In *Nelson*, before turning to whether

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[6] The State does not concede that Appellants prevailed even partially on their claim for declaratory and injunctive relief. The Circuit Court entered Final Judgment on this claim in favor of the State. ROA Dkt. 226 at PDF 4. In general, the party in whose favor judgment is rendered is the prevailing party. *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 126, 176 P.3d 91, 125 (2008). And even though the Circuit Court found that Act 73 effected a temporary taking, that was not the relief sought by the Complaint. Instead, the Complaint prayed for a declaratory judgment that Act 73 was unenforceable, and an injunction forbidding the State from asserting ownership over the makai lands, until just compensation was paid. ROA Dkt. 1 at PDF 9, ¶¶25-27. Appellants never obtained such relief in court, as these claims were mooted by *Maunalua Bay II* and Act 56. ROA Dkt. 210 at PDF 36 (COL 81-82).

the private attorney general doctrine applied, this Court stated that "***[t]he first step in analyzing whether Plaintiffs are entitled to attorneys' fees (and costs) is to determine whether they are the 'prevailing party.***'" *Nelson*, 130 Hawai'i at 165, 307 P.3d at 145 (emphasis added). Thus, the fact that Appellants did not prevail on their claim for just compensation necessarily means that they cannot be the prevailing party for attorneys' fees purposes.

Appellants' contention that a party can be entitled to fees under the private attorney general doctrine even though it does not prevail on its underlying claim would lead to absurdity. It would incentivize non-meritorious claims against the State, because fees would always be on the table, even for unsuccessful claims. This would impose a crippling burden on the State, as the State would not only have to spend resources defending non-meritorious lawsuits, but could also be subject to massive attorneys' fees awards even if its defense was successful. As an equitable rule (*Sierra Club*, 120 Hawai'i at 218, 202 P.3d at 1263) the private attorney general doctrine should be interpreted to avoid such an absurd result.

To summarize, attorneys' fees against the State may only be imposed where the State has clearly waived its sovereign immunity for damages, including fees. And a party may only be awarded fees under the private attorney general doctrine when it prevails. Here, Appellants did not prevail on their claim for just compensation and even assuming *arguendo* that they prevailed in obtaining declaratory relief, such a claim does not entail any waiver of the State's sovereign immunity against damages, including attorneys' fees. Thus, there is no "clear relinquishment" of sovereign immunity applicable here that would allow for attorneys' fees against the State.

2. The private attorney general doctrine does not apply.

Even assuming that sovereign immunity did not bar attorneys' fees in this case, the ICA did not err when it concluded that Appellants would still not be entitled to fees under the private attorney general doctrine. The ICA's determination as to the private attorney general doctrine is reviewed for abuse of discretion, although its application of rules or principles of law is reviewed *de novo*. *Asato v. Procurement Policy Bd.*, 132 Hawai'i 333, 357, 322 P.3d 228, 252 (2014). Courts consider three factors to determine whether the doctrine applies: "(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, and (3) the number of people standing to benefit from the decision." *Public Access Trails Hawai'i v. Haleakala Ranch Co.*, 153 Hawai'i 1, 22, 526 P.3d 526, 547 (2023) (cleaned up). All three prongs must be

satisfied. *Goo v. Arakawa*, 132 Hawai‘i 304, 318, 321 P.3d 655, 669 (2014).

"A case vindicates public policy of strong or societal importance when 'all of the citizens of the state, present and future, stand to benefit from the decision.'" *Maunalua Bay II*, 154 Hawai‘i at 153, 547 P.3d at 1183 (brackets omitted) (quoting *In re Water Use Permit Applications*, 96 Hawai‘i 27, 31, 25 P.3d 802, 806 (2001) ("*Waiahole II*")). Thus, when the outcome of a case vindicates the rights of the public as a whole or provides precedential value for the public in the future, the first prong has been found to be satisfied. *See, e.g.*, *Kaleikini v. Yoshioka*, 129 Hawai‘i 454, 463-64, 304 P.3d 252, 261-62 (2013) (finding the first prong satisfied where the case clarified "the principle of procedural standing in historic preservation law in Hawai‘i"); *Sierra Club*, 120 Hawai‘i at 220, 202 P.3d at 1265 ("[T]his litigation is responsible for establishing the principle of procedural standing in environmental law in Hawai‘i and clarifying the importance of addressing the secondary impacts of a project in the environmental review process[.]").

Appellants do not explain how the rights of the public as a whole have been vindicated by this case, nor how the public as a whole has or will benefit. Unlike in *Kaleikini* and *Sierra Club*, the only people who arguably benefit from this case are those who owned accreted lands "not otherwise awarded" that were taken by Act 73. Even then, such individuals would only benefit to the extent they, unlike Appellants here, could prove that their accreted lands had value. And Appellants do not address the ICA's observation that Appellants vindicated private interests *over* public interests because "[p]ublic policy, as interpreted by [the Hawai‘i Supreme Court], favors extending to public use and ownership as much of Hawai‘i's shoreline as is reasonably possible." *Maunalua Bay I*, 154 Hawai‘i at 154, 547 P.3d at 1184. The ICA thus did not abuse its discretion in finding that the first prong was not satisfied.

The second prong of the test is intended to fulfill the purpose of the private attorney general doctrine—incentivizing private attorneys to take on public interest cases despite their costs and complexities. This Court explained that the private attorney general doctrine is meant to promote cases which, "while of significance to society as a whole, ***do not*** involve the fortunes of a single individual to the extent necessary to encourage their private vindication in the courts." *Waiahole II*, 96 Hawai‘i at 30, 25 P.3d at 805 (emphasis added) (quoting *Serrano v. Priest*, 569 P.2d 1303, 1313-14 (Cal. 1977)). Thus, to determine whether to award fees under the doctrine,

> [t]he issue is whether the financial burden placed on the party is out of

> proportion to its personal stake in the lawsuit, looking to whether the plaintiff's reasonably expected financial benefits exceed by a substantial margin the plaintiff's actual litigation costs, focusing on the plaintiff's incentive to litigate absent a statutory attorney's fee award.

20 C.J.S. Costs § 148. Although Appellants were ultimately unsuccessful, as the ICA noted, they clearly believed that they should have been awarded over $6 million in compensation. *Maunalua Bay II*, 154 Hawai‘i at 154, 547 P.3d at 1184. "This obviously is not a case where no single person would have an incentive to sue the State for compensation[.]" *Id.* Thus, the second prong of the test does not weigh in Appellants' favor.

Finally, the number of people standing to benefit from this case does not weigh in favor of awarding fees. Appellants state in conclusory fashion that "challenging unconstitutional takings is consistent with the public interest" and benefits all members of the public by "safeguarding" their rights. App. at PDF 16. But, as already noted, Appellants do not explain how the public as a whole has benefited from the outcome of this case. The only rights that have arguably been vindicated are those of owners of accreted lands that were temporarily taken by Act 73 and that had some value at the time of the taking. Appellants do not even attempt to estimate how many such owners actually exist. Appellants have therefore failed to satisfy the third prong. *Goo*, 132 Hawai‘i at 319, 321 P.3d at 670 (finding the third prong unsatisfied when "it was 'very unclear' how many people would actually benefit" from the court's ruling, the case involved private property, and lacked precedential value).

Because none of the prongs of the private attorney general doctrine were satisfied, the ICA did not abuse its discretion in declining to award fees.

CONCLUSION

The State respectfully requests that Appellants' Application be denied.

DATED: Honolulu, Hawai‘i, July 16, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been served electronically (through the Court's JEFS system), or conventionally via US Mail, upon the following parties:

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