IN THE SUPREME COURT OF THE STATE OF HAWAI‘I

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MARK KIMBALL, KEITH KIMBALL, and CRAIG ELEVITCH,
Plaintiffs/Counterclaim Defendants-Appellees

vs.

DAVID RAIKE and SHAWN RAIKE, Individually and as
Trustees of the RAIKE IRREVOCABLE CHILDREN’S TRUST OF 1994,
Defendants/Counterclaimants-Appellants

NO. 20928

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 94-200K)

AUGUST 9, 2002

MOON, C.J., LEVINSON, NAKAYAMA, RAMIL, AND ACOBA, JJ.

OPINION OF THE COURT BY RAMIL, J.

Defendants-Appellants David Raike and Shawn Raike, individually and as trustees of the Raike Irrevocable Children’s Trust of 1994, appeal from the third circuit court’s:[1] (1) order denying their motion for partial summary judgment, filed on September 14, 1995; (2) denial of their motion in limine regarding Frances Fox Lincoln’s intent made on December 18, 1996; (3) order denying their motion for judgment notwithstanding the verdict, filed on July 8, 1997; (4) order denying their motion

[1] The Honorable Ronald Ibarra presided over this case.

for declaratory judgment regarding non-merger of estates, filed on July 8, 1997; (5) order denying their motion to alter or amend judgment, filed on July 8, 1997; (6) order awarding attorney's fees, filed on July 8, 1997; and (7) amended final judgment, filed on August 8, 1997, in favor of Plaintiffs-Appellees Mark Kimball, Keith Kimball, and Craig Elevitch. On appeal, the Raikes argue that the circuit court erred by: (1) denying their motion for judgment notwithstanding the verdict because (a) the lease was void due to an illegal subdivision and (b) the record was legally insufficient to support the jury's finding of an implied easement; (2) denying their motion in limine regarding the intent of the original owner, Frances Fox Lincoln, because the "common source of title" rule prevented the Kimballs from challenging the Raikes' title; (3) denying their motion for partial summary judgment because the doctrine of merger of estates was inapplicable and, thus, the lease applied to all 155.7 acres specified in the lease; (4) denying their motion for declaratory judgment regarding the doctrine of merger because the lease applied to all 155.7 acres specified in the lease; (5) denying their motion to alter or amend the judgment on special verdict because it was not supported by the jury's special verdict, the evidence, or applicable law; (6) entering its amended final judgment because it was not supported by the jury's special verdict, the evidence, or applicable law; and (7) granting the Kimballs and Elevitch's motion for award of attorney's fees because there was no supporting authority.

First, because the lease is void due to an illegal subdivision and the record does not support a finding of an implied easement, we vacate the circuit court's (1) denial of the Raikes' motion in limine regarding Lincoln's intent, (2) order denying the Raikes' motion for judgment notwithstanding the verdict, (3) order denying the Raikes' motion to alter or amend the judgment on special verdict, and (4) amended final judgment. Second, because attorney's fees are not provided for by agreement, the circuit court erred in its award and we vacate the circuit court's (1) order awarding attorney's fees and (2) the amended final judgment concerning such award. Because the lease is void, we do not address the issue concerning the doctrine of merger. We remand for further proceedings -- including the fashioning of any equitable remedies that may be appropriate -- consistent with this opinion.

I. BACKGROUND

A. Factual Background

This case centers on a dispute concerning three adjoining land parcels in Holualoa on the island of Hawai‘i: (1) a 0.8-acre lot, which is currently owned by Keith Kimball; (2) a 17.7-acre lot, which is currently owned by the Raikes; and (3) a 139-acre lot, which is currently owned by the Kimballs.

Originally, Lincoln owned all three parcels, and her residence straddled the boundary line between the 0.8-acre and

17.7-acre lots.[2] On January 12, 1988, Lincoln leased, for 45 years, both the 17.7-acre and 139-acre lots to Mark Kimball for organic farming. The lease specifically exempted "[a]n area of one acre surrounding [Lincoln's] residence." In addition, Lincoln "reserve[d] an easement for access and utility purposes from Mamalahoa Highway to her residence over the [17.7-acre lot]."

Almost three years later, Lincoln sued Mark Kimball, claiming that the lease was voidable. A jury, however, found that the lease was valid, and this court affirmed on appeal. See Kimball v. Lincoln, 72 Haw. 117, 809 P.2d 1130 (1991).

On March 16, 1993, following Lincoln's death in August 1991, the Lincoln Trustees recorded with the State of Hawai'i Bureau of Conveyances their conveyance of (1) the 17.7-acre lot, subject to the lease, to the Raikes, and (2) the 139-acre lot, subject to the lease, and the 0.8-acre lot to the American Friends Service Committee (AFSC), through quitclaim deeds.

On September 17, 1993, David Raike claimed in a letter that Mark Kimball had defaulted on his lease by, inter alia, failing to (1) pay rent and (2) use the requisite amount of acreage for the cultivation of crops.

In response, on September 25, 1993, Mark Kimball wrote a letter to David Raike, who now possessed Lincoln's residence,

[2] About two-thirds of the residence, including the barn, sits on the 17.7-acre lot, while the remaining one-third is on the 0.8-acre lot.

providing notice of eviction. Kimball explained that the lease excluded the residence and surrounding one acre of land "to allow only Frances Lincoln to use her home for the rest of her life."

On January 18, 1994, AFSC conveyed by warranty deed its interest in the 0.8-acre and 139-acre lots to the Kimballs. Specifically, AFSC conveyed a two-thirds undivided interest to Mark Kimball, and a one-third undivided interest to Keith Kimball.

On August 23, 1994, Mark Kimball quitclaimed his interest in the 0.8-acre lot to his brother, Keith Kimball.

B. Procedural History

Given these changes in ownership and claims, on August 2, 1994, the Kimballs filed a complaint requesting declaratory judgment to determine their rights and obligations with respect to the 17.7-acre lot. The Raikes filed a counterclaim on May 31, 1995, requesting a declaratory judgment that the Kimballs had breached the lease.

On June 7, 1996, the Raikes moved to join Craig Elevitch, who Mark Kimball had hired to work and live on the land, as a plaintiff. The circuit court granted the motion.

1. Implied easement

In a motion in limine, the Raikes sought to exclude all evidence of Lincoln's intent regarding the lease's exclusion of one acre. While the Kimballs contended that the ambiguity of the lease justified the court's allowing evidence of Lincoln's intent, the Raikes countered that the "common source of title"

rule precluded such evidence. The circuit court denied the Raikes' motion.

At trial, the Kimballs and Elevitch adduced evidence, over the Raikes' objection, to show that before (1) the Lincoln Trustees recorded their quitclaim deeds on March 16, 1993 and (2) the execution of the lease, Lincoln intended to create an implied easement in favor of the 0.8-acre lot for the exclusive use of the residence and the one acre exempted from the lease.

The jury returned its special verdict in favor of the Kimballs and Elevitch on December 23, 1996, finding that Keith Kimball has the "right to use the house and one acre surrounding the house."

On January 3, 1997, the Raikes filed their motion for judgment notwithstanding the verdict. The Raikes contended that the lease constituted an illegal subdivision. In particular, they argued that, at trial, the Kimballs and Elevitch had proven that the exclusion of one acre from the lease violated the County's subdivision code. In response, the Kimballs and Elevitch countered that the creation of an easement, which was specifically exempted by the code, prevented the lease from being illegal. The circuit court denied the Raikes' motion.

The court then entered its judgment on special verdict in favor of the Kimballs and Elevitch on January 21, 1997. The court declared that Keith Kimball was

> the owner of an exclusive perpetual easement in favor of and appurtenant to [the 0.8-acre lot] over and across [the 17.7-acre lot], for the purposes of using and maintaining the house, and using, maintaining the surrounding one acre

> described on Exhibit A for gardening, access, farming, landscaping and other reasonable uses and purposes, together with an easement over and across [the 17.7-acre lot] for access and utility purposes.

On January 31, 1997, the Raikes filed their motion to alter or amend the judgment on special verdict, which the circuit court denied.

On August 8, 1997, the circuit court issued its amended final judgment in favor of the Kimballs and Elevitch.

2. Merger of estates

On July 24, 1995, the Raikes filed a motion for partial summary judgment, in which they argued that the doctrine of merger of estates did not apply to the 155.7 acres[3] subject to the lease. The circuit court denied the motion.

At trial, Mark Kimball claimed that, under the doctrine of merger, he and Keith could cancel the lease with respect to the 139-acre lot. On January 13, 1997, the Raikes filed their motion for declaratory judgment asserting, inter alia, that (1) the 155.7 acres covered by the lease were not divisible, (2) the lease of 155.7 acres to Mark Kimball did not merge into the Kimballs' title to the reversionary interest in the 139 acres, and (3) the lease of 155.7 acres did not merge into Mark Kimball's undivided two-thirds interest in the 139-acre parcel. The circuit court denied the motion.

[3] Includes the 139-acre and 17.7-acre lots, minus the one acre surrounding Lincoln's residence that was specifically exempted by the lease.

3. Attorney's fees

On January 7, 1997, the Kimballs and Elevitch filed their motion for an award of attorney's fees. Although the Raikes opposed the motion, the circuit court granted it.

On August 8, 1997, the circuit court issued its amended final judgment in favor of the Kimballs and Elevitch, awarding them attorney's fees of $43,000.00 and costs of $4,552.14.

II. STANDARDS OF REVIEW

A. Motion in Limine Regarding the Intent of Lincoln

The motion in limine to exclude all evidence of Lincoln's intent regarding the lease's exclusion of one acre is an evidentiary decision based on Hawai'i Rules of Evidence (HRE) Rules 401 and 402, whose application can yield only one correct result. Accordingly, we review the circuit court's grant of motion under the right/wrong standard. See State v. White, 92 Hawai'i 192, 204, 990 P.2d 90, 102 (1999) (quoting State v. Wallace, 80 Hawai'i 382, 409, 910 P.2d 695, 722 (1996)).

B. Judgment Notwithstanding the Verdict

It is well settled that a trial court's rulings on

> directed verdict or [judgment notwithstanding the verdict] [(]JNOV[)] motions [are reviewed] de novo. Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a [person] of reasonable caution to support a conclusion.
>
> In deciding a motion for directed verdict or JNOV, the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and either motion may be granted only where there can be but one reasonable conclusion as to the proper judgment.

> Carr v. Strode, 79 Hawai‘i 475, 486, 904 P.2d 489, 500 (1995). Thus, "[w]here there is conflicting evidence, or there is insufficient evidence to make a one-way verdict proper, [JNOV] should not be awarded." Id. at 487, 904 P.2d at 501 (citing Guaschino v. Eucalyptus, Inc., 3 Haw. App. 632, 643, 658 P.2d 888, 896 (1983) (internal quotation signals and citation omitted).

In re Estate of Herbert, 90 Hawai‘i 443, 454, 979 P.2d 39, 50 (1999) (quoting Lee v. Aiu, 85 Hawai‘i 19, 30-31, 936 P.2d 655, 666-67 (1997) (citation omitted)).

C. Motion for Partial Summary Judgment

This court reviews a circuit court's award or denial of summary judgment de novo under the same standard applied by the circuit court. See Shoppe v. Gucci American, Inc., 94 Hawai‘i 368, 376, 14 P.3d 1049, 1057 (2000) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted)). In other words:

> [S]ummary 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 a judgment as a matter of law.

Id. (quoting Amfac, Inc., 74 Haw. at 104, 839 P.2d at 22 (citations and internal quotation signals omitted)) (citing Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(c) (1990)). In addition, this court must "view all of the evidence and the inferences drawn therefrom in the light most favorable to [the party opposing the motion]." Id. (quoting TSA Int'l, Ltd. v. Shimizu Corp., 92 Hawai‘i 243, 251-53, 990 P.2d 713, 721-23 (1999) (quotation omitted) (brackets in original)).

D. Motion for Declaratory Judgment

Because the Raikes' motion for declaratory judgment regarding the doctrine of merger presents a question of law, this court reviews the circuit court's denial of such motion de novo. See Koʻolau Agric. Co. v. Commission on Water Resource Mgmt., 83 Hawaiʻi 484, 488, 927 P.2d 1367, 1371 (1996) (citation omitted).

E. Motion to Alter or Amend Judgment

"A motion made pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 59(e) to alter or amend the judgment is reviewed under the abuse of discretion standard." Shanghai Inv. Co. v. Alteka Co., 92 Hawaiʻi 482, 492, 993 P.2d 516, 526, as amended, (2000), overruled on other grounds by, Blair v. Ing, 96 Hawaiʻi 327, 329, 31 P.3d 184, 186 (2001) (citing Gossinger v. Association of Apartment Owners of the Regency of Ala Wai, 73 Haw. 412, 425, 835 P.2d 627, 634 (1992)). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Kaneohe Bay Cruises, Inc. v. Hirata, 75 Haw. 250, 258, 861 P.2d 1, 6 (1993) (citations omitted).

F. Attorney's Fees

This court reviews the circuit court's granting of attorney's fees under the abuse of discretion standard. See Weinberg v. Mauch, 78 Hawaiʻi 40, 52-53, 890 P.2d 277, 289-90 (1995) (quoting Coll v. McCarthy, 72 Haw. 20, 28-29, 804 P.2d 881, 887 (1991) (citations omitted)).

III. DISCUSSION

The three principal issues in this case are: (1) whether the lease is void due to an illegal subdivision; (2) whether the record supports a finding of an implied easement; and (3) whether attorney's fees can be awarded to the Kimballs and Elevitch. We address each in turn.

A. Illegal Subdivision

The Hawai'i County Subdivision Code § 23-76 prescribes that "[l]and shall not be offered for sale, lease or rent in any subdivision, nor shall options or agreements for the purchase, sale, leasing or rental of the land be made until approval for recordation of the final plat is granted by the director." In turn, "subdivided land" is defined as

> improved or unimproved land or lands divided into two or more lots, parcels, sites, or other divisions of land for the purpose, whether immediate or future, of sale, lease, rental, transfer of title to or interest in, any or all such parcels, . . . and when appropriate to the context, relates to the process of subdividing of the land or territory subdivided.

Code § 23-3(30) (emphases added).

Here, Lincoln divided the 17.7-acre lot into two parts: (1) the 16.7-acre parcel to be leased and (2) the 1-acre parcel that was excluded from the lease. Thus, Lincoln was required to seek approval of such subdivision, as required by the Hawai'i County Code.[4] Because Lincoln failed to comply with the subdivision requirements, the lease is void. See generally Ai v.

[4] We note that the 45-year lease does not qualify as a farm subdivision, as defined by Hawai'i County Code § 23-113, which provides for a maximum lease term of thirty years.

Frank Huff Agency, 61 Haw. 607, 618, 607 P.2d 1304, 1312 (1980), overruled on other grounds by, Robert's Haw. Sch. Bus, Inc. v. Laupahoehoe Transp. Co., 91 Haw. 224, 982 P.2d 853 (1999); Wilson v. Kealakekua Ranch, 57 Haw. 124, 127-28, 551 P.2d 525, 527-28 (1976).

B. Implied easement

In response to the subdivision issue, the Kimballs and Elevitch counter that the creation of an easement, which is specifically exempted by the Hawai'i County Code, prevents the lease from being illegal. The Kimballs and Elevitch support this claim of an easement by relying on evidence indicating Lincoln intended to create a 1-acre easement appurtenant to the 0.8 acre lot.

The Raikes, on the other hand, contend that the record is insufficient to support the jury's finding of an implied easement, consisting of the residence and the surrounding one acre, over the 17.7-acre lot in favor of the 0.8-acre lot. Specifically, the Raikes aver that the Lincoln Trustees did not create a 1-acre easement upon conveyance of the 17.7-acre and 0.8-acre lots, and that the "common source of title" rule precluded the introduction of evidence of Lincoln's intent as irrelevant.

"We have recognized that a conveyance of a portion of a larger parcel of land owned by the grantor may result in the creation by implication of an easement corresponding to a pre-existing quasi-easement and burdening one of the resultant

parcels in favor of the other." Neary v. Martin, 57 Haw. 577, 579-80, 561 P.2d 1281, 1283 (1977) (citing Stibbard v. Rego, 38 Haw. 84 (1948)).

In Neary we distinguished between a "true easement"and a "quasi-easement":

> All implications of easements necessarily involve an original unity of ownership of the parcels which later become the dominant and servient parcels. When A owns Blackacre, it is not possible for A as the owner of the west half of Blackacre to have a true easement with respect to the east half of Blackacre; but it is both possible and frequent to find A using the east half of Blackacre for the service of the west half of Blackacre, as for example, when the east half of Blackacre contains drains, or sewers, or irrigation ditches, or roadways or stairways which increase the usability of the west half of Blackacre. It is then possible to describe A's utilization of one part of Blackacre for the service of another part thereof as a quasi-easement, and to speak of the served part as the quasi-dominant tenement, and of the burdened part as the quasi-servient tenement.

Id. at 580, 561 P.2d at 1283 (quoting 3 Powell on Real Property § 411 (Rohan ed., 1976)) (emphases added).

In order to determine that an implied easement exists, the pre-existing quasi-easement must have been: (1) apparent; (2) permanent; and (3) either (a) "important for the enjoyment of the conveyed quasi-dominant parcel[,]" or (b) "strictly necessary" for the enjoyment of the dominant parcel. See Neary, 57 Haw. at 580-81, 561 P.2d at 1283-84.

As this court explicated in Tanaka v. Mitsunaga, 43 Haw. 119 (1959), "[A]n easement corresponding to a pre-existing quasi-easement 'does not pass with the land if the language of the conveyance shows clearly an intention otherwise, or if the circumstances are such as to exclude a construction of the

language of the conveyance as inclusive of the easement.'" (citing 3 Tiffany, Real Property, 3d ed., § 781) (emphasis added). The Tanaka court further explained, "Since the implication of an easement from a pre-existing quasi-easement is made in supposed execution of the parties' intent, the implication is never made where the evidence shows the absence of such intent." Id. (quoting 3 Powell on Real Property, § 411) (emphasis added).

When Lincoln died, the Lincoln Trustees were given the power to alienate the 17.7-acre and 0.8-acre lots as they deemed to be in the best interest of the estate. Lincoln's revocable living trust grants to the trustees the power "[t]o purchase or sell at public or private sale . . . , in such manner and on such terms as the Trustee in its sole discretion may deem advisable, any property, real or personal, which at any time may constitute a part of the trust property." Similarly, in Neary, we examined a trust deed and observed that the trustee had the power to sell the trust property free of any quasi-easements, which may have been established by the settlor:

> The trustee's powers expressed in the trust deed included power "to sell, encumber or otherwise deal with any of the trust property." . . . The powers conferred upon the trustee clearly authorized him to sell the trust property in such portions and divisions as he determined to be in the best interests of the estate. . . . We conclude that there was no lack of power in the trustee to effectuate the intent to convey the property to Appellees free of the quasi-easement . . . .

57 Haw. at 583-84, 561 P.2d at 1285. Likewise, the trustee was able to convey the property with the quasi-easement, which would then become a true easement once the trust property was severed.

In this case, the record on appeal contains no evidence that the Lincoln Trustees conveyed a quasi-easement for use of the residence, when conveying the 0.8-acre lot to AFSC and the 17.7-acre lot to the Raikes. In fact, although the Kimballs and Elevitch claim that they have an implied easement to the residence and the surrounding one acre, the deed from AFSC to the Kimballs specifically states that the 0.8 lot is conveyed "subject to all . . . encroachments affecting the property." Similarly, Mark Kimball admitted that, when he purchased the 0.8-acre lot from AFSC, he did not believe that he was acquiring any interest in the house or the surrounding one acre. The record suggests that the Kimballs understood that the Raikes took possession of the house with the consent of the trustees. Moreover, the Kimballs and Elevitch have not demonstrated that the alleged one-acre easement is "apparent," "permanent," and "important for the enjoyment of the conveyed quasi-dominant parcel." Because the Lincoln Trustees did not convey a quasi-easement -- even assuming one existed before the Lincoln Trustees took control of the land[5] -- the trial court did not need to

[5] Even if we were to consider Lincoln's intent, there still would be insufficient evidence to establish an implied easement. First, the language in the lease agreement between Lincoln and Kimball does not indicate Lincoln intended to create an easement for use of her residence. With respect to the one-acre "exemption," the lease states, "An area of one acre surrounding lessor's residence shall be exempted from this lease. Lessor reserves an easement for access and utility purposes from Mamalahoa Highway to her residence over the premises." A plain reading of this language demonstrates that the lease describes only an exclusion or an exemption -- not an easement -- of the one acre. In addition, the maxim "inclusio unius est exclusio alterius," or the "inclusion of one is the exclusion of another," as explained in the ICA's opinion in Seltzer Partnership v. Linder, 2 Haw. App. 663, 670, 639 P.2d 420, 425-26 (1982), supports this interpretation. The ICA in Seltzer quoted from this court's decision in Tanaka v. Mitsunaga, 43 Haw. 119 (1959), (continued...)

address whether a quasi-easement actually existed. Accordingly,

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[5](...continued)
in clarifying such maxim: "Where the grantor specifically includes other easements in the deed but omits the claimed easement, that fact may be considered as an evidence of his intent to exclude the claimed easement from the conveyance." Seltzer, 2 Haw. App. at 670, 639 P.2d at 425-26 (quoting Tanaka, 43 Haw. at 124-25). Thus, in this case, the parties to the lease included an easement for access and utility purposes, but none for use of the one acre surrounding the house. The parties to the lease indicated that they knew how to use the term "easement," but they refused to use it in describing the one acre. Moreover, the evidence adduced by the Kimballs and Elevitch failed to demonstrate that the one acre easement was "apparent," "permanent," or "important for the enjoyment of the conveyed quasi-dominant parcel."

More importantly, there was no severance of the property by Lincoln to effectuate an implied easement upon conveyance. Here, the lease failed to sever the 0.8-acre and 17.7-acre lots from Lincoln's common ownership because the lease was void. As we have explained above, an implied easement may be claimed where there was a quasi-easement only when there is a conveyance of at least part of the commonly-owned land:

> Where such a quasi-easement has existed and the common owner thereafter conveys to another the quasi-dominant tenement, the conveyee is in a position to claim an easement by implication with respect to the unconveyed quasi-servient tenement. Whether this claim will be effective depends upon the satisfaction of certain tests established by the cases. It is usually said that the quasi-easement must [be] "apparent," "permanent," and "important for the enjoyment of the conveyed quasi-dominant parcel."

Neary, 57 Haw. at 580, 561 P.2d at 1283-84 (quoting 3 Powell on Real Property § 411) (emphases added). See also id., 561 P.2d at 1284 ("Where a quasi-easement exists at the time of the severance of the parcels, a corresponding easement may be implied whether it is the quasi-dominant tenement or the quasi-servient tenement which is conveyed." (Emphasis added). Because the lease is void, there was no severing of the 0.8-acre and 17.7-acre lots by Lincoln, the common owner.

Furthermore, even if the lease were valid, the lease was for a period of only 45 years. Possession of the 17.7-acre lot was to return to Lincoln upon the conclusion of the lease, thus reinstating "common ownership" of the lots and ending the "severance" of the property. At most, this would create an easement for the duration of the lease term, but not a perpetual easement as argued by the Kimballs and Elevitch. See generally, Lalakea v. Hawaiian Irrigation Co., 36 Haw. 692, 703-704 (1944) ("[W]here the owner of land subjects part of the land to an open, visible, permanent and continuous service or easement in favor of another part and then aliens either, the purchaser takes subject to the burden or benefit as the case may be. . . . The same is true where the owner of the fee leases either portion for a term of years. The lessee takes the demise subject to the burden or benefit as the case may be." (Footnotes omitted.)); Schmidt v. Eger, 289 N.W.2d 851, 856 (Mich. Ct. App. 1980) ("Given the nature and purpose of the severance requirement, we hold that the date of severance cannot be placed in the middle of a continuous possessory interest, but must instead be placed at the point where the possessory interest first arose, which in this case is . . . the date of the lease.").

there is no implied easement.[6]

Because the lease is void and the trustees did not convey an implied easement, the circuit court: (1) erred in denying the Raikes' motion for judgment notwithstanding the verdict; (2) abused its discretion in denying the Raikes' motion to alter or amend the judgment on special verdict; and (3) erred by entering its amended final judgment.

We note that the circuit court in this case granted Keith Kimball an "exclusive perpetual easement" in favor of the 0.8-acre lot over the 17.7-acre lot for "the purposes of using and maintaining the house, and using, maintaining the surrounding one acre . . . for gardening, access, farming, landscaping and other reasonable uses and purposes." While the granting of an exclusive and perpetual easement is not absolutely prohibited, see, e.g., Seltzer Partnership, 2 Haw. App. at 670, 639 P.2d at 426, we emphasize that easements, by definition, are "limited" rights, Black's Law Dictionary 509 (6th ed. 1990) ("Traditionally, the permitted kinds of uses were limited . . . . A right in the owner of one parcel of land . . . to use the land of another for a special purpose not inconsistent with a general property in the owner.") (emphases added). See also Seltzer

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[6] As it stands, the Raikes own the 17.7-acre lot in its entirety, including the house. Similarly, the Kimballs own the 0.8-acre lot, subject to the encroachment of the house. "An encroachment is an item attached to one owner's land that illegally intrudes into another owner's land. The usual cause of action against an encroachment is trespass . . . , although nuisance theory may be applicable as well." 9 Powell on Real Property § 68.09[1] at 38. Because (1) this issue was not raised on appeal, (2) this issue has not been briefed, and (3) the record on this issue is not fully developed, the trial court -- not this court -- is the proper forum to fashion any appropriate remedy.

Partnership, 2 Haw. App. at 670, 639 P.2d at 426 (recognizing a "specific, perpetual and exclusive easement for roadway and utility purposes") (emphases added); 4 Powell on Real Property § 34.01[1] at 5 (Wolf ed., 2000) (Easements are "interests in land that are nonpossessory: they grant to A, the dominant owner, limited rights to use or to enjoy land that is lawfully possessed by B, the servient owner.") (emphases added); id. § 34.02[1] at 10 (quoting Restatement of Property § 450) (Restatement specifies that an easement is an interest of a "limited use or enjoyment of the land in which the interest exists") (internal quotation signals omitted) (emphasis added).

Here, the circuit court granted an exclusive perpetual easement for broad purposes: (1) "using and maintaining the house," and (2) "using [and] maintaining the surrounding one acre . . . for gardening, access, farming, landscaping and other reasonable uses and purposes." But, historically, Hawai'i courts have restricted easements to specific, limited purposes. See, e.g., City and County of Honolulu v. Boulevard Properties, Inc., 55 Haw. 305, 517 P.2d 779 (1974) (for utility); Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 81 Hawai'i 512, 918 P.2d 1168 (App. 1996) (for access to fish and use beach); Consolidated Amusement Co. v. Waikiki Bus. Plaza, Inc., 6 Haw. App. 312, 719 P.2d 1119 (1986) (for access); Rogers v. Pedro, 3 Haw. App. 136, 642 P.2d 549 (1982) (for utility purposes); Henmi Apartments, Inc. v. Sawyer, 3 Haw. App. 555, 655 P.2d 881 (1982) (for utility and pedestrian purposes); Seltzer Partnership, 2 Haw. App. at

663, 639 P.2d at 420 (for roadway and utility purposes). As Powell on Real Property points out, an interest in fee simple cannot be disguised as an "easement":

> The requirement that the easement involve only a limited use or enjoyment of the servient tenement is a corollary of the nonpossessory character of the interest. If a conveyance purported to transfer to A an unlimited use or enjoyment of land, it would be in effect a conveyance of ownership to A, not an easement. It is, of course, possible to create an easement that excludes the servient owner wholly from some specified uses of the servient land, as for example, the springs of water located thereon. Whenever an easement exists, the servient owner is privileged to use the servient land in any way not inconsistent with the limited use permitted the easement owner.

§ 34.02[2][a] at 12 (emphases added). See also Thompson on Real Property §60.04(b)(2) at 459 (Thomas ed., 1994 & Supp. 2000) ("Where the exclusive easement grants to the easement holder exclusive use for all purposes, the easement more closely resembles a fee interest and, some courts say, should not be considered an easement."). Thus, courts must ensure that an easement is not effectively -- though improperly -- used to convey an interest in fee simple.

C. Merger of Estates

The Raikes contend that the circuit court improperly denied their motion for partial summary judgment. In such motion, the Raikes asserted that the principle of merger of estates did not extinguish the lease with respect to the 139-acre lot because (1) the lease applied to both the 139-acre and 17.7-acre lots and (2) Mark Kimball had only an undivided two-thirds interest in the 139-acre lot. Similarly, the Raikes allege that the circuit court improperly denied their motion for declaratory

judgment. Because the lease is void, this issue is rendered moot and we need not address it.

D. Award of Attorney's Fees

Finally, the Raikes argue that the circuit court erred by awarding attorney's fees to the Kimballs and Elevitch because: (1) there was no agreement providing for recovery of attorney's fees; and (2) in the alternative, the Kimballs and Elevitch are not the prevailing party.

This court has established that "[o]rdinarily, attorneys' fees cannot be awarded as damages or costs unless so provided by statute, stipulation, or agreement." Weinberg v. Mauch, 78 Hawai'i 40, 53, 890 P.2d 277, 289-90 (1995) (quoting S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 76 Hawai'i 396, 399 n.3, 879 P.2d 501, 504 n.3 (1994) (citations omitted)).

First, there is no valid agreement that provides for attorney's fees. Even if the lease were not void, it does not provide for attorney's fees. Moreover, even if attorney's fees were authorized "by statute, stipulation, or agreement," the Kimballs and Elevitch are likely not the prevailing party, given our ruling. See Shanghai Inv., 92 Hawai'i at 502, 993 P.2d at 536. Thus, no basis for attorney's fees exists in this case, and the circuit court erred by awarding attorney's fees to the Kimballs and Elevitch.

IV. CONCLUSION

Based on the foregoing discussion, we vacate the circuit court's: (1)(a) order denying the Raikes' motion for

judgment notwithstanding the verdict, (b) order denying the Raikes' motion to alter or amend the judgment on special verdict, and (c) amended final judgment regarding the finding of an implied easement; and (2)(a) order awarding attorney's fees and (b) amended final judgment concerning such award. We remand for further proceedings -- including the fashioning of any equitable remedies that may be appropriate -- consistent with this opinion.

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