NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; MAUI TOMORROW, INC., a Hawaii non-profit corporation; and the KAHULUI HARBOR COALITION, an unincorporated association, Plaintiffs-Appellants/ Cross-Appellees/ Appellees/Cross-Appellants, vs. THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; BRENNON MORIOKA, in his capacity as Director of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; MICHAEL FORMBY, in his capacity as Director of Harbors of the DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII, Defendants-Appellees/ Cross-Appellants/ Appellants/Cross-Appellees, HAWAII SUPERFERRY, INC.	Civil No. 05-1-0114-03 (Declaratory Judgment) APPEAL **AND** CROSS APPEAL FROM A) FINAL JUDGMENT; CERTIFICATE OF SERVICE FILED JANUARY 31, 2008; B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAI'I'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; CERTIFICATE OF SERVICE FILED NOVEMBER 14, 2007; C) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND COSTS FILED ON JANUARY 15, 2008 FILED MARCH 27, 2008; **AND** CROSS APPEAL FROM A) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION; CERTIFICATE OF SERVICE FILED

1344

Defendant-Appellee/ Cross-Appellant/ Appellant/Cross-Appellee.	)	OCTOBER 9, 2007 AND B) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY INJUNCTION; CERTIFICATE OF SERVICE FILED NOVEMBER 9, 2007 CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAI'I The Honorable Joseph E. Cardoza, Judge

khc/SCII/replybrief

ANSWERING BRIEF OF PLAINTIFFS/APPELLANTS/ CROSS-APPELLEES/ APPELLEES/CROSS-APPELLANTS THE SIERRA CLUB, MAUI TOMORROW, INC. AND THE KAHULUI HARBOR COALITION TO OPENING BRIEF OF HAWAII SUPERFERRY, INC.

AND

CERTIFICATE OF SERVICE

ISAAC HALL #2238
2087 Wells Street
Wailuku, Maui, Hawaii 96793
Telephone: (808) 244-9017
Attorney for Plaintiffs/Appellants/
Cross-Appellees/Appellees/
Cross-Appellants The Sierra Club,
Maui Tomorrow, Inc.
and the Kahului Harbor Coalition

TABLE OF CONTENTS

12117

TABLE OF AUTHORITIES

CASES

1349

STATUTES

HAWAII ADMINISTRATIVE RULES

1361

HAWAII RULES OF APPPELLATE PROCEDURE

HAWAII RULES OF EVIDENCE

LEGISLATIVE

TREATISES

1352

ANSWERING BRIEF OF SIERRA CLUB
TO OPENING BRIEF OF HAWAII SUPERFERRY, INC.

Sierra Club files this Answering Brief to the Opening Brief of Hawaii Superferry Inc,, pursuant to Rules 27, 28 and 30 of the Hawaii Rules of Appellate Procedure ("HRAP"), as follows.[1]

I. INTRODUCTION

Sierra Club prevailed on the main claims in this case, securing a significant environmental decision by the Hawaii Supreme Court establishing procedural standing for the first time in the State of Hawaii, in a case in which the Supreme Court issued a ruling on the merits, several hours after oral argument, directing that summary judgment be entered in favor of Sierra Club. Sierra Club then participated in a four-week long trial after which the Circuit Court entered a permanent injunction prohibiting the operation of Superferry, finding, in part, that a permanent injunction was in the public interest and that it was possible that Superferry would cause irreparable harm to multiple environmental resources if it operated during the time it takes to prepare an Environmental Assessment ("EA"). Only a legislative act, also now subject to appellate review, mooted Sierra Club's claim. In this Answering Brief, Sierra Club seeks a full award of attorney's fee to these non-profit environmental plaintiffs.

II. COUNTER-CONCISE STATEMENT OF THE CASE

Sierra Club, for the sake of coherency and to avoid repetition in the overall briefing of these appeals, restates and incorporates by reference Section II, the Counter-Concise Statement of the Case, within its Answering Brief in response to the Opening Brief of HDOT filed concurrently with this Brief.

---

[1] Plaintiffs-Appellants/Cross-Appellees/Appellees/Cross-Appellants the Sierra Club, Maui Tomorrow, Inc. and the Kahului Harbor Coalition will be referenced hereafter as "Sierra Club." Defendant-Appellee/Cross-Appellant/ Appellant/Cross-Appellee Hawaii Superferry, Inc. will be referenced hereafter as "Superferry." Defendants/Appellees/ Cross-Appellants/Appellants/Cross-Appellees the Department of Transportation of the State of Hawaii; Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii; Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii will be referenced hereafter as "HDOT."

III. STANDARD OF REVIEW FOR SUPERFERRY'S POINTS OF ERROR ON AWARD OF ATTORNEYS' FEES

"This court reviews the denial and granting of attorney's fees under the abuse of discretion standard." *Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai`i,* 106 Hawai`i 416, 431, 106 P.3d 339, 354 (2005) (citations, brackets, ellipses, and quotation signals omitted).

"The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Canalez v. Bob's Appliance Serv. Ctr., Inc.,* 89 Hawai`i 292, 299, 972 P.2d 295, 302 (1999) (quoting *Lepere v. United Pub. Workers,* 77 Hawai`i 471, 473, 887 P.2d 1029, 1031 (1995)) (quotation marks omitted). In other words, "[a]n abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." *Canalez,* 89 Hawai`i at 299, 972 P.2d at 302 (quoting *State ex rel. Bronster v. United States Steel Corp.,* 82 Hawai`i 32, 54, 919 P.2d 294, 316 (1996)) (quotation marks omitted; alteration in original). *Maui Tomorrow v. BLNR,* 110 Haw. 234, 131 P.3d 517 (2006).

IV. ARGUMENT

A. Sierra Club is the Prevailing Party

Superferry and HDOT present similar arguments in their Opening Briefs on why the Trial Court purportedly abused its discretion in determining that Sierra Club was the prevailing party. Sierra Club, for the sake of coherency and to avoid repetition in the overall briefing of these appeals, restates and incorporates by reference Section IV. A. on pp. 11 through 23 of its Answering Brief in response to the Opening Brief of HDOT demonstrating why the Trial Court properly determined that Sierra Club was the prevailing party. Sierra Club states these arguments in abbreviated fashion below and addresses any distinct arguments raised by Superferry.

1. Sierra Club Prevailed Upon its Main Claims

Sierra Club filed a five (5) count Complaint for Declaratory, Injunctive and Other Relief. ROA 1-45.[2] Counts I and III are the core or main claims in the Complaint. The whole case hinges upon a declaration that the exemption determinations are void (Count III) and through the concomitant conclusion that an EA is required (Count I).

Sierra Club secured a significant environmental decision from the Hawaii Supreme Court. *Sierra Club v. Department of Transportation,* 115 Hawai'i 299, 167 P.3d 292 (2007). The Circuit Court thereafter also entered a permanent injunction, after a four (4) week trial, on October 9, 2007. ROA 2273-2281.

There can be little doubt that Sierra Club prevailed on the "disputed main claims" presented in this litigation. *Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc.,* 58 Haw. 606 at 620. 575 P.2d 869 at 879 (1978). The Trial Court was required to first identify the principle issues raised by the pleadings and proof in a particular case, and then determine, on balance, which party prevailed on the issues. *MFD Partners v. Murphy,* 9 Haw. App. 509, 514-15, 850 P.2d 713, 716 (Haw. Ct. App.1992). The Trial Court properly reviewed these claims and determined that Sierra Club was the prevailing party for the purpose of awarding attorney's fees and costs.

2. The Reliance of Superferry and HDOT Upon A General Rule Is Misplaced in this Case

The Trial Court, over Sierra Club's objections, granted the Motion to Dissolve and Vacate filed by HDOT and Superferry. ROA 2544-2833. Superferry and HDOT argue that the Judgment entered in their favor is dispositive and prevents Sierra Club from being recognized as the prevailing party. Superferry and HDOT rely upon a **general** rule that the party in whose favor a Judgment is entered is the prevailing party in a lawsuit. For this proposition Superferry and HDOT cite *Wong v. Takeuchi,* 88 Haw. 46, 961 P.2d 614 (1998), *Kamaka v. Goodsill Anderson Quinn & Stifel,* 117 Haw. 92, 176 P.3d

[2] Record on Appeal will be referenced hereafter as "ROA." Exhibits will be referenced as marked. Transcripts will be referenced by Transcript number, date, page and line.

1355

91 (2008) and Section 2667 of 10 C. Wright, S.Miller & M. Kane, *Federal Practice and Procedure*: Civil at 186-187 (2d ed. 1983) In this case this reliance is misplaced because these cases construe HRS § 607-14 and do not deal with situations in which legislative actions have mooted claims upon which Plaintiffs have prevailed.

3. Sierra Club Is The Prevailing Party Even Though Subsequent Legislation Has "Mooted" Sierra Club's Claims

An entirely different principle in the "prevailing party" doctrine is applicable to this case. See Section 2667 of 10 C. Wright, S.Miller & M. Kane, *Federal Practice and Procedure*: Civil (2d ed. 1983), only in another place, at 221 and 224 where the Treatise states:

> Further, in suits seeking injunctive relief, if the defendant alters its conduct so that plaintiff's claim becomes moot before judgment is reached, costs may be allowed if the court finds that the changes were the result, at least in part, of plaintiff's litigation. The key in these cases is whether the plaintiff actually has gained some benefit, either directly or indirectly, from the litigation.

See also 10 Moore's *Federal Practice* at 54-302 § 54.171[3][c] (2d ed. 2008). In *National Black Police Ass'n v. District of Columbia*, 168 F.3d 525, 530 (D.C. Cir. 1997), the Court held that:

> .... **an injunction of limited duration is sufficient to support an award of attorney's fees, even where the case has become moot in the interim**. (Emphasis added)

Like holdings were issued in *Richard S. v. Dept. of Developmental Services of Calif.*, 317 F.3d 1080 (9th Cir. 2003); *Young v. City of Chicago*, 202 F.3d 1000 (7th Cir. 2000); *Virzi Subaru, Inc. v. Subaru of New England, Inc.*, 742 F.2d 677(1st Cir. 1884); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980); *Black Hills Alliance v. Regional Forester*, 526 F. Supp 257 (D.C.S.D. 1981); *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469 (E.D.N.Y. 1977)

4. The Cases Relied Upon by HDOT and Superferry are Inapposite and Inapplicable

The reliance of Superferry and HDOT upon *Sole v. Wyner,* 551 US ___, 127 S.Ct. 218 (2007) is misplaced. The facts in *Sole, supra,* bear little or no resemblance to the facts here. In that case the Court found that the tentative character of the injunctive relief had not altered any legal relationships between the parties. *Rhodes v. Stewart,* 488 U.S. 1 (1988) is likewise factually dissimilar primarily because there were no remaining parties with any "capacity" to benefit from a prevailing party status.

5. Sierra Club Has Prevailed on Its HRS § 607-25 Claim

Sierra Club has prevailed on its HRS § 607-25 claim in this case. Sierra Club's claims pursuant to HRS § 607-25 have remained alive throughout this lawsuit, were unaffected by Act 2 and were actually preserved by the Trial Court in the Final Judgment. The Final Judgment entered by the Trial Court on January 31, 2008 does not dismiss Sierra Club's claims pursuant to HRS § 607-25 and does not enter a Final Judgment in favor of Defendants on Sierra Club's claims pursuant to HRS § 607-25. ROA 3718-3722.

In the Final Judgment the Court reiterated its authorization to Sierra Club to file its request for reimbursement of attorney's fees. This authorization is not subject to the dismissal and mooting described in the paragraphs above in the Final Judgment. Most importantly, Act 2 only affects Sierra Club's claims pursuant to Chapter 343 and does not affect any of Sierra Club's claims pursuant to HRS § 607-25. Act 2 looks forward. Act 2 seeks to allow Superferry to operate in the future without the impediment of the "no action" provisions of Chapter 343. The HRS § 607-25 claim looks backwards to Superferry's implementation of the Superferry project without an EA at a time when the "no action" provisions were in full, force and effect. As such, Sierra Club is free to be awarded fees and costs in this case based upon this claim. Based upon the *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 32 P.3d 52 (2001) and *Henlsey v. Eckherhart,* 461 U.S. 424, 103 S. Ct. 1933 (1983) analysis the case has always involved a common core of facts that are not severable and Sierra Club is therefore entitled to compensation for all of its work on this case. Sierra Club has not sought compensation for work

applicable to Act 2, however. Only a legislative act, still subject to potential appellate review, mooted Sierra Club's claim. As such, Sierra Club is just as much the prevailing party as were the other Plaintiffs in the cases relied upon by Sierra Club and recited above.

B. Sierra Club is Entitled to Attorney's Fees and Costs Pursuant to HRS § 607-25

1. The Constitutional Private Environmental Right of Action and HRS § 607-25

The 1978 Constitutional Convention recommended and the voters approved an amendment to the Hawaii State Constitution entitled "Environmental Rights." This amendment appears as Article XI, § 9, of the State Constitution:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhance of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law. (Emphasis added.)

To give fuller effect to this amendment, the Legislature adopted HRS § 607-25. The Hawaii Supreme Court described in detail the interface between the Constitutional private right of action created in Article XI, Section 9 of the Hawaii Constitution and HRS § 607-25 in *KSOA v. Maui County Council*, 86 Haw. 132, 948 P.2d 122 (1997) holding as follows:

> HRS § 607-25 was enacted by the 1986 State Legislature as Act 80. Act 80, § 1, explained the purpose of the statute as follows:
>
> **The legislature finds that article XI, section 9, of the Constitution of the State of [Hawai'i] has given the public standing to use the courts to enforce laws intended to protect the environment. However, the legislature finds that the public has rarely used this right and that there have been increasing numbers of after-the-fact permits for illegal private development.** Although the legislature notes that some government agencies are having difficulty with the full and timely enforcement of permit requirements against private parties, after-

the-fact permits are not a desirable form of permit streamlining. For these reasons, the legislature concludes that to improve the implementation of laws to protect health, environmental quality, and natural resources, the impediment of high legal costs must be reduced for public interest groups by allowing the award of attorneys' fees in cases involving illegal development by private parties. (Emphasis added.)

Additionally, the legislative history stated:

Your committee find[s] that the volume of development throughout the State is a limiting factor on State or County investigation of alleged abuses against public resources and the environment . . .

The bill will give fuller effect to Article XI, Section 9 of the Constitution of the State of [Hawai'i], which gives Hawaii's people the right to bring lawsuits enforcing environmental laws.

Members of the public interested in using their constitutional standing may be deterred by the high cost of litigation. Awarding attorney's fees and costs will enable individuals and organizations to assist the state in enforcing laws and ordinances controlling development. They are to be awarded costs if they prevail after fruitlessly bringing the violation to the attention of those undertaking the development and the relevant state agency.

This bill will help assure that the state honors the commitment to its environment that is reflected in its laws concerning development.

Sen. Stand. Comm. Rep. No. 450-86, in 1986 Senate Journal, at 976 (Emphasis added.)

From the legislative history, we are able to determine that the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws. To encourage individuals and organizations to enforce the law, the legislature allowed the individual or organization to recover attorneys' fees if it prevailed in its lawsuit. (Emphasis added).

HRS § 607-25 provides in pertinent part:

(e) In any civil action in this State where a private party sues for injunctive relief against another private party who

1359

has been or is undertaking any development without obtaining all permits or approvals required by law from government agencies:

The court may award reasonable attorneys' fees and costs of the suit to the prevailing party.

According to the Hawaii Supreme Court, the legislature intended that this statute encourage "individuals and organizations [to] help [with] the state's enforcement of laws and ordinances controlling development by acting as private attorneys general and suing developers who did not comply with the proper development laws" by allowing "the individual or organization to recover attorneys' fees if it prevailed in its lawsuit." *KSOA v. Maui County Council*, 86 Haw. 132, 134-35, 948 P.2d 122 (1997).

HRS § 607-25 defines with particularity those permit or approval processes which are subject to enforcement. It states in HRS § 607-25(c):

> For purposes of this section, compliance with the procedural requirements established by Chapter 343 and rules pursuant to Chapter 343 constitute a discretionary agency approval for development. (Emphasis added.)

HRS § 607-25 (a) defines "development" to include:

> (1) The placement or erection of any solid material or any gaseous, liquid, solid, or thermal waste;
> (2) The grading, removing, dredging, mining, pumping, or extraction of any liquid or solid materials; or
> (3) The construction or enlargement of any structure requiring discretionary permit.

2. Superferry is a Private Party That Undertook Development Without All Permits or Approvals Required by Law, Namely A Required Environmental Assessment

Superferry violated the procedural requirements of Chapter 343 in two primary manners:

(1) When Superferry constructed Harbor Equipment or Improvements at Kahului Harbor before the EA required by law in this case was prepared or "accepted"; and

(2) When Superferry commenced operations at Kahului Harbor at the end of August 2007 before the EA required by law in this case was prepared or "accepted."

a. Superferry Undertook Development Within the Meaning of HRS § 607-25 (a) Without A Required EA

One claim for relief in the lawsuit brought by Sierra Club is that illegal "development" has been undertaken at the Kahului Harbor without required permits, namely a required EA. ROA 40-41. The construction undertaken by HDOT and by Superferry, without the required EA, qualifies as "development" within the meaning of HRS § 607-25(a).

The Trial Court, on November 9, 2007, entered detailed "Findings of Fact, Conclusions of Law in Support of Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction" (ROA 2946-2973) that included the following Findings of Fact:

> 18. HDOT and HSF entered into a Harbors Operating Agreement on the 7th day of September, 2005. The Operating Agreement grants to HSF the use of certain "premises" or state lands at the Kahului Harbor for the Hawaii Superferry Project. The Operating Agreement also provides that the agreement is subject to HSF compliance with state laws, including state environmental laws. ROA 2954.
>
> 19. Through the Operating Agreement, HDOT agreed to provide certain facilities at Kahului Harbor. ROA 2954.
>
> 20. Through the Operating Agreement, HSF was able to use approximately 5.1 acres of state land at Kahului Harbor and to construct certain facilities thereupon, with the approval of HDOT. ROA 2955.
>
> 21. Certain improvements were constructed on the 5.1 acre parcel of state land at Kahului Harbor for the Hawaii Superferry Project. ROA 2955.

These Findings of Fact have not been challenged by Superferry in this appeal. By the Letter of Intent, HDOT agreed that facilities did not exist at state harbors for interisland ferry services and that Superferry would be permitted to

construct, at its own cost, improvements for ticket sales, customer processing, passenger vehicle weighing and inspection areas and areas for embarkation and disembarkation. HSF-16. Tr. No. 7919, 9/26/07, p. 13, l. 21 – p. 15, l. 22. Irrespective of what may have been alleged in the Complaint, as the case developed, it became clear that Superferry was responsible for constructing or developing some of the infrastructure necessary for the implementation of the Hawaii Superferry Project.

The Operating Agreement was also received into evidence. HSF-9. By the Operating Agreement, Superferry is entitled to construct "HSF Equipment" on the "premises" granted by HDOT to Superferry at Kahului Harbor. HSF-9, p. 28, ¶ VI.A.2. The Operating Agreement defines "HSF Equipment" as "gangways", "tents for security, vehicle and agricultural inspection", "pavement", "infrastructure upgrades" and "parking areas, storage areas" and the like. HSF-9, p. 5. ¶ V. This "Equipment" is described in detail on p.81 of the Agreement and includes the above and "new pavement/roadway", "grading" and the like. HSF-9, p. 81.

Superferry, in 2007, constructed these improvements on the 5.1 acre parcel of state land at Kahului Harbor. Superferry has conceded that it constructed or had constructed these improvements on the 5.1 acres of state land at Kahului Harbor. Mr. John Garibaldi, as the Chief Executive Officer of Superferry, testified that the State allowed Superferry to place certain improvements on state land, that Superferry obtained approvals from the State before doing so, that "during 2007" fencing, barriers, gangways, tenting structures and removable restrooms were constructed by Superferry at Kahului Harbor and that the improvements were the ones shown on Exhibit HSF-22. Tr. No. 7995, 10/5/07, p. 48, l. 15 – p. 50, l. 15. Mr. Barry Fukunaga, on behalf of HDOT, testified, that HDOT provided written approvals to Superferry to construct passenger accommodations, fencing, tents and passenger processing equipment on state land at Kahului Harbor. Tr. No. 7919, 9/26/07, p. 53, l. 19 – p. 59, l. 9.

22. HDOT, based upon the Operating Agreement, constructed certain improvements including a barge, vehicle

1367

boarding ramp and gangways for use at Kahului Harbor by Hawaii Superferry.

This Finding of Fact has not been challenged by HDOT in this appeal. Mr. Barry Fukunaga, on behalf of HDOT, testified, that HDOT constructed or had constructed these improvements at Kahului Harbor, including the barge and boarding ramps and certain other shoreside improvements, including utilities with some of the $40,000,000.00 of state funds. Tr. No. 7919, 9/26/07, p. 39, l. 18 –20; p. 54, l. 1 – 18. Mr. John Garibaldi, as the CEO of Superferry, testified that without the state-owned barge Superferry would not be able to operate. Tr. No. 7995, 10/5/07, p. 48, l. 2 – 14.

The "HSF Equipment" constructed by Superferry on the 5.1 acres of state land at the Kahului Harbor - - including a passenger terminal, bathroom facilities, check-in sales counter, security area fencing, electrical and water infrastructure, grading, gates, paved roadway and paved inspection areas - - beyond dispute fall within the definition of "development" in HRS § 607-25 (a). Likewise, the improvements constructed by HDOT on the 5.1 acres of state land at the Kahului Harbor - - including the barge, vehicle boarding ramp and gangways - - beyond dispute fall within the definition of "development" in HRS § 607-25(a). Some or all of these improvements constructed clearly fall within "the placement .... of any solid material," "grading" and "the construction or enlargement of any structure."

Superferry has long admitted that the improvements described above are all "necessary" facilities that are "a prerequisite to Superferry's commencement of its operations." ROA 1493. It is undisputed that no EA existed at the time the "improvements" or "developments" built by Superferry were constructed by Superferry and that no EA existed at the time the "improvements" or "developments" built by HDOT were constructed by HDOT.

b. Superferry Violated the Procedural Requirements of Chapter 343 When Superferry Commenced Operations in August 2007, As Was Properly Found and Concluded by the Trial Court

Superferry asserts that no Court ever ruled that Superferry violated Chapter 343 or any other law. See pp. 5, 9 and 14 of the Superferry Opening Brief. This is a gross and material misstatement of the record in this case. The Trial Court entered injunctive relief on three (3) occasions -- a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction -- against Superferry, prohibiting Superferry from operating in violation of the procedural requirements of Chapter 343. Superferry's violations were, by definition, violations of HRS § 607-25(e).

The Trial Court, on November 9, 2007, entered detailed "Findings of Fact, Conclusions of Law in Support of Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction" (ROA 2946-2973) that included the following Findings of Fact:

> 31. On August 23, 2007, the Hawai'i Supreme Court, after conducting oral arguments and thoroughly considering the written briefs submitted by the parties, reversed the exemption determination in the above-captioned case and directed that this Court enter Summary Judgment in Plaintiffs' favor requiring the preparation of an environmental assessment.
>
> 32. The Hawaii Supreme Court issued its Order dated August 23, 2007.
>
> 34. As a result, **this Court, on August 24, 2007, issued an order granting summary judgment in favor of the Plaintiffs on their claim as to their request for an environmental assessment.**

Through the entry of the Hawaii Supreme Court's Order on August 23, 2007 recognizing the applicability of the EA requirement of Chapter 343 and the Trial Court's entry of Summary Judgment in favor of Plaintiffs on August 24, 2007 requiring the preparation of an EA, a panoply of environmental rights and protections were then vested in Sierra Club and the public.

The non-implementation or "no-action" provisions of Chapter 343 were automatically triggered once the Hawaii Supreme Court ordered the preparation of an EA. Chapter 343 prohibits the implementation of the project

while the environmental studies are being prepared, HRS § 343-5(b),(c). HAR § 11-200-23(c) prohibits the use of state lands and funds while an EA is being prepared, such that the Kahului Harbor improvements for Superferry could not be used and state lands granted to Superferry at Kahului Harbor through the Operating Agreement could not be used.

The Harbors Operating Agreement entered into on September 7, 2005 between HDOT and Superferry, granting the state the right to use state lands at Kahului Harbor and to construct improvements at Kahului Harbor, was void ab initio, as dictated by *Kepoo v. Kane,* 106 Haw. 270, 103 P.3d 939 (2005), since an EA was required as of February 23, 2005 and the Agreement was based upon an erroneous exemption determination.

As of August 23, 2007, the non-implementation or "no-action" provisions of Chapter 343 mandated that Hawaii Superferry cease its operations, that HDOT not allow Superferry to use state lands for Superferry and that Superferry improvements or developments not be used by Superferry.

Once Sierra Club timely appealed the Circuit Court ruling that the exemption determination was valid, Superferry and HDOT proceeded at their own risk of reversal and voidance on appeal of all actions that they took after the exemption determination including, but not limited to, any development undertaken, any permits or approvals issued and any leases (or Operating Agreements) executed.

Upon actual reversal of the exemption determination on August 23, 2007, the non-implementation or "no-action" requirements of Chapter 343 mandated that both Superferry and HDOT cease implementing the Superferry project until the required EA was completed. Superferry and HDOT could and should have ceased any further actions implementing the Superferry project until the required EA was completed. Instead, Superferry and HDOT chose to flagrantly violate the procedural requirements of Chapter 343.

The "Findings of Fact" of the Trial Court continue:

35. On the same date, on August 24, 2007, the Department of Transportation determined that it would allow the Hawaii Superferry to operate.

36. **Later on Friday afternoon, August 24, 2007, HSF announced publicly that it was accelerating the date of the commencement of its commercial services from Tuesday, August 28, 2007 to Sunday, August 26, 2007, at reduced fares.**

37. **Plaintiffs notified HDOT and HSF that they objected to the proposed implementation of the Hawaii Superferry project and would seek judicial relief if necessary.**

38. **On Monday, August 27, 2007, at the request of Plaintiffs, this Court issued a temporary restraining order essentially prohibiting the Hawaii Superferry from utilizing the improvements at the Kahului Harbor, and in essence, putting a stop to those operations pending further hearing on this matter.**

The Temporary Restraining Order issued on August 27, 2007 was against Superferry and was issued to require it to cease its violation the procedural requirements of Chapter 343. It stated, in pertinent part (ROA 1570-1576), as follows:

1. On August 24, 2007, this court entered summary judgment in favor of Plaintiffs on the claim requiring the preparation of an Environmental Assessment, pursuant to Chapter 343.

2. By HRS § 343-5(b):

Acceptance of a required final statement shall be a condition precedent to approval of the request and commencement of proposed action.

3. By Chapter 343, acceptance of a required statement is a "condition precedent":

i. To the commencement or implementation of a proposed project, HRS Section 343-5(c); HAR Section 11-200-23(d); and

ii. To the use of state lands or funds in implementing the proposed action. HRS Section 343-5(b); HAR Section 11-200-23(c); and

iii. To the issuance of approvals or entitlements for the project, HRS Section 343-5(c); HAR Section 11-200-23(d); Kepoo v. Kane, 106 Haw. 270, 103 P.3d 939 (2005); KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

4. "Acceptance" refers to the acceptance of an EIS, the entry of a FONSI, and/or an Exemption Determination. Kepoo v.

Kane, 106 Haw. 270, 103 P.3d 939 (2005). KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997).

5. At present, there is no "acceptance" of this project pursuant to Chapter 343.

6. The proposed action or project is:

a. The barge to load and unload vehicles and passengers between the Hawaii Superferry, Inc. ("HSF") and Pier 2 at the Kahului Harbor, Kahului, Maui, Hawai'I;

b. Operational support to accommodate HSF, including the provision of utilities (water, power and lighting); security fencing (separating the premises granted to HSF from other state lands); pavement striping (of the roadways from the Pier connecting to local highways as well as the staging areas for ticketing and inspection of passengers and vehicles); the placement of boarding gangway ramps; and the installation of tents at inspection points or customer waiting areas (for passenger terminals);

c. The state lands granted by Hawaii Department of Transportation ("HDOT") to HSF to use for the HSF project at the Kahului Harbor;

d. The HSF project or action that is facilitated by the harbor improvements, since these harbor improvements are a condition precedent or prerequisite to HSF operations. KSOA v. County of Maui, 86 Haw. 66, 947 P.2d 378 (1997); Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i, 91 Haw. 94, 105, 979 P2d 1120 (1999).

7. A Temporary Restraining Order is necessary without notice to the Defendants to avoid immediate and irreparable injury in this case because (1) despite the entry of summary judgment in favor of Plaintiffs, HSF and HDOT are moving forward with implementation of the HSF project at the Kahului Harbor possibly rendering meaningless this Court's requirement that an Environmental Assessment be prepared; (b) HDOT and HSF may be violating the prohibitions in Chapter 343 against the implementation of a project and the use of state lands for that project while an EA is being prepared; (c) if HSF operations are to be halted, there will be less harm to customers who need to be returned to their ports of origin if action is taken at the earliest date; (d) HDOT and HSF are risking actual harm to the environment that may best be explored through the preparation of an EA prior to the implementation of the action.

Based upon the foregoing, Defendants HDOT and HSF and their subordinates, agents, attorneys, and all other persons acting in concert or participation with them who have actual knowledge of this Order, are prohibited from the following until the Court's decision on Plaintiffs' Motion for Preliminary Injunction, such

period not to exceed ten (10) days from the grant of this order unless this Court extends this order for good cause shown:

A. Defendant HSF is prohibited from using the barge attached to Pier 2 at the Kahului Harbor or any of the "premises" or state lands granted by HDOT to HSF at the Kahului Harbor for the passenger terminal, for inspection or ticeting and for roadways to and from Pier 2 and the non-harbor Kahului roadway system.

B. Defendant HDOT is prohibited from permitting HSF from using the barge attached to Pier 2 at the Kahului Harbor or any of the "premises" or state lands granted by HDOT to HSF at the Kahului Harbor for the passenger terminal, for inspection or ticeting and for roadways to and from Pier 2 and the non-harbor Kahului roadway system.

Superferry immediately filed a Motion to Dissolve the TRO. ROA 1874 – 1895. This Motion was denied on August 29, 2007. ROA 2933 – 2934.

The Court converted the Temporary Restraining Order into a Preliminary Injunction through an oral ordered issued on September 14, 2007 and entered in writing on November 7, 2007. ROA 2935-2937.

Plaintiffs filed a "Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction" on August 27, 2007. ROA 1577 – 1786.

After conducting twenty (20) days of evidentiary hearings over a four (4) week period of time, the Trial Court, on October 9, 2007, entered an "Order Granting Plaintiff's Motion to Enforce Judgment by Requiring Environmental Assessment by Prohibiting Implementation of Hawaii Superferry Project, for Temporary, Preliminary and/or Permanent Injunction", permanently enjoining Superferry operations until lawful completion of the environmental process and voiding the Operating Agreement, as it applied to Kahului Harbor. ROA 2273-2281.

The permanent injunction was granted on three (3) major bases: (1) the "no action" requirements in HRS 343-5(b),(c) in Chapter 343 prohibit implementation of the project until lawful completion of the environmental process (ROA 2274-2277); (2) the Court "finds and concludes that the balance

1368

of irreparable damage favors the issuance of a permanent injunction in this case as Plaintiffs have demonstrated the possibility of irreparable injury with respect to the environmental impacts of Hawaii Superferry operations on natural resources, protected species, increased introduction of invasive species and causing social and cultural impacts" if Superferry is allowed to operate while an EA/EIS is being prepared (ROA 2278) and (3) the Court "finds and concludes that that the public interest in implementing the environmental review process supports the granting of this permanent injunction in this case." (ROA 2278) The Circuit Court also voided the Operating Agreement based upon *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005)(ROA 2279-2280).

Sierra Club received the benefits of injunctive relief from August 27, 2007 until November 14, 2007. This is a period of almost three (3) months duration, lasting for eighty (80) days and 11.5 weeks.

Viewing the record recited above as a whole, it is clear that the Trial Court found and concluded that Superferry was in violation of the procedural requirements of Chapter 343.

c. Superferry Violated HRS § 607-25 Even if HDOT Had the Duty to Prepare the EA

While the Supreme Court did not determine that the Superferry project was a "connected" action based upon HAR § 11-200-7, the Court plainly found that HDOT, through agreements entered into between Superferry and HDOT, including the Letter of Intent and the Operating Agreement, "facilitated" the Hawaii Superferry Project. See *Sierra Club v. Department of Transportation,* 115 Hawai'i 299, 167 P.3d 292 (2007). The Supreme Court relied upon the Record on Appeal then available that only included the PUC application and the Letter of Intent between HDOT and Superferry. Footnote 9 references the Operating Agreement between HDOT and Superferry that is part of the ROA in this appeal. On remand, the Operating Agreement was received into evidence by the Trial Court. HSF-9.

HDOT was not acting alone or in isolation in developing the Hawaii Superferry Project. The Record on Appeal amply demonstrates that Superferry and HDOT acted together in the development and implementation of the Hawaii Superferry Project, based upon the terms and conditions, mutually agreed upon, in the Letter of Intent and in the Operating Agreement.

It does not matter that it was HDOT that had the primary responsibility to prepare the EA. Superferry still constructed its improvements at the Kahului Harbor without a required EA in a situation in which an EA was required before the construction or development by Superferry took place.[3]

This was what occurred in *KSOA v. County of Maui*, 86 Haw. 66, 947 P.2d 378 (1997). The Maui County Planning Commission entered an exemption determination for the Napilihau Villages Condominium Project. While it was technically the Planning Commission that violated Chapter 343, because of the non-implementation provisions of Chapter 343 the SMA permit was vacated and JGL's development could not be implemented until the EA was prepared. The "development" was required to stop until compliance with Chapter 343 was achieved. See also, *Kepoo v. Kane*, 106 Haw. 270, 103 P.3d 939 (2005) and *Sierra Club v. Office of Planning*, 109 Haw. 411, 126 P.3d 1089 (2006).

The same legal principles apply here. While it is technically HDOT that violated Chapter 343 by entering the exemption determinations, because of the non-implementation provisions of Chapter 343, the Operating Agreement was vacated and the Superferry Project could not be implemented until the EA was prepared. The "development" was required to stop until compliance with Chapter 343 was achieved. As such, the Trial Court exercised its discretion appropriately to award Sierra Club its attorney's fees and costs pursuant to HRS § 607-25(e).

3. Superferry Did Not Rely in Good Faith Upon a Written Statement, Prepared Prior to the Suit on the Development, by the Government Agency Responsible for Issuing the Permit or Approval which is the Subject

[3] As importantly, under the factual circumstances of this case, as described within, Superferry was intimately involved in the non-preparation of the EA and, on these additional grounds.

1375

of the Civil Action, that the Permit or Approval was not Required to Commence the Development

Superferry argues, based upon HRS § 607-25(e)(3), that it relied in good faith upon a written statement that an EA was not required and therefore the Trial Court abused its discretion in awarding attorney's fees and costs. Superferry misconstrues this provision that states in full:

> Notwithstanding any provision to the contrary in this section, the court shall not award attorneys' fees and costs to any party if the party undertaking the development without the required permit or approval failed to obtain the permit or approval **due to reliance in good faith** upon a written statement, prepared prior to the suit on the development, by the government agency responsible for issuing the permit or approval which is the subject of the civil action, that the permit or approval was not required to commence the development. The party undertaking the development shall provide a copy of the written statement to the party bringing the civil action not more than sixty days after receiving the written notice of any violation of a requirement for a permit or approval.

Superferry alleges that Sierra Club did not submit any evidence demonstrating that Superferry did not rely in good faith on the exemption determination. The "written statement" relied upon by Superferry does not qualify as the "written statement" meant by HRS § 607-25(e)(3), as demonstrated in Subsection a. below. Superferry ignores the import of Exhibits "1" through "15" discussed in Subsection b. below. Superferry also ignores all of the additional evidence relied upon by Sierra Club in Subsection c.ii. below. Worse, Superferry has totally ignored why Superferry could not have relied upon the exemption determination as a matter of law, as discussed in Subsection c.i. below. Finally, it is beyond dispute that Superferry was not relying on any "written statement" that an EA was not required when Superferry implemented its project in late August 2007 after the Hawaii Supreme Court and the Circuit Court had both ruled that an EA was required as a matter of law, as proven in Subsection d. below.

a. Superferry Never Triggered HRS § 607-25(e)(3)

Superferry has misconstrued HRS § 607-25(e). In general, the Court has the discretion to award fees. See HRS § 607-25(e)(1). The Court "shall" award fees to a Plaintiff, however, when a sixty (60) day prior notice of violation has been sent by Plaintiff and a $2,500 bond has been posted. See HRS §§ 607-25(e)(2)(A) and (B). Further, the Court "shall not" award fees if a Defendant obtains a statement from the government agency responsible for issuing the permit that the permit is not required, provides a copy of the written statement to the Plaintiff within thirty (30) days after receiving notice from Plaintiff of the violation and then relies in good faith on this statement or if a Defendant ceases all work and applies for the permit. See HRS §§ 607-25(e)(3) and (4).

These provisions must be read together, *in pari materia*. Sierra Club admittedly sent no notice of violation and did not post any $2,500 bond prior to the filing of this lawsuit. Likewise, since Sierra Club did not take this first step (serve any notice of violation or post a bond) neither Superferry nor HDOT provided a written statement to Sierra Club "not more than thirty days after receiving the written notice of violation" as required by HRS § 607-25(e)(3). The factual circumstances contemplated by HRS §§ 607(e)(2) – (4) simply never arose in this lawsuit.

As Sierra Club argued below, the provision requiring a written statement was intended to obviate the need for litigation. HRS §§ 607(e)(2) – (4) are intended to provide a process of incentives by which a Plaintiff challenges the existence of proper approvals, backed by a bond, and Defendants can extricate themselves from the looming litigation, under certain factual circumstances.

The written statement was not intended to be the document that is the triggering event for litigation itself. Here, the exemption determination is itself subject to judicial review by statute through HRS § 343-7(a) and cannot possibly constitute the sort of "written statement" contemplated by § 607-25(e).

Finally, HDOT was the agency responsible for determining whether an EA was required. The OEQC letter is irrelevant. The initial determination of this Court, after the litigation commenced, is also irrelevant.

For all of these reasons, Superferry never obtained the sort of written statement in this case that could possibly provide it with the "safe haven" from an award of attorney's fees. The Trial Court properly exercised its discretion and generally awarded fees and costs in this case.

b. The Circuit Court Could and Should Have Taken Into Consideration and Given Weight to the Documents Presented by Sierra Club that Demonstrate that Superferry Did Not Rely in Good Faith on the Exemption Determination

Sierra Club attached a number documents for consideration by the trial court on the issue of whether HDOT and Superferry "relied in good faith" on any written statement that an EA was not required. The Circuit Court erred in refusing to consider or give weight to these documents.

Sierra Club, for the sake of coherency and to avoid repetition in the overall briefing of these appeals, restates and incorporates by reference Section C. on pp. 3 through 9 of its Reply Brief on Cross-Appeal, demonstrating why the Trial Court should have given weight to Exhibits "1" – "15", filed with the Supreme Court on August 6, 2008, in response to the Answering Brief of Hawaii Superferry, Inc. Some of these arguments are briefly outlined below.

HDOT filed a Motion to Dismiss or, in the Alternative, for Summary Judgment with the Trial Court on May 12, 2005 in which it argued that the propriety of the Exemption Determination should be decided by summary judgment (ROA 145-149; pp. 5-9) and that no trial and no discovery were required (ROA 148-149; pp. 8-9). HDOT included the Affidavit of Fred Pascua attaching Exhibits 3 to 103 including (1) memoranda between HDOT and the Office of Environmental Quality Control ("OEQC") (¶ 4) and (2) "**documents relevant to the determination**" (¶ 5). ROA 157-159. HDOT further filed the Declaration of Barry Fukunaga on June 14, 2005 in which, in ¶ 3, he stated under oath that his "**determinations were based on the documents attached to the declaration of Fred Pascua**." ROA 1011.

Sierra Club sought discovery by filing a Notice of Taking Depositions on

June 8, 2005 and Requesting Answers to Interrogatories and the Production of Documents on April 4, 2005 to obtain documents related to the exemption determination and the HSF project. ROA 999-1000A, 104-105.

HDOT then filed a Motion for Protective Order on June 14, 2005 claiming that "the propriety of the State's exemption determination as to certain improvements at Kahului Harbor is an issue of law to be resolved by summary judgment based solely on the documents considered by Mr. Fukunaga in making the determination." ROA 1001-1007. Superferry filed a Joinder on June 22, 2005 in which it argued, on p.4, that **"Plaintiffs' challenge, therefore should be limited to the administrative record which formed the basis for the exemptions and additional discovery should not be allowed**." ROA 1017.

The Honolulu Advertiser published documents that it received from HDOT in response to an open-records law request pertaining to the Exemption Determination. ROA 3802-3824. These documents, marked as Exhibits "1" through "15", amply demonstrate that Superferry was not relying in good faith on any exemption determination. HDOT was selective in presenting those documents to the Court that it was willing to have described as the "administrative record" considered by Barry Fukunaga in making his exemption determination.

Superferry doubts that it has been implicated by these Exhibits or that these Exhibits demonstrate that Superferry's reliance on the exemption determination was not in good faith. To the contrary, the documents left out or withheld by HDOT (perhaps intentionally) demonstrate that:

(1) HDOT's own planners, including Fred Pascua, believed that a state-wide EA studying the cumulative impacts of the HSF project was required. ROA 3808-3813,3815; Exhibits "3", "4", "5", "6" and "8."

Exhibit "4", dated October 27, 2004, is from **Fred Pascua** to **Terry White** of Superferry. In pertinent part, it states:

> Hopefully you have contacted **OEQC** to get a feeling of **their hesitation regarding the use of barges and an exemption**. We

1374

note that an environmental document will be required for ferry improvements. Any interim or permanent improvements should be included in a Statewide environmental document to show the complete impact of the operations/improvements. **While the barge itself is in a grey area, the project can not be segmented and we are looking at the creation of a Statewide document to cover the impact of the ferry and especially the onshore-offshore cumulative impacts**. Even assuming that an exemption is attempted for an initial project at Kahului, there is the necessary consultation process required prior to submitting the environmental document. As **the ferry operation has a lot of potential impacts**, we do not view that as the appropriate choice. ..... Hope that clarifies your question on environmental documentation.

Exhibit "5", dated October 28, 2004, from Barry Fukunaga to Rodney Haraga stating that HDOT must provide a letter to Superferry with a clear statement that it is Superferry's responsibility to prepare an EA for the introduction of their operation at the respective ports, including traffic impacts.

(2) The Army Corps of Engineers took the position that federal permits were required and had a concern, as early as July 15, 2004, over "the ferries hitting whales and monk seals." ROA 3802, 3807, 3817; Exhibits "1", "2" on p.6,, "10."

Exhibit "1", dated July 15, 2004, states that National Marine Fisheries, an agency with expertise and responsibility for enforcement of the Marine Mammal Protection Act, probably will voice a concern over the ferries hitting whales and monk seals. The HDOT officials then expressed these concerns in a meeting with Superferry officials who told HDOT that they had met with National Marine Fisheries at a higher level. In summary, Superferry was on notice of the concern of National Marine Fisheries about ferries hitting whales and monk seals before the exemption determination was issued.

(3) OEQC believed that an EA was required. ROA 3802, Exhibit "1." See above.

(4) HDOT's attorney believed that an EA was required. ROA 3814, 3818; Exhibits "7" and "11."

Exhibit "7", dated November 4, 2004, states that ".... There has been much discussion on the need for an EA ... Our Deputy AG was asked for a legal analysis and should be providing his opinion next week.

Exhibit "11", dated December 15, 2004, states that:

> **HSF continues to feel they have no requirement for producing an{d} EIS addressing their operations .... They intend to have their environmental counsel look further into the matter. We are expecting to have a meeting with them soon. ..... Our attorney [is] feels that one statewide comprehensive document is necessary that would cover the improvements as well as the cumulative operational impacts.** (Emphasis added)

(5) The Governor's office intervened, at the urging of Superferry, and dictated that an Exemption would be entered. ROA 3787-3840, Exhibits "8", "9", "13", "14" and "15."

Exhibit "9", dated November 11, 2004, HDOT official proclaims: "Its quite obvious we are in deep kimchee." The HDOT official references a meeting with "Awana and company."

Exhibit "13", dated December 30, 2004, states: "Decisions made: We need to pursue EXEMPTION." A meeting with Bob Awana on the exemption rout was scheduled for the afternoon.

Exhibit "14", dated January 4, 2005, reference a follow-on meeting at the governor's office about Superferry.

(6) Superferry played a significant role throughout in securing the Exemption Determination. ROA 3818, 3822, 3824; Exhibits "11", "13"and "15."

Exhibit "11", dated December 15, 2004, demonstrates the extent to which Superferry was directing the planning for the Hawaii Superferry Project. Superferry wants Kawaihae ready earlier. Superferry doe not want to do an EA. Superferry is drafting the documents for MaRad. Superferrry is hiring the consultant for ferry facility design.

Exhibit "13", dated December 30, 2004, states that the Monday meeting on the "exemption route" with Bob Awana would also include "the head of OEQC and HSF's environmental attorney." Superferry was participating in

meetings at which the course was being plotted away from preparing an EA addressing the cumulative impacts of the Hawaii Superferry Project, and towards entering the exemption determination.

HDOT had "sanitized" what it was describing as the "administrative record" of documents reviewed by Barry Fukunaga to attempt to justify the Exemption Determination. HDOT and Superferry could not, under these circumstances, have relied in good faith on the Exemption Determination. See *County of Kauai v. Pacific Standard Life Ins.*, 65 Haw. 318, 653 P.2d 766 (1982).

The Honolulu Advertiser had requested the production of these public or government records by HDOT as a public agency pursuant to HRS Chapter 92F. HDOT had produced these public or government records to the Advertiser. There is no question that these documents are public records from the files of HDOT. There is no question that these documents are authentic.

Sierra Club laid a sufficient foundation for the consideration of Exhibits "1" through "15" by the Trial Court. Exhibits "1" through "15" are in fact e-mails by and between HDOT officials and Superferry officials, regarding whether to prepare an EA for the Superferry, from the public records files of HDOT, produced to the Honolulu Advertiser, pursuant to a public records production request by the Advertiser. See ROA 3802-3824

Exhibits "1" through "15" were attached to the Declaration of Irene Bowie and Sierra Club's Reply Memorandum. See ROA 3802-3824. Ms. Bowie was familiar with the Advertiser website. She downloaded and printed the e-mails, the HDOT public records, from the Advertiser website. Ms. Bowie visited the Advertiser website and had personal knowledge of the website. See Rule 602 HRE. She printed out the e-mails from the website and authenticated the printouts as accurate copies of the data that she read at the site at the time. See ROA 3798-3801 and Rule 803(6) HRE.

HRE 902, 1005, 1007. Further, these documents constitute admissions against interest by a party opponent. HRE 803(a)(1). At a minimum, these documents demonstrate that HDOT and Superferry were on notice that an EA was, as a matter of fact and law, required at the initial trial level in this case.

1377

Sierra Club was only requesting that the Trial Court give weight to these Exhibits to prove that Superferry and HDOT could not have been relying in good faith upon the HDOT exemption determination. The Trial Court had already recognized that this was an appropriate use of the Exhibits, ruling: "Those arguments and exhibits were presented in relation to arguments made concerning good faith, and that, in the Court's view, is an appropriate response to that argument." Tr. No. 7692, 2/13/08, p. 39, l. 17 – 20.[4] Having decided that Exhibits "1" through "15" were not excluded and were appropriately presented, the Trial Court erred as a matter of law in refusing to give these Exhibits any weight on the issue of whether Superferry or HDOT "relied in good faith", without first conducting an evidentiary hearing. First, the nature of these documents was mischaracterized. Second, no evidentiary hearing is required before Exhibits attached to a Motion for Attorneys Fees may be considered by the Trial Court. Third, no genuine issue as to the authenticity or admissibility of Exhibits "1" through "15" has ever been presented.

The existence of these documents, at the same time as those that were presented by HDOT and Superferry as the "administrative record" to the Trial Court, disqualify HDOT and Superferry from claiming that they were relying "in good faith" on HDOT's exemption determination or the affirmance obtained from the Trial Court based upon the "sanitized" "administrative record." The Circuit Court abused its discretion and/or clearly assessed the evidence erroneously by failing to review these documents for at least the limited purpose of finding that Superferry and HDOT could not have relied and did not rely in good faith on HDOT's exemption determination.

---

[4] Second, the issue also seemed to become entangled with the issue of whether fees were being awarded as sanctions for the "obstreperous" behavior of HDOT and Superferry. Sierra Club did argue that the Exhibits did demonstrate "obstreperous" behavior by HDOT and Superferry for the purpose of analyzing the tests for enhancement based upon *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 32 P.3d 107 (2001). Sierra Club was not, however, seeking sanctions against Superferry or HDOT.

c. Superferry and HDOT Proceeded At Their Own Risk and Therefore Could Not and Did Not Rely in Good Faith

HDOT and Superferry could not have "relied in good faith" on any written statement indicating that an EA was not required. What constitutes "good faith reliance" in land use matters was discussed definitively by the Hawaii Supreme Court in *County of Kauai v. Pacific Standard Life Insurance Company,* 65 Haw. 318, 653 P.2d 766 (1982). In that case, the Court employed "an objective standard that reflects 'reasonableness according to the practices of the development industry.'" The Court held that rights vested with the securing of the last discretionary permit and that the developers "proceeded at risk" and without objective good faith prior to securing the last discretionary permit.

i. HDOT and Superferry Did Not Rely in Good Faith as a Matter of Law

aa. Assumed Risk in Face of Timely Appeal

Here, the issuance of the exemption determination was immediately and timely challenged in Circuit Court. The Circuit Court affirmation of the exemption determination was immediately and timely appealed to the Appellate Courts. Superferry and HDOT proceeded at their own risk of reversal of the exemption determination, not in good faith reliance. An owner or developer who obtains a permit and begins construction before the expiration of an appeal period proceeds at his own risk. *City of Hagerstown v. Long Meadow Shopping Center,* 264 Md.481, 287 A.2d 242 (1972); *Lipsitz v. Parr,* 164 Md. 222, 227-228, 164 A. 743, 745-746 (1933).

Based upon *Kepoo v. Kane,* 106 Haw. 270, 103 P.3d 939 (2005), *KSOA v. County of Maui,* 86 Haw. 66, 947 P.2d 378 (1997) and *Sierra Club v. Office of Planning,* 109 Haw. 411, 126 P.3d 1089 (2006), once Sierra Club timely challenged the exemption determination and timely appealed the Circuit Court affirmance of the exemption determination, HDOT and Superferry proceeded at their own risk of the reversal of the exemption determination and at their own risk of the voidance of the Operating Agreement. HDOT and Superferry knew or

should have known of these precedents which reach backwards and vacate and/or void permits or approvals and entitlements to the use of land which may have been approved or affirmed at the trial court level and/or the agency level, even earlier. Based upon these precedents, HDOT and Superferry cannot be said to have been "relying in good faith" on the exemption determination.

bb. Hawaii Supreme Court Noted Lack of Evidentiary Support for Exemptions

HDOT's and Superferry's reliance upon the HDOT exemption determination also cannot be said to be in "good faith" because of Footnote 50 in *Sierra Club v. Department of Transportation*, 115 Hawai'i 299, 167 P.3d 292 (2007), in which the Hawaii Supreme Court makes clear that there was never any evidentiary support for the exemptions claimed.

ii. HDOT and Superferry Did Not Rely in Good Faith as a Matter of Fact, as Superferry Had Been Placed On Notice By Sierra Club and Others

HDOT and Superferry had been placed on notice from multiple sources that they were acting at all times at their own risk that an EA was required. The Public Utilities Commission had conditioned its approval on December 30, 2004 upon Superferry showing, to the satisfaction of the PUC, that Superferry has complied with all applicable federal and state laws, rules and regulations, including, matters relating to the EIS law, under Chapter 343. The PUC prohibits Superferry from commencing operations until the PUC has received written confirmation that all requirements and conditions noted above have been met to the satisfaction of the PUC. ROA, p. 635.

Likewise, the Operating Agreement between HDOT and Superferry provides that it is subject to Superferry's compliance with state laws, including state environmental laws. HSF-9, pp. 21-22, 44-45; ROA 2954, FoF 18.

HDOT and Superferry were fully aware that the County Councils of the neighbor islands had all passed Resolutions demanding that an EIS be prepared for Superferry (a) The Maui County Council, by Resolution adopted on

March 11, 2005; ROA 1353-1356; (b) The Kauai County Council, by Resolution adopted on January 26, 2005; ROA 1358-1359; and (c) The Hawai'i County Council, by Resolution adopted on May 4, 2005; ROA 1361-1362.

These documents preclude HDOT and Superferry from claiming that they were relying "in good faith" on any assurance that an EA was not required which could shield them from an attorney's fee claim through HRS § 607-25.

d. Superferry was not acting in good faith reliance on any written authorization from HDOT when it commenced operations in late August, 2007, in violation of the procedural requirements of Chapter 343

Superferry certainly did not act in good faith reliance upon any written statement when it implemented the Hawaii Superferry Project after the Hawaii Supreme Court declared the exemption "erroneous" in August 2007. ROA 1552-1553. This occurred before Superferry and HDOT implemented the Hawaii Superferry Project on August 26, 2007. FoF 36. Superferry and HDOT did not have the shield of any purported "safe harbor" when they rushed their project into operation at this time.

4. HRS 607-25 Encourages The Award of Attorneys Fees

The circumstances underlying this case mirror the concerns that gave rise to the enactment of HRS § 607-25. Each of the requirements set forth in HRS §607-25 for the recovery of attorney's fees have been met here. Sierra Club, private "individuals and organizations...acting as attorneys general," successfully sued another private party, Superferry, for its violation of the procedural requirements of HRS Chapter 343 and were granted injunctive relief against Superferry. Superferry undertook what is defined as "development" at the Kahului Harbor, without the required EA.

HRS § 607-25 encourages the award of attorney's fees to "private attorneys general" who sue developers who do not comply with development laws. See *KSOA v. Maui County Council*, 86 Haw. 132, 134-35, 948 P.2d 122 (1997). While discretionary, the Legislative history relied upon by the Hawaii

Supreme Court certainly tilts in favor of an award in favor of a party, like Sierra Club here, who prove that a private party has gone ahead with construction without required permits, in this case, a required EA.

C. Sierra Club is Entitled to Attorney's Fees and Costs Pursuant to the Private Attorney General ("PAG") Doctrine

Superferry and HDOT present similar arguments in their Opening Briefs on why the Trial Court purportedly abused its discretion in awarding attorneys fees and costs to Sierra Club based upon the Private Attorney General Doctrine ("PAG"). Sierra Club, for the sake of coherency and to avoid repetition in the overall briefing of these appeals, restates and incorporates by reference Section C. on pp. 23 through 34 of its Answering Brief in response to the Opening Brief of HDOT demonstrating why the Trial Court properly awarded fees and costs based upon the PAG. Sierra Club states these arguments in abbreviated fashion and addresses any distinct arguments raised by Superferry below.

1. The PAG Doctrine is Recognized in Hawaii

The Hawaii Supreme Court recognized the PAG Doctrine in *In re Water Use Permit Applications*, 96 Hawai`i. 27, 25 P.3d 802, (2001) (hereafter, "*Waiahole II*"). The Court would not have gone to the trouble of finding in detail that Tests 1 and 3 had been met but Test 1 had not been satisfied in that case if the Court were rejecting the Doctrine in full.

2. Nothing Prohibits the Private Attorney General ("PAG") Doctrine from Being Applied in this Case

HDOT argues that HRS § 607-25 is primarily intended to provide the basis for an award of attorney's fees in a Chapter 343 related case against a private party, such as Superferry. ROA 3732. Superferry argues that the Private Attorney General Doctrine is primarily intended to provide a basis for an award of attorney's fees in a Chapter 343 related case against a governmental entity. ROA 3768. Should the Appellate Courts agree with HDOT and Superferry, there would be no conflict between HRS § 607-25 and the Private Attorney General Doctrine. To the extent that the two sources of authority for awarding attorney's fees are not in conflict and do not cover the

same circumstances, there are no real problems with the co-existence or co-applicability of HRS § 607-25 and the Private Attorney General Doctrine.

The elements or tests that must be satisfied for proving an entitlement to fees through the two sources are markedly different. The elements that must be proven to be awarded attorney's fees and costs based on HRS § 607-25 are narrower and more specific. The elements or tests that must be proven to be awarded attorney's fees and costs based on the Private Attorney General Doctrine are more general and designed to encompass a broader set of circumstances.

There is no basis for ruling that the Legislature intended that HRS § 607-25 is the "exclusive" manner in which attorney's fees can be awarded in litigation relating to Chapter 343. HDOT and Superferry have not pointed to any language in HRS § 607-25 manifesting an intent that this is to be an "exclusive" remedy. Nor have HDOT and Superferry pointed to anything in the Legislative history of HRS § 607-25 manifesting an intent that this is to be an "exclusive" remedy.

Should, for any reason, it be determined, that attorney's fees and costs cannot be awarded against Superferry or HDOT based upon HRS §607-25 because one of the specific, necessary elements is inapplicable to one or both of them, there is no reason, as a matter of law, that attorney's fees and costs cannot be awarded to Sierra Club based upon the broader Private Attorney General Doctrine, upon determinations that the three tests of that Doctrine have been satisfied.

3. All Three Tests Are Satisfied in this Case

a. This Case Has Resulted In The Vindication Of Strong Societally Important Public Policies

The first prong of this test is satisfied if there is a "determination that the public policy vindicated is one of constitutional stature. *Serrano v. Priest,* 569 P.2d 1303,1315 (Cal. 1977)(*"Serrano"*). The court in *Serrano* found that the public policy advanced by that litigation was grounded in the state Constitution. *Id.,* at 1315 (emphasis in the original). As in *Serrano,* this case

1282

involves the protection of rights grounded in the Hawai`i State Constitution and Hawai`i law, which will benefit the public at large. Here, Plaintiffs' efforts have resulted in the protection and enhancement of Hawaii's environment and natural resources, as secured by Article XI, Section 9 of the Hawaii Constitution, entitled "Environmental Rights."

In this case, the Hawaii Supreme Court, for the first time firmly established the principle of "procedural standing" in environmental law, clarified the law with respect to exemptions and emphasized the importance of analzing secondary impacts. The societal importance of the public policies vindicated by the litigation, was significant. Thus, the principles in this proceeding vindicated important public policies of a constitutional stature sufficient to meet the first prong under the PAG doctrine

The Public Utilities Commission action, pointed to by Superferry as a demonstration of the public interest, was explicitly conditioned upon Superferry's compliance with Chapter 343. ROA 635. Act 2 does not express the public interest because it is unconstitutional special legislation.

b. Plaintiffs' Role in this Litigation Was Critical To Protecting The Rights And Property At Issue

The second prong of the test for application of the PAG doctrine examines whether it was necessary for Plaintiffs to bring the action, and the magnitude of the burden placed on Plaintiffs for bringing that action.

Superferry argues that HDOT did not abandon or actively oppose Sierra Club in this case. It is beyond dispute based upon any objective review of the record as a whole in this case that the State did "abandon" and "actively oppose" Sierra Club. Superferry further argues that the burden of enforcement on Plaintiffs was relatively small. This makes light of the fact that HDOT and Superferry forced Sierra Club to participate in a four (4) week trial to make sure Superferry would not operate while a Chapter 343 EA was being prepared.

c. A Substantial Number Of People Will Benefit From The Court's Rulings In This Case

Superferry argues that no people will benefit from Sierra Club's claims because Act 2 mooted them. Act 2 cannot be the determinant of the number of people who will benefit because Act 2 is unconstitutional special legislation.

It is beyond dispute that significant numbers of people will benefit from the rulings in Plaintiffs' favor in this case. This case established "procedural standing," for the first time in the State of Hawaii that will benefit many in the future. The law regarding the exemption process pursuant to Chapter 343 has been clarified and will benefiting significant numbers of people both inside of government and outside of government. The need to address secondary impacts in environmental disclosure documents has been emphasized benefiting significant numbers of individuals in the environmental review process and the environment as a whole.

D. The Trial Court Did Not Abuse its Discretion by Awarding, as Superferry Alleges, "More Fees than Plaintiffs Paid Their Counsel"

1. Reasonable Hourly Rate

Superferry argues in its Opening Brief that Sierra Club may only be reimbursed attorney's fees at the hourly rate agreed upon between attorney and client. Sierra Club disagrees that this is true but even, for the sake of argument, if it were true, Superferry has misstated the record. There was never any agreement that Counsel for Sierra Club would be paid at the hourly rate of $156. Any discounts that Counsel for Sierra Club may have given to Sierra Club are not discounts to Superferry or HDOT for the purposes of a Motion for Reimbursement of Attorney's Fees. The record reflects that Sierra Club's Counsel's regular hourly rate is $250 per hour and that he billed Sierra Club at the rate of $200.00 per hour. ROA 3825-3829, 3828, ¶19. The parties agreed to pay this amount. Even if the legal theory espoused by Superferry is applicable, Sierra Club was entitled to be reimbursed by Superferry and HDOT, at a minimum, at the hourly rate of $200.[5]

[5] Superferry has ignored the enhancements available based on the application of the tests set out in *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 32 P.3d 52,

1385

2. Fees Were Not Severable and Were Properly Awarded

Based upon the *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 32 P.3d 52 (2001) and *Henlsey v. Eckherhart*, 461 U.S. 424, 103 S. Ct. 1933 (1983) analysis the case has always involved a common core of facts that are not severable and Sierra Club is therefore entitled to compensation for all of their work on this case. Sierra Club did not seek compensation for work applicable to Act 2, however.

E. The Trial Court Did Not Err in Awarding Costs to Sierra Club

The Trial Court awarded $5,442.44 in costs to Sierra Club. HDOT has not objected on appeal to specific costs awarded. Costs can be awarded against the State. *Kamalu v. Paren, Inc.*, 110 Haw. 269, 132 P.3d 378 (2006). As the prevailing parties, Plaintiffs are entitled generally to the reimbursement of all "costs" allowed by HRCP Rule 54(d) and HRS § 607-9. The Hawai`i Supreme Court in *Wong v. Takeuchi,* 88 Haw. 46, 961 P.2d 611, reconsideration denied 88 Haw. 46, 961 P.2d 611 (1998), recognized that HRCP Rule 54(d) provides that, '[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]' *Id. at 52.*

Superferry objects in its Opening Brief to certain specific costs awarded amounting to $ 910.35 ($471.47 for supplies, $52.08 for conference room rental, $50.00 for ex officio filing fees and $336.80 for interisland travel =

---

101 (2001), namely (1) the contingent nature of Counsels arrangement with Plaintiffs, (2) the inability of Plaintiffs' Counsel to mitigate the risk of nonpayment due to the nature of environmental non-profit litigation and (3) the other factors in this case that justify enhancement. See *Schefke, supra.* The "other factors" cited in *Schefke, supra,* that justify enhancement are (a) this case involves issues of public importance, (b) the case subjected Plaintiffs to unpopularity in the community, (c) Defendants obstreperousness, (d) the difficulties Plaintiffs have in finding competent counsel to represent them in cases of this magnitude, (e) the lack of a damage award from which compensation could be obtained and (f) the inability of Plaintiffs to pay Counsel. Sierra Club has demonstrated that it is entitled to the modest enhancement to the hourly rate of $300 an hour because all of the six (6) factors listed in (a) through (f) above are applicable to this case. All of these factors are present in this case. If there were any case in which enhancement should be allowed, this is such a case.

1386

$910.35). Most of these costs were incurred during the time of the first appeal. Sierra Club had expressed a willingness at the time to have these costs excluded. ROA 3850-3851. Because the total of the challenged costs is relatively insignificant Sierra Club will not oppose their exclusion at this time.

V. CONCLUSION/ RELIEF REQUESTED

Based upon the foregoing, Sierra Club respectfully requests that this Court:

A. Affirm "Order Granting Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs" entered by the Circuit Court on March 27, 2008 to the extent that it: (1) awarded reasonable attorney's fees and costs to Sierra Club, as the prevailing parties, in general, under the particular facts and circumstances of this case; (2) based the award on HRS § 607-25 and/or the Private Attorney General Doctrine; (3) required these fees and costs to be paid by HDOT and Superferry; and (4) required payment of not less than the amount $91,712.72 and at not less than the minimum rate of $200.00 per hour to be paid to Sierra Club and reverse this Order to a limited extent and (a) award attorney's fees to Sierra Club for that period of the litigation in the Circuit Court prior to the initial Supreme Court appeal and (b) award attorney's fees at the enhanced amount of $300.00 per hour.

B. Award Sierra Club, should they prevail on these appeals, reasonable attorney's fees and costs, on these appeals, pursuant to Rule 39 HRAP.

DATED: Wailuku, Maui, Hawai'i 8.13.08

Isaac Hall
Attorney for Plaintiffs/Appellants/
Cross-Appellees/Appellees/
Cross-Appellants The Sierra Club,
Maui Tomorrow, Inc. and the Kahului
Harbor Coalition

CERTIFICATE OF SERVICE

I certify that two (2) copies of the foregoing document were duly served upon each of the following parties by the method and on the date described below:

Method

[x] Mailing through the United States Postal Service, postage prepaid

Lisa Woods Munger, Esq.
Lisa A. Bail, Esq.
Goodsill Anderson Quinn & Stifel
Alii Place, Suite 1800
1099 Alakea Street
Honolulu, Hawaii 96813
Attorneys for Defendant-Appellee
Hawaii Superferry, Inc.

Dorothy Sellers, Esq.
Solicitor General
Department of the Attorney General
Appellate Division
State of Hawaii
425 South Queen Street, Room 300
Honolulu, Hawaii 96813
Attorneys for Defendants-Appellees
The Department of Transportation of the State of Hawaii, Brennon Morioka, in his capacity as Director of the Department of Transportation of the State of Hawaii, Michael Formby, in his capacity as Director of Harbors of the Department of Transportation of the State of Hawaii

DATED: Wailuku, Maui, Hawaii 8.18.08

Isaac Hall
Attorney for Plaintiffs/Appellants/
Cross-Appellees/Appellees/
Cross-Appellants The Sierra Club,
Maui Tomorrow, Inc. and the Kahului
Harbor Coalition