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Supreme Court
SCWC-28501
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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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RICHARD MARVIN III, and AMY MARVIN, individually and as Next Friends of IVY MAE MARVIN, SADIE MARVIN, SAVANNAH MARVIN and ANABELLE MARVIN, minors; WYLIE HURD; NICHOLAS FRED MARVIN, individually and as Next Friend of ALANA MARVIN, minor; AARON MARVIN; BARBARA NELSON; JEFFREY McBRIDE; MARITA ZIMMERMAN, individually and as Next Friend of TEVA DEXTER and LIKO McBRIDE, minors,

Petitioners/Plaintiffs-Appellees,

vs.

JAMES PFLUEGER, PFLUEGER PROPERTIES; and PILAʻA 400, LLC,
Respondents/Defendants-Appellants.

JAMES PFLUEGER, PFLUEGER PROPERTIES; and PILAʻA 400, LLC,
Resondents/Counterclaimants-Appellants,

vs.

RICHARD MARVIN III; AMY MARVIN; NICHOLAS FRED MARVIN and JEFFREY McBRIDE, Petitioners/Counterclaim-Defendants-Appellees.

NO. SCWC-28501

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(ICA NO. 28501; CIV. NO. 02-1-0068)

April 27, 2012

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

The majority forecloses Respondent/Defendant-Appellant

James Pflueger[1] (Pflueger) from joining Heidi Huddy-Yamamoto (Huddy-Yamamoto), the owner of one-third of the kuleana parcel at issue, the Haena Kuleana (hereinafter referred to as Haena Kuleana or the kuleana), in the lawsuit for access and water rights over Pflueger's land brought by Petitioners/Plaintiffs-Appellees & Counter-Claim Defendants-Appellees Richard Marvin, III (Richard III), Nicholas Fred Marvin, and Barbara Nelson (hereinafter collectively referred to as the Marvins), the owners of the other two-thirds of the kuleana, essentially because Pflueger allegedly raised joinder in an untimely manner. With all due respect, in doing so, the majority undermines the plain language and purpose of Hawaiʻi Rules of Civil Procedure (HRCP) Rule 19 (2000),[2] which mandates a court to order joinder of a

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[1] Defendants include James Pflueger, individually and as a representative of Pflueger Properties, Pflueger Properties, Pilaʻa 400 LLC, and Roger Taniguchi Inc. (hereinafter collectively referred to as Pflueger).

[2] HRCP Rule 19 entitled "Joinder of Persons Needed for Just Adjudication," states as follows:

> **(a) Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (A) as a practical matter impair or impede the person's ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff.
>
> **(b) Determination by court whenever joinder not feasible.** If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The

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"necessary party"[3] such as Huddy-Yamamoto. HRCP Rule 19 facilitates the judicial obligation to ensure due process and to maintain the efficient administration of justice. The majority's decision today abrogates that obligation.

I would have held that Huddy-Yamamoto is a necessary party under HRCP Rule 19(a). Further, because it was feasible to join Huddy-Yamamoto, the circuit court of the fifth circuit (the

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[2]...continue

> factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.
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> **(c) Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.
>
> **(d) Exception of class actions.** This rule is subject to the provisions of Rule 23.

(Emphases added.)

[3] As indicated in note 2, the HRCP does not describe a person who meets the criteria under HRCP Rule 19(a) as a "necessary" party. The HRCP was amended in 1972 to conform to the 1966 revision of the Federal Rules of Civil Procedure (FRCP), Almeida v. Almeida, 4 Haw. App. 513, 516, 669 P.2d 174, 178 (1983), which eliminated the necessary party label to "emphasize" the "real purpose" of HRCP Rule 19(a), which was "to bring before the court all persons whose joinder would be desirable for a just adjudication of the action[.]" Int'l Sav. & Loan Ass'n v. Carbonel, 93 Hawaiʻi 464, 471, 5 P.3d 454, 461 (App. 2000) (quoting 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil § 1604, at 36-37 (2d ed. 1986)). However, since this court has continued to refer to parties to be joined under HRCP Rule 19(a)(1) as "necessary," we follow precedent and continue to refer to those parties as necessary, keeping in mind the purpose of the revision. See UFJ Bank Ltd. v. Ieda, 109 Hawaiʻi 137, 142-43, 123 P.3d 1232, 1237-38 (2005) ("Initially, the circuit court must determine whether the absent party is a 'necessary' party and, if so, 'the court shall order that [the person] be made a party.'" (quoting HRCP Rule 19(a))) (emphasis added). In any event, most courts continue to employ the terms necessary and indispensable, despite the revision. See 4 James Wm. Moore et al., Moore's Federal Practice § 19.02[2][c] (2011) (hereinafter referred to as Moore's Federal Practice) ("Although Rule 19 does not use the term 'necessary,' it is the traditional term that counsel and judges routinely use.").

court) should have ordered her joined as a party. It is only when joinder of a necessary party is not feasible that, pursuant to HRPC Rule 19(b), a court considers whether, in equity and good conscience, the case should be dismissed because the absentee is an indispensable party. Assuming, arguendo, that Huddy-Yamamoto's joinder was not feasible, she was indispensable under HRPC Rule 19(b), and therefore, the court should have dismissed the case without prejudice.

Respectfully, the majority errs in several other respects. First, the majority mischaracterizes Huddy-Yamamoto's interest by construing it narrowly. Second, the majority errs in holding that Huddy-Yamamoto is not an indispensable party. Third, the majority wrongly contends that delay is the crucial factor to be considered in applying HRCP Rule 19(b) in the instant circumstances. Fourth, neither equity, good conscience, nor policy considerations support the majority's position. Fifth, "substantial compliance" with Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4)(C) (2007)[4] need not be reached because the findings that were not challenged by Pflueger on appeal were in actuality conclusions of law redundant of conclusion number 12, which was challenged by Pflueger. Lastly, in a holding that will have wide-ranging and deleterious effects on civil practice in this jurisdiction, the majority incorrectly

[4] HRAP Rule 28(b)(4)(C) provides that an opening brief shall contain "a concise statement of the points of error" and "when the point involves a finding or conclusion of the court or agency," there must be "either a quotation of the finding or conclusion urged as error[.]"

concludes that a party waives the defense of the lack of a necessary party if the defense is not raised in a responsive motion or pleading pursuant to HRCP Rule 12(h)(1) (2000)[5], and that a party does not waive the defense of the lack of an indispensable party under the same circumstances. This theory was never raised, argued, or briefed by the parties, and to assert it as a basis for the majority's holding, without giving the parties an opportunity to express their views, is unfair to the parties and injurious to the appellate process. Thus, I respectfully dissent.[6]

I.

The following facts are adduced from the unchallenged findings issued by the court in its January 4, 2007 Findings of Fact, Conclusions of Law, and Order (findings, conclusions, and order). Testimony of witnesses and the submissions of the parties supplement the court's findings for a complete recitation of the facts.

[5] HRCP Rule 12(h)(1) provides that "[a] defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." (Emphases added.)

[6] I concur that we can review the findings that were not challenged by Pflueger on appeal, but not because Pflueger substantially complied with HRAP Rule 28, as the majority holds. In my view, the unchallenged findings were in the nature of conclusions that were challenged, and were therefore reviewable on appeal.

A.

The Haena Kuleana is traceable to the Great Mahele. The Great Mahele of 1848 divided the lands between the chiefs and the King. Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (1982); see Rogers v. Pedro, 3 Haw. App. 136, 139 n.5, 642 P.2d 549, 553 n.5 (1982) (noting that the Great Mahele awarded divisions of land running from the sea to the mountains). "Two years later, . . . commoners were permitted to obtain fee simple title to the lands which they had cultivated[,]" under HRS § 7-1. Kalipi, 66 Haw. at 7, 656 P.2d at 749. HRS § 7-1 (2009 Repl.) states:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such article to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

(Emphasis added.)

At some point, the Haena Kuleana came to be owned by, among others, William L.F. Huddy (William) and Elisabeth S. Huddy (hereinafter, William and Elisabeth are collectively referred to as the Huddys). In July 1965, a Partition Order subdivided the Haena Kuleana into Lot 1-A to the Huddys, and Lot 1-B to other owners. Ownership of Lot 1-A is now vested in Huddy-Yamamoto. Ownership of Lot 1-B now rests with the Marvins. Neither the Partition Order nor the intervening conveyances contained any

exceptions or reservations as to the right of access, or "assign[ed] or allocate[d] any appurtenant water rights between Lots 1A and 1B."

The Pilaʻa property is currently owned by Pilaʻa 400, LLC, of which Pflueger may presently be the "sole member[.]" (Hereinafter, the Pilaʻa property is referred to as the Pflueger property or Pflueger's property.) "The Haena [K]uleana is a landlocked parcel of land and is located within the [Pflueger property]." (Emphasis in original.) The kuleana is accessible only by traveling across Pflueger's property.

B.

1.

Taro has been growing on the kuleana "since way back[.]" (Internal quotation marks omitted.) There are two streams near the kuleana. One stream, west of the kuleana and on Pflueger's property, "ran continuously[,]" whereas a stream east of the kuleana was "a trickle." A ditch ran from the western stream to the kuleana. Because the Marvins and the Huddys sought a water source, they reached "an agreement about the water" and inserted a pipe in the ditch, which carried water from the stream to the Marvins' property and to the Huddys' property. However, in 2001, the water pipe became clogged and water no longer traveled through the pipe to Huddy-Yamamoto's property.

In 1974, Richard III discovered a spring above the ditch between the western stream and the Marvin property. This spring was on the Pflueger property, approximately thirty-eight

feet from the Marvins' western boundary. Richard III built a catchment to collect water from the spring, and has used it as his sole source of drinking water.

2.

Three access routes to the kuleana through the Pflueger parcel have been used over time. The "traditional access route" is entered through the middle gate at Koolau Road, crosses the Pflueger property on the western end, and terminates at the bluff above Pilaʻa Beach. The "center, or traditional, road" crosses the middle section of the Pflueger property. This road, more direct than the first, has been maintained by the Marvins. Fishermen, beachgoers, campers, and others have used this route to access the beach. A third route, created in 2000, crossed the east side of the Pflueger property, but was condemned by the county following the mudslide of November 26, 2001 (mudslide).

3.

Access has been a point of contention between Pflueger and the kuleana owners for some time. In 1988, William Huddy participated in a lawsuit over road access through the Pflueger property to various kuleana. The 1988 complaint alleged that Pflueger, among other defendants, "'failed to provide any access to the Plaintiff Kuleana Owners parcels' and 'that the Defendants acted willfully, intentionally, and maliciously in destroying roadways providing access to the Plaintiff Kuleana Owners' properties.'" (Quoting the complaint.) Richard Marvin was named in the 1988 complaint, but he withdrew from the lawsuit after

Pflueger "told him that if he [withdrew] from the suit, the Marvin family would always be able to get to their property." There is nothing in the record to suggest the outcome of the Huddy claim for access, except there is no evidence of any legal right of way having been established for Huddy or for the Marvins.

II.

A.

In April 2002, the Marvins filed their initial complaint against Pflueger for damages incurred in the mudslide. According to the Marvins' attorney, "before the filing of the lawsuit," the Marvins asked Huddy-Yamamoto if she "wanted to participate" in the lawsuit, but, according to the court's findings, "she refused." In January 2003, the Marvins filed a Second Amended Complaint[7] that for the first time included a claim for an alleged prescriptive easement over the Pflueger property, and alleged a violation of kuleana rights. There is no indication the Marvins asked Huddy-Yamamoto to join the lawsuit at this point.[8] Pflueger, in his answer to the Second Amended Complaint, asserted, inter alia, that "[the Marvins] have failed

[7] In September 2002, a First Amended Complaint was filed that reiterated the same claims as the original complaint but included Pilaʻa 400 LLC as a defendant.

[8] The court and majority appear to imply that Huddy-Yamamoto refused to join the action regarding access and water rights. See majority opinion at 3. However, the court did not indicate in its findings when Huddy-Yamamoto was asked to participate, or whether she was asked to join when the litigation involved kuleana rights. Thus, it is not clear whether Huddy-Yamamoto knew that the proceeding involved kuleana claims when she purportedly refused to participate.

to name indispensable parties to this action."[9]

In 2003, Pflueger also filed a motion to prohibit the Marvins from entering his property except through an eastern temporary roadway that the Marvins had used "occasionally since July 2000[,]" which the court granted in part.[10]

The case was stayed from April 2004 to June 2005. In May 2006, the Marvins filed a Third Amended Complaint. A month later, the Marvins, as kuleana owners, moved, inter alia, for partial summary judgment on their easement claim (summary judgment motion),[11] which was "derived . . . from case law and statutory law governing landlords' title subject to tenants' or kuleana owners' use." Attached to the summary judgment motion was a title report prepared by Title Guaranty of Hawaiʻi on July 25, 2002. The report stated that Pflueger's title did not

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[9] The majority maintains that although Pflueger raised this defense, "it is clear from the context of the other filings in the case that [Pflueger was] not referring to Huddy-Yamamoto[,]" alluding to the "filings" of Pflueger's motion to establish temporary roadway access, filed on March 18, 2003, which did not mention Huddy-Yamamoto, and Pflueger's motion to dismiss for failure to join Bluewater Sailing, Inc. as an indispensable party, filed in 2006. Majority opinion at 4 n.5. Respectfully, viewing the defense in light of subsequent filings does not make it "clear" who Pflueger asserted was indispensable.

The defense was never limited to any party and, of course, was pleaded and preserved. Furthermore, Huddy-Yamamoto was not necessary to those motions inasmuch as they did not involve kuleana rights or the establishment of a permanent access route based on kuleana law. The former sought temporary roadway access; it did not attempt to establish a legal right of way based on kuleana law; therefore, Huddy-Yamamoto would not have been a necessary party to that action. Pflueger's motion to dismiss the complaint filed on July 19, 2006, does not support the conclusion that Pflueger's answer to the complaint, filed in 2003, was limited to Bluewater Sailing.

[10] The order granting in part Pflueger's motion allowed the Marvins to "use the vehicular way that [they] are presently using[,]" which appears to have been the center route that bisected Pflueger's property.

[11] The Marvins also sought a preliminary injunction prohibiting interference with the Marvins' access.

include "Royal Patent No. 3853, Land Commissioner Award Number 6527 to Haena[.]" (Emphasis added.)

After the Marvins filed the summary judgment motion, Pflueger filed his answer to the Third Amended Complaint, again listing as a defense the failure to join indispensable parties. Pflueger opposed the summary judgment motion, contending that there were material issues of fact in dispute,[12] and that the court was "required to conduct a trial on" whether an easement by necessity existed. On July 28, 2006, the court held in abeyance the Marvins' motion for summary judgment pending an evidentiary hearing set for August 9, 2006.

On August 4, 2006, Pflueger filed a position statement. In his position statement, Pflueger argued, inter alia, that "[b]ecause the question of an easement, at the very least, requires the presence of the owners of the Huddy parcel, the action should be dismissed in its entirety or the disposition of the motion stayed pending the joinder of the Huddy parcel owners as necessary and indispensable parties." (Emphasis added.) Pflueger maintained that, "without the presence of the owners of the other [part of the kuleana], [] access rights cannot be

[12] As noted supra, on July 19, 2006, Pflueger moved, inter alia, to dismiss the Third Amended Complaint, naming Bluewater Sailing, Inc., as an indispensable party. On September 5, 2006, almost a month after the August 9, 2006 commencement of the evidentiary hearing on the summary judgment motion, the Marvins filed an opposition to Pflueger's motion to dismiss. The Marvins claimed that the motion to dismiss, filed after the answer, was procedurally defective unless the court, in its discretion, treated the motion as one for summary judgment. On September 11, 2006, Pflueger filed a reply, stating, "A defense based upon the absence of indispensable parties is not waived by the filing of an answer, but can be raised at any time[,]" and citing Haiku Plantations Ass'n v. Lono, 56 Hawai'i 96, 103, 529 P.2d 1, 5 (1974). The record does not reflect whether Pflueger's motion to dismiss was decided prior to the entry of judgment.

determined, as it would leave [Pflueger] and the servient parcel subject to subsequent litigation over the same issue, and to conflicting decisions."

B.

The evidentiary hearing on the Marvins' summary judgment motion was held on August 9, August 23, September 15, and September 22. A site inspection occurred in December 2006. The court did not render a decision on the summary judgment motion until January 2007.

On August 9, 2006,[13] and September 15, 2006,[14] Pflueger argued repeatedly that Huddy-Yamamoto needed to be involved in the litigation. On September 15, 2006, Pflueger moved for a directed verdict[15] on the ground that the proceeding lacked an

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[13] On August 9, before testimony was presented, Pflueger argued that Huddy-Yamamoto was necessary to the proceedings, an issue he claimed had to be addressed before the evidentiary hearing commenced. The Marvins responded that it would be "unfair" and "untimely" to allow Pflueger to raise the issue. After the court stated that the hearing was to proceed, Pflueger inquired if he was precluded from "arguing indispensable parties," to which the court responded that it would "rul[e] on that later[.]" At the end of the day, Pflueger argued that access could not be "litigated and adjudicated without the Huddys[.]"

[14] On September 15, noting that the absence of indispensable parties can be raised at any time, Pflueger again argued that the issue was "fundamental" and that there was a "judicial imperative" for the court to address whether Huddy-Yamamoto was needed in the proceedings inasmuch as "conclusive evidence" established that "the kuleana is the combination" of the Marvins' and Huddy-Yamamoto's properties, and that "any adjudication of kuleana rights affects the entire lot." The court denied the motion.

[15] Although the majority insists on calling the evidentiary hearing a trial, see majority opinion at 14, the nature of the hearing held by the court, whether a bench trial, or an evidentiary hearing, or both, is not evident from the record. HRCP Rule 50 (2000) was "amended [in 2000] and no longer refers to motions for directed verdict[,]" but "to motions for 'judgment as a matter of law[.]'" Nelson v. Univ. of Hawaiʻi, 97 Hawaiʻi 376, 393, 38 P.3d 95, 112 (2001) (quoting HRCP Rule 50). That rule provides that, "during a trial by jury . . . the court may determine the issue against [a] party and may grant a motion for judgment as a matter of law against that party[.]" HRCP Rule 50(a)(1) (emphases added). The instant hearing was not a continue...

indispensable party, Huddy-Yamamoto.

After the court denied Pflueger's motion for a directed verdict, Huddy-Yamamoto was called as a witness by Pflueger and questioned extensively about the kuleana rights of her property. Huddy-Yamamoto testified that, as a child, from approximately 1955 to 1960, she spent her summers at the Huddy property and visited her grandmother. To access the property, she traveled on a "dirt road through the pasture, and [] parked on a plateau, and [] went down a trail." Fishermen, family members, friends, and others used the walking trail. In 1964, a company built a road (the company road) to the west of the Huddy property. A third route went over the Huddy parcel.

Before the third route was built, the Huddy parcel lacked vehicular access because the company road went directly to the Marvins' property without providing access to the Huddy property. Huddy-Yamamoto stated that she did not have permission to use that road because the Marvins denied her and her family access.

Although a pipe carrying water from an eastern stream provided rinsing water, Huddy-Yamamoto explained that potable water had to be manually carried to the Huddy property. Additionally, a pipe carried water from the western stream to the

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[15]...continue
trial by jury. In a bench trial, the correct motion would be brought pursuant to HRCP Rule 52(c), which provides that a court may make a finding against a party on an issue and then enter judgment as a matter of law with respect to a claim or defense. HRCP Rule 52(c); see 9 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure: Civil § 2371, at 220 (2011) (hereinafter Wright & Miller)(explaining that motions for judgment as a matter of law are held to different standards in jury and bench trials).

Huddy property, and some irrigation water was provided by Pflueger.

Huddy-Yamamoto was repeatedly questioned by both parties about her involvement in the case and her wishes for access and water. On direct examination by Pflueger's attorney, Huddy-Yamamoto testified she wanted to be involved as a party in the determination of access and water rights:

> Q: Do you and your mother want vehicular access to your property, lot IA?
> A: Yes, we do want vehicular access.
> . . . .
> Q: Do you want to participate in this process as a party?
> A: Yes.
> Q: Do you want this Court to decide these issues of access to lots 1A and 1B without your involvement as a party?
> A: I want to be involved.
> Q: Do you have an attorney?
> A: Not presently here.
> . . . .
> Q: And do you want water access for -- drinking potable water for lot 1A?
> A: Yes.
> Q: Do you have it now?
> A: No.
> . . . .

(Emphases added.) On cross-examination by the Marvins' attorney, Huddy-Yamamoto testified that she had not been able to "work things out" with Pflueger regarding her access rights:

> Q: You remember having a conversation with me, do you not, before the filing of the lawsuit?
> A: Yes.
> Q: And I asked you if you wanted to participate in this case?
> A: Yes.
> Q: And at that time you did not, did you?
> A: Did not.
> Q: And did you say that you would work things out directly with Mr. Pflueger, didn't you?
> A: Yes.
> Q: And have you worked things out with Mr. Pflueger?
> A: Regarding the access?
> Q: Yes.
> A: This is not up to Mr. Pflueger. It's up to the County or powers to be.
> Q: All right, but when you told me that you did not want to participate in this lawsuit, you wanted to work

> things out with Mr. Pflueger, did you later meet Mr. Pflueger and come to any agreement as to what type of access your kuleana would have?
>
> A: No.
>
> Q: And did you try to work things out with Pflueger insofar as access?
>
> A: Not with Mr. Pflueger directly. I went to the planning commission instead, a planning person.[16]

(Emphases added.)

C.

In January 2007, the court issued its findings, conclusions, and order. In pertinent part, the court found that although the Marvins and Huddy-Yamamoto were entitled to access, Huddy-Yamamoto refused to participate in the lawsuit and would not be prejudiced if the litigation proceeded without her:

> 60. . . . . The Marvin and Huddy kuleana are entitled to access through the [Pflueger] parcel. Indeed, all kuleana owners have access.
>
> . . . .
>
> 102. There are no facts in the record to suggest that [Huddy-Yamamoto][17] will be prejudiced by not participating in the instant lawsuit. Indeed, [she was] asked to participate, and refused. The access [she] currently enjoy[s] is "now improved, and easier access than before."
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> 103. Based on [Pflueger's] witness Bruce Graham's testimony that the Marvin side of the kuleana was the "House Lot" side [and] that the Huddy side of the kuleana was the "lo'i," [Huddy-Yamamoto] is entitled to irrigation water. [Huddy-Yamamoto] testified that she has irrigation water to her kuleana from [Pflueger].
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> 104. There are no facts in the record to suggest that [Huddy-Yamamoto] will be prejudiced by the Plaintiffs' claim to irrigation and drinking water in the instant case.
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> 105. [Huddy-Yamamoto] enjoys access and water to [her] kuleana and specifically refused to participate in this case.
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> 142. [Pflueger], who now argue[s] that [Huddy-Yamamoto] is an indispensable party with respect to road access, failed to bring [Huddy-Yamamoto] into the instant case when filing [the] Motion to Establish Temporary Roadway Access in 2003.

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[16] Huddy-Yamamoto met with a representative of the county, who explained that it would not be possible to rebuild the third route that provided access to her property "because of the violations Mr. Pflueger had done."

[17] The court referred to the prejudice to the Huddy family; however, insofar as Huddy-Yamamoto was the owner, only prejudice to Huddy-Yamamoto is relevant.

(Emphases added.) The court concluded that the Marvins were entitled to access to, and water for, their property, and that Huddy-Yamamoto was not indispensable because she refused to participate:

> 3. As owners of a Kuleana . . . that is landlocked and traceable to the Great Mahele, [the Marvins] are entitled to an easement by necessity, and reasonable use of water for drinking, domestic and agricultural purposes.
> 4. [The Marvins'] right to an easement by necessity, and to drinking, domestic and agricultural water, is derived [in part] from case law and statutory law governing landlord's title subject to tenants' or kuleana owners' use, and the facts specific to this case.
> . . . .
> 6. The kuleana rights to which [the Marvins] are entitled . . . run with their land.
> 7. [The Marvins] are statutorily entitled to an easement by necessity under HRS Section 7-1, using the road they currently use from Koolau gate, along the western bound[ary] . . . to their kuleana parcel at Pilaʻa beach.
> 8. Based on Hawaiʻi case law, . . . and the facts specific to this case, [the Marvins] are entitled to vehicular and pedestrian access along the current route[.]
> 9. [The Marvins] are entitled to continued use of the road from the parking plateau to their kuleana provided they remain responsible for the maintenance and repair of that portion of the road.
> . . . .
> 12. The Court finds [Huddy-Yamamoto] is not an indispensable party as [she is] not prejudiced by the instant proceeding, and [she] refused to participate in the instant lawsuit.
> 13. The [Marvins'] right to water from the western stream and spring is an incident of their land ownership and cannot be severed from the land.
> . . . .
> 15. The Court finds that unless [Pflueger is] enjoined and restrained from interfering with, dismantling, damaging or otherwise destroying [the Marvins'] pvc pipe and cistern that brings their only source of water to their kuleana, the [Marvins] will be permanently and irreparably injured.

(Emphases added.) In January 2007, the court granted the Marvins' summary judgment motion, confirmed an easement by necessity, and restrained Pflueger from "interfering with . . . [the Marvins'] water system that brings water from the western stream and spring to their kuleana." Pflueger was ordered to

"execute[] a recordable Non Exclusive Grant of Easement in favor of [the Marvins.]"

The parties stipulated to dismiss the remaining claims. In March 2007, judgment was entered, inter alia, in favor of the Marvins and against Pflueger "as to Count VII (Kuleana Rights) of the Third Amended Complaint[.]"[18]

III.

On appeal, the ICA reviewed Pflueger's "arguments for plain error[,]" Marvin v. Pflueger, No. 28501, 2010 WL 2316274, at *10 (Haw. App. June 8, 2010) (mem.), and concluded that under HRCP Rule 19(a)(2), Huddy-Yamamoto was a necessary party[19] because (1) "the Huddy parcel and the Marvin parcel are parts of one kuleana" and "the kuleana is entitled to one right of way[,]" id. at *12, thus, "[a]s part owner of the kuleana," "Huddy-Yamamoto's ability to access her parcel could be impacted[,]" id. at *14; (2) the court's "determination regarding the kuleana's historical entitlement to water, if any, including the location of the water source and direction in which the water flows," id., in addition to the amount of water in favor of the Marvins, could greatly impact Huddy-Yamamoto's access to water; (3) there was no evidence that Pflueger was legally bound to continue providing

[18] The court dismissed the Marvins' prescriptive easement claim.

[19] Given the court's repeated use of the term "indispensable," the ICA apparently inferred "that the court found that Huddy-Yamamoto was not necessary a[s a] party under 19(a) and . . . then proceeded to analyze the facts according to 19(b)." Pflueger, 2010 WL 2316274, at *12. However, as the ICA recognized, the court would have had to first "infer" that Huddy-Yamamoto was a necessary party to comport with controlling case law, as discussed infra.

Huddy-Yamamoto with a right of way or water; (4) non-joinder would subject Pflueger to multiple or inconsistent obligations, inasmuch as Huddy-Yamamoto could later make claims for a different location of the easement, or a different location, direction, or amount of water for the kuleana, id. at *25; (5) "it would [not] have been infeasible to join Huddy-Yamamoto[,]" id. at *15; and (6) if joinder was somehow infeasible, she was an indispensable party under HRCP Rule 19(b), id. at *16.[20] The ICA determined the court erred in failing to join Huddy-Yamamoto as a party under HRCP Rule 19 and remanded the case for further proceedings. Id. at *16.

IV.

At the outset, it must be noted that mandatory joinder ensures due process for the absent party. In general, "under fundamental principles of due process, a court is without jurisdiction to enter an order or judgment which affects a right or interest of someone not before the court." Feen v. Ray, 487 N.E.2d 619, 620 (Ill. 1985); see Jordan v. Officer, 525 N.E.2d 1067, 1070 (Ill. App. 1988) ("Basic notions of due process require that all parties whose interest will be materially affected be before the court to present their position[.]"). "Rule 19 is designed to protect the interest of absent persons as well as those already before the court" inasmuch as "[t]he

[20] The ICA applied the correct analysis of HRCP Rule 19. The opinion logically and carefully proceeded through the application of HRCP Rule 19 to the determination of necessary or indispensable persons. Contrary to the majority's position, under our precedent the ICA's "[HRCP] Rule 19 analysis," majority opinion at 7, was the only proper "analysis" of HRCP Rule 19.

failure of the court to protect those not before it may amount to a violation of due process should the judgement in the action have the effect of destroying their rights." 7 Wright & Miller § 1602, at 17308. Mandatory joinder "preserves the principles[21] of due process that are inherent in Rule 19 and which long antedate the Rules of Civil Procedure." Disabled in Action of Pennsylvania v. Se. Pa. Transp. Auth., 635 F.3d 87, 101 (3d Cir. 2011). Thus, "[d]ue process requires that a necessary person be a party to the action." In re R.K.E., 594 N.W.2d 702, 705 (N.D. 1999).

Indeed, the United States Supreme Court has indicated that a court's failure to protect an outsider's potential interests may involve due process, stating, "Neither Rule 19, nor we, . . . mean to foreclose an examination in future cases to see whether an injustice is being, or might be, done to the substantive, or, for that matter, constitutional rights of an outsider by proceeding with a particular case." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 123 (1968). HRCP Rule 19, then, is a "reliable and practical guide for the appropriate exercise of . . . equity jurisdiction, in accordance with the fundamentals of due process." Britton v. Green, 325 F.2d 377, 382 (10th Cir. 1963). Thus, compulsory

[21] The principles of due process include "considerations of notice and a right to be heard." S-W Co. v. Schwenk, 568 P.2d 145, 149 (Mont. 1977); see Nat'l Farmers Union Prop. & Cas. Co. v. Schmidt, 219 N.W.2d 111, 114 (N.D. 1974) ("On behalf of one not made a party to the action, due process demands the right to appear and to defend in a trial which might jeopardize or destroy the interest of such person.").

joinder ensures the due process rights of absent persons by protecting their interests.

Mandating joinder also promotes the administration of justice inasmuch as joinder ensures the fair, efficient, and final determination of disputes. The policy interests underlying Rule 19, that of "according complete relief, avoiding harm to the absentee, and avoiding unfair imposition of liability on the defendant[,] outweigh plaintiff autonomy in [the] structuring of litigation." Gering v. Fraunhofer USA, No. 05-73458, 2009 WL 648511, at *1 (E.D. Mich. Mar. 11, 2009); see Humphrey v. Yates, No. 1:09-cv-00075, 2009 WL 5197217, at *1 (E.D. Cal. Dec. 23, 2009) ("[T]he policy rationale of [FRCP] Rule 19 is to avoid creating harm for an absentee party or a defendant, rather than deferring to [the p]laintiff's autonomy.").

The absence of a necessary person in a suit renders it likely that the same or a similar dispute will be relitigated with the same or similar parties before another court in the future, resulting in additional delays and costs that are detrimental to the parties and the court system. It is the court's duty, not the parties' duty, to see to the administration of justice. "The necessity of preserving the integrity of judicial proceedings is always an overriding consideration, and in protecting the proper use of our courts it is not necessary for us to rely upon the diligence of the parties." Farrow v. Dynasty Metal Sys., Inc., 89 Hawaiʻi 310, 313, 972 P.2d 725, 728 (App. 1999) (internal citation omitted) (emphasis added). Thus,

HRCP Rule 19 recognizes the "overriding consideration" of ordering joinder of a necessary person.

V.

It is manifest that the ICA correctly determined that Huddy-Yamamoto is a necessary party under HRCP Rule 19(a)(2).[22] Huddy-Yamamoto claims interests in access to, and water for, her property; her absence impairs or impedes her ability to protect those interests; and her non-joinder "may" leave the Marvins and Pflueger subject to a "substantial risk of incurring multiple, or otherwise inconsistent obligations." Id. Inasmuch as Huddy-Yamamoto satisfies all of the requirements under HRCP Rule 19(a)(2), the court was mandated to join her in the action as a necessary party.

A.

1.

Huddy-Yamamoto claimed an "interest relating to [the] subject matter of the action" inasmuch as the "action" involved access to the kuleana, and Huddy-Yamamoto sought access to her part of the kuleana. HRCP Rule 19(a)(2). At the hearing, she stated that she sought "vehicular access" and desired to "participate" in determining "access to Lots 1-A and 1-B."

[22] It is not surprising that in all other cases dealing with a kuleana's right to an easement, all owners of the kuleana have been parties to the lawsuit. See Rogers, 3 Haw. App. at 138, 642 P.2d at 551 (all owners of kuleana were involved in the lawsuit alleging easement by necessity under HRS § 7-1); see also Palama v. Sheehan, 50 Haw. 298, 298-99, 440 P.2d 95, 303 (1968) (defendants, owners of four separate kuleanas, sought a right of way through the plaintiffs' land, and the court held that they were entitled to a right of way); Haiku Plantations Ass'n v. Lono, 1 Haw. App. 263, 263, 618 P.2d 312, 312-13 (1980) (appellants, owners of a kuleana, sought an easement under HRS § 7-1).

Therefore, she "claimed" an interest, i.e., access, "relating to" the action that involved a right of way derived from kuleana rights.

Because a kuleana is entitled to only one right of way, and that has been granted to the Marvins' portion of the kuleana, Huddy-Yamamoto's right to access her parcel may be legally foreclosed by the court's ruling.[23] See Henry, 9 Haw. at 491. In Henry, the plaintiff "own[ed] a kuleana" and sought a way to and from his land. Id. The Hawaiʻi Supreme Court of the Republic of Hawaiʻi stated that the plaintiff's right to and from his land is one that "he acquired with the land[]" and the plaintiff, based on that right, "could not have a number of roads; he [was] only entitled to one[.]" Id.; see also Bremer, 104 Hawaiʻi at 58, 85 P.3d at 165 (quoting Henry). In the instant case, the court-placed easement leads solely to the Marvins' property.[24] Thus, the Marvins have obtained the only

[23] HRS § 7-1 gives a kuleana owner a right of way based on necessity, or ancient or historical use. Bremer v. Weeks, 104 Hawaiʻi 43, 58, 85 P.3d 150, 165 (2004) (explaining that courts have granted a right of way based on necessity, or based on ancient and historical use). In determining that the plaintiff was entitled to a right of way, Henry v. Ahlo stated, "We do not regard it necessary to consider the question of prescriptive right, as this is a case of a way of necessity." 9 Haw. 490, 491 (Haw. Rep. 1894) (emphasis added). A court may grant an easement for a right of way, even though statutory language does not specifically require a court to grant an easement. In Rogers, 3 Haw. App. at 138, 642 P.2d at 551, kuleana owners sought an easement under HRS § 7-1 based on necessity because the kuleana was landlocked. The ICA affirmed the court's grant of an easement, stating that the entitlement to an easement was derived "not only from expressed reservation contained in [Grant 464 issued by the Hawaiian Government] but also from HRS § 7-1, which confers a right of way to tenants' allodial lands." Id. at 139, 642 P.2d at 551.

[24] Respectfully, the majority's assertion that the easement "leads" to the parking area by a staircase that goes to Huddy-Yamamoto's property, majority opinion at 48, is misleading, inasmuch as it does not negate the fact that Huddy-Yamamoto does not have vehicular access to her property and does continue...

right of way to the kuleana. Under Henry, the court has, as a practical matter, excluded Huddy-Yamamoto from legal access to her parcel. Consequently, the court's holding has impaired or impeded Huddy-Yamamoto's ability to protect her interest in accessing her property.

The impairment of Huddy-Yamamoto's ability to protect her interest is not mitigated by the fact that she currently has access to her property. Although she apparently has informal permission to travel on Pflueger's property to reach her own property, it does not appear that Pflueger is under any binding obligation to allow such access. "A right that is terminable at will or merely permissive is not a legally enforceable right." Bremer, 104 Hawaiʻi at 67, 85 P.3d at 174 (noting that the plaintiff's claim of easement by necessity under HRS § 7-1 was not defeated even though the plaintiff had "current and undisturbed use" of an access route because the use of the access route was "revocable" at any time and carried with it no legal obligation). In other words, Pflueger or his successor can deny Huddy-Yamamoto access at any time.[25]

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[24]...continue
not have a legal right to use said easement.

[25] The majority incorrectly states that this statement is not "accurate" inasmuch as Huddy-Yamamoto has "the same right to access her property that she had before this lawsuit[,]" and, thus, she can "pursu[e] legal action" to enforce her right of access. Majority opinion at 38. With all due respect, insofar as a kuleana is entitled to one right of way, and the court gave that right to the Marvins, Huddy-Yamamoto lacks any legally enforceable right to her property inasmuch as her access is by way of Pflueger's permission. The majority's statement to the contrary is not accurate.

2.

Huddy-Yamamoto also claimed an interest in water. She wanted "fresh spring water" rather than the "irrigation water" that was being provided. Her interest "related to" the action inasmuch as it also involved kuleana water rights. The Marvins asserted a right to water based on their status as kuleana owners. A kuleana has a recognized right to water. "It is the general law of this jurisdiction that when land allotted by the Mahele was confirmed to the awardee . . . such conveyance of the parcel of land carried with it the appurtenant right to water for taro growing." McBryde Sugar Co. v. Robinson, 54 Haw. 174, 188, 504 P.2d 1330, 1339 (1973) (emphases added).

The amount of water a kuleana enjoys for agricultural purposes must be, as precisely as possible, "the amount of water that was actually being used for taro cultivation at the time of the Land Commission Awards." Id. at 188-89, 504 P.2d at 1340. A kuleana also has a right to "running water," defined as "water flowing in natural water courses, such as streams and rivers[.]" Id. at 192, 504 P.2d at 1342. "[T]he right to 'running water' . . . guarantees a land owner the same flow of water in a stream or river as at the time of the [M]ahele, without substantial diminution, or the right to flow of a stream in the form and size given it by nature." Id. at 192-93, 504 P.2d at 1342.

As noted before, the court enjoined Pflueger from interfering with the Marvins' "water system that brings water from the western stream and spring to their kuleana." Because

the Marvins were entitled to such water based on kuleana rights, the type, quality, amount, and perhaps source, of water to the kuleana was also adjudicated by the court's decision. See id. at 192, 504 P.2d at 1342 (noting that the right to the use of running water "guarantees a land owner the same flow of water in a stream or river as at the time of the [M]ahele, without substantial diminution") (emphasis added).

The court concluded that the Marvins, as kuleana owners, were entitled to water from the "western stream and spring[.]" In doing so, the court implicitly ruled that the kuleana historically had water from that source. If Huddy-Yamamoto were to seek water, she would have to prove that the kuleana did not obtain water from that western stream, but from another source, or that some of the water going to the Marvins must be diverted for her use. It is plain, then, that Huddy-Yamamoto's interest in water was impaired or impeded by the court's decision, as the ICA correctly decided. The Marvins have a legal right to fresh running water as a result of this decision. Huddy-Yamamoto does not.

B.

An alternative basis for mandating HRCP Rule 19(a) joinder is that "any . . . of the . . . parties [may be] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the [absentee's] claimed interest." HRCP Rule 19(a)(2)(B).

1.

The Marvins may be at substantial risk of incurring multiple and inconsistent obligations as a result of the failure to join Huddy-Yamamoto. The easement granted to the Marvins under HRS § 7-1 runs directly to their property and does not provide access to Huddy-Yamamoto's property. Since Huddy-Yamamoto expressed an interest in having access, and a kuleana is entitled to only one right of way, there is a "substantial risk" that Huddy-Yamamoto will seek a different access route that runs to her property or an alteration of the Marvins' route. Consequently, there is a "substantial risk" that the location of the Marvins' court-granted right of way will be challenged or altered. Thus, the Marvins "may" be "subject to . . . multiple or . . . inconsistent obligations," HRCP Rule 19(a)(1)(B), because Huddy-Yamamoto was not joined.

The Marvins may also be subject to multiple and inconsistent obligations as a result of Huddy-Yamamoto's claimed interest in water. Currently, the Marvins have access to running water from a stream, but Huddy-Yamamoto also desires running water. A kuleana is entitled to a limited amount of water. Huddy-Yamamoto, as part owner of that water, may seek to change the location, flow, or amount of water presently allowed by the court for the Marvins' part of the kuleana. Therefore, the Marvins may be subject to multiple and inconsistent obligations with respect to their current use of water from the western stream.

2.

As the ICA correctly observed, Pflueger is also at a "'substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [Huddy-Yamamoto's] claimed interest[s].'" Pflueger, 2010 WL 2316274, at *15 (quoting HRCP Rule 19(a)(2)(B)). Pflueger currently is obligated to provide an easement over his property to the Marvins. He is not legally obligated to provide Huddy-Yamamoto any access rights. In the future, Huddy-Yamamoto may seek to have a legal right of way established by asserting rights to an easement as part owner of the kuleana. She may seek to have the easement changed or located elsewhere, in a more convenient and accessible location. Therefore, Pflueger may be subject to further court proceedings over whether Huddy-Yamamoto is entitled to an alteration or relocation of the access serving only the Marvins.

Additionally, Huddy-Yamamoto could later claim that the kuleana water source should be relocated, the water direction modified, or the amount of water changed. In that case, again, Pflueger would be subject to future lawsuits and "double, multiple, or otherwise inconsistent obligations[,]" HRCP Rule 19(a)(2)(B), involving water access from or over his land.

C.

As cogently explained by the ICA, if a party is "necessary" under HRCP Rule 19(a)(2), the question becomes whether the person can be feasibly joined. HRCP Rule 19(a) provides that "[a] person who is subject to service of process

shall be joined as a party" if that person is necessary. "If the party has not been so joined," HRCP Rule 19(a)(2), then it is the mandated duty of the court (i.e., the court "shall") to "order that the person be made a party[,]" HRCP Rule 19(a)(2)(B).

In the instant case, Huddy-Yamamoto was a necessary party, as elucidated supra, and could be feasibly joined, since she participated in the evidentiary hearing and, thus, was subject to service of process. Based on the evidence adduced, Huddy-Yamamoto's absence may impede or impair her ability to protect her interests and may subject the Marvins and Pflueger to a substantial risk of incurring double or multiple obligations. With all due respect, under these circumstances, the court abused its discretion in failing to join Huddy-Yamamoto "as a defendant[] or . . . an involuntary plaintiff," HRCP Rule 19(a)(2)(B). See Ieda, 109 Hawaiʻi at 142, 123 P.3d at 1237 (holding that whether action should proceed without absentee is a discretionary determination).

VI.

Additionally, given that Huddy-Yamamoto's father previously sued Pflueger to obtain access to the kuleana, it is clear that this is not an issue that will be resolved by the court's order in this lawsuit in the absence of Huddy-Yamamoto's joinder. As noted before, in 1988, William Huddy participated in a lawsuit against Pflueger in a dispute over road access through the Pflueger property to various kuleana. Legal right of access to the Huddy kuleana was apparently not resolved. It is entirely

foreseeable that Pflueger and the Marvins are at substantial risk of further litigation, inasmuch as access to the kuleana has been a source of contention in the past, has continued into the present, and in the absence of Huddy-Yamamoto's joinder, will continue in the future.

Manifestly, joinder of necessary parties, the purpose of which is to prevent multiple litigation, is designed to prevent the situation presented in this case. See 7 Wright & Miller § 1602, at 17308 ("Rule 19 is designed to protect the interests of absent persons as well as those already before the court from multiple litigation or inconsistent judicial determinations."); see also Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1043 (9th Cir. 1983) ("precluding multiple lawsuits on the same cause of action[]" is a goal of FRCP Rule 19). Moreover, the Advisory Committee on the Federal Rules of Civil Procedure (Advisory Committee) noted that the interests furthered by FRCP Rule 19 include the public's interest "in avoiding repeated lawsuits on the same essential subject matter." Advisory Committee's Notes on 1966 Amendments to FRCP Rule 19. Because there have been "repeated lawsuits" over the "same essential subject matter[,]" i.e., access, it is entirely reasonable to conclude that future litigation involving access would be avoided by joining Huddy-Yamamoto.

VII.

A.

Here, respectfully, the court did not engage in the reasoned analysis required under HRCP Rule 19, making it difficult to determine the bases for its decision. The court should have ascertained first, under HRCP Rule 19(a), whether the absentee was "'necessary[.]'" Ieda, 109 Hawaiʻi at 143, 123 P.3d at 1238 (quoting HRCP Rule 19(a)). Second, if the party was necessary, then the court should have determined whether joinder was feasible. Id. ("[I]f [feasible], 'the court shall order that [the person] be made a party.'").

If joinder of the necessary party is not feasible, the next question is whether "the court should 'in equity and good conscience' dismiss the case because the absentee is indispensable." Glancy v. Tabuman Ctrs., 373 F.3d 656, 666 (6th Cir. 2004); see Moore's Federal Practice § 19.02[3][c] ("Under Rule 19(b), an absentee could be considered 'indispensable' only if the absentee (1) was a necessary party, that is, met the definition . . . under Rule 19(a), (2) its joinder could not be effected, and (3) the court determined that it would dismiss the pending case rather than proceed . . . without the absentee." (emphasis in original)). This three-part approach is well-established, being described by treatises and followed by federal courts of appeals when applying FRCP Rule 19, "upon which the HRCP is based[.]" Carbonel, 93 Hawaiʻi at 471, 5 P.3d at 461. Thus, "[b]y proceeding in this orderly fashion [a] court will be

able to avoid grappling with the difficult question of indispensability[.]" 7 Wright & Miller § 1604, at 17330; see E.E.O.C. v. Peabody W. Coal Co., 400 F.3d 774, 779 (9th Cir. 2005) (describing the "three successive inquiries" of FRCP Rule 19).

It follows then, that, "[w]here joinder [of a necessary party] is feasible, the court need not proceed under [HRCP] Rule 19(b) to determine whether to proceed or dismiss for lack of an indispensable party." Lau v. Bautista, 61 Haw. 144, 154, 598 P.2d 161, 168 (1979) (emphasis added). However, if joinder is not feasible, a court must decide, based on considerations of "equity and good conscience," whether to allow the lawsuit to proceed in the absence of the necessary party. HRCP Rule 19(b). Hence, if litigation continues without the necessary party, it is assumed the party is not "indispensable." If the court determines that the action should not proceed but should be dismissed, "the absent person(s) [are] thus regarded as indispensable." Life of the Land v. Land Use Comm'n, 58 Haw. 292, 298, 568 P.2d 1189, 1194 (1977) (internal quotation marks and citation omitted).

B.

Logically the court could not have proceeded to determine that Huddy-Yamamoto was an indispensable party under HRCP Rule 19(b) without first ruling that Huddy-Yamamoto was a necessary party under HRCP Rule 19(a). If the court concluded that Huddy-Yamamoto was a necessary party, it did not say so. If

it concluded that she could not be feasibly joined, it did not so indicate. But, if the court did decide that Huddy-Yamamoto could not be feasibly joined, it was in error. It is undisputed that Huddy-Yamamoto was amenable to service and was within the court's jurisdiction inasmuch as she testified at the hearing.

In order to reach the question of whether Huddy-Yamamoto was an indispensable party, the court would have had to first decide that Huddy-Yamamoto was a necessary party, but then, that she could not be feasibly joined. Lau, 61 Haw. at 154, 598 P.2d at 168 (noting that if joinder is feasible, then the court need not proceed under HRCP Rule 19(b)). Assuming, arguendo, that the court reached this point in its analysis without saying so, it erred in holding that Huddy-Yamamoto was not indispensable under HRCP Rule 19(b) for the reasons discussed infra. The court apparently chose to forego the necessary party analysis altogether, despite case law holding that the analysis under HRCP Rule 19 must proceed in that manner.[26] See Life of the Land, 58 Haw. at 298, 568 P.2d at 1194 (noting that a court's dismissal for failure to join indispensable parties was premature because the record failed to indicate whether the alleged absent parties were subject to service of process).

[26] With all due respect, the majority commits the same error as the court, inasmuch as the majority holds that Huddy-Yamamoto is not an indispensable party, without indicating how it can reach this conclusion in light of the factors showing Huddy-Yamamoto was a necessary party who could feasibly be joined. Based on the foregoing, it is manifest that the court abused its discretion in not joining Huddy-Yamamoto when presented with evidence that she was a necessary party.

VIII.

It is the court's duty to join a necessary party where the parties have failed to do so. Respectfully, failure to take such action was a decision that "clearly exceeded the bounds of reason" and disregarded "rules" "to the substantial detriment of a party litigant[,]" Kealoha v. County of Hawaii, 74 Haw. 308, 318-19, 844 P.2d 670, 676 (1993), or was "base[d] . . . on an erroneous view of the law or on a clearly erroneous assessment of the evidence[,]" Ieda, 109 Hawaiʻi at 142, 123 P.3d at 1237 (internal quotation marks and citation omitted). "[C]learly," the court "erroneous[ly] assess[ed]," id., the evidence in determining that Huddy-Yamamoto would not be prejudiced by the proceeding inasmuch as the evidence indicated she was a necessary party. Furthermore, although the court acted conscientiously, it "erroneously view[ed]" the case law on joinder of necessary parties inasmuch as it failed to determine that Huddy-Yamamoto, a necessary party, could be feasibly joined. Id. Therefore, I would affirm the ICA's decision to remand to the court for further proceedings consistent with the ICA's opinion.

IX.

Assuming, arguendo, that the court determined Huddy-Yamamoto was a necessary party who could not be joined, the relevant test under HRCP Rule 19(b) is whether "in equity and good conscience" the case should proceed or should be dismissed. HRCP Rule 19(b) requires a court to apply the following four factors:

> [F]irst, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(Emphasis added.) As the ICA correctly determined, applied here, the four factors weigh in favor of dismissal. Huddy-Yamamoto "might be" prejudiced by the judgment, in terms of access to, and water for, her kuleana, and those "already parties" might be prejudiced by "multiple or [] inconsistent obligations," as explained supra. Second, the prejudice could have been "lessened or avoided" only by joining Huddy-Yamamoto. Third, the judgment rendered in Huddy-Yamamoto's absence is inadequate, inasmuch as it is foreseeable that future litigation will not be avoided. Provident Tradesmens, 390 U.S. at 111 ("We read the Rule's third criterion, whether the judgment issued in the absence of the nonjoined person will be 'adequate,' to refer to this public stake in settling disputes by wholes, whenever possible[.]"). "The fourth [] factor--whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder--has been examined in terms of whether there is an alternative forum where all parties may be joined." Royal Travel, Inc. v. Shell Mgmt. Hawaiʻi, Inc., No. 00314, 2009 WL 2448495, at *2 n.4 (D. Haw. 2009) (citing Dawavendewa v. Salt River Project Agric. Imp. & Power Dist., 276 F.3d 1150, 1162 (9th Cir. 2002)). The Marvins appear to have had an adequate remedy if the court had dismissed for non-joinder because the Marvins could bring another suit that

included Huddy-Yamamoto.[27] Accordingly, the "equity and good conscience" standard of HRCP Rule 19(b) does not support proceeding without Huddy-Yamamoto.

X.

It goes without saying, as the majority repeatedly intones, that the circumstances of each case differ and that we decide particular cases. Majority opinion at 53. However, that does not absolve this court from applying the legal standards in HRCP Rule 19. In that regard, the majority errs in (1) characterizing Huddy-Yamamoto's interest narrowly; (2) concluding that Huddy-Yamamoto is not indispensable; (3) arguing that delay is a factor to be considered in HRCP Rule 19(b) under the circumstances here; (4) maintaining that policy considerations support the outcome; (5) deciding Pflueger's "substantial compliance" with the HRAP permits appellate review; and (6) determining that the defense of joining a necessary party is waivable. Respectfully, the result would imply that this "court[] fail[s] to understand the process by which the court is to determine indispensability, and[,] thus[,] endanger[s] its pragmatic efficiency." Moore's Federal Practice § 19.02[2][d].

XI.

In connection with the first error, the majority states that Huddy-Yamamoto is affected by the route of access to the

[27] Because HRCP Rule 41(b), entitled "Involuntary dismissal: Effect thereof," provides that a dismissal for failure to join a party under HRCP Rule 19 does not operate as an adjudication on the merits, the Marvins could reassert the kuleana claim if the court dismissed for failure to join Huddy-Yamamoto.

kuleana,[28] but that she had no "involvement" in the injunctions issued by the court, and would therefore not be "affect[ed]" by the court's establishment of a right of access in favor of the Marvins, inasmuch as the partition order did not affect the rights of all the residents to access the kuleana.[29] Majority opinion at 34. Respectfully, this is incorrect.

Contrary to the majority's position, the partition order neither granted nor denied access to the Marvins or to Huddy-Yamamoto, or affected the rights of the kuleana owners. According to the majority, Huddy-Yamamoto would have had an interest in the establishment of the Marvins' right of access if the "existence of the [Marvins'] access would somehow negate Huddy-Yamamoto's access." Majority opinion at 35. But Huddy-

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[28] Respectfully, it is misleading to state that "the fact that a nonparty may be affected by a proceeding is not sufficient to make them an indispensable party." Majority opinion at 36 (citing Provident Tradesmens, 390 U.S. at 110). To reiterate, the court must first analyze whether the absentee is necessary and, if so, whether joinder is feasible. Only if joinder is infeasible does the court proceed to HRCP Rule 19(b). The majority also misstates Provident Tradesmens. That case states that the absentee is not bound by a judgment, "which obviously does not mean either (a) that a court may never issue a judgment that, in practice, affects a nonparty or (b) that (to the contrary) a court may always proceed without considering the potential effect on nonparties simply because they are not 'bound' in the technical sense." Provident Tradesmens, 390 U.S. at 110 (emphases added). The Court continued, "When necessary, however, a court of appeals should, on its own initiative, take steps to protect the absent party, who of course had no opportunity to plead and prove his interest below." Id. at 111. Hence, the ICA was correct in "considering" the "potential effect" of the court's judgment on Huddy-Yamamoto.

[29] The majority additionally states that the trial court's relevant findings of fact "show a pattern of [Pflueger's] conduct toward [the Marvins] in which Huddy-Yamamoto was not involved." Majority opinion at 35. The majority suggests that, as a result, Huddy-Yamamoto is not affected by the court's injunctions. See majority opinion at 35-36. The court's lack of findings with respect to Huddy-Yamamoto, however, is easily explained. Since the court decided not to join Huddy-Yamamoto, the court had no reason to enter findings with respect to her as to any matter in dispute in the litigation other than whether she needed to be joined. The lack of findings involving Huddy-Yamamoto, therefore, does not speak to whether or not Huddy-Yamamoto is affected by Pflueger's conduct or by the court's injunctions.

Yamamoto has an interest because, unlike the Marvins, she has no "established" right of access based on her status, whereas the Marvins arguably have the one access permitted the kuleana. See Ahlo, 9 Haw. at 490; see also majority opinion at 36 (quoting Ahlo for the proposition that a kuleana has only one right of way). Additionally, the court's injunctions, which prevent Pflueger from interfering with the Marvins' right to access and water, are a means of enforcing the Marvins' rights as kuleana owners. Because kuleana rights are the basis for the court's action, Huddy-Yamamoto has an interest in how the rights enforced on behalf of the Marvins would limit her rights to access and water.

Furthermore, with respect to water, because the Marvins and Huddy-Yamamoto share the land, the court's grant of water for the Marvins affects Huddy-Yamamoto's interest, inasmuch as the right to water is limited and is allocated to the kuleana as a whole. Since Huddy-Yamamoto has an interest in obtaining an adequate amount of water, to which she testified at the hearing, the injunctions affect Huddy-Yamamoto with respect to her share of the water that can be legally allotted to the kuleana.

Therefore, it would appear self-evident that Huddy-Yamamoto claimed an "interest" relating to the proceeding involving kuleana rights. Since it was feasible to do so, Huddy-Yamamoto should have been joined as a necessary party under HRCP Rule 19(a).

XII.

In connection with the second error, because the majority does not follow the proper analysis under HRCP Rule 19 under the guise of waiver, see discussion infra, the majority erroneously concludes that HRCP Rule 19(b) applies. Assuming, arguendo, that Huddy-Yamamoto could not have been feasibly joined and the court was presented with the question of whether to proceed with the lawsuit or dismiss it altogether, under the circumstances of this case, Huddy-Yamamoto was indispensable and the case should have been dismissed without prejudice. HRCP Rule 19 authorizes the court itself, as described above, to join a necessary party. Nevertheless, the majority concludes that Huddy-Yamamoto was not indispensable and that the case need not have been dismissed.[30]

A.

1.

As to the first part of the first of the four factors,[31] the potential for prejudice to Huddy-Yamamoto, the majority maintains that Huddy-Yamamoto is not "bound" by the court's decision, her access is "better than it was before[,]" the

[30] The majority also states that the factors are "in no way exclusive[.]" Majority opinion at 36-37 (citing Carbonel, 93 Hawaiʻi at 470, 5 P.3d at 460). However, that does not mean that the factors or legal standards (such as those found in HRCP Rule 19(a)) can be disregarded, inasmuch as "a court should consider all of the factors and employ a functional balancing approach." Carbonel, 93 Hawaiʻi at 470, 5 P.3d at 460 (internal quotation marks and citation omitted).

[31] To reiterate, the first factor provides that a court must consider "to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties[.]" HRCP Rule 19(b).

court's order does not "preclude" her from pursuing litigation to gain better access, and since she refused to participate in the litigation,[32] she was not likely to be prejudiced by the order.[33] Majority opinion at 37. With all due respect, those reasons are irrelevant in ascertaining the potential for prejudice.

A non-party such as Huddy-Yamamoto is rarely ever "bound" by litigation, see Advisory Committee's Notes on the 1966 Amendments to FRCP Rule 19 ("[T]he court can make a legally binding adjudication only between the parties actually joined in the action."), and nothing indicates that she would be bound, so this is a non-factor. Huddy-Yamamoto's so-called "better" access

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[32] In connection with Huddy-Yamamoto's refusal, the majority suggests that Huddy-Yamamoto knew the proceeding involved a kuleana claim at the time she refused to participate because the initial complaint sought an injunction prohibiting Pflueger from blocking the Marvins' access road, "access" "has always been at issue" in the case, and Huddy-Yamamoto's testimony during the hearing on the summary judgment motion indicated that she knew the claim involved kuleana rights. Majority opinion at 39. However, the initial complaint seeking an "injunction" was not relevant to whether Huddy-Yamamoto knew that the complaint involved kuleana rights, inasmuch as, in the majority's words, "Huddy-Yamamoto was not involved in the conduct necessitating the injunction, nor would she be affected by the court's injunction[.]" Id. at 34. It is not evident what the Marvins' attorney told Huddy-Yamamoto when inquiring whether she wanted to join the lawsuit. The majority engages in pure speculation to support its position that Huddy-Yamamoto knew, before the hearing, that the litigation involved kuleana rights. More importantly, Huddy-Yamamoto's trial testimony does not indicate that she knew, at the time the complaint was filed, what the complaint involved.

[33] That majority claims that because Huddy-Yamamoto may seek to have a legal right of way established in the future, she is not prejudiced by the court's failure to join her. Majority opinion at 37. First, the majority takes the statement that Huddy-Yamamoto may seek to have a legal right of way established in the future out of context. As stated infra, the entire point of HRAP Rule 19 is to avoid future disputes that could have been resolved in the present litigation. Further, if Pflueger chooses to deny Huddy-Yamamoto access, it is going to be more difficult in the future for her to gain access because a court has already established the right of way in this proceeding and ostensibly a kuleana can only have one right of way. It is also incorrect to say that the prejudice to Huddy-Yamamoto is lessened as a result of the court's finding that "access can be moved at the need of either party," see majority opinion at 48. It is apparent that the court was referring to the needs of Pflueger and the Marvins inasmuch as Huddy-Yamamoto was not made a party to the action.

is not legally enforceable so as to prohibit Pflueger or a subsequent owner from altering her access at any time, and given that the court established a right of way for the Marvins, whether she would be successful in any future litigation is uncertain. See Henry, 9 Haw. at 491 (noting that a kuleana owner is entitled to only one right of way). Finally, HRCP Rule 19(a) mandates that the party who is necessary shall be joined by the court, even involuntarily; thus, Huddy-Yamamoto's supposed refusal (posited by the majority despite her expression of interest to be joined at the hearing) has no bearing on whether she suffered prejudice. See HRCP Rule 19(a) ("If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff"); Lau, 61 Haw. at 154, 598 P.2d at 168 ("Under [HRCP] Rule 19(a), if such a person has not been joined, the court shall order that he be made a party.") (Internal quotation marks and citation omitted.) (Emphasis added.)

As to the second part of the first factor, the potential prejudice to Pflueger, the majority states that although Pflueger asserts that he may be prejudiced by future lawsuits, "equitable principles," including Pflueger's delay in raising the issue, outweigh any possible prejudice. Majority opinion at 41. Other than possible delay, the majority does not identify other "equitable principles[.]" Moreover, the majority provides no authority for the proposition that a defendant's alleged "delay" in raising joinder, as an "equitable

principle[,]" alone outweighs other factors involved in the "equitable" calculus if the case proceeds without the absentee. In any event, the majority's purported "delay" thesis lacks merit, as discussed later.

2.

As to the second factor, lessening or avoiding prejudice to Huddy-Yamamoto or the other parties,[34] the majority maintains that because (1) the easement is non-exclusive and preserves the status quo, (2) the access road leads to an area from which Huddy-Yamamoto can walk to her property on an improved staircase, and (3) Huddy-Yamamoto can challenge the easement because the decision is not binding on her, any prejudice was lessened. Majority opinion at 48-49. Obviously, the fact that the easement is "non exclusive[,]" defined as "[a]n easement allowing the servient[35] landowner to share in the benefit of the easement[,]" Black's Law Dictionary at 586, does not lessen any prejudice to Huddy-Yamamoto, since the easement only allowed Pflueger, whose property is subject to the easement, to "share in the benefit[,]" but does not allow Huddy-Yamamoto to share in that benefit.[36] The majority ignores the fact that Huddy-Yamamoto

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[34] As noted previously, the second factor is "the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice [to the absentee or those already parties] can be lessened or avoided[.]" HRCP Rule 19(b).

[35] "Servient" is "subject to a servitude or easement." Black's Law Dictionary 1491 (9th ed. 2009).

[36] The majority contends that because the Marvins were given a non-exclusive easement, Huddy-Yamamoto and others are not precluded from utilizing the easement. See majority opinion at 45 n.16. This is not correct. As continue...

testified that she did not have permission to use the company road the Marvins used because the Marvins denied access to her and her family. Moreover, the order does not preserve the status quo because it granted the Marvins, as kuleana owners, legally-enforceable access while Huddy-Yamamoto, who shares the same status, lacks such access. In fact, the majority admits that Huddy-Yamamoto will be affected. See majority opinion at 36 ("It follows that if a partitioned kuleana is only allowed one access point, then the owners of the property within that kuleana may be affected by the determination of where that access point should be placed."). The majority does not explain how Huddy-Yamamoto, a non-party, can challenge a judgment that, according to the majority, has, in effect, nothing to do with her.

[36]...continue
noted, a non-exclusive easement merely allows Pflueger to share in the benefit of the easement. This means that if Pflueger and the Marvins wanted to prevent Huddy-Yamamoto from using the easement, they could do so, because Huddy-Yamamoto does not have a legally-enforceable right to use the easement. See Restatement (Third) of Property § 1.2, cmt. c (defining non-exclusive easement as one in which the servitude holder can exclude anyone except the servient owner and others authorized by the servient owner). The majority is therefore wrong to conclude that there is no evidence that the easement is "exclusive" in the sense that Huddy-Yamamoto and other third parties could be prevented from using it. See majority opinion at 45 n.16. For the same reason, the majority is plainly incorrect in concluding that "the circumstances surrounding the injunction show that Huddy-Yamamoto [will not] be affected by the court's injunction[,]" majority opinion at 34, and that the court's order "does not affect Huddy-Yamamoto because the right of access exists for all of the residents of the kuleana[,]" majority opinion at 35. Similarly, it is not the case that "legally-enforceable" rights are being "conflat[ed]" with "judicially-determined rights[,]" majority opinion at 38, for Huddy-Yamamoto now has neither; she has no legally enforceable rights in the easement granted by the court and she has no judicially-determined rights.

3.

As to the third factor,[37] the adequacy of the judgment, the majority maintains the court "was able to adequately resolve" the question of "access rights" in Huddy-Yamamoto's absence. Majority opinion at 49. But the court's resolution was founded upon kuleana rights; thus, Huddy-Yamamoto should have been joined to further the public's interest "in settling disputes by wholes[.]" Provident Tradesmens, 390 U.S. at 111; see also Moore's Federal Practice § 19.05[5][a] ("Proceeding in litigation without the absentee--who, at this point, has been found necessary but cannot be joined--requires the court to enter a judgment that does not fully resolve a dispute between the extant parties."). Plainly, the judgment was not "adequate" to settle the dispute, but left all parties subject to foreseeable litigation in the future.

4.

As to the fourth factor,[38] the adequacy of the remedy if dismissal was granted, the majority asserts that the Marvins "had waited years to determine their access rights," and so lacked an adequate remedy if the case was dismissed. Majority opinion at 50. To the contrary, this has no bearing on an adequate remedy, and does not weigh heavily at all under the actual circumstances

[37] As noted previously, the third factor is "whether a judgment rendered in the person's absence will be adequate[.]" HRCP Rule 19(b).

[38] As noted previously, the fourth factor is "whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder." HRCP Rule 19(b).

of this case. See discussion on delay infra. Rather, this fourth factor "indicates that the court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." Advisory Committee's Notes on 1966 Amendments to FRCP Rule 19. "[B]etter joinder would be possible[,]" id., if the court dismissed the complaint, inasmuch as the Marvins could bring another suit that includes Huddy-Yamamoto.

B.

Applying the four factors, "equity and good conscience" support dismissal. The "'equity[39] and good conscience[40]' language of Rule 19(b) does appear to set out the standard to be used in measuring indispensability, and . . . [does not] [] merely place the determination within the discretion of the district court[.]" Envirotech Corp. v. Bethlehem Steel Corp., 729 F.2d 70, 77 (C.A.N.Y. 1984) (quoting FRCP Rule 19(b)). It is manifest that such a standard does not support proceeding without Huddy-Yamamoto.

"Equity" supports dismissal of the suit absent Huddy-Yamamoto. Assuming, arguendo, that Huddy-Yamamoto refused to participate when kuleana rights were asserted, it would have been

[39] "The term equity denotes the spirit and habit of fairness and justness." Gilles v. Dep't of Human Res. Dev., 521 P.2d 110, 116 n.10 (Cal. 1974) (internal quotation marks and citation omitted).

[40] The term conscience means "the sense of right or wrong together with a feeling of obligation to do or be that which is recognized as good." Webster's Third New Int'l Dictionary 482 (1981). Similar language found in the Social Security Act, "against equity and good conscience" has been stated as being "language of unusual generality." Gilles, 521 P.2d at 116.

inequitable to proceed because the Marvins had previously asked Huddy-Yamamoto to be a party, apparently knowing that she should be made a party,[41] but then reversed positions, objecting vigorously to her joinder when Pflueger subsequently attempted to join her. Although the Marvins requested her presence, they did not list her as a necessary party in the complaint, as required by HRCP Rule 19(c). See HRCP Rule 19(c) ("A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a) (1)-(2) [defining a necessary party] hereof who are not joined, and the reasons why they are not joined.") (Emphasis added.) By first requesting Huddy-Yamamoto's presence as a party, then failing to abide by HRCP Rule 19(c), and later objecting to her joinder, the Marvins' posture in this case is not fair and is not supported by equity.

As to "good conscience," it was "wrong" to proceed without Huddy-Yamamoto, inasmuch as the parties and the court had notice that Huddy-Yamamoto should be a party, see discussion infra, and her joinder was appropriately and timely raised and, in fact, tried at the "evidentiary hearing." Since kuleana rights flow to the kuleana as a whole, it was erroneous to proceed without Huddy-Yamamoto, part-owner of the kuleana, in an

[41] The majority's only response is that "the invitation to join another party, or even the belief that a nonparty 'should be made a party' is not sufficient to establish that the invited party is indispensable to the case." Majority opinion at 41. Obviously, as discussed above, the fact that the absentee should be made a party is not the sole factor to be considered, but is, using the majority's term, an "equitable principle[,]" id., in deciding whether under the facts the action should proceed without the absentee. Further, the Marvins' invitation also suggests that they knew that Huddy-Yamamoto was a necessary party to the litigation.

action deciding kuleana rights. Because the Marvins, in addition to Pflueger and the court, were well-aware or should have been aware that Huddy-Yamamoto should have been included in the lawsuit, but failed to join her, see discussion infra, "equity and good conscience" do not weigh in the Marvins' favor.

XIII.

In the third error, the majority maintains that (1) a defendant's "delay in raising [a] defense" is a factor the trial court may properly consider in deciding "the potential prejudice to the parties," majority opinion at 41; and (2) the "long delay in raising the issue at trial weighs against requiring dismissal of the proceedings[,]" id. at 44.[42] Respectfully, these are false premises that have no bearing in these circumstances.

A.

As to whether a party's delay should be considered in evaluating the prejudice to the parties, it must be emphasized that there is no time limitation on when the issue of joinder

[42] The majority also states that the consideration of timeliness serves the two functions of giving the court greater opportunity to consider claims and to submit them to the opposing party for briefing, and preventing sandbagging, "the practice of saving issues to stall proceedings at the trial level to raise them on appeal only if they lose at trial." Majority opinion at 44. Those considerations have nothing to do with this case.

Here, Pflueger raised the joinder issue before the hearing began and more than five months before the court issued its ruling, the parties fully argued the issue, and evidence was taken on the issue. Second, "sandbagging" has been defined as a litigant remaining silent about an objection "and belatedly raising the error only if the case does not conclude in his favor." State v. Miller, 122 Hawaiʻi 92, 135, 223 P.3d 157, 200 (2010) (Nakayama, J., dissenting) (citing Wainwright v. Sykes, 433 U.S. 72, 89 (1977)). Pflueger did not attempt to "sandbag" the court or the other parties because he raised the issue before the evidentiary hearing. The Marvins themselves sought to have Huddy-Yamamoto join the suit even before they filed it and failed to join her themselves. And the parties and the court knew or should have known that Huddy-Yamamoto was a necessary party.

must be raised. The defense of failure to join indispensable parties can be raised at any time. "[A] defense of failure to join a party indispensable under Rule 19" can be made "in any pleading permitted or ordered . . . , or by motion for judgment on the pleadings, or at the trial on the merits." HRCP Rule 12(h) (emphasis added). Thus, the HRCP expressly allows the issue to be raised "at the trial[,]" irrespective of whether the parties knew about the issue. Id. Indeed, "[t]he matter of indispensable parties is 'so vital that an appellate court, sua sponte, if necessary, may consider it although the point was not raised in the trial court.'" Mossman v. Hawaiian Trust Co., 45 Haw. 1, 14, 361 P.2d 374, 382 (1961) (emphasis added); see Filipino Fed. of Am. v. Cubico, 46 Haw. 353, 369, 380 P.2d 488, 497 (1963) (noting that the absence of indispensable parties "can be raised at any time even by a reviewing court on its own motion"). In the instant case, Huddy-Yamamoto's joinder was "vital" to the proceedings, Mossman, 45 Haw. at 14, 361 P.2d at 382, for the reasons previously stated. Indeed the court ultimately ruled on Huddy-Yamamoto's joinder on the merits instead of denying the motion due to untimeliness.

Second, despite the majority's argument that delay can be a consideration, the court did not rule that Pflueger's supposed delay in raising the issue was a reason for concluding that Huddy-Yamamoto was not an indispensable party.[43] Although

[43] The majority contends that it is "incorrect" to say that the court did not consider delay inasmuch as the court described the timing of continue...

the Marvins objected to Pflueger raising the issue in its position statement "for the first time[,]" the court "noted" the objection, but decided to proceed with the hearing. There is not one finding or conclusion by the court with respect to delay or untimeliness. Rather, the court proceeded to the merits and determined that Huddy-Yamamoto was not an indispensable party, implicitly and correctly deciding that the joinder motion should not be rejected for any supposed reason of delay or untimeliness. Hence, delay or timing was never a consideration that entered into the court's decision.

B.

As to whether the delay weighs against joinder, respectfully, the majority is wrong that it does. The majority relies on the Advisory Committee's Notes on the 1966 Amendments to FRCP Rule 19 and on Almeida. Majority opinion at 41-43. However, neither the notes of the Advisory Committee nor Almeida support the majority's position.

1.

According to the Advisory Committee, "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment . . . , his undue delay in making the motion can

[43]...continue
Pflueger's motion raising joinder as a "fundamental problem" and concern. Majority opinion at 44-45. As noted supra, the court made no finding or conclusion at all indicating such delay was a consideration.

properly be counted against him as a reason for denying the motion." Advisory Committee's Notes on 1966 Amendments to FRCP Rule 19 (emphasis added). The majority contends that Almeida stands for the same proposition. Majority opinion at 42-43. However, there is nothing in the record indicating that the court, in ruling on the issue, considered Pflueger's alleged "undue delay" in seeking to protect himself. Further, as discussed, infra, Pflueger was not only seeking to protect his interest, but also sought to protect Huddy-Yamamoto's, and therefore, any purported "delay" would not count against him.

In Almeida, the ICA explained that, even "if an absentee is deemed needed for the just adjudication of a claim, a decision to dismiss must be based on the pragmatic 'equity and good conscience'" test under HRCP Rule 19(b).[44] 4 Haw. App. at 516, 669 P.2d at 178. When a moving party "seek[s] dismissal in order to protect himself against a later suit by the absent person[,]" instead of seeking to "protect the absent person against a prejudicial judgment[,]" "undue delay in making the motion can properly be counted against him as a reason for denying the motion." Id. at 517, 669 P.2d at 178 (citing Advisory Committee's Notes on 1966 Amendments to FRCP Rule 19) (emphases added). Thus, the majority passes over the fact that

[44] In Almeida, 4 Haw. App. at 514-15, 669 P.2d at 177, a mother sought to divest her son George of his interest in a jointly-held property because George allegedly did not fulfill his part of an agreement to care for her in return for joint ownership of the property. On the day of trial, George filed a motion to dismiss the complaint, contending that his brother Harry, who was also a grantor of the property, was an indispensable party. Id. at 515, 669 P.2d at 177.

Almeida only said that "undue delay" can be "counted" against the party seeking dismissal when that party is attempting to "protect himself against a later suit by the absent person."[45] Id.

In Almeida, the defendant sought to dismiss the lawsuit, and did so to protect his interest alone.[46] 4 Haw. App. at 515, 517, 669 P.2d at 177, 178. The opposite is true in this

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[45] The majority states that this analysis is incomplete because it fails to take into account that the ICA in Almeida considered several "factors," and based its decision to uphold the denial of the defendant's motion for joinder of an absent party, in part, on the fact that the plaintiff was in the courtroom ready to proceed and on "the likelihood that the court's decision would not be binding" on the absentee. Majority opinion at 43. In Almeida, the ICA reasoned that (1) "after the conclusion of a trial on the merits, there is reluctance on the part of an appellate court to overturn the trial court's decision as to indispensable parties, unless there is real prejudice to the absentee"; (2) "when the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . his undue delay in making the motion can properly be counted against him[;]" and (3) in National Board of YWCA v. YWCA of Charleston, S.C., 335 F. Supp. 615 (D.S.C. 1971), it was noted that a "defendant's delay in making its motion until the very morning of trial would warrant its denial because of laches." Almeida, 4 Haw. App. at 516-17, 669 P.2d at 178 (internal quotation marks and citation omitted). Based on the foregoing, the ICA concluded:

> [The defendant's] primary complaint is that the absence of [the absentee] may subject [the defendant] to "multiple suits and result in inconsistent judicial decisions imposing undue hardship" on him. [] Applying the above principles, we believe that it was fatal for [the defendant] to have waited to file his motion until the day of trial when [the plaintiff] was in court ready to proceed. Furthermore, it appeared unlikely that [the absentee] would be adversely affected in a practical sense.

Id. (emphasis added). Thus, contrary to the majority's position, in Almeida, the ICA based its decision on the fact that the defendant argued that he, himself, was going to be subject to undue hardship. See id. Thus, while other "principles" may have been considered, they were not the primary reason for upholding the trial court's ruling. See id.

Contrary to the majority's contention, Almeida is not distinguished on the basis of the moving party's motive for seeking joinder. See majority opinion at 42. The parties may have many subjective motives. It is not the motive of the movant that matters, but instead whether joinder would advance only the moving party's cause or, instead, also protect the party sought to be joined.

[46] Moreover, it is notable that in Almeida, the defendant filed his motion on the day of trial. In this case, there was an evidentiary hearing on a motion for partial summary judgment that spanned months. The joinder issue was raised before the commencement of the hearing and had been pleaded well before that.

case. Pflueger argued in his position statement and to the court that the case must be "stayed pending the joinder" of Huddy-Yamamoto.[47] Pflueger maintained that Huddy-Yamamoto's absence "could irreparably prejudice the rights of the owners of the Huddy Property[,]" and asserted during the September 15 hearing that Huddy-Yamamoto should have a "say" in determining the access inasmuch as she had a "vital interest" in the proceedings and "deserve[d]" to be involved. Accordingly, Pflueger did not seek to protect only his interest, but attempted to "protect [Huddy-Yamamoto] against a prejudicial judgment[.]" Almeida, 4 Haw. App. at 517, 669 P.2d at 178 (internal quotation marks and citation omitted). This case does not involve a defendant's self-interested delay, as was the case in Almeida. Id.

2.

Further, Pflueger's delay, if any, in raising the issue was never a factor in this case.[48] First, it is undisputed that

[47] The majority disagrees because the "first argument" in the position statement states that Pflueger will be subjected to undue hardship. Majority opinion at 43-44. But another argument in the position statement is that Huddy-Yamamoto would be harmed. Thus, the fact Pflueger argues that he will be harmed does not mean that he did not argue that Huddy-Yamamoto would also be subject to prejudice, as the majority implies. The majority states that Huddy-Yamamoto's knowledge of, and participation in, the proceeding "diminished" Pflueger's "role as protector[.]" Id. But her purported "knowledge," if any, does not bear on whether Pflueger argued that Huddy-Yamamoto's interests would be harmed or on whether her interests were actually harmed.

[48] Although the majority characterizes Pflueger's attempt to raise the joinder issue as "troublesome," it must concede that the issue was raised before the court, and that the court decided it without any indication that it was "troublesome." Majority opinion at 15 n.10. Indeed this is not a case in which Pflueger "slept on his rights," as the majority suggests, see majority opinion at 43 (citing Ishida v. Naumu, 34 Haw. 363, 372 (1937)), because Pflueger raised the issue of whether there were indispensable parties from the start in his answer, as the majority itself acknowledges, see majority opinion at 44 n.15. Furthermore, the question of whether a party is necessary is

continue...

Pflueger asserted the defense of failure to join indispensable parties in every answer to the Marvins' complaints, thus preserving the defense for review. Second, Pflueger contended that Huddy-Yamamoto was a necessary party in his position statement, filed August 4, 2006, five days before the evidentiary hearing that commenced on August 9, 2006, and the hearing itself spanned four days and was not completed until December. The order itself was not issued until January 2007, leaving ample time to address the issue.

Third, the parties and the court had notice that Huddy-Yamamoto was a part-owner of the kuleana even before the hearing began; thus, the parties and the court knew or should have known that Huddy-Yamamoto was a necessary party. As noted before, a title report, and a copy of the partition order dividing the kuleana into two lots, was attached to the Marvins' June 6, 2006 motion for summary judgment. The title report indicated that the kuleana was awarded to Haena, and the partition order indicated that the kuleana was divided into two parts with two different owners. Thus, at the latest, at the time the Marvins' motion for summary judgment was filed in June 2006, the parties and the

[48]...continue
subsumed within that of whether a party is indispensable, since in order to decide whether a party is indispensable, a court must first determine whether the party is necessary. See HRCP Rule 19. Thus, Pflueger did not "sleep on his rights" or "lay behind the log and raise the issue of indispensable parties following an adverse ruling," as suggested by the majority, see majority opinion at 44 n.15 (citing Judwin Properties, Inc. v. U.S. Fire Ins. Co., 973 F.2d 432, 434-35 (5th Cir. 1992)). Respectfully, considering the circumstances of this case, the majority's insistence in raising this issue repeatedly appears to be a makeweight argument.

court knew or should have known that the kuleana had been partitioned and that precedent indicated that a kuleana had only one right of way and an appurtenant limited access to water.

Fourth, as observed, the parties in fact litigated the issue of whether Huddy-Yamamoto was a necessary party. Pflueger specifically asserted in his position statement that "the disposition of the motion" should be stayed pending the joinder of Huddy-Yamamoto as a necessary party. Robert Graham Jr., an "expert witness" in kuleana law, stated that "[t]he kuleana access, whatever it was [when the kuleana was originally created], continues . . . to exist to this day[, b]ut the partition could not have multiplied it[,]" suggesting that rights ran to the entire kuleana. Carlos Andrade, an expert in kuleana history, explained that kuleanas were allowed "a certain amount of water," meaning "the water that had been flowing from time and memorial [sic] was available to the people for both domestic as well as for agriculture." Pflueger argued on the first day of the hearing that Huddy-Yamamoto was a necessary party because "[y]ou cannot adjudicate one kuleana access, which consists of two parts, with only one half of it being here. I mean, that's the basic part of our motion."

After hearing argument from the Marvins, the court stated that it was inclined not to order Huddy-Yamamoto joined. Again, on the third day of the hearing, Pflueger argued that it "tried to make the motion [for joinder] at the beginning" of the hearing, and contended that the court had a "fundamental duty" to

address the issue of "join[ing]" Huddy-Yamamoto. The Marvins responded that Huddy-Yamamoto was not necessary since the court could "determine access up to the kuleana, and once that determination ha[d] been made, it's up to the Marvins and the Huddys to determine how each of them will gain access." After hearing the parties' statements, the court denied Pflueger's request. Thus, whether Huddy-Yamamoto was a necessary or indispensable party was litigated on the merits at numerous points throughout the hearing.

Fifth, the Marvins had asked Huddy-Yamamoto if she wanted to be joined before the lawsuit was filed, indicating that they knew she should be a party to the action. As noted before, although she initially "refused" to participate in the suit, the Marvins did not take any action to join her as an involuntary party under HRCP Rule 19. Thus, any delay that resulted from Huddy-Yamamoto's joinder should be attributed to the Marvins' earlier failure to join her in the proceedings. In sum, Huddy-Yamamoto's status as a necessary party was covered in Pflueger's answers, the parties and the court knew or should have known that Huddy-Yamamoto was a necessary party before the hearing when evidence of the kuleana's partition was submitted and Pflueger asserted that Huddy-Yamamoto was a necessary party, joinder was litigated at numerous points throughout the hearing, at no point did the court rule that timing was a reason to deny joinder, and the Marvins knew Huddy-Yamamoto's joinder was appropriate and invited her to join in the lawsuit, but failed to join her

themselves as required by HRCP Rule 19(c) after they filed suit, even before Pflueger raised the matter.

XIV.

In the fourth error, the majority maintains that the "expensive," "cost-prohibitive[] undertaking" of a lawsuit is a "policy" consideration that does not require that "everyone with an interest in the kuleana must retain counsel[49] and join the lawsuit" and be present at trial. Majority opinion at 50-51. To the contrary, the majority's "policy" discussion invites foreseeable future litigation, which would render the ultimate remedy even more expensive and "cost-prohibitive", id., because it leaves Huddy-Yamamoto's rights unresolved. The relevant "policy" inherent in HRCP Rule 19 is to effect the public's interest "in avoiding repeated lawsuits on the same essential subject matter." Advisory Committee's Notes on 1966 Amendments to FRCP Rule 19. See 7 Wright & Miller § 1602, at 17308 ("Rule 19 is designed to protect the interests of absent persons as well as those already before the court from multiple litigation[.]"); see also Northrop Corp., 705 F.2d at 1043 ("precluding multiple lawsuits on the same cause of action[]" is a goal of FRCP Rule 19). Thus, the majority's policy determination, that litigation is an "expensive" and "cost-prohibitive" "undertaking[,]" majority opinion at 50-51, militates in favor of, rather than against, joining all kuleana owners in one proceeding for resolution of the controversy to avoid future delay, expense, and

[49] Of course, a party may proceed pro se.

piecemeal litigation, as the majority would allow.

Previous litigation in 1988 did not resolve access for all parties. This case is the inevitable result of the incomplete resolution in 1988. It is reasonable to believe that it is just as inevitable that litigation involving kuleana rights will arise again. Contrary to the majority's statement that it is not always "possible" to have all desirable parties before a court, majority opinion at 50-51, in the instant case, Huddy-Yamamoto was in fact before the court and testified at the proceeding as to her interest and desire to participate. Joinder under these circumstances was obviously "possible" and eminently feasible.[50]

XV.

The fifth error, and a matter of concern, is the majority's view that Pflueger's substantial compliance with the HRAP permitted appellate review.[51] Respectfully, this proposition

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[50] The majority claims that "if avoiding multiple litigation were the singular aim of Rule 19, the rule would simply require joinder of every party with an interest when raised at any time, and it would forbid courts from entering judgments in the absence of any affected party." Majority opinion at 51. With all due respect, the suggestion that courts would never be able to enter judgments if HRAP Rule 19 were followed is simply untrue. The majority itself admits that some jurisdictions hold that the Rule 19 defenses are not waived even if not raised in the first responsive pleading. See majority opinion at 21. There is absolutely no evidence that following Rule 19 has hindered or prevented courts in those jurisdictions from entering timely judgments. Nor is it the case that "every" party with an interest will have to be joined, see majority opinion at 51; obviously, only parties who satisfy the criteria of Rule 19 would be subject to joinder.

[51] Additionally, according to the majority, Pflueger correctly argued that the ICA could review unchallenged findings that are redundant of a conclusion. Majority opinion at 9. Respectfully, the majority misstates Pflueger's arguments. Pflueger argued that the challenged findings were "in reality, conclusions of law" "redundant of" a conclusion that was properly challenged. (Emphasis added.) Pflueger also maintained that the ICA had discretion to review a point of error that did not comply with HRAP Rule

continue...

is not applicable to this case.

A.

Preliminarily, Pflueger's Amended Opening Brief raised as a point of error that the court "erred in granting summary judgment in the absence of non-parties whose interests in their adjacent real property . . . could be affected by the resulting order[,]" citing the court's conclusion 12[52] that Huddy-Yamamoto was not an indispensable party because she was "not prejudiced by the instant proceeding" and "refused to participate in the instant lawsuit." On the other hand, the Marvins contended that findings 102[53] and 104[54] as to the same prejudice were not challenged on appeal by Pflueger and therefore were binding in the appellate courts.[55] Nevertheless, the Marvins "assum[ed]"

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[51]...continue
28(b)(4), quoting State v. Miller, 122 Hawaiʻi 92, 118 n.24, 223 P.3d 157, 183 n.24 (2010), for the proposition that "an appellate court [may] choose to review error when not raised by counsel, . . . in order to avoid the infringement of substantial rights."

[52] Conclusion 12 stated, "The Court finds the Huddy family is not an indispensable party as they were not prejudiced by the instant proceeding, and they refused to participate in the instant lawsuit." (Emphasis added.)

[53] Finding 102 stated, "There are no facts in the record to suggest that the Huddy family will be prejudiced by not participating in the instant lawsuit. Indeed, they were asked to participate, and they refused. The access they currently enjoy is 'now improved, and easier access than before.'" H. Huddy testimony, 9/15/06, commencing at 2:25:25 p.m. (Emphasis added.)

[54] Finding 104 stated, "There are no facts in the record to suggest that the Huddy family will be prejudiced by the [Marvins'] claim to irrigation and drinking water in the instant case." (Emphasis added.)

[55] The majority suggests that I agree with the Marvins. See majority opinion at 15-16 (rejecting dissent's reasoning because "[t]o hold that the ICA was bound by the unquoted [findings] 102 and 104, which found no facts supporting prejudice, means that the ICA could not meaningfully review the properly challenged COL 12"). However, in my view, as explained infra, the unchallenged findings were freely reviewable by the ICA because the findings were in the nature of conclusions and were redundant of conclusion 12, which was challenged.

that this court would reach the merits of Pflueger's arguments, and argued that the court's judgment should be affirmed on the merits, not because of a procedural error. As noted before, the ICA applied a plain error analysis to Pflueger's "arguments" and determined that findings 102 and 104 were "clearly erroneous, and the portion of [conclusion] 12 stating that Huddy-Yamamoto was not prejudiced by the proceeding is wrong." Pflueger, 2010 WL 2316274, at *16.

In this case, findings 102 and 104 concerning prejudice may be viewed as redundant of conclusion 12. The majority apparently agrees. See majority opinion at 9 (concluding that Pflueger is correct in arguing that "the ICA had authority to review the two [unchallenged] findings [] because they are redundant of [conclusion] 12). A conclusion of law is an "inference on a question of law, made as a result of a factual showing, no further evidence being required; a legal inference." Black's Law Dictionary at 329. The Ninth Circuit Court of Appeals has explained that a conclusion of law is based on "application of a legal standard." Lundgren v. Freeman, 307 F.2d 104, 115 (9th Cir. 1962).

Under the circumstances, the determination of whether prejudice redounded to Huddy-Yamamoto is a legal inference, inasmuch as the "factual showing" proffered during the evidentiary hearing led the court to determine, albeit erroneously, that Huddy-Yamamoto would not suffer prejudice. The

court explicitly stated in the core of findings 102 and 104[56] that there were "no facts" giving rise to a demonstration of prejudice. Similarly, the court stated in conclusion 12 that Huddy-Yamamoto was "not prejudiced by the instant proceeding and . . . refused to participate in the instant lawsuit." (Emphasis added.) The court's determination of no prejudice, then, involved the application of a legal standard.

In the instant case, then, although Pflueger did not properly challenge findings 102 and 104, the "findings" are in the nature of conclusions and redundant of conclusion 12. Consequently, Pflueger's failure to properly challenge those purported findings does not preclude the ICA or this court from reviewing the properly-challenged conclusion 12. It need not be decided, thus, whether an appellant's "substantial compliance" with the HRAP allows the ICA to review findings that were not challenged on appeal. Majority opinion at 9, 17.

Generally, as the Marvins contend, unchallenged findings are "binding" on an appellate court. Kelly v. 1250 Oceanside Partners, 111 Hawaiʻi 205, 227, 140 P.3d 985, 1007 (2006) ("[g]enerally, a court finding that is not challenged on appeal is binding upon this court"); Poe v. Hawaii Labor Relations Bd., 97 Hawaiʻi 528, 536, 40 P.3d 930, 938 (2002) ("Unchallenged findings are binding on appeal." (Citations omitted.)); Robert's Hawaiʻi School Bus, Inc. v. Laupahoehoe

[56] A numbered finding can include both factual findings and conclusions.

Transp. Co., Inc., 91 Hawaiʻi 224, 239, 982 P.2d 853, 868 (1999) ("Findings of fact that are unchallenged on appeal are the operative facts of a case."); Wisdom v. Pflueger, 4 Haw. App. 455, 459, 667 P.2d 844, 848 (1983) (same).[57]

Inasmuch as findings are the underpinnings of conclusions, a successful attack on a finding may invalidate one or more conclusions. But "an attack on a conclusion which is supported by a finding is not an attack on that finding." Wisdom, 4 Haw. App. at 459, 667 P.2d at 848. Thus, if an appellant "attack[s] only the conclusions and not the findings upon which the conclusions are based," that appellant makes a "fatal error" because "any conclusion which follows from [the unchallenged findings] and is a correct statement of law is valid." Id.; see Okada Trucking Co., 97 Hawaiʻi at 458, 40 P.3d at 81 ("Findings of fact. . . that are not challenged on appeal are binding on the appellate court.").

According to the majority, the consequence of holding that unchallenged findings are binding is that, "anytime a trial court's [findings/conclusions] contain any repetition, an opening brief must always quote each instance of the repeated finding, otherwise the binding quality of any unquoted finding will negate

[57] See also Bremer, 104 Hawaiʻi at 63, 85 P.3d at 170 ("findings of fact . . . that are not challenged on appeal are binding on the appellate court"); Kawamata Farms, Inc. v. United Agri. Prod., 86 Hawaiʻi 214, 252, 948 P.2d 1055, 1093 (1997) (holding that unchallenged findings of fact were binding on appellants); Curtis v. Dorn, 123 Hawaiʻi 301, 311, 234 P.3d 683, 693 (App. 2010) (noting that the court was bound by an unchallenged finding); Lum v. Donohue, 101 Hawaiʻi 422, 434 n.15, 70 P.3d 648, 660 n.15 (App. 2003) ("It is well settled that findings of fact unchallenged on appeal are binding on appeal."); Burgess v. Arita, 5 Haw. App. 581, 593, 704 P.2d 930, 939 (1985) (same).

the review of any properly-raised points of error." Majority opinion at 15-16. The majority's reasoning is circular because it assumes what is at issue--whether the points of error were properly raised. Further, respectfully, insofar as HRAP Rule 28 directs that a challenged finding be set forth in a brief, it binds us all, the majority's apparent protestation notwithstanding. The binding quality of unchallenged findings reinforces the role of the appellate courts, which "do not make findings of fact but rather review findings of fact of the circuit court to determine whether they are clearly erroneous." Ward v. Williams, 118 S.W.3d 513, 518 (Ark. 2003).

B.

In certain circumstances, however, when "justice and fairness" requires it, this court can review arguments even if some of the underlying findings have not been challenged. HRAP Rule 30 provides in pertinent that "[w]hen the brief of an appellant is otherwise not in conformity with these rules, the appeal may be dismissed or the brief stricken and monetary or other sanctions may be levied by the appellate court[,]" (emphasis added), giving an appellate court "discretion" to determine the proper course of action, Schefke v. Reliable Collection Agency, Ltd., 96 Hawaiʻi 408, 420, 32 P.3d 52, 64 (2001).

This "discretion" has been exercised often in favor of reaching the merits, in light of the "policy of affording litigants the opportunity to have their cases heard on the

merits, where possible," id.[58] Additionally, HRAP Rule 2 allows an appellate court, "[i]n the interest of expediting a decision, or for other good cause shown," to "suspend the requirements or provisions of any of these rules in a particular case . . . and [to] order proceedings in accordance with its direction."[59]

In my view, however, as explained, supra, the unchallenged findings in this case are in the nature of conclusions that were challenged by Pflueger, and are therefore subject to review. The majority does not appear to disagree with this reasoning. On the contrary, the majority agrees that findings 102 and 104 are redundant of conclusion 12, which Pflueger properly challenged, and agrees that for this reason the ICA could review the unchallenged findings, see majority opinion at 9. There is therefore no need to reach the question of

[58] See Moi v. State of Hawaiʻi Dep't of Public Safety, 118 Hawaiʻi 239, 245, 188 P.3d 753, 759 (2008) (considering Petitioner's arguments on the merits although Petitioner failed to "identify the particular findings of fact he dispute[d] in his point of error" and the unchallenged findings supported the agency's conclusions); Chay v. Dep't of Educ., No. 26496, 2007 WL 4217482, at *1 n. 5 (Haw. Nov. 30, 2007) (SDO) (addressing Petitioner's arguments on the merits although Petitioner failed to comply with HRAP Rule 28(b)(4)(C) "inasmuch as her points of error do not quote the disputed findings of fact" because "the disputed findings of fact are encompassed within the points of error and argument section of her opening brief"); Dan v. State, 76 Hawaiʻi 423, 428, 879 P.2d 528, 533 (1994) (reviewing unchallenged findings and conclusions pertinent to arguments made by Petitioner although Petitioner did not quote all findings and conclusions to which he took exception).

[59] Thus, in O'Connor v. Diocese of Honolulu, 77 Hawaiʻi 383, 386, 885 P.2d 361, 364 (1994), this court, "pursuant to HRAP Rule 2," "elect[ed]" to "address the issue posed by th[e] appeal[,]" despite its lack of compliance with HRAP Rule 28(b)(4), quoted supra. See State v. Rees, No. 27349, 2006 WL 2860183, at *2 (Haw. App. Oct. 9, 2006) (SDO) (relying on O'Connor and HRAP 2 despite lack of compliance with HRAP, "in the interest of permitting the appellant his day in court"); State v. Deparini, No. 27272, 2006 WL 3190340, at *1 (Haw. App. Nov. 6, 2006) (SDO) ("This court, pursuant to HRAP 2, is empowered to address any issues raised by appellants and will address the constitutional issues Deparini does raise and argue with some degree of clarity.").

whether "substantial compliance" with the HRAP suffices to preserve review of unchallenged findings.

XVI.

The sixth error is the majority's conclusion that Pflueger waived any claim that Huddy-Yamamoto was a necessary party, in any event, because Pflueger did not raise the claim in a pre-answer motion or in the answer. See majority opinion at 29. Procedurally, it must be emphasized that the majority's foregoing position, based on its interpretation of HRCP Rules 12(b) and 12(h), was never raised, argued, or briefed by the parties to the court, to the ICA, or to this court because waiver in this regard has never been a part of our law, and, in fact, is inconsistent with our law.

Although the majority concedes that it decided the case on a ground not briefed by the parties, it did not request supplemental briefing by the parties. Respectfully, this is fundamentally unfair to the parties and injurious to the appellate process. Because the parties have concrete interests at stake, their views and arguments as to the impact of a revisionary change in the rules fostered by the majority are necessary to a just disposition of this case.

A.

Based on our precedent, it must be noted that this aspect of the majority's opinion is puzzling because Pflueger's waiver would be dispositive of the issues, rendering the rest of the majority's opinion superfluous. Second, under the majority's

opinion, a defendant would be deemed to have waived the defense of failure to join a necessary party because it was not asserted in an HRCP Rule 12(b)(7)[60] motion to dismiss or in an answer, but not the defense of a failure to join indispensable parties. The majority's position will have a far reaching and deleterious effect on civil practice in this jurisdiction.

Under the majority's rule, then, a circuit court considering a motion to dismiss would have two options if a defendant fails to assert the necessary party defense but asserts the indispensable party defense: either deny the motion, thus determining that the absentee is not indispensable, or grant the motion, concluding that the suit could not continue without the absentee. In other words, the circuit court would not be permitted to ascertain whether the absentee was necessary and subject to joinder. Similarly, under the majority's view, the appellate court would not have the power to remand to the trial court to determine if joinder was feasible; the appellate court would only have the power to remand for continuation without the absentee, or to affirm the court's dismissal of the suit.

B.

The majority's holding that a party can waive the defense of the lack of a necessary party while not waiving the defense of the lack of an indispensable party due to an

[60] HRCP Rule 12(b)(7) provides in pertinent part that the defense of "failure to join a party under Rule 19" "may[,] at the option of the pleader[,] be made by motion[,]" or the defense "shall be asserted in the responsive pleading[,]" which, for all relevant purposes here, is the answer. (Emphases added.)

"inconsistency" between HRCP Rule 12(b) and HRCP Rule 12(h)(1) ignores the express language of HRCP Rule 12(b)(7) and HRCP Rule 12(h)(2), (2) has been expressly rejected, (3) conflicts with precedent, (4) is inconsistent with the majority's own position, (5) undermines the purpose of HRCP Rule 19 and the structure of the civil rules, and (6) is not supported by the majority's own purported rationale.[61]

[61] It must be observed that the majority's opinion is wrong in another respect. It asserts that Rule 12(b)(7) allows a party to assert a Rule 19 defense only "before pleading if further pleading is permitted[,]" majority opinion at 21 (quoting HRCP Rule 12(b)(7)), thereby ignoring the plain language of Rule 12(b) and misapprehending motions practice.

It is basic that a party first files a "pleading," being an "original claim [or] counterclaim," and the defendant then files an "answer[.]" HRCP Rule 7(a). However, if a defendant files a motion (say, for example, a motion to dismiss), the defendant usually must file its responsive pleading, i.e., answer, within ten days after the court rules on the motion. It is well-established that a motion "is not a responsive pleading[.]" Ellis v. Crockett, 51 Haw. 45, 60, 451 P.2d 814, 824 (1969) (internal quotation marks and citation omitted).

HRCP Rule 12(b) provides that a party may, "at the option of the pleader," bring HRCP Rule 12(b) motions "before pleading[,]" meaning before the defendant submits its answer. (Emphasis added.) If the defendant elects not to bring a motion at all, then "[e]very defense" including 12(b)(1) to 12(b)(7) defenses, if applicable, shall be asserted in its answer. HRCP Rule 12(b).

Nevertheless, the majority states that an HRCP Rule 12(b)(7) defense "shall be made before pleading if further pleading is permitted[,]" majority opinion at 21 (quoting HRCP Rule 12(b)) (emphasis added), which, as shown supra, plainly contradicts HRCP Rule 12(b), insofar as the defense can be asserted in an answer and need not be made "before pleading[.]" The majority also misquotes HRCP Rule 12(b). Majority opinion at 21. The full sentence provides that "[a] motion making any of these defenses shall be made before pleading if a further pleading is permitted[,]" HRCP Rule 12(b) (emphasis added), indicating only that if a party brings a 12(b) motion, it must do so before submitting its answer.

In this regard, it must be observed that the majority takes inconsistent positions. The majority states that the necessary party issue is waived if not asserted in a pre-answer motion, or in a responsive pleading, suggesting that if a party does not bring a pre-answer motion, that party may still assert the defense in an answer. Majority opinion at 29. However, as indicated above, the majority also says that the defense of failure to join a necessary party under HRCP Rule 19 must be made before pleading. Majority opinion at 21. Hence, on one hand, the majority states that the defense can be made either in a pre-answer motion or, if no motion is filed, in an answer; on the other hand, the majority states that the defense must be asserted in a pre-answer motion.

1.

Contrary to the majority's position, there is no ambiguity or "inconsistency" between HRCP Rule 12(b) and HRCP Rule 12(h). HRCP Rule 12(b) lists the defenses that can be brought by motion, including the "failure to join a party under [HRCP] Rule 19[.]" HRCP Rule 12(h) categorizes the defenses listed in HRCP Rule 12(b) into those that can be waived and those that cannot. HRCP Rule 12(h)(1) expressly lists the defenses that are waived if not brought by a motion or included in a responsive pleading. Opposed to the majority's view, HRCP Rule 12(h)(1) on its face does not include the failure to join a necessary party as a defense that is subject to waiver.

Indeed, HRCP Rule 12(h)(1) does not refer at all to HRCP Rule 19, the defense of the failure to join a necessary party, or the defense of the failure to join an indispensable party. In this regard, the majority incorrectly reads into HRCP Rule 12(h)(1) a defense that is not listed in that section and makes it waivable. Insofar as these defenses do not fall under HRCP Rule 12(h)(1), they cannot be deemed waived if not brought by a motion or included in a responsive pleading.

In contrast, HRCP Rule 12(h)(2) provides that a defense "of failure to join a party indispensable under [HRCP] Rule 19 can be made in any pleading permitted or ordered under [HRCP] Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." Insofar as HRCP Rule 12(h) categorizes the defenses listed in HRCP Rule 12(b) into those that are waivable

and those that are not, it is plain that the defense of failure to join a party (necessary or indispensable) falls under HRCP Rule 12(h)(2) and is not waivable.

2.

Additionally, the majority's position that a party waives the defense of necessary parties if it does not raise it in a pre-answer motion or an answer has been rejected. As the majority notes, majority opinion at 21, it has been stated by some commentators that there is a perceived ambiguity between FRCP Rule 12(b)(7), which allows the defense to be raised, and FRCP Rule 12(h)(2). 5C Wright & Miller § 1392, at 15251-52. However, Wright & Miller rejects the application of FRCP Rule 12(h)(1) and (2) advocated by the majority. According to Wright & Miller, if FRCP Rule 12(h)(2) were "interpreted in a limiting way," it would "seem[] to indicate that the objection to the absentee's nonjoinder is not available after the responsive pleading [i.e., answer,] is served[,]" which is "clearly problematic[.]" Id. (emphases added).

Wright & Miller explains that "this semantic discrepancy results from an oversight when the rulemakers were revising [FRCP] Rule 19, trying to conform the appropriate rules to the revision of Rule 19, and rewriting [FRCP] Rule 12(h) all at the same time."[62] Id. The majority's statement that a failure

[62] Many commentators believe that the inconsistency is an oversight. See 7 Wright & Miller § 1609, at 17483 ("[T]he discrepancy in the wording of [FRCP] Rule 12(b)(7) and [FRCP] Rule 12(h)(2) probably reflects a drafting oversight on the part of the Advisory Committee that prepared the 1966 amendments. Both [FRCP] Rule 12(h) and [FRCP] Rule 19 were undergoing

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to raise the joinder of necessary parties in a pre-answer motion or answer results in waiver of that defense, is a "limiting" interpretation of HRCP Rule 12(h)(2) that suggests that an "objection to the absentee's nonjoinder is not available after the" answer. Id.; see also W. Casey Walls, Note, Inequity and Bad Conscience: The Effect of the Federal Rules Civil Procedure Twelve on Persons Needed for Just Adjudication, 64 Notre Dame L. Rev. 422, 439 (1989) (noting that the limiting conclusion is not supported by any rationale). As said, this is "clearly problematic[,]" 5C Wright & Miller § 1392, at 15251-52, for the reasons listed above and discussed below.

3.

The majority's position is problematic in suggesting that a court must not assess whether an absent party is necessary under HRCP Rule 19(a) when faced with the issue of whether that party is indispensable. Majority opinion at 29-30. Barring a court from reviewing whether an absentee is necessary, as the majority does, directly conflicts with our precedent, which requires that the necessary party analysis precede consideration

[62]...continue
extensive revision simultaneously; at the same time [FRCP] Rule 12(b)(7) was being altered to conform it with the changes in [FRCP] Rule 19. It is quite possible that in the final adjustment of [FRCP] Rule 12(h) and [FRCP] Rule 19, which reintroduced a reference to the indispensable-party concept in the latter rule, the semantic discrepancy between [FRCP] Rule 12(b)(7) and [FRCP] Rule 12(h)(2) and the absence of a specific provision governing [FRCP] Rule 19(a) persons were overlooked."); W. Casey Walls, Note, Inequity and Bad Conscience: The Effect of the Federal Rules Civil Procedure Twelve on Persons Needed for Just Adjudication, 64 Notre Dame L. Rev. 422, 434 (1989) ("Almost certainly, the difference was not intentional. Instead, the retention of the pre-1966 reference to Rule 19 in Rule 12(h)(2) was probably a mere oversight in drafting.").

of whether the necessary party was indispensable.[63] See Ieda, 109 Hawaiʻi at 143, 123 P.3d at 1238 (noting that the first step is to determine whether the absentee is necessary; if so, then, whether the absentee can be feasibly joined; and only if the absentee cannot be feasibly joined, analyzing whether the absentee is indispensable); Lau, 61 Haw. at 146, 153, 154, 598 P.2d at 163, 167-68 (noting that "[w]here joinder [of a necessary person] is feasible, the court need not proceed under [HRCP] Rule 19(b) to determine whether to proceed or dismiss for lack of an indispensable party"); see also Moore's Federal Practice § 19.02[3][c] ("Under [FRCP] Rule 19(b), an absentee could be considered 'indispensable' only if the absentee (1) was a necessary party, that is, met the definition . . . under [FRCP] Rule 19(a), (2) its joinder could not be effected, and (3) the court determined that it would dismiss the pending case rather than proceed . . . without the absentee.") (emphasis in original).

[63] Life of the Land, 58 Haw. at 292, 568 P.2d at 1191, is instructive in this regard. There, the plaintiffs filed a complaint, and a defendant filed a motion to dismiss for failure to join indispensable parties. Id. at 293, 568 P.2d at 1191. The circuit court granted the motion. Id. at 294, 568 P.2d at 1192. This court determined that the circuit court erred.

According to this court, the absent "parties should have been joined[,]" and, if they were not, "the court should have ordered that they be made parties." Id. at 298, 568 P.2d at 1194 (emphases added). "Since the record d[id] not indicate that the alleged necessary parties were not subject to service of process, the court's dismissal was premature." Id. Insofar as the defendant asserted the defense of indispensable parties, and this court determined that the first steps, in analyzing that defense, was to determine whether the absentee was necessary and subject to joinder, our precedent mandates the necessary party analysis precede consideration of whether the necessary party is indispensable.

4.

In addition to conflicting with precedent, the majority's position is inconsistent. The majority correctly states that a court "must determine whether an absent party should be joined if feasible[,]" and only if the party is necessary "but it is not feasible to join the party[,]" the court "must proceed to [HRCP] Rule 19(b)." Majority opinion at 19. But in contradiction to the foregoing statement, the majority states that a party waives the defense of a failure to join necessary parties, and faults the ICA in the instant case for considering whether Huddy-Yamamoto was necessary, majority opinion at 29 (stating that the ICA erred in analyzing whether Huddy-Yamamoto was necessary under HRCP Rule 19(a) "because [Pflueger] had waived the 19(a) defense") which, according to the majority's statement, majority opinion at 19, was the correct procedure for the ICA to have followed.[64] By stating that a court must decide whether joinder of a necessary party is feasible, but then asserting that such an argument was waived, the majority's position is plainly contradictory.

In this regard, the majority's opinion will engender confusion in civil practice. When a party asserts only the indispensable party defense (thereby waiving the necessary party defense under the majority's view), is the court to presume that the absentee is necessary and cannot be joined? Or, is the court

[64] There is nothing "complicated" about the procedure under HRAP Rule 19. See majority opinion at 51. The application of the HRAP Rule 19 factors is straightforward if the logical steps in the rule are followed.

to presume that the absentee is not necessary? Or, is the court to analyze whether an absentee is necessary, and ignore HRCP Rule 19(a) stating that the absentee must be joined, if feasible?

5.

The majority's position also undermines the purpose of HRCP Rule 19 and the structure of the rules.

a.

The "purpose[]" of HRCP Rule 19(a) is to "bring[] all interested persons before the court," whereas the purpose of HRCP Rule 19(b) "is to determine whether it is possible to go forward with an action despite the nonjoinder of someone whose presence is desirable but not feasible." 7 Wright & Miller § 1604, at 17330. The purpose of HRCP Rule 19 is not furthered by the majority's new rule. If a party is determined to have waived the argument that an absentee is necessary for mere failure to include it in a pre-answer motion (or, if no motion is brought, then in the answer), then parties who are necessary and should be joined will not be joined, for the sole reason that the issue is said to be waived, contradicting the policies of HRCP Rule 12 and HRCP Rule 19. Similarly, determining that the issue of necessary parties is subject to waiver is inconsistent with the purposes of HRCP Rule 19(a). "Terminating the right to seek joinder of a person described in Rule 19(a) as early as the service of the responsive pleading would be inconsistent with th[e] objective" of HRCP Rule 19(a), which is to bring all interested parties before the court. 7 Wright & Miller § 1609, at 17483 (emphasis

added).

b.

Additionally, the structure of the rules suggest that a party does not waive the argument that an absentee is necessary, despite that party's failure to include it in a pre-answer motion. HRCP Rule 21 specifically states that a party may bring a motion to require joinder at any stage of the proceeding, without limitation as to the reason. See HRCP Rule 21 (noting that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just") (emphasis added). The majority's conclusion that a party waives the right to argue joinder under HRCP Rule 19(a) at the pre-answer motion or answer stage is in inherent conflict with HRCP Rule 21.[65]

[65] The majority claims that the language of HRCP Rule 21 is so broad that nearly any denial of joinder under HRCP Rule 19 can be cast as in inherent conflict with HRCP Rule 21, and thus HRCP Rule 21 can be used as a vehicle for circumventing the specific instructions in HRCP Rules 12 and 19. Majority opinion at 26 n.14. However, the majority's solution is to render HRCP Rule 21 superfluous by giving it no effect whatsoever. Instead of reading HRCP Rule 21 out of the HRAP, as the majority does, HRCP Rule 19 and HRCP Rule 12 should be construed together to allow a party to raise an HRAP Rule 19 defense at any time. This construction of HRAP Rules 12 and 19 would be in harmony with HRAP Rule 21.

The case cited by the majority, Pan Am. World Airways, Inc. v. U.S. Dist. Ct., 523 F.2d 1073, 1079 (9th Cir. 1975), in support of its reading of HRAP Rule 21 actually supports the reading of HRAP Rule 21 advanced here. In Pan Am., the plaintiffs sought to use FRAP Rule 21 to justify asking the district court for an order to notify nonlitigants of the case. See id. at 1077, 1079. Pan Am. explained that "Rule 21 has been used to join potential plaintiffs who are necessary parties, see Rule 19(a), or real parties in interest, see Rule 17(a)." 523 F.3d at 1080 n.7. (emphasis added). However, since FRAP Rule 21 did not permit "mass" joinder, the district court could not derive authority from FRAP Rule 21 to notify the nonlitigants of the action in that case. 523 F.3d at 1080 n.9. Clearly, then, and contrary to the majority's contention, Pan. Am. holds that FRAP Rule 21 can be used to join parties under FRAP Rule 19(a).

6.

The majority's position is not supported by its rationale. In fact, the cases relied upon by the majority are unhelpful to its position. Majority opinion at 22-26 (citing Citibank N.A. v. Oxford Props. & Fin. Ltd., 688 F.2d 1259, 1263 n.4 (9th Cir. 1982), Baykeeper v. Union Pac. RR Co., No. C06-02560 JSW, 2009 WL 1517868 (N.D. Cal. June 1, 2009), Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.C.D.C. 1999), N. Dixie Theatre, Inc. v. McCullion, 613 F. Supp. 1339, 1346 (D.C. Ohio 1985), Indymac Fed. Bank v. OTM Invs., No. 10CA0056-M, 2011 WL 3274075 (Ohio Ct. App. Aug. 1, 2011)). Citibank is no longer predominant and the remaining cases do not support waiver of an HRCP Rule 19 necessary party defense for failure to assert it in a pre-answer motion or answer.

a.

In Citibank, the Ninth Circuit Court of Appeals cited FRCP Rule 12 in a footnote, saying that "[i]n federal procedure, failure to join necessary parties is waived if objection is not made in defendant's first responsive pleading; it is only the absence of an indispensable party which may (possibly) be raised later." Citibank, 688 F.2d at 1263 n.4 (citations omitted). However, two years later, in McCowen v. Jamieson, 724 F.2d 1421 (9th Cir. 1984), the Ninth Circuit Court of Appeals decided that the assertion of the lack of a necessary party could be raised for the first time on appeal. There, the plaintiffs alleged that the distribution of food coupons made by a state agency did not

comply with federal regulations regarding food coupons. Id. at 1422. The plaintiffs added the Secretary of Agriculture as a defendant, but subsequently dismissed him. Id. at 1423. The plaintiffs then filed a motion for summary judgment, which the district court granted. Id.

On appeal, the defendants argued for the first time that the Secretary of Agriculture was a necessary party whose joinder should have been required, if feasible. Id. The plaintiffs responded that the defendants "never have pressed this issue before and therefore [were] estopped from asserting it[.]" Id. at 1424. The Ninth Circuit rejected that argument, stating it was "wrong as a matter of law[,]" and noting that "[t]he issue is sufficiently important that it can be raised at any stage of the proceedings—even sua sponte." Id. (emphasis added).

In remanding "the case to the district court with directions to add the Secretary of Agriculture as a necessary party[,]" the Ninth Circuit noted that it was "acting to protect the Secretary's interest, not that of the [defendants,]" and it "refuse[d] to allow the Secretary to be injured by the [defendants'] error." Id. The court did not mention its decision in Citibank from two years earlier, where it held that such an objection under the same rule of procedure was waived.

Notably, the Ninth Circuit has not followed Citibank[66]

[66] In fact, the position set forth in Citibank was only cited in the two cases cited in the majority opinion: Baykeeper and Ransom.

at all since that case was decided, but has followed McCowen.[67] Thus, it is plain that the Ninth Circuit takes the position that it is irrelevant whether a party moves, or fails to move, or asserts, or fails to assert, the defense of the failure to join a necessary party inasmuch as it is so "importan[t]," Takeda v. NW Nat'l Life Ins. Co., 765 F.2d 815, 818 n.2 (9th Cir. 1985), that it can be raised sua sponte by the court, or at any time by the parties.

b.

Baykeeper, Ransom, McCullion, and Indymac do not support the majority's position.[68] Contrary to the majority's

[67] The issue in George v. Bay Area Rapid Transit, No. 04-15682, 2006 WL 897250, at *1 (9th Cir. Mar. 26, 2006), was whether Department of Transportation (DOT) regulations were arbitrary and capricious. The DOT was not a party, but it appeared as an amicus curiae on appeal, and it indicated at oral argument that it was not notified of the challenge to the regulations. Id. The Ninth Circuit, reasoning that McCowen recognized "that joinder issues may be brought up sua sponte," vacated and remanded to add the DOT as a party because "the DOT ha[d] a strong interest in the continuing validity of its regulations." Id. at 810 (citation omitted) (emphasis added).

[68] In contrast to the inapposite cases relied upon by the majority, Gentry v. Smith, 487 F.2d 571, 580 (5th Cir. 1973), is instructive. There, the defendant agreed to purchase stock in a Florida corporation. Id. at 573. The defendant refused to close. Id. at 574. The plaintiffs asserted a breach of contract claim. Id. at 575. After trial, the defendant moved to join the corporation, although the defendant "had made no earlier motion to join the corporation, and had previously opposed its joinder." Id. The district court denied the motion and entered judgment declaring the nullity of the contract. Id. The defendant appealed, and the Fifth Circuit Court of Appeals decided that the corporation should have been joined. Id. at 575, 580.

Noting that, in "deciding joinder motions under [FRCP] Rule 19, courts emphasize pragmatic considerations rather than rigid formalism: the maximum effective relief with the minimum expenditure of judicial energy[,]" the appellate court determined that "the mere fact of delay in seeking to join a party [does not] limit the exercise of this discretion." Id. at 580. According to the Fifth Circuit, "[t]h[e] concern with the practical gives [a court] wide latitude in deciding when the promise of a speedy resolution to a controversy in a single action outweighs any inconvenience to the parties caused by a failure to conform strictly to the requirements of pleading[,]" and "it is permissible to join a defendant at any stage of the litigation in the trial court so long as it is given sufficient notice and opportunity adequately to defend its interests." Id. (internal quotation marks and citation omitted) (emphases added). See also Geissal v. Moore Med. Corp., 927 F. Supp. 352, 356 (E.D. Mo. 1996) (noting that the defense of failure to join

continue...

contention, Baykeeper,[69] Ransom[70] and McCullion[71] only establish that when a defendant fails to raise the defense of an indispensable party in an answer, the defense that a party is necessary may be waived. However, these cases do not suggest that when a party asserts in an answer the defense that an absentee is indispensable, then that party waives the ability to argue the absentee was necessary.[72]

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[68]...continue
a necessary party "can be raised as an issue at a trial on the merits, . . . the question of whether there is a genuine issue for trial with regard to this defense can appropriately be raised on a motion for summary judgment") (rev'd on other grounds, Geissal v. Moore Med. Corp., 524 U.S. 74 (1998)).

[69] Baykeeper was an unpublished order denying the defendants' motion for leave to amend their answer to plead an affirmative defense of failure to join all necessary and indispensable parties. Baykeeper, 2009 WL 1517868, at *1. Baykeeper noted, "Courts have clearly found that although the absence of an indispensable party may be raised at any time, the failure to join necessary parties may be waived if objections are not made in the defendant's first responsive pleading." Id. (citations omitted) (emphasis added). This is simply a questionable statement, insofar as it failed to cite, analyze, or apply McCowen, a binding Ninth Circuit opinion wherein the parties raised the issue for the first time on appeal and the court addressed it.

[70] In Ransom, the defendants moved to amend their answer to incorporate the defense of failure to join a necessary or indispensable party, contradicting their earlier statement to the court that they did not believe other persons needed to be joined in the action. 69 F. Supp. 2d at 148. Noting the inconsistency, and that "Defendants may not now seek to have this case dismissed for Plaintiffs' failure to join the [absentee] in this action[,]" the court decided that the absentee was not a necessary party inasmuch as the suit would not impair or impede the non-parties' interests, and whatever interest they had was adequately represented by the current defendants. Id. at 148.

[71] In McCullion, the defendant, in a supplemental motion for summary judgment filed after the answer, sought dismissal because the plaintiff failed to join entities that the defendant believed were necessary parties. 613 F. Supp. at 1346. The defendant did not assert in his answer that any entity was necessary or indispensable, and did not assert, in his supplemental motion, that any entity was indispensable. Id. That court denied the motion because the defendant did "not argue that any of the [entities] is an indispens[a]ble party within the meaning of [FRCP] Rule 19(b)[,]" but only argued that "they [were] 'necessary parties' within the meaning of Rule 19(a)[,]" and, thus, the defendant "waived his right to present it[.]" Id.

[72] According to the majority, this reasoning is "unsupportable" because it overlooks that necessary and indispensable parties are treated differently, see majority opinion at 26 n.14. However, as noted, Baykeeper, Ransom, and McCullion did not deal with a party who raised the indispensable
continue...

The majority suggests that McCowen is inconsistent because the dissenting judge in that case stated that, in his view, courts were not required to open the door and go out and look for other parties to join. See majority opinion at 26 n. 14. Respectfully, this is misleading. It is clear that the majority in McCowen remanded to require the district court to order a necessary party to be joined, even though the necessary party defense was only raised on appeal. 724 F.2d at 1422-23. There is nothing inconsistent in that holding.

The majority also says that McCowen is primarily cited for the holding that failure to join an indispensable party is not subject to waiver. See majority opinion at 26 n.14. Again, however, McCowen remanded for joinder of a necessary party. 724 F.2d at 1422-23.

Indymac is not relevant. Rule 19(a) of the Ohio Rules of Civil Procedure expressly provides that a party waives the defense of failure to join a necessary party if it is not "timely" asserted in a pre-answer motion, or, if no pre-answer motion is asserted, in the answer, inasmuch as it provides that "[i]f [the absentee] has not been so joined, the court shall order that he be made a party upon timely assertion of the

[72]...continue
party defense but not the necessary party defense, as was the case here. Since to determine whether a party is indispensable a court must first determine whether the party is necessary, as discussed supra, these cases did not deal with the situation that arises when a party preserves the indispensable party defense but does not expressly assert the necessary party defense. The majority's assertion that this reading of Baykeeper, Ransom, and McCullion overlooks a fundamental point of logic, see majority opinion at 26 n.14, ignores our case law and misapprehends the purpose of HRCP Rule 19.

defense of failure to join a party as provided in Rule 12(B)(7). If the defense is not timely asserted, waiver is applicable as provided in Rule 12(G) and (H)." Insofar as "Ohio eliminated any possible confusion" by discussing the "forfeiture issue in Civil Rule 19[,]" Indymac, 2011 WL 3274075, at *5, it has no bearing here.

XVII.

The majority states that the instant case "illustrates the wisdom" of its adoption of a new rule insofar as determining that a party waives the necessary party defense (1) ensures other parties have notice and will investigate and respond to the claims, (2) encourages necessary parties to be joined with minimal disruption, and (3) even if the defense included both subsections of HRCP Rule 19, Pflueger's assertion on the eve of trial was untimely. Majority opinion at 27.

A.

On the contrary, respectfully, there is no "wisdom" in splitting a defense into two, one that can be waived (HRCP Rule 19(a)) and one that cannot (HRCP Rule 19(b)), simply in order to reach the outcome here. As to notice, it is the plaintiff's duty to initially join necessary parties, and thus to give defendants and other parties notice.

In this regard, the majority creates a situation in which defendants must assert the necessary party defense in the absence of information the plaintiff should have, but did not, provide. According to the majority, the defense must be asserted

in the first HRCP Rule 12(b) motion,[73] or in the defendant's answer; if not, it is waived. Majority opinion at 29. A defendant must file its answer, or an HRCP 12(b) motion, within 20 days after the complaint is filed. HRCP Rule 12(a). If a plaintiff fails to list possible necessary parties, as it is required to do by HRCP Rule 19(c)("A pleading asserting a claim for relief shall state the names, if known to the pleader, of any [necessary] persons . . . who are not joined, and the reasons why they are not joined."), then, at this initial stage of the proceedings, the defendant may lack the requisite information to assert the defense of necessary parties. However, if the defendant fails to do so, the majority requires that the defendant's objection be deemed waived. In other words, the majority penalizes a defendant for failing to assert a necessary party defense, when it is the plaintiff's failure to abide by HRCP Rule 19 that results in the lack of information required by the defendant to raise the necessary party defense.

This case is a good example. Since the Marvins asked Huddy-Yamamoto to join the litigation early on, they must have known that she was potentially a necessary party; yet, they failed to abide by HRCP Rule 19(c) and list her as a necessary party in their complaint. However, it is Pflueger who is faulted by the majority for not "rais[ing] the issue of Huddy-Yamamoto's

[73] As noted supra, HRCP Rule 12(g) allows a party to make a motion under HRCP Rule 12(b) and "join" with it any other motion allowed under HRCP Rule 12(b). If the party omits any defense from that motion, the party shall not make a motion based on the defense or objection so omitted, except that the party may make a subsequent motion on the grounds provided in HRCP Rule 12(h)(2).

nonjoinder before the court," see majority opinion at 42. This is unfair to Pflueger[74] inasmuch as it is clear that the Marvins had notice long before the evidentiary hearing[75] that Huddy-Yamamoto claimed an interest in access. Since kuleana rights flow to the kuleana as a whole, the Marvins were well-aware or should have been aware that Huddy-Yamamoto should have been included in the lawsuit. The fact that the Marvins asked Huddy-Yamamoto whether she wanted to join the lawsuit further suggests the Marvins knew she had an interest in the litigation. It is therefore highly unlikely that Huddy-Yamamoto's testimony during the evidentiary hearing that she wanted vehicular access and potable water was the Marvins' "first notice of these desires," see majority opinion at 27.

As to ensuring that "all parties have an opportunity to investigate and respond," see majority opinion at 27, the majority's rule, in fact, cuts off any investigation, for if waiver occurs after the first responsive pleading, there is no opportunity for defendants to investigate further. Thus, if, during discovery and after the filing of the first responsive pleading, a defendant learns that there is a necessary party who could have feasibly been joined but was not, there is nothing the defendant can do. By virtue of the majority's decision, the

[74] Thus, the majority's holding does not "entertain[] the broadest possible scope of action consistent with fairness to the parties." See majority opinion at 51-52 (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966)).

[75] To reiterate, although the majority insists on calling the evidentiary hearing a trial, see majority opinion at 29, the nature of the hearing held by the court, whether a bench trial, or an evidentiary hearing, or both, is not evident from the record, as noted, supra, n.15.

defendant's "opportunity to investigate" will therefore be meaningless.

B.

In illustrating its "wisdom," the majority also emphasizes that ordering Huddy-Yamamoto's joinder would have "necessarily delayed proceedings" because she "may" have needed to retain expert witnesses, and she "may" have wanted to raise third-party claims against the Marvins or Pflueger. Majority opinion at 27. At the outset, whether she "may" have done so is entirely speculative. Moreover, since future litigation is likely as a result of the majority's decision, any purported "delay" in this litigation pales in comparison to the potential waste of judicial and party resources in the future.

C.

As to Pflueger's raising of the defense on the eve of trial, the paucity of support for that position (one unpublished decision from an Ohio appellate district court) cuts against the majority's decision. The majority relies on Mihalic v. Figuero, No. 53921, 1988 WL 86428, at *3 (Ohio App. Dist. May 26, 1988), where that court stated, "a mere five word statement contained in the appellant's answer without further affirmative action to prosecute the raised defense results in a waiver of said defense." (Emphasis added.) According to Mihalic, however, "[a] party must not only initially raise the defense[,] but must demonstrate or prosecute the defense through either a motion or presentation of said defense at trial." Id. (emphasis added).

Insofar as Pflueger "present[ed]" the "said defense" before trial, in a position statement, it would not be untimely under Mihalic.

XVIII.

Finally, even assuming, arguendo, that Pflueger failed to plead the HRCP Rule 19 defense, and the rule that failure to plead a necessary party defense applies retroactively, the majority entirely ignores HRCP Rule 15(b) (2000). Under the liberal amendment practice of the HRCP, "issues not raised by the pleadings that are tried by express or implied consent of the parties . . . shall be treated in all respects as if they had been raised in the pleadings." HRCP Rule 15(b). Therefore, the "failure to plead an affirmative defense is immaterial if evidence of the defense is introduced and not objected to for failure to plead it, and no surprise is claimed." Godoy v. Hawaiʻi Cnty., 44 Haw. 312, 322, 354 P.2d 78, 83 (1960) (citation omitted). "The purpose of Rule 15(b) is to allow an amendment of the pleadings to bring the pleadings in line with the actual issues upon which the case was tried . . . and to promote the objective of deciding cases on their merits rather than in terms of the relative pleading skills of counsel or on the basis of a statement of the claim or defense that was made at a preliminary point in the action and later proves to be erroneous." Schefke, 96 Hawaiʻi at 433, 32 P.3d at 77 (internal quotation marks and citations omitted).

In the instant case, the Marvins did not expressly

consent to try the pleaded issue of whether Huddy-Yamamoto should have been joined, but they implicitly consented. "In this jurisdiction, consent will be implied from the failure to object to the introduction of evidence relevant to the unpleaded issue." Schefke, 96 Hawaiʻi at 433, 32 P.3d at 77 (internal quotation marks and citation omitted). The Marvins did not object to the "introduction of evidence[,]" id., in the form of Huddy-Yamamoto's testimony and other witnesses' testimony regarding the rights of a kuleana. Thus, from the circumstances, it is apparent that the Marvins implicitly consented to try the issue of whether Huddy-Yamamoto was necessary. Inasmuch as the parties expressly tried the issue, it cannot be said, as the majority does, that Pflueger waived the necessary party defense.

XIX.

In conclusion, I would affirm the ICA's June 30, 2010 judgment.

/s/ Simeon R. Acoba, Jr.