NO. 22243

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

AUGUST K. DUVAUCHELLE and SOPHIE M. DUVAUCHELLE, husband and wife, and EDWINA P. DUVAUCHELLE, Plaintiffs-Appellees, v. KAKANI, also known as AKUNEY, his heirs and successors; KEKUHI also known as J. KEKUHI, his heirs and successors; DAVID KAKANI; HOWARD D. BOWEN as TRUSTEE FOR DAVID KAKANI, or SUCCESSOR TRUSTEES FOR DAVID KAKANI; Personal Representatives of the Estate of EUGENE K. DUVAUCHELLE, Deceased; RACHEL MARIE WRIGHT; Personal Representatives of the Estate of REIMENN DUVAUCHELLE, Deceased; LOUISE MOC SING; Personal Representatives of AUGUST H. REIMANN, Deceased; JOHN H. BOONE as TRUSTEE OF THE MAUD VAN CORTLAND HILL SCHROLL TRUST; JOSEPH W. HALL and LAUREL E. HALBERSTROH, husband and wife; JOHN DOES 1-50; JANE DOES 1-50; DOE CORPORATIONS 1-50; DOE ENTITIES 1-50; DOE GOVERNMENTAL AGENCIES 1-50; AND ALL OTHER PERSONS, FIRMS, CORPORATIONS CLAIMING ANY RIGHT, TITLE AND INTEREST OR LIEN IN THE REAL PROPERTIES DESCRIBED IN PLAINTIFFS' COMPLAINT BY, THROUGH OR UNDER ANY NAMED DEFENDANT AND UNKNOWN PERSONS GENERALLY, Defendants, and STATE OF HAWAII; COUNTY OF MAUI; DALLAS KEAAU JENSEN, Defendants-Appellees, and THE TIDES FOUNDATION, Defendant-Appellant.

and

DALLAS KEAAU JENSEN, Counterclaimant-Appellee, v. ESTATE OF AUGUST K. DUVAUCHELLE, deceased, SOPHIE M. DUVAUCHELLE, widow, by EDWINA P. DUVAUCHELLE, her Attorney-in-fact, EDWINA P. DUVAUCHELLE, ZELIE DUVAUCHELLE-MCCARY, Counterclaim Defendants-Appellees, and ROBERT MCCARY, Counterclaim Defendant.

APPEAL FROM THE SECOND CIRCUIT COURT
(CIVIL NO. 91-0256 (1))

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Defendant-Appellant The Tides Foundation (Tides) appeals the circuit court of the second circuit's[1/] December 22, 1998 Amended Final Judgment and the court's September 2, 1997 Order Granting Motion for Partial Summary Judgment on Easements in favor of Plaintiffs-Appellees Edwina P. Duvauchelle; Sophie M. Duvauchelle, by her attorney-in-fact Edwina P. Duvauchelle; and the Estate of August K. Duvauchelle, by its Special Administrator Edwina P. Duvauchelle (collectively, the Duvauchelles).[2/]

This controversy arose out of an action filed by the Duvauchelles to quiet title to three parcels of real property, described as Royal Patent Grant 2611 to Kakani (RPG 2611), located in Pukoʻo on the island of Molokaʻi. The properties are also designated as Tax Map Key (TMK) 5-7-07:17, TMK 5-7-07:66 and TMK 5-7-07:55.

[1/] The Honorable E. John McConnell (now retired), judge presiding.

[2/] When the Complaint to Quiet Title was filed on May 3, 1991, the plaintiffs were August K. (August) and Sophie M. (Sophie) Duvauchelle, husband and wife, and their daughter Edwina P. Duvauchelle (Edwina) (collectively, the Duvauchelles).

The complaint listed various defendants, including the State of Hawaiʻi, The Tides Foundation (Tides) and Dallas Keaau Jensen (Dallas). On November 20, 1992, the Duvauchelles filed their First Amended Complaint in order to add the County of Maui as a defendant.

In May of 1993, Sophie was confined to the hospital. As a result, Edwina became her representative through a power of attorney.

In September of 1993, August died. Prior to his death, he had issued a deed to his granddaughter, Zelie Duvauchelle-McCary (Zelie) for part of Royal Patent Grant 2611 (RPG 2611). As a result, Zelie was added as a counterclaim defendant and Edwina, as special administrator for the estate of August, was substituted as plaintiff/counterclaim defendant for the deceased.

At the time the action was filed, the properties lay side-by-side along the shoreline without record access to the public highway, King Kamehameha V Highway. Directly mauka of the properties lay an abutting parcel of Tides property, that had at its mauka-most boundary the public highway. Mauka and to the east of the properties lay a non-abutting parcel, owned by the State of Hawai‘i’s Irwin Health Center, that also had at its mauka-most boundary the public highway. The Tides parcel and the Irwin Health Center parcel abutted for a distance running in the makai direction from the public highway. In the context of this case, there were geographically only two possible routes for access to the Duvauchelle properties from the public highway; one which ran at least partially through the Tides property, and another which ran at least partially through the Irwin Health Center property.

The order granting partial summary judgment on easements that is the subject of this appeal granted an access easement appurtenant to the Duvauchelle properties from the public highway. The access easement ran over the Tides property and consisted of two parts. The makai portion, by prescription (finding of fact #2 below), is not at issue in this appeal. The mauka portion, by necessity (finding of fact #3 below), is the sole subject of this appeal. The mauka portion of the access easement runs over a preexisting roadway easement (granted by Tides to the County of Maui by a December 9, 1991 grant of easements) that was utilized by the general public at the time of

the litigation (findings of fact #3 & #4 below). The order contained the following relevant findings of fact:

> 2. The Court finds that the portion of the Easement granted hereby which runs over and across the Tides Property from the location of the County of Maui easement parking area, makai to the mauka boundary of TMK 5-7-07-55, for ingress and egress and for utility purposes, at least 12 feet wide, is a prescriptive easement, there being no genuine issue of material fact that Plaintiff has satisfied the elements necessary to establish an easement by prescription as a matter of law, which, based on the affidavits submitted, vested by 1985, and there being no genuine issue of material fact that such prescriptive easement was not legally divested.[3/]
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> 3. The Court finds that the portion of the Easement granted hereby which runs from the Main Government Road (King Kamehameha V Highway) over the Tides Property, at the location of the 15 foot wide existing County of Maui roadway easement ("County Road"), to the County of Maui easement parking area, . . . is an easement by necessity, there being no genuine issue of material fact that: (a) the Parcels are land-locked; and (b) the most equitable and least burdensome location for the easement by necessity is over the County Road and not over the State's parcel . . . which is burdened by a reverter clause[4/] . . . . Furthermore, Plaintiff has agreed with the State not to seek an easement on the Irwin Health Center property.[5/]

[3/] Tides does not contest the prescriptive easement on appeal. At the hearing on the motion for partial summary judgment on easements, Tides conceded the easement by prescription.

[4/] The Irwin Health Center Property was deeded to the State of Hawai'i in 1938. The deed contained a reverter clause which prohibited the use of the property for anything other than public health purposes.

[5/] On March 5, 1993, the circuit court approved a Stipulation of Settlement between the Duvauchelles, Dallas and the State, in which the Duvauchelles agreed not to seek access over the State's property. Tides was not a party to the stipulation. The stipulation stated, in relevant part:

> 4. Plaintiffs and Defendants herein claim no right, title or interest, either by way of roadway and/or utility easements or otherwise, in, over or across the adjoining lands owned by the State of

(continued...)

> However, even if there were no stipulation or Reverter Clause issues related to the Irwin Health Center Property, the Court finds that the most equitable location of the easement by necessity is over the recently created County Road because it is already in existence and currently serves the public.
>
> 4. The Court also finds that the Easement is a permitted use pursuant to Grant of Easements dated December 9, 1991, recorded as Document No. 92-000778 in the Bureau of Conveyances for the State of Hawai'i.[6/]
>
> 5. The Court finds that the Affidavit of Charles M. Busby filed by the Tides in opposition to the Motion on August 22, 1997 ("Busby Affidavit") is untimely due to its filing past the August 18, 1997 deadline imposed by the Order Continuing Motion.

(Footnotes added.)

The location of an easement by the circuit court is an "exercise of its equitable powers," and will not be overturned absent an abuse of that discretion. Rogers v. Pedro, 3 Haw. App. 136, 140, 642 P.2d 549, 552 (1982) (citation omitted). It will be affirmed if "the location of the easement by the trial court is not in any way unreasonable and . . . it conforms to the necessities of the case." Id. (citations omitted). See also Henry v. Ahlo, 9 Haw. 490, 492 (1894). The real question for the circuit court in this respect was "where the location of the road should be, also how wide it should be, at the same time taking into consideration the necessity for the road and the best

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[5/](...continued)
Hawai[']i, to-wit: the Irwin Health Center (Governor's Executive Order 1189).

[6/] Pursuant to the December 9, 1991 Grant of easements, Tides granted to the County of Maui a roadway easement over its property. The easement by necessity established in finding of fact #3 of the circuit court's order is in the same location as the "County Road."

location to place it, so as not to interfere, more than was necessary, with the occupation of land over which the road passed." Id. at 491.

Tides contends on appeal that the Duvauchelles were not entitled to judgment as a matter of law because (1) genuine issues of material fact precluded such judgment; (2) the court abused its discretion in striking the affidavit of Charles Busby, proffered by Tides in opposition to the motion; and (3) summary judgment should alternatively be granted in Tides' favor. To be clear, the primary thrust of Tides' appeal is that it was not, as a matter of law, most equitable and least burdensome in this case to locate the easement by necessity on a public roadway already in use by the general public. For the reasons that follow, we affirm the amended final judgment and the order granting the motion for partial summary judgment on easements.

I. Background.

A. Procedural History.

On May 3, 1991, the Duvauchelles filed their quiet title action. The complaint included a claim of easement for access and utilities from RPG 2611 to the main public highway (King Kamehameha V Highway).

Numerous defendants were named in the complaint, including the State, owner of the Irwin Health Center property; Tides, owner of the property directly mauka of RPG 2611 over which the appurtenant easement by necessity was granted; the County, which held the preexisting roadway easement for public

use over the Tides property; and Dallas Keaau Jensen (Dallas), who claimed an ownership interest in RPG 2611. Other parties were defaulted by order for default judgment dated August 23, 1991.

Prior to the commencement of the action, the Duvauchelles had reached RPG 2611 from the public highway over a road through the Irwin Health Center property, then over Tides property at the location of the makai prescriptive easement granted by the trial court (see finding of fact #2, supra). As shown in Exhibit "E" of the first amended complaint, the Duvauchelles had originally claimed that the mauka portion of their easement ran over a road through the Irwin property.

On March 5, 1993, a stipulation settled the claims and counterclaims between the State and the Duvauchelles.[7/] As part of the settlement, the Duvauchelles and Dallas agreed not to seek access over the Irwin Health Center property. Tides was not a party to the stipulation.

On March 15, 1994, a nonjury trial was held to determine ownership of RPG 2611.[8/] On June 20, 1994, the circuit

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[7/] In its answer to the Complaint, the State denied the Duvauchelles' claim of easement through the Irwin Health Center property. The State also asserted various counterclaims relating to accretion, mineral rights, native tenant rights and encroachment upon public lands. These claims were also settled by the March 5, 1993 stipulation.

[8/] Ownership of RPG 2611 was determined by the circuit court as follows:

1. Zelie owned the western parcel of RPG 2611, TMK [5]-7-07:17.

2. Sophie and Edwina together owned an undivided half interest in the eastern portion of RPG 2611, TMK 5-7-07:66 and 55.

(continued...)

court issued its judgment on the nonjury trial, certified as final pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b).[9/] The Duvauchelles and Counterclaim-Defendant Zelie Duvauchelle-McCary (Zelie) filed a notice of appeal from the June 20, 1994 judgment. On December 17, 1996, the supreme court affirmed the June 20, 1994 judgment by summary disposition order.

On June 30, 1997, the Duvauchelles filed the motion for partial summary judgment on easements, seeking perpetual easements from the public highway over the Tides property to RPG 2611, for access and utilities. At this point in the litigation, the Duvauchelles were seeking an easement by necessity over the Tides property for the mauka portion of their access and, as one alternative for the makai portion of their access, a prescriptive easement over the Tides property. As stated in the motion,

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[8/](...continued)

3. Dallas owned an undivided half interest in the eastern portion of RPG 2611, TMK 5-7-07:66 and 55.

[9/] Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) (1990) provides:

> **Judgment Upon Multiple Claims or Involving Multiple Parties.** When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

> The Plaintiff seeks an easement for ingress and egress . . . over the TIDES property, from the Government Main Road, on and over the existing County of Maui Roadway easement to the location on the County of Maui Easement reserved for parking, and from there, makai on the existing County of Maui easement, or on the existing roadway easement over which the Plaintiff has a prescriptive easement on the east boundary of the TIDES property[.]
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> . . . .
>
> The Plaintiff is claiming an easement by necessity from the Main Government Road over the Tides foundation property, at the location of the 15 foot wide existing County of Maui easement, to the County of Maui easement parking area[.]

Submitted with the motion was Zelie's affidavit. In her affidavit, Zelie stated that she and her grandparents, August and Sophie, had lived in Puko‘o on property located in RPG 2611 since 1965. The makai portion of their access to the property had always been across the Tides property on the route ultimately granted to the Duvauchelles as a prescriptive easement (finding of fact #2, supra). Utility access had crossed the Tides property in the same location. She had crossed the road continuously and had never asked for permission to use the roadway or to maintain utilities thereon. She had always used the road openly. The road had never been fenced, gated or locked.

Zelie made no mention of the mauka portion of their access in her affidavit. However, in response to Tides' memorandum in opposition to the motion, the Duvauchelles conceded that they had never used the County roadway from the public highway, ultimately granted to them as the mauka easement by

necessity (finding of fact #3, supra), for access to their property. The mauka portion of their access had always been across the Irwin Health Center property, not across the Tides property. The Duvauchelles argued, however, that this issue was neither here nor there, because they were claiming the mauka easement by necessity, and not by prescription.

The Duvauchelles also submitted a copy of tax map 5-7-07, that showed the location of properties in the Puko‘o area and the location of the requested easements. They supplemented the motion with a copy of the quitclaim deed of the Irwin Health Center property to the State. The deed contained the following clause:

> [T]hat if said land or any part thereof, or any building or structure thereon, shall at any time hereafter be used for any purpose other than public health purposes, title to all of said land and all appurtenances thereto shall revert to [grantor] Paul I. Fagan, his heirs, executors, administrators or assigns[.]

In light of the March 5, 1993 settlement agreement (discussed supra) and the reverter language in the deed, the Duvauchelles argued below, as they do on appeal, that the most equitable and least burdensome route for the mauka portion of their access is along the existing County road through the Tides property.

The State filed a statement of no opposition to the Duvauchelles' Motion. The County filed a qualified statement of no opposition, that stated:

> Defendant County has no opposition . . . provided that this Honorable Court shall find

> and so order that the easements being sought by Plaintiff . . . are permitted uses pursuant to said Grant of Easements to Defendant County by Document No. 92-000778.

Attached to the County's statement was a copy of the December 9, 1991 grant of the mauka roadway easement from Tides, as "Grantor," to the County, as "Grantee." The grant, in relevant part, states:

> Whereas, now, in fulfillment of the requirement imposed by the Land Use Commission upon Grantor to provide beach access across its Property, Grantor agrees to convey to Grantee for public recreational use:
>
> 1. Easement A, a fifteen-foot-wide unpaved easement for purposes of vehicular and pedestrian access on the east side of the Property, together with space for ten (10) parking stalls and a vehicular turnaround[.]
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> . . . .
>
> Grantor does hereby grant and convey to the Grantee, and to its successors and assigns forever, and the Grantee does hereby accept, the perpetual easements for public access as described . . . for the specific uses and purposes hereinafter provided and only for such specific uses and purposes:
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> 1. Permitted Uses. The easements are for public recreational use, however they may not be used by any person, group or business that charges a fee or any other type of compensation for an activity that involves their use. . . . More specifically, the easements shall be used for such things as the following, as long as in the pursuit of these and similar activities no one is required to pay a fee or other compensation to do them: fishing, limu gathering, hiking, swimming, windsurfing, snorkeling, boating, nature studying, and viewing of scenic sites.
>
> 2. Non-Permitted Uses. The easements shall only be used for uses set forth in section one of this Grant of Easement, "Permitted Uses."

(Emphasis omitted.)

In opposition to the motion for partial summary judgment, Tides submitted the affidavits of Pukoʻo residents Anna D. Goodhue (Goodhue), Ruth E. Yap (Yap) and Collette Y. Machado (Machado). Machado attested that she had lived in Pukoʻo since 1987 and that Tides had granted the Duvauchelles permission to use the roadway (the makai prescriptive easement) over the Tides property for access. She also stated, in response to Zelie's affidavit, that the mauka portion of the access to RPG 2611 had always been over the Irwin Health Center property. Goodhue and Yap attested that they had lived in the Pukoʻo area for a number of years and that access to RPG 2611 had always been permitted over the Irwin Health Center property.

Hence, Tides' written opposition to the motion seemed directed, at least in part, at the Duvauchelles' claim of a makai easement by prescription over the Tides property. However, at the hearing on the motion, counsel for Tides conceded the issue of the makai easement by prescription: "Yes, yes, Judge. As I admit as far as the easement by prescription over the Tides portion, you know, it looks like the Court could grant that." Rather, he focused his argument on the location of the mauka easement by necessity: "But the real issue is there's no necessity to go back over the Tides [property.]" He argued that the most equitable location for the mauka portion of the easement was across the Irwin Health Center property, because the Duvauchelles and their predecessors in interest had always used that road.

Prior to the August 28, 1997 hearing on the motion, on August 22, 1997, Tides had submitted the affidavit of civil engineer and surveyor Charles M. Busby (Busby). The affidavit alleged that there was a public roadway over the Irwin Health Center property that served as the mauka portion of the access to RPG 2611, that was established before the deed of the Irwin property to the State. The affidavit was filed four days after a court-ordered filing deadline. At the hearing on the motion, Tides requested a second continuance to supplement the record with further affidavits. The court denied the request. The court also struck the Busby affidavit as untimely.

On September 2, 1997, the court filed its order granting the motion for partial summary judgment on easements. On December 22, 1998, the court filed the Amended Final Judgment. On January 22, 1999, Tides filed a notice of appeal. The notice was one day late. On February 19, 1999, the court filed an order granting the Tides' motion for a one-day extension of time to file its notice of appeal.

II. Standard of Review.

"We review an award of summary judgment under the same standard applied by the circuit court." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22 (1992) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that

the moving party is entitled to a judgment as a matter of law." HRCP Rule 56(c) (1997).

"A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716, (1982) (citations omitted).

In reviewing a summary judgment, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai'i 76, 80, 947 P.2d 944, 948 (1997) (brackets and citations omitted). However, "[b]are allegations or factually unsupported conclusions are insufficient to raise a genuine issue of material fact, and therefore, insufficient to reverse a grant of summary judgment." Reed v. City and County of Honolulu, 76 Hawai'i 219, 225, 873 P.2d 98, 104 (1994) (citations omitted).

III. Discussion.

1. The circuit court did not abuse its discretion in striking the affidavit of Busby.

Tides argues that the circuit court should have chosen "substance over form" by considering the Busby affidavit, because it contained relevant and material facts. In addition, Tides argues that "[g]iven the totality of the circumstances, including taking account the commencement of the quiet title action in 1991 and the recent withdrawal and substitution of counsel in 1997, the trial court abused its discretion in striking the affidavit

of Busby." We disagree. The record reveals the following relevant events.

On June 30, 1997, the Duvauchelles filed their motion for partial summary judgment on easements. Counsel for Tides was served with a copy of the motion on June 26, 1997 (presumably a copy of the unfiled motion). On July 9, 1997, Tides filed a document purporting to be a memorandum in opposition to the motion. But the document was, in substance, a request for an extension of time to provide counter-affidavits.

At the originally scheduled July 10, 1997 hearing on the motion, counsel for the Devauchelles and counsel for Tides agreed that the hearing would be continued to August 28, 1997, that Tides would have until August 18 to "file his objections" and that reply memoranda would be due on August 25. Thereupon, the circuit court warned Tides' counsel that "I want the motion disposed of on the dates indicated[.]" On July 31, 1997, the court filed its order continuing the hearing on the motion. The order tracked the agreement of the parties. In particular, it provided that Tides "must file and serve all responding memorandums in opposition, and other documents, no later than August 18, 1997." Pointedly, the order confirmed that the Tides "agreed to and will not file a motion for an additional continuance." However, Tides filed the Busby affidavit on August 22, 1997.

HRCP Rule 6(b) allows the circuit court, at its discretion, to extend a deadline prescribed by rule or order of

the court, upon a request made before the deadline, or upon a request made after the deadline showing excusable neglect.[10/]

The burden of establishing an abuse of discretion is on the appellant. Title Guaranty Escrow Services, Inc. v. Powley, 2 Haw. App. 265, 270, 630 P.2d 642, 645 (1981) (citations omitted). "[T]o constitute an abuse [of discretion] it must appear that the court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Bank of Hawai'i v. Shaw, 83 Hawai'i 50, 56, 924 P.2d 544, 550 (1996) (citations and internal quotation marks omitted).

The order of the circuit court that continued the hearing on the motion required opposing affidavits to be filed by August 18, 1997. Tides had requested the continuance for the express purpose of filing counter-affidavits. Tides had agreed to the deadline and its counsel was present was admonished by the court about sticking to the new schedule. Nevertheless, the Busby affidavit was served four days after the court-imposed deadline. The filing violated the court's order. Tides did not request an extension of the deadline before its expiration and did not file a motion for an extension after the deadline. Tides

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[10/] HRCP Rule 6(b) provides that "[w]hen by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]

made no attempt to show excusable neglect at any time before the continued hearing.

On appeal, Tides attempts to justify the dilatory filing by noting that the circuit court did not approve its withdrawal and substitution of counsel until July 21, 1997. We note, however, that this did not stop their new attorney from filing the July 9, 1997 memorandum in opposition/request for continuance. Tides also argues that counsel had been involved in a two-week criminal jury trial from August 4 to August 14, 1997. Simply put, this is not excusable neglect. HRCP Rule 6(b).

Tides was served with a copy of the motion on June 26, 1997. Tides had, in sum, over six weeks to file counter-affidavits, yet it still managed, unaccountably, to miss the deadline. The August 18, 1997 deadline and the order setting it were clear and unambiguous. Accordingly, we conclude that the circuit court did not abuse its discretion in striking the Busby affidavit.

2. Summary judgment was appropriately granted on the issue of the easement of necessity.

Tides argues on appeal that the circuit court erred in granting summary judgment on the mauka easement by necessity because (1) the Duvauchelles failed to prove unity of title, (2) the Duvauchelles failed to prove that their property was landlocked and that they had no other means of ingress and egress, (3) the Duvauchelles failed to prove that the use of the roadway over the Irwin Health Center property would trigger the reverter clause, and (4) the stipulation between the State and

the Duvauchelles raised questions of bad faith, collusion, unclean hands and laches.

With respect to Tides' first argument, we agree that an easement by necessity requires proof of unity of title between the dominant and servient estates, followed by a severance thereof.[11/] However, Tides did not raise the issue of unity of title at any point in the proceedings below. Indeed, at the hearing on the motion, Tides' counsel admitted that the only issue before the court was the location of the easement by necessity. During argument, the court inquired, "There's no -- you would agree with me, there's no necessity for -- necessity of easement. It's only a question of where the easement should be." Counsel for Tides responded, "Exactly." In summarizing Tide's position, counsel stated, "If I can just clarify, I think there is a genuine issue of material fact as to what route is least burdensome, and that is really what the Yap, the Goodhue, and Busby affidavit[s] attempted to do. The least burdensome is right where they have been using it since 1904."

Because Tides failed to raise the issue of unity of title in the proceedings below, the issue is deemed waived on

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[11/] "A way of necessity is merely a way created by an implied grant or reservation, the necessity being only evidence of the intention of the parties to make the grant or reservation. If it is not in the power of the grantor to create a way, no necessity however strict or absolute, can be evidence of an intention to do so, -- as where the only means of access to the land is over the land of a stranger." Kalaukoa v. Keawe 9 Haw. 191, 193 (1893); Calaca v. Caldeira, 13 Haw. 214, 215 (1900) ("A way of necessity may be implied from a grant in favor of either the grantor or the grantee, and cannot be implied in favor of or against a stranger to the grant."). "All implications of easements necessarily involve an original unity of ownership of the parcels which later become the dominant and servient parcels." Neary v. Martin, 57 Haw. 577, 580, 561 P.2d 1281, 1283 (1977).

appeal. Kawamata Farms v. United Agri Products, 86 Hawai‘i 214, 248-49, 948 P.2d 1055, 1089-90 (1997); Mauna Kea Power v. Bd. of Land & N.R., 76 Hawai‘i 259, 262 n.2, 874 P.2d 1084, 1087 n.2 (1994). The rule is not a merely mechanical or technical one. As the supreme court has pointed out, it is not fair to the opposing party or to the court in its administration of justice to allow a party to concede an issue below in order to stake its fight on another issue, and having lost below, to come up on appeal in order to fight the conceded issue anew:

> There are sound reasons for the rule. It is unfair to the trial court to reverse on a ground that no one even suggested might be error. It is unfair to the opposing party, who might have met the argument not made below. Finally, it does not comport with the concept of an orderly and efficient method of administration of justice.

Kawamata Farms, 86 Hawai‘i at 248, 948 P.2d at 1089 (citation and internal block quote format omitted).

In any event, we also observe that Tides as much as admitted below that unity of title was a matter of established fact. At various points during the hearing on the motion, Tides' counsel argued as follows:

> [TIDES' COUNSEL]: I think that if the [Duvauchelles] have locked themselves into such a situation where they -- in effect land locked themselves by their predecessors of [sic] interest selling and subdividing their parcels.
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> . . . .
>
> And it seems to me that what the [Duvauchelles] have done by their manner of subdividing their parcels -- and they had the area since, you know, the late 1800s is they, themselves, through their predecessors of [sic] interest have sold lands, including lands to

> [Tides], where they did not disclosed [sic] any right-of-ways [sic] or easement.
>
> . . . .
>
> Because in the manner, Judge, as to how I understand the Duvauchelles have sold and subdivided is that [they] may well not be able to utilize the full area of their acreage because of the way that they have land locked themselves in by subdividing their parcels.
>
> . . . .
>
> And now they are seeking relief from the equity of the Court to help them kind of like patch up or put them back where they should have been prior to selling their properties to others, including [Tides].
>
> THE COURT: So you're saying [the Duvauchelles] should have reserved an easement across your client's property, and having failed to do so they can't come back again? Is that it?
>
> [TIDES' COUNSEL]: In part, yes, Judge, because . . . they have always used this portion over the now Irwin Health Center to gain access to their family's makai property.

Having conceded unity of title for purposes of the motion below, Tides may not resurrect that issue on appeal. As the supreme court stated in Smith v. New England Mutual Life Ins. Co., 72 Haw. 531, 827 P.2d 635 (1992):

> A concession of fact on motion for summary judgment establishes the fact for all time between the parties. The party cannot gamble on such a conditional admission and take advantage thereof when judgment has gone against him. This Court will not emasculate thus the efficient devices of summary judgment.

Id. at 541, 827 P.2d at 640 (citation and internal block quote format omitted). See also Tradewind Ins. Co., Ltd. v. Stout, 85 Hawai'i 177, 181, 938 P.2d 1196, 1200 (App. 1997).

By the same token, Tides next contention, that the Duvauchelles failed to prove that their properties were landlocked, was waived. Tides did not raise this issue before the circuit court. And as is evident from several of the passages quoted above, Tides' counsel conceded during oral argument on the motion that the Duvauchelle properties were indeed "land locked[.]" The record clearly indicates that RPG 2611 was landlocked. A tax map attached to the motion shows that RPG 2611 was separated from the public highway by the Irwin Health Center property and the Tides property. The only means of accessing the government road from RPG 2611 was by way of the Tides property, then over either the Tides property or the Irwin property. Tides makes no argument and cites no evidence that may raise a doubt as to the obvious conclusion to be drawn from the map.

Tides next contends that the Duvauchelles failed to prove that they had no other means of ingress and egress. Tides argues that a public roadway ran over the Irwin Health Center property at the time the property was deeded to the State. Apparently, this alleged public roadway is the mauka portion of the access that the Duvauchelles had employed before they filed their quiet title action. However, the allegation of a public roadway previously established over the Irwin property was based solely on the dilatory Busby affidavit. We previously concluded that the circuit court did not abuse its discretion in striking that affidavit. Hence, the allegation that a public

roadway had been established on the Irwin property was not before the court on the motion.

For its penultimate argument, Tides contends that the Duvauchelles failed to prove that continuing access to their property via the Irwin Health Center property would trigger the reverter clause thereon. For this argument, Tides relies upon the affidavits of Goodhue and Yap, both of whom swore that access to and from RPG 2611 over of the Irwin property was established prior to the 1938 transfer of the Irwin property to the State. Although Tides presents a meager one-paragraph argument on this issue on appeal, we discern from a review of the record that Tides' basic argument is as follows: A prescriptive easement was established over the Irwin property prior to 1938. Therefore, the 1938 deed of the Irwin property to the State, along with its reverter clause, was made subject to that prescriptive easement and hence, the reverter clause was not a barrier to continuing access via the prescriptive easement. There being an alternative access over the Irwin property, the circuit court's conclusion that the "most equitable and least burdensome location for the easement by necessity is over the County Road [on the Tides property] and not over the State's parcel [the Irwin property]" was not appropriate as a matter of law on summary judgment.

"It is well established that one claiming title to real property by adverse possession must bear the burden of proving by clear and positive proof each element of actual, open, notorious, hostile, continuous[,] and exclusive possession for the statutory

period." Morinoue, 86 Hawai'i at 81, 947 P.2d at 949 (citation and internal quotation marks omitted). It is also settled that "[t]he law which governs the elements necessary for acquisition of title by adverse possession is applicable to the establishment by prescription." Tagami v. Meyer, 41 Haw. 484, 487 (1956) (citations omitted) (discussing the material elements of a claim of an easement by prescription).

Therefore, in order to establish a prima facie case of a prescriptive easement acquired before 1938, it was necessary to prove open, notorious, hostile, continuous, and exclusive use for ten years prior to 1938.[12/] The affidavits submitted by Tides established, at best, that the Irwin road was used openly for access to RPG 2611 for some time before and for some time after 1938. The affidavits fail to even allege that prior to 1938, the use was continuous or hostile or for the requisite statutory period of ten years. Thus, Tides's penultimate argument on appeal falls along with its foundation, the alleged prescriptive easement over the Irwin Health Center property.

For its final argument on appeal, Tides contends that the March 3, 1993 stipulation among some of the other parties not to assert an easement across the Irwin Health Center property was a "ruse to create the perception of [the] necessity" of locating the easement by necessity on the Tides property. Tides asserts

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12/ "The statutory period for establishing title to real property through adverse possession was twenty years in the 1880s but was reduced to ten years in 1898." Morinoue v. Roy, 86 Hawai'i 76, 81 n.6, 947 P.2d 944, 952 n.6 (1997) (citations omitted). The current statutory period is twenty years. Hawai'i Revised Statutes § 657-31 (1993).

that "[t]he stipulation raises questions of bad faith, collusion, unclean hands and latches [sic], especially where the record is undisputed that the STATE has acquiesced to the DUVAUCHELLE'S continued use of the roadway over the Irwin Health Center for ingress and egress and for utility and water line purposes since the mid-1960's." (Capitalization in the original.)

We do not see the point of this argument. Although the stipulation played a part in the circuit court's decision, the court expressly deemed it unnecessary to the decision. Indeed, the court did the same with respect to the reverter clause issue. Although we might disagree with the court's latter conclusion, we do agree with the court that locating an easement by necessity is a matter of law where the easement can be located over a public road already utilized by the general public, and where there exists no practicable and legally colorable alternative route: "However, even if there were no stipulation or Reverter Clause issues related to the Irwin Health Center Property, the Court finds that the most equitable location of the easement by necessity is over the recently created County Road because it is already in existence and currently serves the public." Cf. Palama v. Sheehan, 50 Haw. 298, 299-301, 440 P.2d 95, 96-97 (1968) (trial court's grant of an easement for access over an existing, direct right of way affirmed where the only alternative route was circuitous and flooded with water whenever it rained); Kalaukoa v. Keawe, 9 Haw. 191, 193 (1893) ("And even where there is not a strict, but only a reasonable necessity, as where some

other way is possible though very difficult or expensive, this, if coupled with additional evidence of a way actually used and which is apparent and of a continuous nature, has been held to be sufficient evidence of an intention to grant or reserve the way.").

We conclude, finally, that the circuit court properly granted the Duvauchelle's motion for partial summary judgment on easements.

3. Summary judgment was not appropriate in favor of Tides.

In light of the foregoing discussion, Tides' contention that we should grant summary judgment in its favor and hold that the Duvauchelles have an easement by necessity over the Irwin Health Center property, instead of over the County roadway easement, is plainly untenable.

IV. Conclusion.

For the foregoing reasons, we affirm the December 22, 1998 amended final judgment of the circuit court and the

underlying September 2, 1997 order granting partial summary judgment on easements.

DATED: Honolulu, Hawaii, July 5, 2001.

On the briefs:

Hayden Aluli for defendant-appellant The Tides Foundation.

Chief Judge

Tom C. Leuteneker (Carlsmith Ball) for plaintiffs-appellees.

Associate Judge

Linden H. Joesting and Sonia Faust, Deputy Attorneys General, for defendant-appellee State of Hawai‘i.

Associate Judge