*** * * NOT FOR PUBLICATION * * ***

NO. 20928

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

DAVID RAIKE and SHAWN E. RAIKE,
Individually and as trustees of the RAIKE
IRREVOCABLE CHILDREN'S TRUST OF 1994,
Defendants/Counterclaimants-Appellants.

MOTION FOR RECONSIDERATION
(CIV. NO. 94-200K)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiffs/counterclaim defendants-appellees Mark Kimball, Keith Kimball and Craig Elevitch [hereinafter, collectively, the Kimballs] moved for reconsideration of this court's published opinion in Kimball v. Raike, No. 20928 (Haw. Aug. 9, 2002). The Kimballs request that we reconsider our decision voiding the lease in the instant case, arguing, inter alia, that we overlooked or misapprehended that our prior decision in Kimball v. Lincoln, 72 Haw. 117, 809 P.2d 1130 (1991) [hereinafter, Kimball I] held that the lease was valid. We granted the Kimballs' motion and, having examined the record in light of our decision in Kimball I, we vacate our August 9, 2002 opinion in its entirety and concurrently herewith order its

depublication. For the reasons discussed below, we affirm the judgment of the circuit court.

On appeal, defendants/counterclaimants-appellants David Raike and Shawn E. Raike, individually and as trustees of the Raike Irrevocable Children's Trust of 1994 [hereinafter, collectively, the Raikes] raised seven points of error, alleging that the Circuit Court of the Third Circuit, the Honorable Ronald Ibarra presiding, erred by denying their: (1) July 24, 1995 motion for partial summary judgment; (2) January 3, 1997 motion for judgment notwithstanding the verdict; (3) January 13, 1997 motion for declaratory judgment; (4) January 31, 1997 motion to alter or amend the judgment on the special verdict; and (5) May 16, 1996 motion in limine to exclude evidence of the intent of Lincoln. The Raikes also allege that the trial court erred in entering the amended final judgment because the Kimballs were not entitled to an award of attorneys' fees and costs and because the final judgment was not supported by the jury's special verdict, the evidence, or the applicable law.

First, the record on appeal does not contain the transcripts of the hearings on the: (1) motion for partial summary judgment; (2) motion for a judgment notwithstanding the verdict; (3) motion for declaratory judgment; or (4) motion to alter or amend the judgment on the special verdict. Additionally, none of the orders concerning these motions contain findings of fact or conclusions of law. Thus, the bases for the

trial court's denials of the Raikes' motions are not contained in the record on appeal, and this court therefore lacks the means to assess the merits of the Raikes' claims regarding these motions. See State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000); Bettencourt v. Bettencourt, 80 Hawai'i 225, 230-31, 909 P.2d 553, 558-59 (1995).

Second, despite the fact that the Raikes had failed to demonstrate in the record that the trial court erred in denying their motion for judgment notwithstanding the verdict, this court nevertheless addressed the Raikes' argument that the trial court should have entered findings of fact and conclusions of law terminating the lease because it created an illegal subdivision. Based on the Kimballs' motion for reconsideration, we conclude that all four requirements for collateral estoppel have been met: (1) the validity of the lease between Lincoln and Mark Kimball was previously litigated in Mark Kimball's declaratory action to establish that "there was a valid and subsisting lease of agricultural land." Kimball I, 72 Haw. at 118, 809 P.2d 1131. As previously indicated, the jury in that case determined that the lease was valid. Id. at 120, 809 P.2d at 1132; (2) in Kimball I, this court remanded the case for entry of a declaratory judgment according to the jury verdict, establishing a final judgment on the merits. See id. at 129, 809 P.2d at 136; (3) determining the validity of the lease was essential to the declaratory judgment; and (4) Mark Kimball is a party in both

actions, and the Raikes are in privity with Lincoln, their predecessor in interest. See State ex rel. Price v. Magoon, 75 Haw. 164, 191, 858 P.2d 712, 725 (1993). Inasmuch as collateral estoppel clearly bars relitigation of the issue of the validity of the lease between the present parties, this court's August 9, 2002 opinion erroneously held that the lease between Lincoln and Mark Kimball was invalid.

Third, with respect to the Raikes' motion in limine, because neither party contests the validity of the other's title to their respective parcels and the quitclaim deeds from the Lincoln Trust do not specifically refer to the Lincoln house and do not resolve the issue of whether the Lincoln house passed to the Kimballs as part of the 0.8-acre parcel or passed to the Raikes as part of the 17.7-acre parcel, evidence of Lincoln's intent was not barred by the common source of title doctrine, and the trial court did not reversibly err in admitting it. Cf. McCandless v. Honolulu Plantation Co., 19 Haw. 239, 241 (1911).

Fourth, with respect to the issue of attorneys' fees, the Raikes do not dispute that Mark Kimball is entitled to an award of fees under the terms of the lease, but appear to argue that the Kimballs' award should be reduced because Keith Kimball was not a party to the lease. However, the Kimballs were represented by a single attorney. The dispute over the Raikes' rights to the 17.7-acre parcel and the Lincoln house clearly arose out of the terms of the lease. Thus, in determining the

Raikes' rights to the 17.7-acre parcel and the Lincoln house, the trial court was necessarily required to determine Keith Kimball's rights as owner of the 0.8-acre parcel because of the position of the Lincoln house on both parcels. The Raikes have failed to establish that the determination of Keith Kimball's rights as owner of the 0.8-acre parcel caused any expenses beyond settling the dispute over the 17.7-acre parcel covered by the lease. Therefore, the Raikes have failed to demonstrate that the trial court's award of fees constituted an abuse of discretion.

Fifth, with respect to the Raikes' claims regarding the amended final judgment, they are barred from arguing that the amended final judgment is not supported by the special verdict or that it should have been entered against the trust alone inasmuch as: (1) the Raikes specifically represented that their proposed final judgment conformed to the special verdict rendered by the jury; (2) the language of the Raikes' proposed final judgment recognizing the easements is virtually identical to that adopted by the trial court; and (3) the exhibits submitted by the Raikes setting forth the specific location of the easements referenced in their proposed final judgment are identical to those attached to the court's amended final judgment. See State v. Puaoi, 78 Hawai'i 185, 189, 891 P.2d 272, 276 (1995). Accordingly,

IT IS HEREBY ORDERED that this court's August 9, 2002 opinion is vacated in its entirety and depublished. We affirm the trial court's: (1) order denying the Raikes' motion for

partial summary judgment, filed on September 14, 1995; (2) order denying the Raikes' motion for judgment notwithstanding the verdict, filed on July 8, 1997; (3) order denying the Raikes' motion for declaratory judgment regarding non-merger of estates, filed on July 8, 1997; (4) order denying the Raikes' motion to alter or amend the judgment on the special verdict, filed on July 8, 1997; (5) denial of the Raikes' motion in limine regarding Lincoln's intent, effective on December 18, 1996; (6) order awarding the Kimballs attorneys' fees, filed on July 8, 1997; and (7) amended final judgment, filed on August 8, 1997.

DATED: Honolulu, Hawai'i, March 8, 2004.

On the briefs:

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