*** FOR PUBLICATION in WEST'S HAWAI'I REPORTS and PACIFIC REPORTER ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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LETIZIA THOMPSON, Plaintiff-Appellant,

vs.

KYO-YA COMPANY, LTD., dba SHERATON-MAUI HOTEL, Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE NON-PROFIT ENTITIES 1-10; and DOE GOVERNMENTAL ENTITIES 1-10, Defendants.

NO. 26040

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 02-1-0209)

NOVEMBER 9, 2006

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.; AND ACOBA, J., CONCURRING SEPARATELY, WITH WHOM DUFFY, J., JOINS

OPINION OF THE COURT BY LEVINSON, J.

The plaintiff-appellant Letizia Thompson appeals from the August 18, 2003 judgment of the circuit court of the second circuit, the Honorable Shackley F. Raffetto presiding, in favor of the defendant-appellee Kyo-Ya Company, Ltd. dba Sheraton-Maui Hotel (hereinafter, "the Sheraton") and against Thompson.

On appeal, Thompson essentially argues that the circuit court erred in concluding that the Hawai'i Recreational Use Statute (HRUS), Hawai'i Revised Statutes (HRS) ch. 520 (1993 & Supp. 1997), applied to her presence on the Sheraton's grounds and thereby immunized the hotel from her negligence claims.

For the reasons discussed infra in section III, the Appellant's arguments are unavailing. Accordingly, this court affirms the circuit court's judgment.

I. BACKGROUND

A. Factual Background

The present matter arose out of an incident occurring on the island of Maui on September 26, 2000, when Thompson, a certified scuba instructor working as an independent contractor for Pacific Dive, a business located in Lahaina, led three students on a nighttime dive near the Sheraton at a location known as Black Rock.[1] Neither she nor her students had any affiliation with the hotel as employees or guests, nor had they any plans to visit the hotel during the evening in question. The group entered the water north of the hotel and dove south around Black Rock, exiting the water on the beach in front of the Sheraton. Upon exiting the water, the group, still fully clad in their scuba equipment but carrying their masks, fins, and snorkels, used the hotel's unlit beach-access path to return to their vehicles, which were parked in a lot on the hotel grounds provided free of charge for members of the public using the beach.

In her answer to interrogatories, Thompson described what occurred next:

> We were walking down the pathway to the parking garage when my foot dropped into a hole in the cement

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[1] Inasmuch as the facts surrounding the incident are not disputed, the factual background is drawn from Thompson's sworn answers to interrogatories and her January 4, 2003 deposition.

> pathway. I fell with full scuba gear on and my head hit the concrete. I remember the cracking sound of my skull. After that, I remember being unable to speak or move . . . .

B. Procedural Background

On April 30, 2002, Thompson filed a complaint against the Sheraton and, on May 17, 2002, amended the complaint to allege premises liability negligence claims. On June 30, 2003, the Sheraton filed a motion for summary judgment, asserting that, as Thompson was not on the hotel's property for any commercial purpose pertaining to the hotel, the HRUS immunized it from liability for her claims. In response, on July 21, 2003, Thompson filed a memorandum in opposition, arguing that the HRUS did not apply to her claims because she did not have a recreational purpose for being on the property but rather was on the land for vocational purposes as a scuba-diving instructor. Following a July 30, 2003 hearing, the circuit court granted the Sheraton's motion for summary judgment, issuing the following oral conclusion of law (COL): "The [c]ourt views this as coming under HRS [§] 520-4(b)[[2]] and finds that because whatever commercial interest there was here . . . was related in no way to the landowner . . . the statute applies . . . ." On August 6, 2003, the circuit court issued a written order granting the

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[2] HRS § 520-4(b) (Supp. 1997) provides in relevant part:

> An owner of land who is required or compelled to provide access or parking for such access through or across the owner's property because of state or county land use, zoning, or planning law . . . to reach property used for recreation purposes . . . shall be afforded the same protection as to such access, including parking for such access, as an owner of land who . . . permits any person to use that owner's property for recreational purposes under subsection (a)[, see infra section III.A.1.a, setting forth the general immunities granted under the HRUS].

Sheraton's motion and, on August 18, 2003, issued its final judgment in favor of the Sheraton and against Thompson on all claims. On August 21, 2003, Thompson filed a timely notice of appeal with this court.

II. STANDARDS OF REVIEW

A. Conclusions Of Law

> "'A COL is not binding upon an appellate court and is freely reviewable for its correctness.'" AIG Hawaii Ins. Co. v. Estate of Caraang, 74 Haw. 620, 628, 851 P.2d 321, 326 (1993) (quoting Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 119, 839 P.2d 10, 28 (1992)). This court ordinarily reviews COLs under the right/wrong standard. In re Estate of Holt, 75 Haw. 224, 232, 857 P.2d 1355, 1359 (1993). Thus, "'[a] COL that is supported by the trial court's [findings of fact] and that reflects an application of the correct rule of law will not be overturned.'" Estate of Caraang, 74 Haw. at 628-29, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29). "However, a COL that presents mixed questions of fact and law is reviewed under the clearly erroneous standard because the court's conclusions are dependent upon the facts and circumstances of each individual case." Id. at 629, 851 P.2d at 326 (quoting Amfac, Inc., 74 Haw. at 119, 839 P.2d at 29) (internal quotation marks omitted).
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> State v. Furutani, 76 Hawai'i 172, [180], 873 P.2d 51, [59] (1994).

Allstate Ins. Co. v. Ponce, 105 Hawai'i 445, 453, 99 P.3d 96, 104 (2004). (Some brackets and internal citations omitted.) (Some bracketed material altered.)

B. Interpretation Of Statutes

The interpretation of a statute is a question of law reviewable de novo. State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d

843, 852 (1996).

> Furthermore, . . . statutory construction is guided by established rules:
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> > When construing a statute, our foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. And we must read statutory language in the context of the entire statute and construe it in a manner consistent with its purpose.
> >
> > When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. . . .
> >
> > In construing an ambiguous statute, "[t]he meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." HRS § 1-15(1) [(1993)]. Moreover, the courts may resort to extrinsic aids in determining legislative intent. One avenue is the use of legislative history as an interpretive tool.
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> Gray [v. Admin. Dir. of the Court], 84 Hawai'i [138,] 148, 931 P.2d [580,] 590 [(1997)] (footnote omitted).

State v. Koch, 107 Hawai'i 215, 220, 112 P.3d 69, 74 (2005) (quoting State v. Kaua, 102 Hawai'i 1, 7-8, 72 P.3d 473, 479-80 (2003)). Nevertheless, absent an absurd or unjust result, see State v. Haugen, 104 Hawai'i 71, 77, 85 P.3d 178, 184 (2004), this court is bound to give effect to the plain meaning of unambiguous statutory language and may only resort to the use of legislative history when interpreting an ambiguous statute. State v. Valdivia, 95 Hawai'i 465, 472, 24 P.3d 661, 668 (2001).

C. Summary Judgment

> [This court] review[s] the circuit court's grant or denial of summary judgment de novo. . . .
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> [S]ummary judgment is appropriate if the pleadings, depositions, answers to

> interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 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. The evidence must be viewed in the light most favorable to the non-moving party. In other words, [this court] must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.
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> [Hawai'i Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000)] (citations and internal quotation marks omitted).

Querubin v. Thronas, 107 Hawai'i 48, 56, 109 P.3d 689, 697 (2005) (quoting Durette v. Aloha Plastic Recycling, Inc., 105 Hawai'i 490, 501, 100 P.3d 60, 71 (2004)) (internal citation omitted) (some brackets in original).

III. DISCUSSION

On appeal, Thompson asserts that the circuit court: (1) erred by implicitly concluding that, under Crichfield v. Grand Wailea, 93 Hawai'i 477, 6 P.3d 349 (2000), absent evidence of a commercial purpose related to the landowner for entering the hotel's property, any presence by Thompson on the property was presumptively recreational; and, hence, (2) erred in concluding that the HRUS immunized the Sheraton from Thompson's negligence claims. She contends that, under Crichfield, the determining factor as to whether an entrant is engaged in a "recreational use" and, hence, barred by the HRUS from pursuing negligence claims against the landowner is the subjective intent of the entrant, not the intent of the owner in holding open the land for

public use. She maintains that, inasmuch as her purpose at the Sheraton that evening was "occupational or vocational" as a paid diving instructor, she was not a recreational user under the HRUS.

The Sheraton argues that, inasmuch as Thompson concedes that she had no commercial purpose with the hotel, and that, under the plain language of HRS ch. 520, she was engaged in a recreational activity -- regardless of her motivation for doing so --, her presence falls under the HRUS.[3]

A. The HRUS

1. Ambiguity in the meaning of "recreational user" and "recreational purpose": The plain language of the HRUS and cases construing it

It is undisputed that Thompson's injury occurred on the Sheraton's land, and nowhere does Thompson argue that her students were not engaged in a recreational activity. The crux of the matter, therefore, is whether Thompson was on the Sheraton's property as a "recreational user" for "recreational purposes" under the HRUS when she was engaged in a traditionally

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[3] Thompson was injured on the beach access path as she and her students returned to their cars. She was, therefore, not, strictly speaking, engaged in the recreational activity of diving when she was injured. Nevertheless, the Sheraton was required to provide beach access and free parking as part of the requirements for obtaining its state and county building and use permits. Pursuant to HRS § 520-4(b), see supra note 2, therefore, the fact that Thompson was injured on the path and not while actually diving or using the Sheraton's beach property is immaterial in analyzing whether the HRUS defenses are available to her.

recreational activity[4] but with the subjective intent of doing so for vocational or occupational reasons.

As with any statutory inquiry, we begin by analyzing the plain language of HRS ch. 520.

a. The language of HRS ch. 520

HRS § 520-1 (1993) states that "[t]he purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." To achieve that goal, HRS § 520-3 (Supp. 1997) limits the duty of care owed by a landowner to members of the public entering the land for recreational purposes:

> Except as specifically recognized by or provided in [HRS §] 520-6[(1993) (relating to duties of persons entering the property)],[5] an owner of land owes no duty of care to keep the premises safe for entry or use by others for recreational purposes, or to give any warning of a dangerous condition, use, structure, or activity on such premises to persons entering for such purposes . . . .

Furthermore, HRS § 520-4(a) (Supp. 1997) limits the liability of an owner to any recreational entrant:

> Except as specifically recognized by or provided in [HRS §] 520-6,[see supra note 5,] an owner of land who either directly or indirectly invites or permits

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[4] Thompson concedes that "scuba diving can be recreational and is similar to other 'recreational' activities listed [in HRS § 520-2], e.g., fishing, swimming and water skiing."

[5] HRS § 520-6 in fact emphasizes the duty of the entrant:

> Nothing in this chapter shall be construed to:
> (1) Create a duty of care or ground of liability for injury to persons or property.
> (2) Relieve any person using the land of another for recreational purposes from any obligation which the person may have in the absence of this chapter to exercise care in the person's use of such land and in the person's activities thereon, or from the legal consequences of failure to employ such care.

> without charge any person to use the property for recreational purposes does not:
>
> (1) Extend any assurance that the premises are safe for any purpose;
>
> (2) Confer upon the person the legal status of an invitee or licensee to whom a duty of care is owed;
>
> (3) Assume responsibility for, or incur liability for, any injury to person or property caused by an act of omission or commission of such persons; and
>
> (4) Assume responsibility for, or incur liability for, any injury to person or persons who enter the premises in response to an injured recreational user.[6]

Finally, by its plain language, HRS § 520-4(b), see supra note 2, extends the liability limitations set forth in HRS § 520-4(a) to any public access or parking area an owner is compelled by state or county officials to provide for recreational entrants. Nevertheless, while HRS § 520-4(b) establishes that the protections of HRS § 520-4(a) apply equally to public access areas such as the pathway in the present matter, it does not elaborate on the nature or scope of the protections afforded by HRS § 520-4(a).

In Crichfield, this court summarized the overall effect of the HRUS on land owner liability:

> [The] HRUS confers upon the owner of the land immunity from negligence liability to any person -- who is neither charged for the right to be present nor a houseguest[, see supra note 6] -- injured on the land while that person is using the owner's land for a recreational purpose. In other words, if a person is injured on an owner's land, but that person was not on the land for a recreational purpose, [the] HRUS does not, by its plain language, immunize the owner from tort liability.

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[6] HRUS allows for only three exceptions to the limitations to landowner duty and liability set forth in HRS §§ 520-3 and 520-4: (1) willful or malicious failures to warn by the landowner; (2) entrance to the land being premised on payment of a fee; and (3) any claim involving a houseguest of the owner as plaintiff. See HRS § 520-5 (1993). Thompson concedes that none of the three exceptions apply in the present matter. As noted supra, the Sheraton provides public parking for beachgoers free of charge.

93 Hawai'i at 485, 6 P.3d at 357. (Internal quotations omitted.) In most suits where a HRUS defense has been invoked, the question whether a party is a recreational user has been outcome-dispositive. See, e.g., Howard v. United States, 181 F.3d 1064 (9th Cir. 1999); Palmer v. United States, 945 F.2d 1134 (9th Cir. 1991); Brown v. United States, 180 F. Supp. 2d 1132 (D. Haw. 2001).

Resorting to the plain language of HRS ch. 520 for a definition of recreational user is of limited value. HRS § 520-2 (Supp. 1997) defines "recreational user" to mean "any person who is on or about the premises that the owner of the land . . . indirectly . . . permits, without charge, entry onto the property for recreational purposes." "Recreational purpose," in turn, is defined as including "but not limited to any of the following[:] . . . fishing, swimming, boating, . . . and viewing or enjoying . . . scenic or scientific sites." HRS § 520-2.

As noted, the Sheraton contends that Thompson, as a person using the beach path to return to her car after diving, falls within the plain language of HRS § 520-2 and, hence, that the HRUS operates to bar her negligence claims. The hotel asserts that the mere fact that she engaged in the activity as part of a paid arrangement with her students "does not transform the 'recreational purpose'[] to a 'non-recreational' one."

Thompson, on the other hand, insists that, under Crichfield, her subjective intent to enter the property for a vocational pursuit, even one unrelated to the landowner, is sufficient to establish a non-recreational use of the land. Thompson's argument is unavailing.

b. *Crichfield*

This court concluded in Crichfield that neither the subjective intent of the landowner in holding open the property nor the subjective intent of the entrant in visiting the property were necessarily dispositive as to whether the plaintiff was a recreational user for the purposes of the HRUS. 93 Hawai'i at 487-88, 6 P.3d at 359-60 (noting, "as a preliminary matter, that the subjective intent of an owner of land is obviously relevant to whether he or she has directly or indirectly invited or permitted an injured party to use the land without charge for a recreational purpose" but concluding that the entrant's subjective intent is also material)[7] (internal quotations omitted).

In Crichfield, the plaintiffs alleged that they had entered the Grand Wailea's grounds both to enjoy the gardens and for the commercial purpose of having lunch at one of the hotel's restaurants. 93 Hawai'i at 481, 6 P.3d at 353. This court concluded that the commercial purpose of having lunch at the hotel was a non-recreational use of the property and, in vacating the grant of summary judgment in favor of the hotel, weighed the intent of the landowner and the intent of the entrant and concluded that the plaintiffs' allegations of a commercial purpose with the hotel raised a genuine issue of material fact. 93 Hawai'i at 487-88, 6 P.3d at 359-60. The result in Crichfield

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[7] In concluding that both the subjective intent of the landowner and of the entrant were material in determining whether an entrant qualifies as a recreational user, this court concluded that the United States Court of Appeals for the Ninth Circuit had misconstrued the HRUS in Howard, 181 F.3d at 1073 (concluding that the plaintiff's subjective intent for being on the land was immaterial in the analysis). 93 Hawai'i at 486-87, 6 P.3d at 358-59.

was based on the legislative history underlying HRS ch. 520 that expressly stated that the HRUS would not affect landowners' common law liability toward business invitees of the landowner, 93 Hawai'i at 488, 6 P.3d at 360 (quoting Sen. Stand. Comm. Rep. No. 534, in 1969 Senate Journal, at 1075), and a recognized need to prevent commercial establishments from exploiting the HRUS to escape well-settled landowner duties to non-recreational entrants, 93 Hawai'i at 489, 6 P. 3d at 361.

c. *Palmer* and *Brown*

Research reveals only two other cases that have construed the terms "recreational purpose" and "recreational user" as set out in the HRUS. In Palmer, 945 F.2d 1134, decided before Crichfield, the United States Court of Appeals for the Ninth Circuit affirmed a decision of the district court holding that the HRUS shielded a military recreational facility from negligence liability claims asserted by a grandfather who slipped and fell at a swimming pool while watching over his granddaughters. Id. at 1135. Palmer was only allowed access to the pool area to watch his granddaughters as a favor to his stepdaughter and was not himself allowed in the pool, which was restricted to military personnel and their dependents. Id. at 1136-37. Palmer argued that, because he was denied access to the pool, he was not a recreational entrant and, hence, the HRUS did not shield the facility from his claims. Id. at 1136. The court first considered the intent of the landowner, concluding that, because "[t]he United States has chosen to make the pool . . . available for recreational use free of charge . . . [,therefore,] the HRUS is applicable to the pool under the plain, unambiguous

language of the statute." Id. Addressing next Palmer's contentions that, because his subjective intent in being at the pool was allegedly as a pseudo-lifeguard and therefore not recreational, the court reasoned:

> Even assuming that watching over one's own grandchildren is not a recreational activity, Palmer's services conferred no benefit upon the [recreational facility]. He was not there for the [facilities]' purposes, but rather to facilitate his grandchildren's authorized use of the pool. . . . He was allowed on the property for his granddaughters' recreational purposes, which is the type of permissive use the HRUS seeks to encourage. Moreover, Palmer's behavior was consistent with relaxation and recreation. . . . We therefore conclude that he was engaged in a recreational activity for purposes of the HRUS. By affording immunity in this situation, the purpose of the HRUS to encourage landowners to make their recreational property available for use is served.

Id. at 1136-37. The Palmer court, therefore, considered the intent of the landowner in holding the land open for use, the subjective intent of the entrant, as well as the nature of the entrant's activity while on the property and whether the activity conferred any benefit upon the landowner such that it would be equitable to impose a corresponding duty of care upon the landowner.

The United States District Court for the District of Hawai'i, in Brown, focused primarily on the subjective intent of the entrant. The court concluded that a genuine issue of material fact existed as to whether the plaintiff was on a bicycle path on military land for recreational or non-recreational purposes, given the evidence that he was commuting to work[6] on the day he swerved to avoid a runner and suffered

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[6] It was uncontested that the bicycle Brown was riding that day was specially equipped for commuting, with mirrors, lights, bags, and rainguards. (continued...)

injuries. 180 F. Supp. 2d at 1140. The Brown court concluded that "[t]he Howard and Crichfield courts agree that the 'subjective intent of an owner of land is obviously relevant to whether he or she has directly or indirectly invited or permitted' a person to use the land for recreational purposes," but nevertheless interpreted Crichfield to mean that testimony by the plaintiff that entry was for a non-recreational purpose was sufficient in itself to avoid summary judgment on a HRUS defense. 180 F. Supp. 2d at 1139-40 (some internal quotation marks omitted) (quoting Crichfield, 93 Hawai'i at 487, 6 P.3d at 359) (citing Howard, 181 F.3d at 1072-73).

In Crichfield, this court noted that the "HRUS is ambiguous . . . regarding the standpoint or perspective from which 'recreational purpose' is ascertained." 93 Hawai'i at 487, 6 P.3d at 359. Palmer, Howard, Crichfield, and Brown struggled to define "recreational purpose" and "recreational user" under the HRUS, but there remains indistinctiveness and uncertainty surrounding the terms. An ambiguity exists in the present matter as to whether an activity that (1) is unrelated to the owner of the land and (2) generally falls within the definition of a recreational activity as set forth in HRS § 520-2, see supra section III.A.1.a, can be transformed from a recreational use into a non-recreational one solely by virtue of the plaintiff's subjective reasons for engaging in the activity. Inasmuch as an ambiguity exists, this court may examine the legislative history for guidance. Koch, 107 Hawai'i at 220, 112 P.3d at 74.

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[6](...continued)
180 F. Supp. 2d at 1134.

2. The legislature granted landowners reduced liability exposure to encourage opening private lands to the public for exercise, sightseeing, and access to Hawaii's scenic beauty.

In 1969, the Senate Committee on Lands and Natural Resources, in reporting on Senate Bill 56, the origins of the HRUS, stated that "[t]he purpose of this bill is to limit the liability of landowners who permit persons to use their property for recreational purposes without charge." Sen. Stand. Comm. Rep. No. 534, in 1969 Senate Journal, at 1075. The House Committee on the Judiciary expressed similar sentiments. See Hse. Stand. Comm. Rep. No. 760, in 1969 House Journal, at 914. The Senate committee, however, also noted that it had "amended this bill by deleting section 6 which provide[d] that an owner who provides a public right-of-way through his land to beach areas shall maintain such right-of-way, because it creates an undue burden on landowners." Sen. Stand. Comm. Rep. No. 534, in 1969 Senate Journal, at 1075. The legislature in 1996 further limited the duties of the owners of properties like the Sheraton that maintain beach right-of-ways. Effective June 12, 1996, the legislature amended HRS § 520-4 by adding subsection (b), see supra note 2, to ensure that properties required to provide public access paths to recreational areas would benefit from the same protections afforded owners of the actual recreational lands themselves.

In Crichfield, this court summarized the legislature's intent in enacting and, in 1996, amending the HRUS:

> Thus, the legislature enacted [the] HRUS to encourage the recreational use of our state's resources by limiting landowners' liability to recreational users and, thereby, promoting the use and enjoyment of

> Hawaii's resources. Indeed, in amending [the] HRUS in 1996, the legislature reaffirmed its original intent:
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> > . . . The legislature finds that encouraging the public to engage in recreational activities makes for healthier citizens and allows everyone to enjoy Hawaii's natural resources. In 1969, when the legislature enacted chapter 520, Hawai'i Revised Statutes, to encourage wider access to lands and waters for hunting, fishing, and other activities, the intent was to make access easier and limit landowners' liability.

93 Hawai'i at 488-89, 6 P.3d at 360-61 (emphasis in Crichfield) (quoting 1996 Haw. Sess. L. Act 151, § 1 at 328). Nevertheless, this court also noted that the "HRUS was not intended . . . to have created out of whole cloth a universal defense available to a commercial establishment . . . against any and all liability for personal injury" and that the general rule regarding landowner liability to non-recreational entrants remained intact:

> "a possessor of land, who knows or should have known of an unreasonable risk of harm posed to persons using the land, by a condition on the land, owes a duty to persons using the land to take reasonable steps to eliminate the unreasonable risk, or warn the users against it."

93 Hawai'i at 489, 6 P.3d at 361 (quoting Richardson v. Sports Shinko (Waikiki Corp.), 76 Hawai'i 494, 503, 880 P.2d 169, 178 (1994)).

This court should, therefore, approach the analysis of whether a HRUS defense is available to the Sheraton in the present matter by seeking an outcome that "encourage[s] the recreational use of our state's resources by limiting landowners' liability to recreational users and, thereby, promot[es] the use and enjoyment of Hawaii's resources" by "encourag[ing] wider access to lands and waters for . . . fishing and other

activities," while respecting traditional duties owed by landowners to non-recreational entrants.

B. Inasmuch As Thompson's Presence On The Land Was "An Action In Pursuit Of The Use Of The Property For Recreation," The Circuit Court Correctly Entered Summary Judgment For The Sheraton.

Thompson's position would encourage land closures[9] and fails to address the inequities that would result. By her own argument, Thompson directly benefitted economically from the availability of the path, which enabled her to use the Black Rock beach to guide recreational diving groups.[10] Thompson's use of the path that evening as a paid scuba diver would not have occurred were it not for the recreational use of the ocean and the beach by her clients. Yet Thompson would bite the hand that feeds her by stripping the protections of the HRUS from the landowner, contrary to the legislature's intent to encourage landowners to allow entry to individuals wishing to "use . . . the owner's land for recreational purposes -- i.e., the recreational enjoyment of the natural resources that are an inextricable part of Hawaii's land and waters." Crichfield, 93 Hawai'i at 489, 6 P.3d at 361.

Our research reveals only one case nationally that considers an argument similar to Thompson's, and the court

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[9] It would also arguably run counter to the legislature's purposes behind enacting HRS § 520-4(b), see supra note 2, i.e., extending HRUS immunity to beach paths like the one in question, as well as the legislative intent expressed in Sen. Stand. Comm. Rep. No. 534, in 1969 Senate Journal, at 1075, see supra section III.A.2, that requiring "an owner who provides a public right-of-way through his land to beach areas . . . [to] maintain such right-of-way . . . [would] create[] an undue burden on landowners."

[10] Thompson states in her deposition that, as a responsible instructor, she would not trespass on private land in order to reach the dive site, which is why she used the beach access path.

reached a result antithetical to Thompson's position. In Hafford v. Great N. Nekoosa Corp., 687 A.2d 967 (Me. 1996), the plaintiff, a recreational outfitter supplying canoeing and camping enthusiasts on the Allagash Waterway in Maine, was injured in an auto accident on a private road owned by Great Northern while transporting his staff to pick up his clients' vehicles. Id. at 968. Hafford asserted that the recreational use statute[11] did not apply to him because he was on the property

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[11] In Hafford the court based its analysis on Me. Rev. Stat. Ann. tit. 14, § 159-A, a recreational use statute similar to the HRUS, which provided in pertinent part:

> 1. **Definitions.** As used in this section, unless the context indicates otherwise, the following terms have the following meanings.
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> . . . .
>
> B. "Recreational . . . activities" means recreational activities conducted out-of-doors, including, but not limited to, hunting, fishing, . . . camping, environmental education and research, hiking, sight-seeing, . . . hang-gliding, . . . equine activities, boating, sailing, canoeing, rafting, biking, picnicking, swimming or activities involving the harvesting or gathering of forest, field or marine products. It includes entry of, volunteer maintenance and improvement of, use of and passage over premises in order to pursue these activities. . . .
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> . . . .
>
> 2. **Limited duty.** An owner . . . or occupant of premises does not have a duty of care to keep the premises safe for entry or use by others for recreational . . . activities or to give warning of any hazardous condition, use, structure or activity on these premises to persons entering for those purposes. . . .
>
> 3. **Permissive use.** An owner . . . or occupant who gives permission to another to pursue recreational . . . activities on the premises does not thereby:
>
> A. Extend any assurance that the premises are safe for those purposes;
>
> B. Make the person to whom permission is granted an invitee or licensee to whom a duty of care is owed; or
>
> C. Assume responsibility or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.
>
> 4. **Limitations on section.** This section does not limit the liability that would otherwise exist:
>
> A. For a willful or malicious failure to guard or to warn against a dangerous condition, use, structure or activity;
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> B. For an injury suffered in any case where permission to pursue any recreational . . . activities was granted for a consideration other than the consideration, if any, paid to the following:

(continued...)

for vocational reasons. Id. at 969. The Maine Supreme Judicial Court affirmed the lower court's grant of summary judgment in favor of Great Northern, concluding that

> [t]he trial court correctly concluded that Hafford's travel over Great Northern's land was an action in pursuit of the use of the property for recreation even though Hafford was paid by his customers to provide transportation. Hafford was passing over Great Northern's land to facilitate his customer's recreational pursuits; his status as a commercial outfitter does not change the fact that he was using the land for recreational purposes.

Id. As the Hafford court reasoned, an individual whose purpose for being on the land is unrelated to the owner and is predicated upon the land being available to the public for recreational use at no charge by the landowner due to a recreational use statute is a "recreational user" for the purposes of the statute. The reasoning is sound: without such a rule, entrants who took advantage of open lands to participate in nature walks, scuba

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[11](...continued)

> (1) The landowner or the landowner's agent by the State; or
> (2) The landowner or the landowner's agent for use of the premises on which the injury was suffered, as long as the premises are not used primarily for commercial recreational purposes and as long as the user has not been granted the exclusive right to make use of the premises for recreational activities; or
>
> C. For an injury caused, by acts of persons to whom permission to pursue any recreational . . . activities was granted, to other persons to whom the person granting permission, or the owner . . . or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.
>
> 5. **No duty created.** Nothing in this section creates a duty of care or ground of liability for injury to a person or property.

The Maine statute does not contain an equivalent to HRS § 520-4(b), see supra note 2, which applies the liability limits set forth in HRS § 520-4(a), see supra section III.A.1.a, to public access areas provided by owners under state or county compulsion. Nevertheless, inasmuch as HRS § 520-4(b) merely expands the geographic reach of the protections afforded by HRS § 520-4(a) and inasmuch as HRS § 520-4(a)(1) to (3) is substantially similar to Me. Rev. Stat. Ann. tit. 14, § 159-A(3), the analytical power of the Hafford court's reasoning as applied to Thompson's arguments remains undiminished.

dives, or archeological studies free of charge or benefit to the landowner would be divided into two classes of plaintiffs -- the bulk of the entrants would be barred from pursuing negligence claims against the landowner, while a member of the group paid to guide or instruct the others would not -- despite the fact that, from the viewpoint of the landowner, the two classes were indistinguishable. Such disparate treatment would be inequitable, particularly inasmuch as the favored individual benefits economically from the opening of the land, and such a policy would, no doubt, discourage landowners from allowing any entrants onto their land for fear that one of them might be earning money from the visit.

Rather, a more just result is reached under the reasoning in Hafford, concluding that where the plaintiff's presence on the land is closely associated with the presence of individuals whose purpose on the land is purely recreational, the recreational purpose attaches to the plaintiff. We find the reasoning in Hafford persuasive.

In the present case, in which Thompson's presence on the land would not have occurred but for the recreational activity undertaken by her students and in which she derived a direct financial benefit from the policies underlying HRS ch. 520, to allow her to benefit financially while concluding that the landowner is afforded no protection by HRS ch. 520 would be unfair and contrary to the intent of the legislature.

We, therefore, hold that the circuit court correctly concluded that Thompson's status on the Sheraton's property fell as a matter of law within the ambit of HRS ch. 520 as a recreational user, inasmuch as she was engaged in "an activity in

pursuit of the use of the property for recreational purposes" and, therefore, that the Sheraton was immunized from her negligence claims under the HRUS. We further hold that, inasmuch as there were no genuine issues of material fact in dispute, the circuit court correctly entered summary judgment in favor of the Sheraton and against Thompson.

Our holding accords with legislative intent and with this court's holding in Crichfield.[12] Moreover, unlike Crichfield, there is no danger in the present matter that this ruling will allow owners to exploit the HRUS to avoid liability for activities related to them or from which they benefit.[13]

IV. CONCLUSION

In light of the foregoing, this court affirms the circuit court's August 18, 2003 judgment in favor of the Sheraton and against Thompson.

On the briefs:

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[12] Indeed, in Crichfield, the court characterized "permitting public access to the beach and ocean" as a recreational purpose. 93 Hawai'i at 487, 6 P.3d at 359.

[13] This court offers no opinion as to whether commercial purposes related to the owner comprise the entirety of possible non-recreational uses that plaintiffs may allege to avoid application of HRS ch. 520. In Crichfield, the business-invitee nature of the plaintiffs' allegations and this court's concern that commercial establishments could abuse the HRUS as an improperly broad shield from negligence liability led us to that holding.