*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26412

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KILOHANA RESIDENT COUNCIL, Plaintiff-Appellee,

vs.

KORENA K. JUSTICE, Defendant-Appellant,

and

CONCHITA C. SOMERA, Defendant.

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E. M. RIMANDO
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STATE OF HAWAI'I

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
(CIVIL CASE NO. 1RC02-1-8802)

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

Defendant-Appellant Korena K. Justice ("Korena") appeals from the judgment of the District Court of the First Circuit ("district court") filed September 18, 2003, pursuant to which a writ of summary possession against her issued.[1,2] On appeal, Korena argues that the district court erred by failing to credit her affirmative defense to summary possession, which was that Plaintiff-Appellee Kilohana Resident Council ("KRC") violated certain provisions of the federal Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. § 3601 et seq., and Hawai'i Revised Statutes ("HRS") Chapter 515 (relating to discrimination in real property transactions) by refusing to

[1] Korena filed a notice of appeal from the district court's judgment filed January 15, 2004 which awarded attorney's fees and costs to Plaintiff-Appellee Kilohana Resident Council ("KRC"). KRC moved to dismiss the appeal, but this court deemed the notice of appeal timely and effective to appeal both the January 15, 2004 fees and costs judgment and the September 18, 2003 judgment issuing writ of possession. Only the September 18, 2003 judgment issuing writ of possession is being challenged in the instant appeal.

[2] The Honorable David W. Lo presided over, inter alia, the summary possession trial.

permit a chihuahua named Biker to remain in her apartment as an emotional-support animal to alleviate her mental illness.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) Assuming without deciding that Korena may present an affirmative defense to summary possession by demonstrating housing discrimination under the FHAA, Korena has not demonstrated a violation of the FHAA, because she did not show that Biker's presence was necessary to afford her an equal opportunity to use and enjoy her dwelling.

We first note that Korena asserts that the following portion of the district court's oral ruling is an erroneous conclusion of law subject to the right/wrong standard of review:

> . . . based on defendant's own testimony, that's defendant Korena's own testimony as well as the reports of both doctors, the [c]ourt is going to find that this pet is helpful, but not a medical necessity nor reasonably appropriate to create an exception to the no pet [house rule]. Such exception would include seeing eye, signal, or service dog.

See Aluminum Shake Roofing, Inc. v. Hirayasu, 110 Hawai'i 248, 252, 131 P.3d 1230, 1234 (2006). We disagree, and hold that the district court's ruling is a conclusion of law presenting mixed questions of fact and law because, inter alia, the district court's ultimate conclusion that Biker was "not a medical necessity nor reasonably appropriate to create an exception to the no pet [house rule]" was intrinsically dependent upon the facts and circumstances of the case. Thus, the appropriate standard of review is the clearly erroneous standard. See Aluminum Shake Roofing, id.

We observe that the U.S. Court of Appeals for the Ninth Circuit has adopted a four-prong test for determining whether a

landlord has failed to reasonably accommodate a "handicapped" tenant under FHAA.[3] Pursuant to United States v. California Mobile Home Park Mgmt. Co., 107 F.3d 1374, 1380 (9th Cir. 1997) ("Mobile Home II"),

> [in order] [t]o establish her claim, [Korena] [was] required to show that: (1) [Korena] suffers from a handicap as defined in 42 U.S.C. § 3602(h) [(2000)];[4] (2) [KRC] knew of [Korena's] handicap or should reasonably be expected to know of it; (3) accommodation of the handicap "may be necessary" to afford [Korena] an equal opportunity to use and enjoy the dwelling; and (4) [KRC] refused to make such accommodation.

(Emphases added.) (Footnote added.) (Citing, inter alia, 42 U.S.C. § 3604(f)(3)(B) (2000) and quoting the "may be necessary" language therefrom.) As to definition of "necessary," the Mobile Home II court approvingly quoted the Sixth Circuit, which interpreted "necessary" "to mean that [claimants] 'must show that, but for the accommodation, they likely will be denied an equal opportunity to enjoy the housing of their choice[.]'" Id.

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[3] The following FHAA provisions are relevant to this appeal.

42 U.S.C. § 3604(f)(1) (2000) (relating to, inter alia, discrimination in the rental or sale of housing) makes it unlawful

> [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--
>
> (A) that buyer or renter,
>
> (B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
>
> (C) any person associated with that buyer or renter.

(Emphasis added.) 42 U.S.C. § 3604(f)(3) defines "discrimination" as "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling[.]" See 42 U.S.C.A. § 3604(f)(3)(B). We also note that private rights of action in state or federal court are afforded under the FHAA. See 42 U.S.C.A. § 3613 (2000).

[4] 42 U.S.C.A. § 3602(h) defines "handicap" as "a physical or mental impairment which substantially limits one or more of such person's major life activities[.]" See 42 U.S.C.A. § 3602(h)(1).

(quoting via parenthetical Smith & Lee Assocs., Inc. v. City of Taylor, 102 F.3d 781, 795 (6th Cir. 1996)) (emphasis added).

Turning to the third Mobile Home II prong (necessity of the reasonable accommodation), Korena argues that allowing Biker to remain in her household at the Kilohana Apartments was necessary to afford her an equal opportunity to use and enjoy the apartment because "the benefit to Korena of being allowed to keep Biker in her home was immense given the undisputed fact that Biker substantially ameliorated the effects of Korena's disabilities." However, assuming arguendo that this benefit to Korena was both "undisputed" and "immense," said benefit is irrelevant to the question of whether Biker's presence was "necessary" under the FHAA. In other words, Korena's argument does not suffice as a showing that but for Biker being allowed to live at the Kilohana Apartments, Korena will likely be denied an equal opportunity to enjoy the housing of her choice. Mobile Home II, 107 F.3d at 1380 (quoting via parenthetical City of Taylor, 102 F.3d at 795).

Moreover, Korena does not challenge the following findings of the district court:

> . . . The [c]ourt further note[s] that [Biker] came into the picture only two years ago. Based on Dr. Marvit's testimony that . . . the dog or pet is not reasonably or medically a necessity, further, his testimony that the illness that Korena suffers from is biologically based, which should be treated with medication, with or without a pet.

(Emphasis added.) The district court expressly credited Marvit's testimony and found that Korena's mental illness (i.e., her disability) was responsive to medication with or without Biker.

These unchallenged findings are binding on this court,[5] and the district court's finding of fact that Korena's treatment did not depend on Biker's presence negates the element of necessity under the FHAA. We are therefore not left with a firm and definite conviction that a mistake has been committed. See Aluminum Shake Roofing, 110 Hawai'i at 252, 131 P.3d at 1234. Inasmuch as the district court did not clearly err as to the aforementioned conclusion of law presenting a mixed question of law and fact, see supra at 2, we therefore hold that Korena's first argument is without merit.

(2) After careful review, we hold that Korena's state law point of error (ostensibly based upon HRS Chapter 515) is waived. Korena's argument on appeal is in all material aspects entirely premised upon her federal, FHAA claim. On the other hand, Korena does not present any discernible argument relating to her state law claim. See HRAP Rule 28(b)(7) (2004) (argument must contain "the contentions of the appellant on the points [of error] presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on[]" or the predicate point of error may be deemed waived); see also, e.g., Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (App. 2000) ("[a]n appellate court does not have to address matters for which the appellant has failed to present discernible argument" (citations omitted)). Therefore, the district court's judgment for possession filed September 18, 2003 is affirmed.

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[5] See e.g., Okada Trucking Co., Ltd. v. Board of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002) ("Findings of fact . . . that are not challenged on appeal are binding on the appellate court[]" (citations omitted)), recon. denied, 101 Hawai'i 233, 65 P.3d 180 (2002).

(3) Because (a) we affirm the district court's judgment for possession filed September 18, 2003, and (b) Korena presents no challenge to the district court's judgment filed January 15, 2004 awarding KRC attorney's fees and costs, we hold that the district court's January 15, 2004 judgment awarding KRC attorney's fees and costs is affirmed. Therefore,

IT IS HEREBY ORDERED that (1) the district court's judgment for possession filed September 18, 2003 is affirmed, and (2) the district court's judgment awarding KRC attorney's fees and costs filed January 15, 2004 is affirmed.

DATED: Honolulu, Hawai'i, April 9, 2007.

On the briefs:

Michael P. Kalish
(of Legal Aid Society of Hawai'i)
for Defendant-Appellant
Korena K. Justice

Alvin T. Ito
for Plaintiff-Appellee
Kilohana Resident Council