SCWC NO. 10-150

IN THE SUPREME COURT OF THE STATE OF HAWAII

GEOFFREY MOLFINO, Plaintiff-Appellant and Petitioner, vs. CHRISTOPHER J. YUEN, in his capacity as Planning Director for the County of Hawaii, and COUNTY OF HAWAII, Defendants-Appellees and Respondents.	CIVIL NO. 07-1-0378 APPLICATION FOR WRIT OF CERTIORARI FROM THE SUMMARY DISPOSITION ORDER OF THE HAWAII INTERMEDIATE COURT OF APPEALS, FILED ON AUGUST 28, 2013. HAWAII INTERMEDIATE COURT OF APPEALS HON. KATHERINE G. LEONARD HON. LAWRENCE M. REIFURTH HON. LISA M. GINOZA Associate Judges

REPLY TO RESPONSE TO APPLICATION FOR CERTIORARI

and

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REPLY TO RESPONSE TO APPLICATION FOR CERTIORARI

I.

INTRODUCTION.

On December 9, 2013, Plaintiff-Appellant and Petitioner GEOFFREY MOLFINO (Molfino) filed an Application for Writ of Certiorari (Application) asking, "whether the Hawaii County Planning Department, which issues critical rulings regarding subdivisions on Big Island property, and maintains permanent subdivision records for its own purposes and public access, has a duty to exercise reasonable care in the maintenance of existing subdivision records." Application at 1. Although unable to locate any precedent in Hawaii case law, and without reviewing relevant statutes, ordinances or rules, or considering the Planning Department's own stated policies, the ICA issued a five-page SDO declaring, "strong policy considerations compel us to reject Molfino's argument that Appellees owed a duty to maintain accurate and complete records for persons who seek information regarding the degree to which real property may be capable of subdivision." Application, Exhibit D at 5.

On December 18, 2013, Defendants-Appellees and Respondents CHRISTOPHER J. YUEN, in his capacity as Hawaii County Planning Director, and COUNTY OF HAWAII (together, the County), filed their Response to Application for Writ of Certiorari (Response). The County contends: a) the Application contains numerous inaccurate and unsupported statements, b) Molfino raises issues and arguments not raised in trial court below, c) the County owes no duty to Molfino to maintain accurate existing records, and d) if a duty exists, other grounds justified summary judgment below.

II.

ARGUMENT

A. THE DISPUTED FACTUAL RECORD

First, the County's factual summary sounds more like a closing argument than a brief urging affirmance of a summary judgment ruling. Response at 3-4. "Any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party." **Makila Land Company v. Kapu**, 114 Hawai'i 56, 67, 156 P.3rd 482 (App. 2006). "Courts are normally more indulgent towards the materials submitted by the non-moving party." *Id*. "This is because of the drastic nature of summary judgment proceedings, which should not become a substitute for existing methods of determining factual issues." *Id*.; *see also* **TriS Corp. v. Western World Insurance**, 110 Hawai'i 473, 487, 135 P.3d 82 (2006) ("the court must review all the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion"); **IndyMac Bank v. Miguel**, 117 Hawai'i 506, 519, 184 P.3d 821 (App. 2008) ("summary judgment is a drastic remedy which must be cautiously invoked in order to avoid improperly depriving a party to a lawsuit of the right to a trial on disputed factual issues.") Moreover, none of the County's contrary factual assertions are supported by the record below.

First, the County claims "when Mr. Pruglo, the subsequent purchaser, submitted his request for six pre-existing lots, he provided [the Goldstein approval letter] to the County." Response at 3 n.4, *citing* DOC-1, pg. 28. In fact, the County's citation is to Molfino's Complaint, *not any evidence submitted below*. *Id*. According to Paragraph 21, Pruglo's agent met with Planning Department officials on January 12, 2005, and obtained the Goldstein letter, which he subsequently attached to his client's request for a similar subdivision. *Id*. Nothing in Paragraph 21 or anywhere else in the record suggests that Pruglo or his agent found or produced the Goldstein letter, or how it

came into the possession of Planning Department officials in 2005. *Id*. Moreover, Pruglo, Yuen and Cheplic were deposed, amd none of them were asked and none testified that Pruglo or his agent found the missing Goldstein letter or submitted it to the Planning Department. DOC-57, Exhibit W; DOC-59, Exhibits 4,5. County official Edward Cheplic testified that he checked the TMK file for "this important document" in 2004, when researching Molfino's application for a 7-lot subdivision, and he found no correspondence or plat mentioning a six-lot subdivision. DOC 59, Exhibit 5 at 35,38. Finally, even assuming Molfino had some obligation to locate or attach prior subdivision rulings that were not contained in the agency's TMK file, which is doubtful, that did not abrogate the County's acknowledged duty to keep accurate existing records.

Second, the County asserts, "the mere fact that one property owner receives a benefit while another is denied, does not constitute a basis for legal action." Response at 3 n.4, *citing* **Matter of Cowan v. Kern**, 394 N.Y.S.2d 579 (1977). Molfino agrees with this old New York case, but he did not argue that below and does not now. Molfino did not claim unequal treatment of two property owners based on *identical* facts, but rather inconsistent rulings based on *different* facts caused by negligent record keeping. The Planning Department misplaced documents for over a year and then changed its subdivision ruling on the same property when it found them in 2005.

Third, the County claims, "the Planning file is kept for internal purposes," and *not* for "owners, sellers, buyers, lessors, lessees, legislators and judges." Response at 4. "Perhaps Molfino is confusing the Planning Department file with the property files kept by the real property Division." *Id*. at 4 n.5. The County offers no evidence to support this claim of limited access, and it contradicts Yuen's testimony about his Department's files and the County's obligations under **HRS** Chapter 92F to make existing files available to the public. *See* DOC-59, Exhibit 4. Regardless, is the County conceding that its Real Property Division has a duty to maintain accurate and complete

records, subject to a suit for negligence? Are Real Property Division records subject to Hawaii's **Uniform Information Practices Act**, while Planning Department records are not? Are Director Yuen's "internal records" exempt from **HRS** Section 92F-11(a)'s mandate that "all government records are open to public inspection unless access is restricted or closed by law?" Do these subdivision rulings, such as Goldstein's 2000 letter, fall *outside* **HRS** Section 92F-12(a)(2)'s requirement that they be maintained and made available to the public? Unless the County has some theory that exempts Planning Department files from the same laws that regulate Real Property Division files, this attempt to minimize the importance of these subdivision records is meaningless.

Fourth, the County asserts, "the land grants and map [relied upon by Goldstein] were apparently attached to the [her 2000] letter, not separate documents in the file." Response at 4. As such, the County suggests, the Goldstein letter and the attachments were lost or misfiled at the same time, and there were not two separate misfilings. *Id*. It is unclear what this means, but "apparently" the County was only negligent once, when it misplaced the Goldstein letter and its attachments, and not earlier when it misplaced the attachments themselves. Regardless, there is no evidence that these documents were attached or not separately misplaced, and the County never conducted an investigation to determine this. *See* DOC-59, Exhibit 4 at 22. Again, what is the County arguing? That it's okay to lose one set of documents but not two?

Fifth, "Molfino's complaint failed to allege liability based upon a review of the County records," the County claims, "the Complaint is devoid of any allegations that Molfino had examined the file at the Planning Department and relief upon the information in the file." Response at 5. In fact, Molfino alleged "Defendants owed Plaintiff Molfino a standard of care to act in a reasonably careful and prudent manner, including the duty to maintain and verify the completeness and accuracy of its records in which the public can reasonably be expected to rely." DOC-1 at 9.

"Molfino is informed and believed and thereon alleges that the May 22, 2000, letter prepared by the Planning Department was absent from the official Hawaii County Public record . . . during the period June 13, 2004 through July 19, 2004." *Id*. Molfino argued in his Opposition to Summary Judgment below that his acceptance of Pruglo's offer was based on two inspections of the incomplete TMK file, and the County's Reply to that Opposition did not claim that did not occur or was not alleged in the Complaint. *See* DOC-59; DOC-60. Moreover, in their Answering Brief (AB) the County acknowledged, "the Circuit Court considered every argument made by Appellant," including his reliance on the incomplete TMK file before buying, selling and transferring this property. AB at 9, n.5. Judge Nakamura dismissed this Complaint *solely* because "the Planning Department owes no duty to keep its record accurate and complete." Application, Exhibit B at 3.

B. **NEW ARGUMENTS ON APPEAL.**

"Molfino criticizes the ICA for relying solely on Section 1.8," the County notes, "however, this rule was the only legal basis Molfino provided to the Circuit Court[.]" Response at 6. "Molfino's failure to raise these issues below precluded the ICA from considering them." *Id*. at 7.

In fact, Molfino "raised the issue" of negligent TMK file maintenance below, and challenged the County's claim that it had no duty to exercise reasonable care in preserving existing subdivision records. Moreover, the ICA *did not* rely "solely on Section 1-8," but declared, "Rule 1-8 is similar to the Uniform Information Practices Act" and "UIPA does not impose an affirmative obligation upon a government agency to maintain records." Application, Exhibit D at 4, *citing* **HRS** Chapter 92F. "Similarly, UIPA does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." *Id*. at 4-5, *citing* **Nuuanu Valley Ass'n v. City and County**, 119 Hawai'i 90, 97, 194 P.3d 531 (2008). As such, the ICA concedes that Rule 1-8, which Molfino argued below, "is similar to the Uniform

Information Practices Act," **HRS** Chapter 92F, and the Freedom of Information Act, 5 **USC** Chapter 552, and therefore addressed both in its cursory analysis. *Id*. Indeed, **Planning Department Rules of Practice and Procedure** Section 1-8 is obviously *not a statute*, and yet both the ICA and Judge Nakamura ultimately ruled that "the Planning Department did not have a *statutorily-based* duty to maintain its records with unerring accuracy." *Id*. at 5 (emphasis added). The ICA [and Judge Nakamura] offered these sweeping policy rulings, however, *without citing or considering a single statute* in **HRS** Chapter 92F. *Id*. The majority of the statutes cited by Molfino in his Opening Brief and this Application are contained in this critical uniform law, and the ICA ignored them. *Id*. "Whether there is a duty of care owed by the government tortfeasor to the injured party should be determined by an analysis of legislative intent *of the applicable statute or ordinance*." Application, Exhibit D at 3, *quoting* **Cootey v. Sun Investment**, 68 Haw. 480, 485, 718 P.2d 1086 (1986) (emphasis added). Molfino therefore properly presented every possible Hawaii statute, ordinance and local rule that addresses records and access by a government agency, so the ICA (and this Court) could consider that legislative intent.

C. **DUTY TO PRESERVE EXISTING SUBDIVISION RECORDS**.

First, "UIPA does not obligate agencies to create or retain documents," the County argues, "the UIPA simply requires access to those records the agency has in fact maintained." Response at 7, *citing* **Nuuanu**, 119 Hawai'i at 97.

In fact, Molfino never disputed the holdings in **Nuuanu** and **SHOPO v. Society of Professional Journalists**, 83 Hawai'i 378, 927 P.2d 386 (1996), that the UIPA "does not obligate agencies to create or retain documents; it only obligates them to provide access to those which it in fact has created and retained." **SHOPO**. 83 Hawai'i at 394, *quoting* **Kissinger v. Reporter Comm. for Freedom of the Press**, 445 U.S. 136, 151 (1980) (addressing the similar 5 **USC** Chapter 552).

This "access," noted the **SHOPO** Court, includes the duty to "provide accurate, relevant, timely and complete government records" and "make government accountable to individuals in the collection, use, and dissemination of information relating to them[.]") 83 Hawai'i at 283, *quoting* **HRS** Section 92F-2. "Whether the [records] are actually maintained depends on whether [the agency] chose to retain possession or control of the record." **Nuuanu,** 119 Hawai'i at 97, *quoting* **Kissinger**, 445 U.S. at 151. Director Yuen expressly acknowledged that "any incoming and outgoing correspondence [involving subdivision approvals] is supposed to be kept essentially forever," for use by the public and the Planning Department. DOC 59, Exhibit 4 at 64. "The request that came in from Mr. Williams and the letter that went out in 2000," said Yuen, "would have been put in the TMK file." *Id*. at 24. "There's a written policy to keep something like this." *Id.* at 22. As such, this agency "chose to retain possession and control of the record" and "actually maintained" the Williams/Goldstein correspondence. **Nuuanu**, 119 Hawai'i at 97. **HRS** Section 92F-2(2) therefore required Director Yuen to maintain "accurate, relevant, timely and complete" subdivision records. **SHOPO**, 83 Hawai'i at 383, *quoting* **HRS** Section 92F-2(a).

In stark contrast, the plaintiff in **Nuuanu** "failed to present evidence to prove that DPP maintained or withheld reports inconsistent with departmental policies or procedures." 119 Hawai'i at 98. Honolulu's Department of Planning and Permitting (DDP) elected *not* to keep copies of engineering reports attached to pending subdivision applications, the Court noted, and they were therefore not available for public access or subject to the UIPA. *Id.* "The accepted reports were not kept within DDP files." *Id*. As such, "the engineering reports submitted to DDP in connection with Laumaka's subdivision application did not constitute government records." as that term is defined by UIPA. *Id*. Since UIPA only applies to "existing" government files, DPP had no obligation to preserve them or provide public access. *Id*. The

holdings in **Nuuanu** and **SHOPO** actually support Molfino's arguments in this appeal.

Second, "the County owed no duty," it claims, "to maintain every record it ever possessed." Response at 8. "Molfino attempts to rely on various statutes which he now claims imposes a duty upon the County to perfectly maintain all records, no matter how old." *Id*. at 6.

In fact, what Molfino contends, is that the Planning Department, based on statutes, ordinances and local rules, *and its own stated policies*, has a duty to exercise reasonable care in the maintenance of and access to existing subdivision records. Application at 1. Moreover, the 2000 Williams/Goldstein correspondence was not "old," but occurred only three years prior to searches by Molfino, Yuen and Cheplic of this TMK subdivision file. What the County, Judge Nakamura and the ICA contend is that County officials *have no duty whatsoever* to property owners to preserve existing subdivision records. That is simply not the law. *See* **SHOPO**, 83 Hawai'i at 383, *quoting* **HRS** Section 92F-2 ("[t]his chapter shall be applied and constructed to promote its underlying purposes and policies which are to . . . (2) provide for accurate, relevant, timely and complete government records" and "(4) make government accountable to individuals in the collection, use, and dissemination of information relating to them"); *see also* **Nuuanu**, 119 Hawai'i at 97 ("the UIPA requires agencies to provide access to those records that are actually maintained.")

Finally, the County claims it is the responsibility of the applicant, not the County, to locate prior subdivision rulings before seeking a subdivision approval, and the Planning Department therefore has no duty to preserve its subdivision records. Response at 10, *citing* **Hawaii County Code** Section 23-117 The County had no obligation to safeguard or even consult its own TMK files, the County insists, because Molfino had a duty "to provide proof of a pre-existing lot." *Id*. Again, this argument contradicts Director Yuen's testimony about the County's actual practice with regard to subdivision applications and records or prior approvals. DOC 59, Exhibit 4. "The county

planning department has a duty to try and make as accurate a determination as possible," said Yuen, "that's in keeping with the general role of the planning department to provide a public service and to administer a set of laws properly." *Id*. at 20. In doing so, they "consider all relevant comments and materials of record before taking final action." **Planning Department Rules** Section 3-5. "All correspondence that pertains to a particular property," said Yuen, "is kept in its intended file." DOC 59, Exhibit 4 at 23. "That's policy." *Id*. "That type of a letter involving recognition of pre-existing lots would be kept in what the people in the department call a TMK file, which is filed by tax map key[.]" *Id*. at 24. When the Yuen was shown the missing Goldstein letter in 2005, and realized he had made a mistake on Molfino's 2004 application, he asked his research assistant, Edward Cheplic, "why he didn't refer to or follow the prior letter, and he said he hadn't seen it in his review when he did the workup on the Molfinos' request[.]" *Id*. at 22.

D. **OTHER ARGUMENTS FOR SUMMARY JUDGMENT.**

Judge Nakamura's order, the ICA's affirmance, and Molfino's Application all focus solely on whether "Appellees had a duty to maintain accurate, relevant, timely and complete subdivision records." *See* Application, Exhibit D at 2. Nevertheless, the County again offers multiple other reasons why it insists summary judgment was proper in this case.

1. **Public Duty Doctrine.** "Molfino's action is barred by the Public Duty Doctrine," the County claims, "a municipality is deemed to act for the benefit of the general public rather than specific individuals." Response at 11, *citing* **Ruf v. Honolulu Police Dept.**, 89 Hawai'i 315, 972 P.2d 1081 (1999). That doctrine applies to police departments, however, not public records, and holds that law enforcement "may not be held liable to specific individuals for the failure to furnish them with public protection." 89 Hawai'i at 322 n.5. Moreover, even **Ruf** did not adopt that doctrine for purposes of police protection, expressly declining "to address the scope of a

public agent's liability generally stemming from acts performed for the benefit of the general public." *Id*. Regardless, Hawaii County's Planning Department did not establish TMK subdivision files "to protect the health, welfare and safety of the public at large," but rather to provide information for applicants and officials trying to locate pre-existing subdivisions on specific Tax Map Key properties. *Id*. Adopting the County's overbroad interpretation of this common law doctrine, asserting virtually every government function is "for the benefit of the general public," would eviscerate the Legislature's waiver of sovereign immunity. Counties, like the State, are subject to suits for negligence "in the same manner and to the same extent as a private individual." **HRS** Section 662-2. Negligent record keeping affects individuals who are trying to make decisions about the use of specific property, and these foreseeable plaintiffs are injured when the County fails to maintain accurate, relevant, timely and complete TMK files. .

2. **Unforeseen Third Parties**. "As to the [missing] records," the County argues, "a duty only exists to the original parties to the transaction." Response at 12. "The 2000 letter was intended to influence only the individuals involved with that transaction" and "there is no duty to a third party unrelated to the original transaction." *Id*., *citing* **Chun v. Park**, 51 Haw. 501, 462 P.2d 905 (1969). The County cites no authority that individuals seeking information on specific properties are not foreseeable plaintiffs harmed by negligently maintained records. *Id*.[1] Molfino and other owners, sellers and purchasers of real property depend on "accurate, relevant, timely

[1] **Chun** was *not* a suit against a public agency, but a buyer's claim against the seller's title insurance company for failing to discover a recorded second mortgage. 51 Haw. at 464. Moreover, the **Chun** Court actually allowed the suit to continue, merely declining damages for lost profits. *Id*. The 44-year-old case has nothing to do with negligently maintained public records, which are designed to "ensure that the public [will] be afforded notice of the property interests detailed in the deeds and of potential claims to the property." **Wailuku Agribusiness v. Ah Sam**, 114 Hawai'i 24, 36, 155 P.3d 1125 (2007). Public records "serve as notice to those who are bound to search the record," like Molfino. *Id.*

and complete" records and maps so they can make informed decisions and file requests for subdivision approvals. **HRS** Section 92F-2(2). Williams and his client were not injured when the 2000 correspondence and subdivision maps went missing in 2003-2004; Molfino was. The County's argument that the 2000 documents were created for others, and Molfino was an unforeseen third party, misses the point of public records. Director Yuen acknowledged, "the County Planning Department has the duty to try to make as accurate a determination as possible" regarding pre-existing subdivisions. DOC-59, Exhibit 4 at 20. It cannot do so without consulting "all relevant comments and materials of record[.]" **Planning Department Rules** Section 3-5. Indeed, Goldstein herself relied on three prior land grants to approve a six-lot subdivision in 2000, no doubt preserved in the same TMK file. DOC-59, Exhibit 3 at 3.

3. **Breach**. The County claims there was no breach of duty because "the letter may have been absent from the file for a variety of reasons which do not constitute negligence." Response at 13. Even if the TMK file was incomplete, they insist, the missing documents could have been borrowed, destroyed, or stolen by unknown persons. *Id*. In fact, the Williams/Goldstein documents were missing for a year, and then mysteriously reappeared in January 2005. As such, none of these alternative scenarios could apply. Again, Yuen acknowledged a department and County policy for placing subdivision rulings in TMK files, consulting them for future subdivision applications, and making then available to the public. DOC-59, Exhibit 4 at 22-24. Molfino copied the file twice in 2003-2004 and the Goldstein documents were not there. Cheplic said they were not there in 2004, but reappeared in 2005. DOC-59, Exhibit 5. No investigation was undertaken to explain their disappearance or reappearance. DOC-59, Exhibit 4 at 22. The inference from this evidence is that the County breached its acknowledged duty to keep accurate existing TMK files. Finally, breach is a question of fact, "ordinarily not susceptible of summary

adjudication." **Pickering v. State**, 57 Haw. 405. 407, 557 P.2d 125 (1976).

4. **Causation**. The County claims that neither the misplaced files nor the invalid 2004 subdivision ruling caused Molfino any injury, because he purchased the property after viewing the incomplete TMK file, and signed a "binding contract" with Pruglo before the seven-lot subdivision was denied. Response at 13-14. Judge Nakamura rejected this identical argument in his June 23, 2010 order granting partial summary judgment, and ignored it in his October 12, 2010 order dismissing the case. *See*, Application, Exhibits A and B. Causation, like breach, is an issue of fact inappropriate for summary judgment. **Pickering**, 57 Haw. at 407. Triable issues of fact remain as to whether the missing correspondence caused Molfino to sell a $2.2 million property for $795,000.

5. **Damages.** The County claims that since Molfino "doubled his money" on this Hamakua Coast property by selling it to Michael Pruglo for $795,000 in 2004, he was not injured by the mistaken subdivision ruling or incomplete subdivision files. Response at 14. Moreover, "damages based upon the possibility of subdivision are too speculative." *Id., citing* **Hawaii Housing Authority v. Rodrigues**, 43 Haw. 195 (1959). Finally, Molfino's $2.2 million valuation "is based upon Molfino's declaration," and he "does not have personal knowledge." *Id*. at 14 n.13. In fact, a six-lot subdivision of this property was obviously not speculative because it was actually approved by Yuen for Pruglo seven months later, based on the Goldstein documents. Moreover, the $2.2 million subdivision evaluation was supported by an expert appraisal by CPA Stewart Hussey, and testimony by Pruglo that he sold two of the six parcels for more than $300,000 apiece. DOC-57, Exhibits T and W. Again, damages, like breach and causation, "are ordinarily not susceptible of summary adjudication." **Pickering**, 57 Haw. at 407.

6. **Qualified Immunity**. The County claims Yuen and the County are immune from suit because Molfino acknowledged Yuen was not motivated by malice. Response at 15, *citing* **Towse**

v. State, 64 Haw. 624, 631, 647 P.2d 696 (1982). The County's interpretation of Molfino's interrogatory answer is overbroad, and "malice" in this context does not mean "actual malice" or "reckless disregard." *See* **Towse**, 64 Haw. at 632 ("has acquired a plethora of definitions.") In order to avoid liability, a government official "is required to act as a reasonable man under the circumstances, with due regard to the strength of his belief, the grounds that he has to support it, and the importance of conveying the information." *Id*. at 632-33; *see also* **Russell v. American Guild**, 53 Haw. 456, 463, 497 P.2d 40 (1972) ("the qualified privilege must be exercised in a reasonable manner and for a proper purpose."). Moreover, the County's argument contradicts Yuen's own statements. "I don't think the planning department is immune from lawsuit," he admitted, "there are certainly circumstances where the planning department can be successfully sued." DOC-59, Exhibit 4 at 20. Yuen's observations are consistent with **HRS** Section 662-2, which renders government officials "liable in the same manner and to the same extent as a private individual under like circumstances[.]" The County cites Molfino's answer to interrogatory 29, where he was asked if Yuen "acted with malice" when he sent the June 2, 2004, letter. DOC-57, Memo at 19, *citing* Exhibit K at 10. Appellant answered "not at this time," and he was not asked, and did not say, whether County employees acted with malice when they negligently maintained subdivision records, refused to inform him of the error, and declined to investigate the reasons for the document disappearance. *Id*. Finally, whether a county official qualifies for qualified immunity, like questions of breach, causation and damages, is a factual question not properly resolved by summary judgment. **Towse**, 64 Haw. at 633 ("the issue of the existence of malice is generally for the jury's determination"); *see also* **Waikuku Agribusiness v. Ah Sam**, 114 Hawai'i 24, 36, 155 P.3d 1125 (2007) ("whether or not Wailuku acted in good faith . . . would be a genuine issue of material fact to be determined by the trier of fact and,

hence, summary judgment was improperly granted[.]")

7. **Exhausting Administrative Remedies**. The County claims Molfino failed to exhaust administrative remedies when he did not appeal the two-lot subdivision ruling in 2004. Response at 15, *citing* **HCC** Section 23-5. Molfino, however, did not sue the County to gain belated approval of his seven-lot subdivision application, but rather for damages for a negligent ruling and record keeping. Moreover, even if Molfino sought reversal of the June 2, 2004, decision, administrative review would have been futile without the Williams/Goldstein correspondence, which he did not learn about until December 2006. *See* **Hong v. Doe**, 484 U.S. 305, 327 (1988) ("exhaustion is not required if it would be futile.")[2] Nor could Appellant seek administrative review in 2006 of the June 2, 2004, letter rejecting his request for a subdivision, because by then *the 49-acre property was no longer his*, and the Planning Department had already reversed itself and granted the new owner a 6-lot subdivision. Again, Judge Nakamura rejected a similar argument in the County's first motion for summary judgment, and this restatement of the argument in its second motion was merely an improper motion for reconsideration. *See* **Amfac v. Waikiki Beachcomber**, 74 Haw. 85, 114, 839 P.2d 10 (1992).[3]

8. **Economic Loss Rule**. The County claims Molfino's claim is barred by the Economic Loss Rule. Response at 15, *citing* **City Express v. Express Partners**, 87 Hawai'i 466, 469, 959 P.2d 836 (1998). This case and rule, however, apply to construction defect cases, or tort claims

[2] County employee Edward Cheplic, who drafted Yuen's June 2, 2004, letter, acknowledged that any administrative appeal from that ruling without the Williams/Goldstein correspondence would have been a waste of time. DOC-82, Exhibit 5 at 46 ("I'm not aware of any [errors].")

[3] Moreover, this exhaustion issue was also raised by the County in federal court, and dismissed by U. S. District Court Judge J. Michael Seabright, who declared, "I don't know what else you expect this man to do at that point in time." *See* DOC-34, Exhibit B at 11. "He looked at the file, it wasn't there, he is told you have two lots and that's it." *Id*.

between parties in privity of contract. 87 Hawai'i at 489. It has also been extended to product liability and negligent design cases. **State ex rel. Bronster v. United States Steel**, 82 Hawai'i 32, 919 P.2d 294 (1996). This is not a construction or product liability case, however, and Molfino had no contract with the County. *Id*. No Hawaii case has applied the economic loss rule to bar recovery when a citizen charges public officials with the failure to exercise reasonable care in the performance of their official duties.

III.

CONCLUSION

With respect, this case addresses a matter of great public concern, which has not been addressed by this Court or, before this unpublished decision, the Hawaii Intermediate Court of Appeals. The sanctity and significance of public records, especially those impacting on individuals and land use, in addition to policies reflected in multiple statutes, ordinances and local rules, and Director Yuen's testimony, require the Hawaii County Planning Department to exercise reasonable care in the preservation of existing subdivision records.

Based on the above, this Court is respectfully requested to accept certiorari, reverse the ICA's August 28, 2013, Summary Disposition Order, vacate the lower court's October 12, 2010, order granting summary judgment, January 4, 2011, order awarding costs and January 11, 2011, judgment, and remand for trial.

DATED: December 22, 2013, in Honolulu, Hawaii.

Respectfully submitted:

___/S/ (Peter Van Name Esser)___

Peter Van Name Esser
Attorney for Plaintiff-Appellant and Petitioner
GEOFFREY MOLFINO

SCWC NO. 10-150

IN THE SUPREME COURT OF THE STATE OF HAWAII

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that counsel for the opposing parties were served on December 22, 2013, by notice of electronic filing at the address provided in the court record:

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DATED: December 22, 2013 in Honolulu, Hawaii.

_____/S/ (Peter Van Name Esser)_____
Peter Van Name Esser