CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.,
IN WHICH MOON, C.J., JOINS

I concur with the majority's conclusions that (1) Act 2 constitutes unconstitutional special legislation, (2) the circuit court did not err in finding that Sierra Club was the prevailing party in this case, and (3) the private attorney general doctrine authorizes an award of attorney's fees in favor of Sierra Club and against Superferry. Because attorney's fees should be awarded against Superferry pursuant to the private attorney general doctrine, it would seem understandably fair based on the facts and circumstances of this case to also award fees against DOT on the same basis. The majority appears to take this position through the following statement, which was quoted from this court's opinion in Fought & Co. v. Steel Engineering & Erection, Inc., 87 Hawai'i 37, 56, 951 P.2d 487, 506 (1998): "When the [S]tate has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties." Majority opinion at 106-07 (brackets in original). Thus, a legal basis for such an award could, perhaps, be gleaned by extending this court's sovereign immunity discussion in Fought to this case. However, in my view both the issue of attorney's fees and the private attorney general doctrine are beyond the scope of the state's waiver of sovereign immunity in this case, see Chun v. Board of Trustees of Employees' Retirement System of State, 106 Hawai'i 416, 432, 106 P.3d 339, 355 (2005), thereby requiring a further waiver of sovereign immunity beyond the state's consent to be sued. See Fought, 87 Hawai'i at 56, 951 P.2d at 506; see also Taomae v.

Lingle, 110 Hawai'i 327, 333, 132 P.3d 1238, 1244 (2006).

In Fought, this court addressed the issue of whether sovereign immunity barred an award of attorney's fees arising from an action in the nature of assumpsit, the outcome of which depended largely on this court's interpretation of a statute of "unrestricted application" that is entitled, "Attorneys' fees in actions in the nature of assumpsit, etc." See 87 Hawai'i at 54-56, 951 P.2d at 504-06 (interpreting HRS § 607-14 (Supp. 1997)).[1] "'Assumpsit' is 'a common law form of action which allows for the recovery of damages for non-performance of a contract, either express or implied, written or verbal, as well as quasi contractual obligations.'" Blair v. Ing, 96 Hawai'i 327, 332, 31 P.3d 184, 189 (2001) (citations and brackets omitted). Clearly,

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[1] As quoted by this court in Fought, HRS § 607-14 provided, in pertinent part:

> **Attorney's fees in actions in the nature of assumpsit, etc.** In all courts, in all actions in the nature of assumpsit . . . , there shall be taxed as attorneys' fees to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.
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> The above fees provided for by this section shall be assessed on the amount of the judgment exclusive of costs and all attorneys' fees obtained by the plaintiff, and upon the amount sued for if the defendant obtains a judgment.

87 Hawai'i at 41 n.2, 951 P.2d at 491 n.2 (quoting HRS § 607-14) (ellipses in original).

the underlying action in this case did not consist of a dispute seeking "the recovery of damages for non-performance of a contract, either express or implied[.]" See id.

Insofar as attorney's fees in assumpsit actions are concerned, this court has said in a case prior to Fought that "HRS § 607-14 governs the award of attorneys' fees 'in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing and does not limit an award of attorneys' fees to non-governmental parties." Hawaiian Isles Enter. Inc. v. City & County of Honolulu, 76 Hawai'i 487, 493, 879 P.2d 1070, 1076 (1994). In Fought, this court could "only presume," due to "[c]onsiderations of stare decisis," that "the legislature agree[d] with our interpretation" of HRS § 607-14 in Hawaiian Isles, and could "discern no good reason to change" that interpretation. 87 Hawai'i at 54-55, 951 P.2d at 504-05. Nonetheless, the state defendants in Fought asserted that "the doctrine of sovereign immunity forecloses Kiewit from being awarded costs and attorneys' fees against [the state][,]" and Hawaiian Isles either did not apply to that case or should be overruled. Id. at 54, 951 P.2d at 504. This court thus took the opportunity to explain further its reasoning regarding HRS § 607-14. Id. at 55, 951 P.2d at 505.

> The unrestricted application of HRS § 607-14 is noteworthy, inasmuch as the liability of state agencies for certain other litigation-related expenses is expressly restricted elsewhere. For example, HRS § 607-24 (1993) provides, inter alia, that state agencies are exempt from requirements that a bond be posted for costs, on a motion for new trial, or on appeal. . . . Similarly, HRS § 661-8 expressly prohibits an award of prejudgment interest against state agencies. . . . This court has consistently applied

> the rule of expressio unius est exclusio alterius -- the express inclusion of a provision in a statute implies the exclusion of another -- in interpreting statutes. . . . Applied here, the rule leads to the conclusion that, where the state's liability has not been expressly restricted, normal contract remedies are available against state agencies.

Id. (ellipses added).

Because HRS § 661-1(1) "expressly waive[d] the state's immunity from suit 'upon any contract, expressed or implied[,]'" and HRS § 607-14 "merely establishes the circumstances under which the prevailing party in any action 'in the nature of assumpsit' or on some 'other contract' may recover the expenses of litigation as an additional element of the prevailing party's damages[,]" this court ultimately held that "a further waiver of sovereign immunity is not necessary in order for HRS § 607-14 to apply to the state and its respective agencies in matters in which, by virtue of the express waiver of sovereign immunity set forth in HRS § 661-1, the state (or any of its agencies) has become a party." Id. at 56, 951 P.2d at 506 (emphasis added).

The emphasized portion of this court's holding in Fought is crucial to resolving the issue before us; that is, whether a claim of attorney's fees against the state even requires a "further waiver" of sovereign immunity beyond the state's consent to be sued. The majority answers this question in the negative based on this court's statement in Fought that "[w]hen the [S]tate has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties." Majority opinion at 106-07 (quoting Fought, 87 Hawai'i at 56, 951 P.2d at 506) (internal

quotation marks omitted) (brackets added and in original). So construed, the majority holds that the private attorney general doctrine applies to DOT because it must "be judged under the same principles as those governing the liability of private parties"; namely, Superferry. Majority opinion at 107.

I agree that, in this case, "there has been a clear waiver of the State's sovereign immunity from suit through HRS § 661-1(1) and HRS § 343-7." Majority opinion at 107. Although based on a different part of HRS § 661-1(1), HRS § 661-1(1) was also the basis upon which this court in Fought found that the state had consented to be sued. See 87 Hawai'i at 56, 951 P.2d at 506. However, unlike HRS § 607-14, neither HRS § 661-1(1) nor HRS § 343-7 addresses the issue of attorney's fees against the state. As such, the majority appears to be saying that a state's consent to be sued through HRS § 661-1(1) is alone sufficient to constitute a waiver of the state's sovereign immunity on the issue of awarding attorney's fees against the state. Majority opinion at 105-08. However, such a conclusion would mean that this court's thorough discussion of HRS § 607-14 in Fought would have been unnecessary. I do not believe that this court intended that result.

Indeed, remarkably similar to the majority's reasoning in this case, the plaintiffs in Taomae "[sought] to extend Fought here in declaring that 'if sovereign immunity does not bar the underlying action, then no waiver is required for the imposition

of [attorney's] fees and costs.'"[2] 110 Hawai'i at 333, 132 P.3d at 1244. Ultimately, this court held that the plaintiffs' "contention is not persuasive and . . . an award of fees based on this argument is denied" for the following reasons:

> First, the matter before this court is not in the nature of assumpsit and does not implicate HRS §§ 607-14 or 661-1. Second, simply because "sovereign immunity did not bar the instant contest," as the Plaintiffs state, it cannot be assumed that an assessment of fees and costs is appropriate. It is true that sovereign immunity does not bar the proceedings before this court inasmuch as this case involves injunctive relief. See [Pele Defense Fund v. Paty, 73 Haw. 578, 610 n.21, 837 P.2d 1247, 1266 n.21 (1992)] (noting that sovereign immunity "will not preclude suits brought to enjoin" violations of the Hawai'i Constitution). However, the fact that sovereign immunity does not preclude this court from addressing the merits of this case does not necessarily result in a right to attorney's fees. Here, Plaintiffs have not demonstrated an entitlement to fees under Fought. And unlike in Fought, no statute authorizes a shift in fees to Defendants. Accordingly, Plaintiffs' request for attorneys' fees on this basis must be denied.

Id. (emphases added).

Nonetheless, I understand the majority's reasoning to

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[2] The majority states that Taomae is distinguishable from this case because "there was no clear statutory waiver present in Taomae that could be extended to attorney's fees, as there was in Fought and in this case." Majority opinion at 107-08 n.30. I respectfully disagree.

In Fought, it was unnecessary for this court to extend the state's consent to be sued under HRS § 611-1(1) to the issue of attorney's fees because HRS § 607-14 addressed the attorney's fees issue in that case. The dispositive issue in Fought was whether HRS § 607-14, which by its plain language neither included nor excluded the state, applied to the state. The statute of "unrestricted application" that was at issue in Fought was not HRS § 661-1(1). Therefore, it could likewise be said that Fought is distinguishable from this case because interpreting the plain language of HRS § 661-1 was not before this court in that case.

Nonetheless, as discussed above, I understand the reasoning behind the majority's position to extend this court's analysis of HRS § 607-14 in Fought to HRS § 661-1(1). However, I believe such an extension to be unwise for the following reasons: (1) unlike Fought, this case is not an action in the nature of assumpsit; (2) also unlike Fought, the circuit court did not award damages as a remedy for the underlying action in this case; and (3) insofar as Fought is relevant to this case, in my view a "further waiver" of sovereign immunity is required beyond the state's consent to be sued in light of reasons (1) and (2) above.

extend this court's analysis in Fought to this case. However, even if we were to do so, in my view the issue of attorney's fees would be beyond the scope of the state's waiver of sovereign immunity.

Notably, in Fought, this court observed:

> [T]he courts of other jurisdictions have recognized that an award of costs and fees to a prevailing party is inherently in the nature of a damage award. See Donovan v. Delaware Water and Air Resources Comm'n, 358 A.2d 717, 723 (Del. 1976) (quoting Peyton v. William C. Peyton Corp., 8 A.2d 89, 91 (Del. 1939)) ("'Costs are allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court.'"); Department of Transp. v. Fru-Con Constr., 206 Ga. App. 821, 426 S.E.2d 905, 909 (1992) (quoting Brown v. Baker, 197 Ga. App. 466, 398 S.E.2d 797 (1990)) ("'Th[e attorneys' fee] statute merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of damages.'"); In re Gas Water Heater Prods. Litigation, 697 So.2d 341, 345 (La. Ct. App. 1997) (citing Woodmen of the World Life Ins. Soc'y v. Hymel, 610 So.2d 195 (La. Ct. App. 1992) ("Under Louisiana law, attorneys' fees are not recoverable as an element of damages unless they are provided for by statute or contract.").

87 Hawai'i at 51-52, 951 P.2d at 501-02 (ellipses and emphasis added) (brackets added and in original). Consistent with this observation, this court concluded that HRS § 607-14 "does not create a novel claim for relief, but merely establishes the circumstances under which the prevailing party in any action 'in the nature of assumpsit' or on some 'other contract' may recover the expenses of litigation as an additional element of the prevailing party's damages." Id. at 56, 951 P.2d at 506 (emphasis added). By its plain language, HRS § 661-1(1) waives the state's immunity for "[a]ll claims against the State founded . . . upon any contract, expressed or implied[.]" Inasmuch as

damages were awarded against the state in Fought, 87 Hawai'i at 42, 951 P.2d at 492 (awarding $392,000 plus interest at the rate of ten percent per annum as "compensation for the alleged breach" of contracts), attorney's fees, as an "additional element of the prevailing parties damages," id. at 56, 951 P.2d at 506, would be well within the "claim[] against the State . . . ." See HRS § 661-1(1); see also Blair, 96 Hawai'i at 332, 31 P.3d at 189 ("'Assumpsit' is 'a common law form of action which allows for the recovery of damages for non-performance of a contract[.]" (Emphasis added.)).

However, in this case, we cannot treat attorney's fees as an "additional element of the prevailing party's damages" because damages was not an issue in the underlying claim. Instead, Sierra Club sought injunctive relief. Whether damages should be awarded in the form of attorney's fees is a separate and distinct issue from the relief sought by Sierra Club in the underlying case. See Fought, 87 Hawai'i at 51-52, 951 P.2d at 501-02 ("[A]n award of costs and fees to a prevailing party is inherently in the nature of a damage award."). Consequently, in my view, it would be unwise to consider damages as a part of Sierra Club's "claim against the State[,]" which in this case was "founded upon [a] statute of the State." See HRS § 661-1(1). Therefore, and with all due respect, I believe it would be unwise to extend Fought in the manner that the majority is suggesting because the issue of attorney's fees in this case is beyond the scope of the state's waiver of sovereign immunity through HRS § 661-1(1). See Chun, 106 Hawai'i at 432, 106 P.3d at 355 ("[A]

waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign[.]" ((Internal quotation marks and citations omitted.)); see also Lehman v. Nakshian, 453 U.S. 156, 161 (1981) ("[L]imitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." (Internal quotation marks and citation omitted.)). Accordingly, on this basis, I would hold that a further waiver of sovereign immunity is required in this case. See Fought, 87 Hawai'i at 56, 951 P.2d at 506; see also Taomae, 110 Hawai'i at 333, 132 P.3d at 1244.

There is another basis that suggests that attorney's fees in this case is beyond the scope of the state's waiver of sovereign immunity. To reiterate, Fought is largely a statutory interpretation case inasmuch as the plain language of HRS § 607-14 does not expressly include or exclude the state. Hence, this court utilized a rule of statutory construction, expressio unius est exclusio alterius, to explain that "where the state's liability has not been expressly restricted, normal contract remedies are available against state agencies." Fought, 87 Hawai'i at 55, 951 P.2d at 505. HRS § 607-14's application to the state defendants was made even clearer by HRS § 661-1(1)'s express waiver of sovereign immunity "from suit 'upon any contract, express or implied[.]'" Id. at 56, 951 P.2d at 506 (quoting HRS § 661-1(1)) (brackets in original). According to the majority, this consent alone is enough to attach "liability" "under the same principles as those governing the liability of

private parties." Majority opinion at 107. With regard to attorney's fees, the majority appears to be saying that the "principle[]" governing the liability of the state in this case is the private attorney general doctrine. See Majority opinion at 107 ("DOT will be 'judged under the same principles as those governing the liability' of Superferry for attorney's fees resulting from a violation of HRS chapter 343.").

The private attorney general doctrine is a common law exception to the common law "American Rule." See In re Water Use Permit Applications, 96 Hawai'i 27, 29, 25 P.3d 802, 804 (2001). Comparatively, HRS § 661-1(1) and HRS § 607-14 are statutes enacted by the Hawaii legislature. As it pertains to this case, HRS § 661-1(1) expressly waives sovereign immunity for "'[a]ll claims against the State founded upon any statute of the State[.]'" The underlying claim in this case was founded upon HRS § 343-7. However, Sierra Club's claim for attorney's fees is based on the common law private attorney general doctrine, and not on any "statute of the State[,]" or on any other basis under HRS § 661-1(1). Therefore, I believe that Sierra Club's claim for attorney's fees through the common law private attorney general doctrine is not within the scope of the state's waiver of sovereign immunity. See Chun, 106 Hawai'i at 432, 106 P.3d at 355. Consequently, with regard to the attorney's fees issue in this case, I believe that a further waiver of sovereign immunity is required beyond the state's consent to be sued under HRS § 661-1(1). See Fought, 87 Hawai'i at 56, 951 P.2d at 506; see also Taomae, 110 Hawai'i at 333, 132 P.3d at 1244.

For these reasons, I respectfully dissent from the majority's conclusion that "[s]overeign immunity does not bar application of the private attorney general doctrine against DOT." See Majority opinion at 98-108. Accordingly, I would hold that the circuit court erred by awarding attorney's fees against DOT pursuant to the private attorney general doctrine.