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NO. SCPW-12-0000633

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

MAUI RADIOLOGY ASSOCIATES, LLP, Petitioner,

vs.

THE HONORABLE KELSEY T. KAWANO, Respondent Judge,

and

HAWAIʻI HEALTH SYSTEMS CORPORATION; BOARD OF DIRECTORS, MAUI REGIONAL HEALTH CARE SYSTEM OF THE HAWAIʻI HEALTH SYSTEM CORPORATION; WESLEY P. LO, Respondents.

ORIGINAL PROCEEDING
(CIVIL NO. 12-1-0660(2))

DISSENT BY ACOBA, J., WITH WHOM CIRCUIT JUDGE KIM, JOINS

Petitioner Maui Radiology Associates, LLP (Petitioner) has petitioned (Petition) this court for an emergency writ of mandamus directing Judge Kelsey Kawano to exercise jurisdiction over Petitioner's motion for a temporary restraining order (TRO) against Maui Memorial Medical Center's (Maui Memorial) implementation of a new service provider for its radiology department. To briefly recount the relevant facts and procedural history of this case, the Hawaii Health Systems Corporation (HHSC) is a public body established by HRS chapter 323F. HHSC is

divided into five regional health care systems, one of which is the Maui Regional Health Care System (MRS). See HRS § 323F-2(b)(1)-(5).[1]

I.

Petitioner had been the exclusive radiology services provider for Maui Memorial, which is part of the HHSC. In November 2011, MRS issued a request for proposals for the radiology contract at Maui Memorial. RadCare was awarded the contract effective July 5, 2012. Petitioner formally protested the award.

On June 28, 2012, Petitioner filed a complaint requesting declaratory and injunctive relief and alleging that Maui Memorial "wrongly award[ed] the exclusive contract for radiology services at Maui Memorial . . . to an unqualified bidder." Petitioner also sought a TRO to prevent RadCare's contract from going into effect. On July 2, 2012, Judge Kawano

[1] HRS § 323F-2 (2010 Repl.) provides:

> **§ 323F-2. Hawaii health systems corporation.** (a) There is established the Hawaii health systems corporation, which shall be a public body corporate and politic and an instrumentality and agency of the State. The corporation shall be placed within the department of health for the administrative purposes specified in section 26-35(a)(6) only.
> (b) The corporate organization shall be divided into five regional systems, as follows:
> (1) The Oahu regional health care system;
> (2) The Kauai regional health care system;
> (3) The Maui regional health care system;
> (4) The east Hawaii regional health care system, comprising the Puna district, north Hilo district, south Hilo district, Hamakua district, and Kau district; and
> (5) The west Hawaii regional health care system, comprising the north Kohala district, south Kohala district, north Kona district, and south Kona district;
> and shall be identified as regional systems I, II, III, IV, and V, respectively.

issued a TRO pending a preliminary injunction hearing scheduled for July 11, 2012.

The hearing was advanced to July 6, 2012. At the hearing, Judge Kawano heard oral argument on whether Petitioner had a right to judicial review of the procurement decision to award the contract to RadCare. Judge Kawano concluded the hearing by ordering additional briefing on that issue, and continuing the hearing to July 11, 2012.

At the July 11, 2012 hearing, Judge Kawano ruled that, as a threshold matter, he lacked jurisdiction to review the claims presented by Petitioner. On July 12, 2012, Petitioner filed the Petition seeking a writ of mandamus, or, in the alternative, a writ directing that Judge Kawano has jurisdiction to rule on its TRO and decide its claims for declaratory and injunctive relief on the merits. On August 8, 2012, this court directed Judge Kawano and the other Respondents to answer the petition.

Judge Kawano stated that the Petition should be denied because: (1) Petitioner had not shown that it has a manifest, clear, or indisputable right to have this court issue an instruction because Judge Kawano had only ruled for purposes of the TRO that Petitioner had not shown a likelihood of success on the merits; and (2) Petitioner had alternative means of having this court review Judge Kawano's decision because Petitioner could have filed a notice of dismissal under Hawaii Rules of Civil Procedure Rule 41(a)(1). Along the same lines, Respondents HHSC and Lo (Respondents) argued that Judge Kawano did not exceed

his jurisdiction in denying an injunction where the motion presented a novel question of law and a likelihood of success on the merits could not be found. Respondents also argued that this court's decisions in Alakai Na Keiki, Inc. v. Matayoshi, 127 Hawaiʻi 263, 277 P.3d 988 (2012), and AlohaCare v. Department of Human Services, 127 Hawaiʻi 76, 276 P.3d 645 (2012), were not dispositive as to the jurisdictional question because Maui Memorial's procurement process was not conducted under HRS chapter 103F.

II.

A writ of mandamus and/or prohibition is an extraordinary remedy that will not issue unless the petitioner demonstrates (1) a clear and indisputable right to the relief requested and (2) a lack of other means to redress adequately the alleged wrong or to obtain the requested action. Straub Clinic & Hosp. v. Kochi, 81 Hawaiʻi 410, 414, 917 P.2d 1284, 1288 (1996). Such writs are not intended to supercede the legal discretionary authority of the lower courts, nor are they intended to serve as the legal remedies in lieu of normal appellate procedures. Kema v. Gaddis, 91 Hawaiʻi, 200, 204, 982 P.2d 334, 338 (1999). Where a court has discretion to act, mandamus will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his or her jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject properly before

the court under circumstances in which it has a legal duty to act. Id. at 204-05, 982 P.2d at 338-39.

III.

As noted, in response to this court's August 8, 2012 order directing Judge Kawano to answer the Petition, Judge Kawano stated that Petitioners had failed to meet both prongs of the requisite two-part test. However, respectfully, his response is not persuasive.

As to the first prong, Judge Kawano said that he had "ruled only that for purposes of the Motion for TRO, that [Petitioner] had not shown a likelihood that it would prevail on the merits of its claims and on this basis, denied the Motion for TRO." Judge Kawano appears to suggest that his ruling meant that Petitioner would likely lose on the question of jurisdiction, rather than actually ruling that the court lacked jurisdiction to consider Petitioner's claims for declaratory and injunctive relief on the merits. However, a review of the transcript suggests that Judge Kawano indeed did rule that the court lacked jurisdiction to entertain Petitioner's claims for declaratory and injunctive relief. Judge Kawano stated:

> And the [c]ourt will proceed to enter its ruling on the motion for TRO and application for preliminary injunction, which the [c]ourt saw as having presented a threshold question determinable as a matter of law; and that is, does the [c]ourt have jurisdiction to review the plaintiff's claims and grant the requested declaratory judgment and injunctive relief requested by [Petitioner]. And the [c]ourt's short answer is no.

(Emphasis added.) Judge Kawano subsequently stated that "the [c]ourt rules on this application for injunctive relief that [Petitioner] cannot establish that it will have a likelihood of

prevailing on the merits. . . ." But, shortly after, Judge Kawano appeared to reaffirm that he was ruling that he lacked jurisdiction to entertain Petitioner's claims:

> I will have the parties know that I am very much concerned about this position, that somehow something is happening at the hospital that is beyond the scope of judicial review; but nevertheless, I can't make things up and take jurisdiction where there is a clear legislative intent to preclude that from [c]ourt review, which the [c]ourt has determined to be the case.

(Emphasis added.) Thus, Judge Kawano's ruling was not tentative, but rather, plainly, Judge Kawano clearly determined that he did not have jurisdiction to proceed on the merits of Petitioner's claims.

Even assuming that Judge Kawano's characterization of his decision is correct, there is nothing left to decide in the case. Whether Judge Kawano has jurisdiction to review the procurement process by which the instant contract was awarded is a question of law that will not be dependent on further factual development. Further, a court must ensure that it has jurisdiction before proceeding on the merits of any case. Housing Fin. and Dev. Corp. v. Castle, 79 Hawaiʻi 64, 76, 898 P.2d 576, 588 (1995). If, as in this case, a court does not believe it has jurisdiction to decide a case, the court should dismiss the case and enter judgment against the plaintiff, because the court simply does not have the power to decide the merits of the plaintiff's claims. Cf. id. ("[J]urisdiction is the base requirement for any court considering and resolving an appeal or original action. Appellate courts, upon determining that they lack jurisdiction shall not require anything other than a dismissal of the appeal or action. Without jurisdiction, a

court is not in a position to consider the case further.") (citation, internal quotation marks, and ellipsis points omitted; emphasis added). Judge Kawano's suggestion that his ruling on jurisdiction applies only to whether Petitioner is likely to succeed on the merits therefore seems wrong.

Judge Kawano also stated that Petitioner had failed to satisfy the second prong, the lack of other means to redress adequately the alleged wrong or to obtain the requested action, because Petitioner "could have filed a notice of dismissal under . . . [HRCP] Rule 41(a)(1) [sic]," thereby obtaining this court's review, and if appropriate, reversal of the decision. HRCP Rule 41(1) provides:

> (1) By plaintiff; by stipulation. An action may be dismissed by the plaintiff without order of court (A) by filing a notice of dismissal at any time before the return date as provided in Rule 12(a) or service by the adverse party of an answer or of a motion for summary judgment, or (B) by filing a stipulation of dismissal signed by all parties who have appeared in the action, in the manner and form prescribed by Rule 41.1 of these rules. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States, or of any state, territory or insular possession of the United States an action based on or including the same claim.

It is unclear how Petitioner would be entitled to review from this court if it were to voluntarily dismiss its case. If the action were dismissed without an order of the court, then there would seem to be no final judgment, order, or decree from which to appeal. See HRS § 641-1(a).[2] Additionally,

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[2] HRS § 641-1 (Supp. 2004) provides:

> **§ 641-1. Appeals as of right or interlocutory, civil matters.** (a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court to the intermediate

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although it does not appear that Hawaiʻi courts have addressed the issue, other jurisdictions hold that a plaintiff does not have a right to appeal a trial court's grant of a voluntary dismissal because the plaintiff received the relief it requested.[3] See Unioil, Inc. v. E.F. Hutton & Co., Inc., 809 F.2d 548, 555 (9th Cir. 1986) ("To be appealable, an order must be adverse to the appealing party. As a general rule, a plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him."), overruled in part on other grounds by Moore v. Keegan Mgmt. Co., 78 F.3d 431, 434-35 (9th Cir. 1995); Parker v. Freightliner Corp., 940 F.2d 1019, 1023 (7th Cir. 1991) ("Normally, of course, a plaintiff would have no reason (or right) to appeal the district court's grant of a voluntary dismissal since it would have received the relief it requested.") (citing Cauley v. Wilson, 754 F.2d 769, 770 (7th Cir.1985)); Bowers v. St. Louis Southwestern Ry. Co., 668 F.2d 369, 369-70 (8th Cir. 1981) ("As a general rule, no appeal by the moving plaintiff will lie from an order granting a voluntary

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[2](...continued)

> appellate court, subject to chapter 602.
> (b) Upon application made within the time provided by the rules of court, an appeal in a civil matter may be allowed by a circuit court in its discretion from an order denying a motion to dismiss or from any interlocutory judgment, order, or decree whenever the circuit court may think the same advisable for the speedy termination of litigation before it. The refusal of the circuit court to allow an appeal from an interlocutory judgment, order, or decree shall not be reviewable by any other court.
> (c) An appeal shall be taken in the manner and within the time provided by the rules of court.

(Emphasis added.)

[3] Some jurisdictions qualify that rule to allow the plaintiff to appeal if the conditions imposed on the dismissal legally prejudice the plaintiff. See Parker v. Freightliner Corp., 940 F.2d 1019 (7th Cir. 1991).

dismissal.”); Management Investors v. United Mine Workers of America, 610 F.2d 384 (6th Cir. 1979) (same). Respectfully, Judge Kawano therefore would seem to be wrong that Petitioner had an “alternative means” to obtain this court’s review by filing a voluntary notice of dismissal.

IV.

Therefore, I believe Petitioner has established a clear and indisputable right to the relief requested, and that there exists a lack of alternative means to adequately addressed the alleged wrong or obtain the requested action. See Straub Clinic & Hosp., 81 Hawaiʻi at 414, 917 P.2d at 1288.

A.

HRS chapter 103D regulates government contracts, except for health and human services contracts, which are covered by HRS chapter 103F. Alakai, 127 Hawaiʻi at 283, 277 P.3d at 1008. In Alakai, this court held that HRS chapter 103F did not divest circuit courts of jurisdiction over appeals from an agency decision as the legislature did not exempt such decisions from judicial review. Id. at 283-84, 277 P.3d at 1008-09. Thus, Alakai held that circuit courts have jurisdiction to review final agency decisions rendered pursuant to HRS chapter 103F.

HRS § 103F-101 (2011) provides that HRS chapter 103F “shall apply to all contracts made by state agencies and may be used by county agencies to provide health or human services to Hawaii's residents.” HRS chapter 323F established HHSC, which “[is] a public body corporate and politic and an instrumentality and agency of the State.” HRS § 323F-2(a). HRS chapter 323F

exempts MRS from HRS chapter 103D, but not from HRS chapter 103F.[4] It would seem incontrovertible, then, that HRS chapter 103F applies to contracts made by HHSC and its regional divisions, including MRS, and that under Alakai, the circuit court had jurisdiction to entertain Petitioner's claims for declaratory and injunctive relief.

Even assuming that HRS chapter 103F did not apply, Alakai would still be directly on point. Under Alakai, the test for whether a court has jurisdiction to review an agency decision is whether anything in the relevant statute "expressly excludes judicial review." 127 Hawaiʻi at 280, 277 P.3d at 1005. There is no language in HRS chapter 323F expressly prohibiting judicial review.[5] Thus, in the same way that a circuit court has

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[4] HRS § 323F-7(d) (2010 Repl.) provides:

> (d) Each regional system board shall not be subject to chapters 36 to 38, 40, 41D, and 103D as well as part I of chapter 92 and shall enjoy the exemptions contained in sections 102-2 and 103-53(e), except as otherwise provided in this chapter.

Further, HRS § 323F-7(30) (2010 Repl.) provides as follows with respect to the development of internal policies and procedures for the procurement of goods and services:

> (30) Developing internal policies and procedures for the procurement of goods and services, consistent with the goals of public accountability and public procurement practices, and subject to management and financial legislative audits; provided that the regional system boards shall be responsible for developing internal policies and procedures for each of their regional systems consistent with the corporation's policies and procedures; and further provided that:
> (A) The regional system boards and the corporation board shall enjoy the exemption under section 103-53(e);
> (B) The regional system boards shall enjoy the exemption under chapter 103D[.] . . .

(Emphasis added.)

[5] As in Alakai, "[i]t may be argued that the fact that HRS chapter 103D expressly provides for judicial review while HRS chapter [323F] does not
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jurisdiction to review decisions made pursuant to HRS chapter 103F because there is no language in that chapter expressly precluding judicial review, circuit courts have jurisdiction to review decisions made pursuant to HRS chapter 323F. The circuit court therefore had subject matter jurisdiction to rule on the instant TRO. See id. As such, Petitioner has demonstrated a "clear and indisputable right" to have Judge Kawano exercise jurisdiction and rule on the merits of Petitioner's motion for a TRO. See Straub Clinic & Hosp., 81 Hawaiʻi at 414, 917 P.2d at 1288.

B.

Petitioners have also established that they have no alternate remedy. Judge Kawano's ruling that he lacked subject matter jurisdiction to rule on the TRO cannot be appealed prior to final judgment because the ruling is interlocutory.[6] However, although Judge Kawano believed the court lacked subject matter jurisdiction, he also did not dismiss the case and enter final judgment. Instead, it appears that he scheduled a hearing on a motion to dismiss for November 7, 2012. Petitioner therefore can neither appeal the court's ruling refusing to adjudicate the TRO on the merits nor obtain a ruling on its TRO on the merits.

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[5](...continued)
suggests that the legislature intended to preclude judicial review under HRS chapter [323F]." Alakai, 127 Hawaiʻi at 283, 277 P.3d at 1008. However, this argument was said to be unpersuasive in Alakai because "there is a policy favoring judicial review of administrative agencies . . . the courts of this state have jurisdiction over all civil actions unless 'expressly provided by statute.'" Id.

[6] An order denying a TRO is neither an appealable final order under HRS § 641-1(a) nor a certified interlocutory order under HRS § 641-1 (b).

Petitioner has thus has demonstrated that it does not have an alternate remedy.

V.

For these reasons Petitioner has met the test for a writ of mandamus, and the writ should issue.

DATED: Honolulu, Hawaiʻi, September 27, 2012.

/s/ Simeon R. Acoba, Jr.

/s/ Glenn J. Kim