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SCWC-12-0000061

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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DANA NAONE HALL,  
Respondent/Plaintiff-Appellant,

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES,  
BOARD OF LAND AND NATURAL RESOURCES, WILLIAM J. AILA, JR.,  
in his official capacity as chairperson of the  
Board of Land and Natural Resources and as the State  
Historic Preservation Officer, ALAN S. DOWNER,<sup>1</sup>  
in his official capacity as administrator of the State  
Historic Preservation Division, DEPARTMENT OF HEALTH,  
LORETTA J. FUDDY in her official capacity as the Director  
of the Department of Health, ALVIN T. ONAKA in his official  
capacity as State Registrar of Vital Statistics and  
Chief of the Department of Health's Office of Health  
Status Monitoring, KAWAIAHA'O CHURCH, WILLIAM HAOLE  
in his official capacity as the Chair of the Board of Trustees  
and Chair of the Board of Directors of Kawaiaha'o Church,  
Petitioners/Defendants-Appellees.

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CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-12-0000061; CIV. NO. 09-1-1828)

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<sup>1</sup> Alan S. Downer, administrator of the State Historic Preservation Division, is substituted for Puaalaokalani Aiu, the former administrator of the State Historic Preservation Division.

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,  
WITH WHOM CIRCUIT JUDGE WILSON, JOINS

I concur in upholding the March 2013 judgment on appeal entered by the Intermediate Court of Appeals (ICA) as to the merits of this case<sup>2</sup> but would hold that the request for attorneys' fees and costs by Respondent-Plaintiff-Appellant Dana Naone Hall (Hall) is not barred by sovereign immunity. Hall prevailed on her claim for injunctive and declaratory relief pursuant to Hawai'i Revised Statutes (HRS) chapter 6E<sup>3</sup>, as against Petitioners/Defendants-Appellees, Department of Land and Natural Resources, Board of Land and Natural Resources (BLNR), William Aila, Jr. in his official capacity as chairperson of the BLNR and as the State Historic Preservation Officer, Alan S. Downer in his official capacity as Administrator of the State Historic Preservation Division (SHPD), Department of Health (DOH), Loretta

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<sup>2</sup> The majority affirms the ICA's December 14, 2012 published opinion Hall v. Dep't of Land & Natural Res., 128 Hawai'i 455, 463-69, 290 P.3d 525, 533-39 (App. 2012), vacating the final judgment of the Circuit Court of the First Circuit (the court) as to nine of Hall's eleven claims. Majority's opinion at 4.

<sup>3</sup> HRS § 6E-13(b) (2009) provides, in relevant part, that

(b) Any person may maintain an action in the trial court having jurisdiction where the alleged violation occurred or is likely to occur for restraining orders or injunctive relief against the State, its political subdivisions, or any person upon a showing of irreparable injury, for the protection of an historic property or burial site and the public trust therein from any unauthorized or improper demolition, alteration, or transfer of the property or burial site.

(Emphases added.)

Fuddy in her official capacity as the director of the DOH, Alvin Onaka in his official capacity as State Registrar of Vital Statistics and Chief of the Department of Health's Office of Health Status Monitoring (collectively, State Defendants). Accordingly, since her claim under HRS chapter 6E was not barred in the underlying case by sovereign immunity, she should not be precluded by sovereign immunity from obtaining an award of attorneys' fees as against the State Defendants pursuant to the private attorney general doctrine.<sup>4</sup>

I.

A.

In the underlying case, Hall brought a number of claims before the Circuit Court of the First Circuit (the court), alleging violations of the Hawai'i Administrative Rules (HAR), HRS Chapter 6E, HRS Chapter 343, and the Hawai'i Constitution. The counts relevant to Hall's request for attorneys' fees are discussed as follows.

The court had granted summary judgment in favor of the State Defendants on all of Hall's Chapter 6E claims. On appeal,

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<sup>4</sup> Hall concedes in her Response brief that an award of attorneys' fees against the State is barred by this court's holding in Kaleikini v. Yoshioka (Kalekini II), 129 Hawai'i 454, 468, 304 P.3d 252, 266 (2013). However, inasmuch as I believe the sovereign immunity basis in Kaleikini II should not bar an award of fees in the instant case, I dissent to the majority's opinion.

the ICA, *inter alia*, overturned the court's grant of summary judgment as to the HRS chapter 6E claims. Hall v. Dep't of Land & Natural Res., 128 Hawai'i 455, 470, 290 P.3d 525, 540 (App. 2012). The ICA held that the SHPD had violated its rules by failing to require the completion of an archaeological inventory survey (AIS), pursuant to HRS Chapter 6E and HAR § 13-284-1(a) (2003). Id. at 469, 290 P.3d at 539.

The ICA further concluded that the court erred in granting summary judgment to the State Defendants on Hall's claim, in Count 3, that her due process rights were violated by the use of a blanket disinterment permit under HRS § 338-25.5(a) (1993). Id. at 470, 290 P.3d at 540. On this issue, the ICA noted that Hall's due process claim was premised on the assumption that an AIS was not required, and so in holding that the State was required to prepare an AIS, "the resolution of Count 3 is premature." Id. at 471, 290 P.3d at 540. The ICA explained, however, that "[t]he application of HRS [Chapter 6E] . . . may satisfy any due process requirements and/or render the relief sought in Count 3 unnecessary or redundant of claims made in other counts." Id. (citing Rees v. Carlisle, 113 Hawai'i 446, 456, 153 P.3d 1131, 1141 (2007) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.")).

B.

Hall filed a motion for attorneys' fees and costs, claiming an entitlement to attorneys' fees on the basis of the private attorney general doctrine.<sup>5</sup> In response, the State Defendants argued, *inter alia*, that an award of attorneys' fees against the State was barred because the State had not waived its sovereign immunity. The basis of the State Defendants' contention was that, even though Hall's claims did not require a waiver of sovereign immunity because she sought injunctive relief under HRS § 6E-13(b), an additional waiver of sovereign immunity was required in order for Hall to obtain attorneys' fees. Hall replied that sovereign immunity had been waived by the State over an award of attorneys fees (1) pursuant to HRS § 6E-13(b), or in the alternative, (2) pursuant to Article XI, section 9 of the Hawai'i Constitution<sup>6</sup>.

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<sup>5</sup> The three factors that a court will consider when applying the private attorney general doctrine are: "(1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, and (3) the number of people standing to benefit from the decision." Honolulu Const. & Draying Co. v. Dep't Land & Natural Res., 130 Hawai'i 306, 308, 310 P.3d 301, 303 (2013) (brackets omitted) (quoting Sierra Club v. Dep't of Transp., 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009) ("Sierra Club II")).

<sup>6</sup> Article XI, section 9 of the Hawai'i Constitution provides:

Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable

(continued...)

The ICA awarded requested attorneys' fees to Hall in part, concluding that (1) she had satisfied the three prongs of the private attorney general doctrine and (2) pursuant to Sierra Club II, the State's sovereign immunity argument was without merit. The ICA awarded the requested attorneys' fees and costs to Hall in part, concluding that, first, she had satisfied the three prongs of the private attorney general doctrine and, second, pursuant to Sierra Club II, the State's sovereign immunity argument was without merit.

II.

In this case, Hall's claims in the underlying proceeding against the State Defendants were not barred, because she sought injunctive and declaratory relief under HRS § 6E-13(b). This court has adopted a rule that was derived from Ex Parte Young, 209 U.S. 123 (1908), which distinguishes the impact of sovereign immunity on actions seeking prospective relief (i.e., injunctions) from its impact on actions seeking retrospective relief (i.e., "relief that is 'tantamount to an award of damages for a past violation of . . . law'"). Sierra Club II, 120 Hawai'i at 226, 202 P.3d at 1271 (quoting Pele Def. Fund v. Paty, 73 Haw. 578, 609-10, 837 P.2d 1247, 1266 (1992)) (alteration in original). Actions seeking prospective relief do

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<sup>6</sup>(...continued)

limitations and regulation as provided by law.

not implicate the State's sovereign immunity. Id.; see Nelson v. Hawaiian Homes Comm'n, 130 Hawai'i 162, 183 n.18, 307 P.3d 142, 163 n.18 (2013) (Acoba, J., concurring and dissenting).

This is true even if such relief is "accompanied by a substantial ancillary effect on the state treasury." Pele Def. Fund, 73 Haw. at 609, 837 P.2d at 1226 (quoting Papasan v. Allain, 478 U.S. 265, 278 (1986) (citations omitted)); see Taomae v. Lingle, 110 Hawai'i 327, 333, 132 P.3d 1238, 1244 (2006) ("sovereign immunity does not bar the proceedings before the court inasmuch as this case involves injunctive relief"). However, "relief that is 'tantamount to an award of damages for past violation of . . . law, even though styled as something else,' is barred by sovereign immunity." Pele Def. Fund, 73 Haw. at 609-10, 837 P.3d at 1266 (quoting Papasan, 478 U.S. at 278). "Thus, insofar as [Hall's] requested relief in the underlying case that will have a prospective effect, sovereign immunity would not bar relief, 'even though accompanied by a substantial ancillary effect on the state treasury.'" Nelson, 130 Hawai'i at 175, 307 P.3d at 155 (Acoba, J., concurring and dissenting) (quoting Pele Def. Fund, 73 Haw. at 609, 837 P.2d at 1266).

### III.

Although not dispositive of her attorneys' fees claim, it must be noted that some of Hall's claims would not be barred because they sought relief for violations of the Hawai'i

Constitution. These claims were not barred by sovereign immunity because they sought to enjoin governmental actions as unconstitutional. "It is well-established that 'sovereign immunity may not be invoked as a defense by state officials who compromise an executive department of government when their action is attacked as being unconstitutional.'" Nelson, 130 Hawai'i at 175, 307 P.3d at 155 (Acoba, J., concurring and dissenting) (quoting Pele Def. Fund, 73 Haw. at 582, 837 P.2d at 1252); Kaho'ohanohano v. State, 114 Hawai'i 302, 337, 162 P.3d 696, 731 (2007) (noting that sovereign immunity will not be a bar where governmental action is challenged as unconstitutional); Washington v. Fireman's Fund Ins. Companies, 68 Haw. 192, 198, 708 P.2d 129, 134 (1985) (same).

In Nelson, the concurring and dissenting opinion explained that "[w]here the State's sovereign immunity does not bar the underlying action because it presents a constitutional claim, . . . there is no requirement of a separate waiver of sovereign immunity over attorneys fees." Nelson, 130 Hawai'i at 180, 307 P.3d at 160 (Acoba, J., concurring and dissenting) (citation omitted). Indeed, the application of the private attorney doctrine is particularly apt where a constitutional claim is at issue, inasmuch as claims based in the constitution provide the types of "benefits of a conceptual or doctrinal



character which are shared by the state as a whole.'" Id. (quoting In re Water Use Permit Applications, 96 Hawai'i 27, 30, 25 P.3d 802, 805 (2001) ("Waiahole II"). However, it is observed that, unlike in Nelson, although Hall brought constitutional claims in the underlying suit in this case, and as described, sovereign immunity will not be a bar where government action is challenged as unconstitutional, see Kaho'ohanohano, 114 Hawai'i at 337, 162 P.3d at 731, the constitutional nature of one of Hall's claims cannot form a basis for Hall's attorneys' fees award in this case.

Here, while the ICA reversed the court's grant of summary judgment as to Hall's due process claim, it is clear that the ICA did not decide the constitutional issue, noting instead that "[a] fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" Hall, 128 Hawai'i at 470-71, 290 P.3d at 540-41 (quoting Rees, 113 Hawai'i at 456, 153 P.3d at 1141). Thus, although Hall was the prevailing party for purposes of an award of attorneys' fees pursuant to the private attorney general doctrine, and the ICA reversed the court's summary judgment on Count 3, Hall's due process constitutional claim, see id., no waiver of sovereign immunity arises from the constitutional nature of this one of Hall's claims under the circumstances of this case.

IV.

As noted, the ICA relied on Sierra Club II in holding that Hall's request for attorneys' fees against the State Defendants was not barred by sovereign immunity. In Sierra Club II, the plaintiffs premised their claim in the underlying action on HRS § 661-1(1), which provides original jurisdiction in the courts for claims that are "'founded upon any statute of the State[.]'" 120 Hawai'i at 227, 202 P.3d at 1272 (quoting HRS § 661-1(1)). Since the plaintiffs' claim was founded upon HRS § 343-7, this court also considered whether HRS § 343-7 (1993) contained a waiver of sovereign immunity. Id.

This court held that "there has been a clear waiver of the State's sovereign immunity from suit through HRS § 661-1(1) and HRS § 343-7." Id. at 229, 202 P.3d at 1275. Relying on the holding in Fought & Co. v. Steel Eng'g & Erection, Inc., 87 Hawai'i 37, 951 P.2d 487 (1998), that "'[w]hen the State has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties[.]'" this court held the State Department of Transportation liable for attorneys' fees to the plaintiff. Id. at 229, 202 P.3d at 1274 (original brackets omitted) (quoting Fought, 87 Hawai'i at 56, 951 P.2d at 506).

Applying this holding, the ICA presumably concluded that HRS § 6E-13(b) does provide a private right of action to

recover attorneys' fees.<sup>7</sup> Pursuant to HRS § 6E-13(b), Hall could bring an action "for restraining orders or injunctive relief against the State[.]" Therefore, since, "[w]hen the State has consented to be sued, its liability is to be judged under the same principles as those governing the liability of private parties[.]" Sierra Club II, 120 Hawai'i at 229, 202 P.3d at 1274 (original brackets omitted) (internal quotation marks and citation omitted), and the State Defendants had consented to be sued pursuant to HRS § 6E-13(b), the State Defendants would also be liable for attorneys' fees, in the same way that a private defendant would be liable.

V.

In Kaleikini II, this court held that HRS § 6E-13(b) cannot serve as a basis for a waiver of the State's sovereign immunity, because HRS § 6E-13(b) allows suit to be brought only for a restraining order or injunctive relief. 129 Hawai'i at 468, 304 P.3d at 266. According to Kaleikini II, because "a provision allowing for declaratory or injunctive relief is not a waiver of the State's sovereign immunity, but rather an exception to the sovereign immunity doctrine for which no waiver is necessary[.]" HRS § 6E-13(b), allowing for injunctive relief,

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<sup>7</sup> Although the ICA did not explain its reasoning with respect to the import of Sierra Club II, it stated that "[w]e agree with Hall that the State Defendants' arguments [including that HRS Chapter 6E did not provide a private right of action to recover attorneys' fees] are foreclosed by the [Hawai'i] Supreme Court's decision in Sierra Club II."

would not contain a "waiver" of sovereign immunity. Id. (emphases in original). Thus, Kaleikini II declined to award attorneys' fees as against the State, on the basis that a "waiver" of sovereign immunity was distinguished from an "exception" to sovereign immunity, and that, although the underlying claims fell within an exception to sovereign immunity, a separate and additional "waiver" was required for an award of attorneys' fees premised on the private attorney general doctrine. Id. This is the holding applied by the majority to deny Hall an award of attorneys' fees in the instant case. Majority's opinion at 7-8.

VI.

Respectfully, "an award of attorneys' fees is not governed by a supposed distinction between a 'waiver' of sovereign immunity and the 'inapplicability' of sovereign immunity[.]" Nelson, 130 Hawai'i at 183, 307 P.3d at 163 (Acoba, J., concurring and dissenting). Manifestly, in either case, sovereign immunity is not a bar to the underlying action. See id. It should therefore not be a bar to an award of attorneys' fees. Id. Instead, I would hold that, where Hall had a basis for suit against the State Defendants pursuant to HRS § 6E-13(b), and where there is an entitlement to attorneys' fees established through the private attorney general doctrine, sovereign immunity will not bar an award of fees. See id. No separate or

additional waiver of sovereign immunity is required because of the distinction between prospective and retrospective relief. See id. Instead, as this court reiterated in Sierra Club II, "[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." 120 Hawai'i at 229, 202 P.3d at 1274.

Hall's underlying claims against the State involving HRS Chapter 6E were not barred by sovereign immunity, because HRS § 6E-13(b) provided a basis for the suit. See HRS § 6E-13(b). Thus, the State Defendants, having consented to be sued, should be responsible for an award of attorneys' fees in this case, just as a similarly situated private party would be responsible for attorneys' fees, see Sierra Club II, 120 Hawai'i at 229, 202 P.3d at 1274, where Hall has satisfied the three prongs of the private attorney general doctrine.<sup>8</sup>

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<sup>8</sup> It is noted that in the State Defendants' Memorandum in Opposition to Hall's Motion for Attorneys' Fees and Costs, the State Defendants alleged that Taomae mandated that where a party pursues injunctive or declaratory relief against the state, there is no waiver of sovereign immunity for an attorneys' fees award. The State Defendants quoted the following passage from Taomae: "It is true that sovereign immunity does not bar the proceedings before this court inasmuch as this case involves injunctive relief. 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 attorneys' fees." Taomae, 110 Hawai'i at 333, 132 P.2d 1244. As explained in the concurring and dissenting opinion in Nelson, in Taomae, the plaintiffs were attempting to use the fact that sovereign immunity had not barred their underlying claims as a basis for an award of attorneys' fees. Nelson, 130 Hawai'i at 179, 307 P.3d at 159 (Acoba, J., concurring and dissenting). In other words, unlike the instant case, where the basis for the attorneys' fees award is the private attorney general doctrine, in Taomae, there was no such

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Furthermore, a characterization of attorneys' fees as a "damages award" in Sierra Club II does not mandate that there be a separate waiver of sovereign immunity. See Sierra Club II, 120 Hawai'i at 226, 202 P.3d at 1271. "An award of attorneys' fees by a court is grounded in the inherent equitable powers of the court." Nelson, 2013 WL 3364401, at \*16 (Acoba, J., concurring and dissenting) (citing Waiahole II, 96 Hawai'i at 29, 25 P.3d at 804 (stating that the private attorney general doctrine is one of the "equitable exceptions to the American Rule that each party is responsible for paying his or her own litigation expenses")) (citation omitted). An award of fees and costs granted pursuant to this equitable power is "incidental to the underlying suit to which it is attached and thus cannot conceptually be denominated as in the nature of a separate damages award." Id. (emphasis in original) (citation omitted).

Instead, it need only be determined whether there was a waiver of sovereign immunity over the underlying action, and not whether additionally there was a waiver of sovereign immunity over attorneys' fees. See id. at \*12. As a result, the ICA determining that Hall meets the three factor test of the private

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<sup>8</sup>(...continued)  
basis for an award of fees, and in the quote above, this court concluded that a basis could not be found in the exception to sovereign immunity, as alleged by the plaintiffs. Id. (citing Taomae, 110 Hawai'i at 333, 132 P.2d at 1244).

attorney general doctrine, I would award reasonable attorneys' fees.

DATED: Honolulu, Hawai'i, December 4, 2013.

/s/ Simeon R. Acoba, Jr.

/s/ Michael D. Wilson

