IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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GILBERT V. MALABE and DAISY D. MALABE,
Respondents/Plaintiffs-Appellants,

vs.

ASSOCIATION OF APARTMENT OWNERS OF EXECUTIVE CENTRE,
by and through its Board of Directors,
Petitioner/Defendant-Appellee.

SCWC-17-0000145

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-17-0000145; 1CC161002256)

JUNE 17, 2020

OPINION BY RECKTENWALD, C.J., CONCURRING IN PART AND DISSENTING IN PART, WITH WHOM NAKAYAMA, J., JOINS

I. INTRODUCTION

This case requires us to consider the procedures that must be followed by an association of apartment owners (AOAO) in foreclosing on a lien against a condominium owner. The critical question is whether the AOAO's bylaws must provide some independent contractual basis to foreclose using nonjudicial

foreclosure or whether the legislature's statutory scheme has created that authority. I agree with the majority that the circuit court erred by dismissing the wrongful foreclosure claim against defendant Association of Apartment Owners of Executive Centre because the nonjudicial power of sale foreclosure provisions in Part I of Hawai'i Revised Statutes (HRS) Chapter 667 were not available to an AOAO foreclosing on a lien, and Act 282 does not affect this conclusion. Thus, on the wrongful foreclosure count, I concur in the judgment.

The majority errs, however, by relying on and adopting the Intermediate Court of Appeal's (ICA) decision in Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 426 P.3d 443 (App. 2018), because Sakal was wrongly decided. In my view, the condominium property regime, read in conjunction with HRS Chapter 667, permitted an AOAO to foreclose on a lien pursuant to Part II of Chapter 667.

I also disagree with the majority's conclusion that the Malabes' unfair or deceptive acts or practices (UDAP) claim should not have been dismissed. The circuit court properly dismissed it as time-barred because the Malabes failed to plead any set of facts that would toll the statute of limitations on such a claim. Merely invoking statutory authority – even if that statutory authority is, ultimately, unavailing – does not constitute fraudulent concealment by a defendant. Even if the

Malabes had alleged facts that constituted concealment, they failed to allege that they lacked knowledge of the facts giving rise to their claim. For these reasons, I respectfully dissent with regard to the UDAP claim.

II. DISCUSSION

A. Sakal was Wrongly Decided, and the Majority Errs by Adopting the ICA's Analysis in the Instant Case

The ICA incorrectly decided Sakal. The statutory scheme governing foreclosures on liens by AOAOs permitted the AOAO in the instant case to proceed under Part II, regardless of whether its bylaws contained a power of sale. For this reason, I dissented from the order rejecting the defendants' application for certiorari in that case. See Order Rejecting Application for Certiorari, Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch (SCWC-15-0000529), 2018 WL 6818901, at *1 (Haw. December 28, 2018) (Recktenwald, C.J., dissenting). The instant case gives this court another opportunity to correct the error, but the majority instead adopts the ICA's analysis. I respectfully disagree.[1]

[1] As did the Malabes: throughout this litigation, they have taken the position that the AOAO should have used Part II. In their complaint, they alleged: "At all times relevant herein, the nonjudicial foreclosure or power of sale process that AOAO was authorized to use was the Alternate Power of Sale Foreclosure Process set forth in [Part II]." And in their opening brief to the ICA, the Malabes described the "central issue in this case" as "whether [the AOAO] committed a wrongful foreclosure by using Part I . . . instead of the alternate nonjudicial foreclosure process contained in Part II to foreclose its lien for unpaid common expenses." The Malabes only changed (continued . . .)

Hawai'i's foreclosure scheme within HRS Chapter 667 as it existed in 2010, when the AOAO foreclosed on the Malabes' unit, contained, as relevant to this case, two parts: Part I, "Foreclosure by Action or Foreclosure by Power of Sale"; and Part II, "Alternate Power of Sale Foreclosure Process."[2]

HRS § 667-40 (2016), contained within Part II, provides (as it did in 2010):

> A power of sale foreclosure under this part [i.e., Part II] may be used in certain non-mortgage situations where a law or written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving time share plans, condominium property regimes, and agreements of sale.

(Emphases added.)

Under this provision, it would be sufficient for an AOAO's bylaws or other written documents to contain a power of sale. But it is not necessary. HRS § 667-40 also allows for Part II foreclosures on liens if "a law . . . authorizes, permits, or provides for . . . a power of sale foreclosure . . .

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position before this court. At oral argument, counsel for the Malabes conceded that until Sakal, they read the statutes to permit an AOAO to foreclosure under Part II without a power of sale in their bylaws, but changed their opinion after reading Sakal.

[2] In 2012, the year in which the foreclosure at issue in Sakal occurred, the legislature significantly amended Chapter 667. 2012 Haw. Sess. Laws Act 182, at 630-89. HRS § 667-5 was repealed, and Part I became Part IA, "Foreclosure by Action." Part II became "Power of Sale Foreclosure Process," and the legislature added Part VI, "Association Alternate Power of Sale Foreclosure Process." Part VI "is an alternative process for associations to the foreclosure by action in Part IA and the foreclosure by power of sale in Part II." HRS § 667-91 (2016). HRS § 667-40 did not change.

or a nonjudicial foreclosure."

The statutes governing condominium property regimes supply such a law. HRS § 514B-146(a) (2006) provides that unpaid assessments by the AOAO constitute a lien on the unit. At all relevant points during this litigation, it further stated:

> The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property.[3]

The ICA in Sakal placed great weight on the word "procedures" in HRS § 514B-146(a), gleaning therefrom that the legislature intended for AOAOs to be able to use Part II non-judicial foreclosure procedures, but only if they also had a power of sale. 143 Hawaiʻi at 224-26, 426 P.3d at 448-50. The majority adopts this analysis:

> HRS § 514B-146(a), which was identical to HRS § 514A-90(a),[4] only provided associations with access to nonjudicial power of sale procedures, and "associations were not being granted heretofore non-existent statutory powers of sale[.]" Sakal, 143 Hawaiʻi at 227, 426 P.3d at 451. The text of HRS §§ 514A-90(a) and/or 514B-146(a) refers to an association's ability to conduct a nonjudicial foreclosure in the context of the "procedures set forth in chapter 667 . . . in like manner as a mortgage of real

[3] Act 182 of 2012 amended this provision to remove the language "in like manner as a mortgage of real property" and to provide that any liens arising "solely from fines, penalties, legal fees, or late fees" could only be foreclosed "in court pursuant to part IA of chapter 667." 2012 Haw. Sess. Laws Act 182, § 9 at 655.

[4] As the majority explains, HRS § 514A-90(a) (Supp. 2012) governed condominiums created before July 1, 2006, except that HRS § 514B-146 governs "events and circumstances occurring on or after July 1, 2006[.]" Majority at 21–22 n.18; HRS § 514B-22 (2006).

> property." HRS § 541A-90(a) (emphasis added); HRS § 514B-146(a) (emphasis added). There is no grant of a power of sale in either statute.

Majority at 23 (ellipsis in original).

This restrictive reading ignores the plain language of HRS § 667-40, which only requires that the relevant law "authorizes, permits, or provides for . . . a power of sale . . . or nonjudicial foreclosure." In my view, there is no other way to read "[t]he lien . . . may be foreclosed . . . by nonjudicial or power of sale foreclosure procedures" than to permit nonjudicial or power of sale foreclosure. HRS § 514B-146(a) (emphasis added). This is the plain and obvious meaning of the statute. It is also clear from this statute that our cases holding that "a right in mortgagees to proceed by non-judicial foreclosure . . . is created by contract" are inapposite to HRS § 667-40. Majority at 24 (emphasis added) (quoting Lee v. HSBC Bank USA, 121 Hawaiʻi 287, 292, 218 P.3d 775, 780 (2009)).[5] HRS § 667-40 contemplates that "a law" – not necessarily a contract - will confer "a right . . . to proceed by non-judicial foreclosure" under Part II for certain non-mortgagees (i.e., for AOAOs with a lien). HRS § 514B-146 does

[5] Moreover, Santiago addressed Part I, which does not contain any analogue to HRS § 667-40. 137 Hawaiʻi at 155, 366 P.3d at 630 ("Thus, this court has held that HRS § 667-5 does not provide the nonjudicial power of foreclosure but only allows its creation, if the parties choose to do so, within the four corners of a contract." (emphasis added)); see infra Part II.B. There is no dispute that a mortgagee may only foreclose by nonjudicial foreclosure when the mortgage instrument contains a power of sale. This case, however, presents a very different context.

just that.

In any event, distinguishing between "authorization to conduct a power of sale foreclosure" and "authorization to use power of sale foreclosure procedures" (or "nonjudicial foreclosure" and "nonjudicial foreclosure procedures") creates a distinction without a difference. When the ICA and the majority declare that they decline to find the "power to extrajudicially sell another person's property" they incorrectly imply that the AOAO does not already have the substantive right to enforce their lien by forcing a sale[6] of "another person's property." Majority at 24 (quoting Sakal, 143 Hawaiʻi at 227, 426 P.3d at 451). But no one disputes that the AOAO has the power to foreclose on a lien – the question at stake is what foreclosure procedures they may use to do so. See 1 Gary A. Poliakoff Law of Condominium Property Operations § 5:44 (2019) ("The various methods of foreclosure authorized by condominium statutes may generally be classified as judicial or nonjudicial methods. Regardless of the specific method, foreclosures proceed according to a general sequence of events. First, some event [such as default] converts a lien into a right to satisfy that

[6] This is the very definition of foreclosure: "A legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property." Foreclosure, Black's Law Dictionary (11th ed. 2019). What it means to foreclose, then, is to "force a sale" of someone else's property; how that sale is effectuated is the primary difference between a judicial and nonjudicial foreclosure.

lien via foreclosure." (emphases added; footnote omitted)).

The same is true in the mortgage context: a power of sale clause in a mortgage allows the note-holder to use nonjudicial, as opposed to judicial, foreclosure procedures. In other words, a power of sale does not affect the mortgagee's power to force a sale of someone else's property, it affects the procedures by which that sale is to be carried out. See Santiago v. Tanaka, 137 Hawaiʻi 137, 155, 366 P.3d 612, 630 (2016) ("[N]o state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract." (emphasis added) (quoting Lee, 121 Hawaiʻi at 292, 218 P.3d at 780 (2009)). In Mount v. Apao, 139 Hawaiʻi 167, 384 P.3d 1268 (2016), we described a nonjudicial foreclosure as "a contractual self-help remedy [that] is not conducted under the auspices of or supervised by any court or administrative agency," id. at 176, 384 P.3d at 1277; a foreclosure by action, by contrast, is a remedy overseen by the court system. The difference is the mechanism by which the foreclosing party enforces their contractual right to sell the property in the event of default. The Malabes do not dispute that the AOAO had the power to foreclose on the lien; the only dispute is which procedures it was entitled to use to do so. Indeed, until their appeal to this court, they did not even contest the AOAO's right to use certain nonjudicial foreclosure procedures to enforce

their security interest.[7] In my view, the only plausible reading of HRS § 514B-146 is that it allowed the AOAO to use the nonjudicial foreclosure procedures contained in Part II without some extrinsic authorization.

This is not to say that the procedures used cannot make a difference on the outcome. Nonjudicial foreclosures advantage the foreclosing party. But as we have described, the differences between a nonjudicial and a judicial foreclosure, and the advantages that the former confers, are procedural:

> [A foreclosure pursuant to HRS § 667-5 (Supp. 2010)] is relatively quick and inexpensive. It does not require a lengthy time period between the notice of default and foreclosure sale, and does not require court costs and legal fees associated with discovery and drafting of pleadings.

Lee, 121 Hawaiʻi at 292, 218 P.3d at 780 (quoting Georgine W. Kwan, Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawaiʻi, 24 U. Haw. L. Rev. 245, 253 (2001)); see also Restatement (Third) of Property: Mortgages § 8.2 (Am. Law Inst. 2020) ("The underlying theory of power of sale foreclosure is that by complying with the statutory requirements, the mortgagee accomplishes the same purposes achieved by judicial foreclosure without the substantial additional burdens that the latter type of foreclosure

[7] See supra note 1.

entails.").[8]

Nothing about the procedural advantages to a nonjudicial foreclosure changes the substantive right of the foreclosing party to enforce their mortgage or lien by foreclosure. Thus, to say that the word "procedure" alters the import of HRS § 514B-146(a) ignores the very nature of what a foreclosure is – a means of enforcing a security interest by a certain set of procedures - and conflates the substantive right to foreclose with the means by which that right is enforced.

The ICA also reasoned, and the majority agrees, that

[8] A foreclosure by action only extinguishes junior liens; the Malabes would still be subject to their mortgage had the AOAO pursued judicial foreclosure rather than nonjudicial foreclosure. HRS § 667-3 (2016) ("[J]udgments of foreclosure that are conducted in compliance with [foreclosure by action] shall operate to extinguish the liens of subsequent mortgages and liens of the same property, without forcing prior mortgagees or lienors to their right of recovery[.]"); HRS § 514B-146(a)(2) (giving an association's lien "priority over all other liens" except, inter alia, "any mortgage of record that was recorded prior to the recordation of a notice of a lien by the association."); see Majority at 28-29 n.24.

Moreover, a nonjudicial foreclosure does not automatically result in a deficiency judgment: a creditor must go to court to obtain a deficiency judgment, where our precedent on calculating the deficiency would apply in full force. See Restatement (Third) of Property: Mortgages § 8.4 (Am. Law Inst. 2020) ("If the foreclosure sale price is less than the unpaid balance of the mortgage obligation, an action may be brought to recover a deficiency judgment[.]" (emphasis added)); HRS § 667-51 (2016) (designating deficiency judgments as "final and appealable"); Majority at 29 n.24. Indeed, many creditors give up the right to pursue a deficiency judgment by completing a nonjudicial foreclosure. See HRS § 667-38 (2016) ("Upon completion of the nonjudicial foreclosure of residential property pursuant to [Part II], the mortgagee or other person, excluding an association, shall not be entitled to pursue or obtain a deficiency judgment against an owner-occupant unless the debt is secured by other collateral."). AOAOs are excepted from HRS § 667-38, but they too are sometimes disallowed from pursuing a deficiency judgment depending on the circumstances. HRS § 667-92(f)(2) (2016) (an association that "[p]roceed[s] with a nonjudicial foreclosure of the unit" after being unable to serve the notice of default "shall not be entitled to obtain a deficiency judgment against the unit owner."). In any event, the deficiency calculation is unaffected by the type of foreclosure used.

"[i]f a law provided powers of sale to all associations, there would be no need to reference other written documents[.]" Majority at 27 n.23 (quoting Sakal, 143 Hawai'i at 228 n.18, 426 P.3d at 453 n.18). This argument might be convincing if the statute only referenced written documents, but it does not: HRS § 667-40 explicitly contemplates that "a law or written document" would provide for power of sale foreclosures. By the same logic, if the legislature expected that written documents alone would grant the power of sale, there would be no need to reference a law. Additionally, HRS § 667-40 applies to more than just condominium property regimes: it also covers time share plans and agreements of sale. The statute was written such that a law might provide for power of sale foreclosures in some non-mortgage situations, while a written document would so provide in others.

Moreover, under the rule proposed by Sakal and adopted by the majority, HRS § 514B-146 is made superfluous where a "written document" contains a power of sale clause. State v. Wallace, 71 Haw. 591, 594, 801 P.2d 27, 29 (1990) ("It is a cardinal rule of statutory construction that courts are bound, if rational and practicable, to give effect to all parts of a statute, and that no clause, sentence, or word shall be construed as superfluous, void, or insignificant if a construction can be legitimately found which will give force to

and preserve all words of the statute." (citation omitted)). An AOAO with a power of sale in its bylaws or other written document cannot make up its own procedures for nonjudicial foreclosure – it must adhere to those set forth in Chapter 667. Lee, 121 Hawaiʻi at 292, 218 P.3d at 780 ("A mortgagee, or an entity acting on its behalf, cannot . . . proceed with a nonjudicial foreclosure under a power of sale clause in the mortgage unless it complies with . . . HRS sections 667-21, et seq. Without such compliance, the mortgagee has no legal authority to exercise its power of sale in a nonjudicial foreclosure sale." (footnote omitted)). That HRS § 514B-146 "authorized [the] use of certain nonjudicial foreclosure procedures" would therefore be rendered meaningless where the bylaws contain a power of sale because using those statutory nonjudicial foreclosure procedures would be required regardless of the laws governing condominium property regimes. Majority at 12-13 (citation omitted); Sakal, 143 Hawaiʻi at 220, 426 P.3d at 444. Yet only in this scenario does the majority conclude an AOAO could foreclose by nonjudicial foreclosure.

The legislative history of HRS § 514A-90 confirms that the legislature intended for AOAOs to be able to nonjudicially foreclose on their liens without any additional authorization from the bylaws. Act 236 of 1999, which amended HRS § 514A-90 to include the language at issue in this appeal, stated in its

prefatory section: "The legislature further finds that there is a need for clarification regarding the authority of associations of apartment owners to use non-judicial and power of sale foreclosure procedures to enforce liens for unpaid common expenses." 1999 Haw. Sess. Laws Act 236, § 1 at 723 (emphasis added). The Conference Committee Report on the bill that would become Act 236 noted that the measure was amended to "[a]llow[ ] associations to enforce liens created for delinquent maintenance fees, including non-judicial or power of sale foreclosure procedures[.]" Conf. Comm. Rep. No. 43, in 1999 House Journal, at 927 (emphasis added). What the Act enabled, then, are the procedures by which the AOAO could enforce its lien – not its substantive right to enforce the lien at all. An AOAO's lien for unpaid fees is a creature of statute; the methods by which the lien can be enforced are, likewise, statutory. And the text of HRS § 514A-90 (and now HRS § 514B-146), as well as its legislative history, evinces the legislature's intent to allow an AOAO to enforce its lien by power of sale foreclosure. To impose an additional contractual requirement on a security interest that derives from statute departs from both the plain language and the intention of the law.

Accordingly, for the foregoing reasons, I disagree with the majority's adoption of Sakal, and I respectfully dissent.

B. Because the AOAO in the Instant Case Foreclosed under Part I, I Concur in the Judgment Affirming the ICA as to Wrongful Foreclosure

I concur in the judgment, however, because I agree that Part I procedures were unavailable to the AOAO. Part I of Chapter 667 contained no analogue to HRS § 667-40 and did not contemplate a "non-mortgage situation" falling under its provisions. Instead, Part I was applicable "[w]hen a power of sale is contained in a mortgage[.]" HRS § 667-5(a) (emphasis added). We have held that HRS § 667-5 "authorized the non-judicial foreclosure of mortgaged property only when a power of sale is contained in a mortgage." Santiago, 137 Hawaiʻi at 154, 366 P.3d at 629 (emphasis added; quotation marks, alterations, and citation omitted).[9]

The AOAO argues that HRS § 514B-146's reference to foreclosure "in like manner as a foreclosure on real property" permitted it to rely on HRS § 667-5. This argument is

[9] Because of the important differences between Part I and Part II, the ICA in Sakal, in which part II was at issue, erred by relying on our decisions in Santiago and Lee – in addition to the Ninth Circuit's decision in Apao v. Bank of New York, 324 F.3d 1091 (9th Cir. 2003). According to the ICA, these cases support the conclusion that "no Hawaiʻi statute . . . provides mortgagees the right to proceed by nonjudicial foreclosure." Sakal, 143 Hawaiʻi at 225, 426 P.3d at 449. But these cases specifically addressed HRS § 667-5, which applied "when a power of sale is contained in a mortgage[.]" HRS § 667-5(a). By contrast, HRS § 667-40 explicitly contemplates that foreclosures under Part II will proceed in some non-mortgage situations, referring to condominium property regimes specifically. The ICA asserted that "the principles stated [in those cases] are equally applicable to nonjudicial power of sale foreclosures conducted under Part II . . . of Chapter 667." Sakal, 143 Hawaiʻi at 225, 426 P.3d at 449. But this simply is not the case because Part I contains no analogue to HRS § 667-40.

unavailing because HRS § 514B-146 must be read in conjunction with the provisions of Chapter 667. Only Part II allowed for "certain non-mortgage situations" to fall under its purview. HRS § 667-5, by contrast, only referred to mortgages. Thus, when 514B-146(a) allows for foreclosure "in like manner as a foreclosure on real property," it did not sanction the use of any procedure within that Chapter; it allowed the use of those nonjudicial foreclosures that could apply in non-mortgage situations generally and to condominium property regimes specifically – in 2010, that meant Part II.

C. The Majority's Analysis of Act 282 is Contrary to its Terms and to the Legislature's Intent

Act 282 amended HRS § 514B-146(a) in July 2019 to provide: "The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents[.]" 2019 Haw. Sess. Laws Act 282, § 3 at 782. Per the majority,

> the plain language of the revisions to HRS § 514B-146(a)(2) limits the means by which condominium associations may foreclose on their liens to those: (1) "by action," (2) "by nonjudicial," or (3) "power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents."

Majority at 46.

But "nonjudicial foreclosure" and "power of sale

foreclosure" mean the same thing.[10] This was true before Act 282 – even the Sakal court agreed. Sakal, 143 Hawaiʻi at 225, 426 P.3d at 449 (noting that the legislature added the definition of "nonjudicial foreclosure" to Chapter 667 "presumably to clarify or confirm that a nonjudicial foreclosure was in fact a foreclosure under power of sale"); see also Kondaur Capital Corp. v. Matsuyoshi, 136 Hawaiʻi 227, 230 n.3, 361 P.3d 454, 457 n.3 (2015) ("HRS §§ 667-5 to 667-10 governed the process of foreclosure by power of sale (i.e., non-judicial foreclosure)[.]"). The definitions of the terms as amended by Act 282 confirm that the terms are synonyms:

> "Nonjudicial foreclosure" means foreclosure under power of sale.
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> . . . .
>
> "Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure when:
>
> (1) The mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure; or
>
> (2) For the purposes of part VI, an association enforces its claim of an association lien, regardless of whether the association documents provide for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure.

2019 Haw. Sess. Laws Act 282, § 4 at 782 (emphases added).

It therefore cannot be the case that the "or" between "nonjudicial" and "power of sale" in HRS § 514B-146(a), as

[10] This is true per Hawaiʻi's statutory definitions, but it is also true as a general matter. The definition of "nonjudicial foreclosure" in Black's Law Dictionary simply refers to "power-of-sale foreclosure." Foreclosure, Black's Law Dictionary (11th ed. 2019).

amended by Act 282, created a list with three distinct foreclosure options. Instead, the "or" simply reiterates what HRS § 667-1 already makes clear - that the two terms refer to the same concept. As such, HRS § 514B-146(a) now gives AOAOs two paths to foreclose on their liens: (1) by judicial action or (2) by nonjudicial foreclosure, which is also called power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents.

Moreover, although the new definition in HRS § 667-1 notes that its second prong is "for purposes of part IV," it cannot be the case that the "nonjudicial or power of sale foreclosure, regardless of the presence or absence of power of sale language in an association's governing documents" option was only intended to apply to foreclosures under Part VI. This is because HRS § 667-40 remains intact, and that provision explicitly contemplates that "certain non-mortgage situations" – specifically, "condominium property regimes" – may proceed under Part II. Thus, the majority's three-part framework cannot be accurate. Instead, Act 282 authorizes AOAOs to foreclose under Part II or Part IV "regardless of the presence or absence of power of sale language in an association's governing documents." HRS § 514B-146 (as amended by Act 282).

Nonetheless, Act 282 does not aid the AOAO in the instant case because the AOAO relied on Part I. Nothing about

the amendments to the relevant statutes contained in Act 282 alters the analysis of the statutory scheme enumerated herein.[11]

D. The ICA Correctly Concluded that Faulty Reliance on Statutory Authority Does Not Constitute Fraudulent Concealment

I disagree with the majority that the Malabes have sufficiently pleaded their UDAP claim. The statute of limitations for a UDAP claim is four years, the foreclosure took place in 2010, and the Malabes filed their complaint in 2016; it was therefore time-barred.[12] HRS § 480-24(a) (2008). I would

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[11] Admittedly, this reading is in tension with some of Act 282. The Preamble states that "Act 236, Session Laws of Hawaii 1999, provided a statutory grant of power and an incorporation into written documents authorizing condominium associations to utilize nonjudicial foreclosure under sections § 667-5 [of Part I] and 667-40 [of Part II][.]" 2019 Haw. Sess. Laws Act 282, § 1 at 779 (emphasis added). The retroactivity provision also provides for the Act's application to pending claims "arising out of a nonjudicial foreclosure under HRS § 667-5[.]" Act 282, § 5 at 782. But read together, Chapter 667 and Chapter 514B never permitted HRS § 667-5 to be a vehicle for AOAO foreclosures. While legislative history can aid in the interpretation of a statute, it is the statutory text that must govern, and HRS § 667-5 refers specifically to "mortgages" that contain a power of sale.

I note, however, that while the majority purports to be using "subsequent legislative history" in a limited fashion, it presents a three-part framework that has forward-reaching effects as well. The majority's selective reading of the Preamble cannot be justified by our hesitation to rely on subsequent legislative history because the Preamble itself serves as a source of legislative history to understand the Act's future application. There can be no doubt in reading the Preamble that the legislature intended to repudiate Sakal's holding that a foreclosure under Part II required a power of sale; this clear intent, which, as explained herein, comports with the plain text of the amended statutes, must be applied at least prospectively. But the majority's conclusion that the new law serves only to allow foreclosures under Part VI fails to give effect to the legislature's intent.

[12] As the ICA explained in its summary disposition order (SDO), it and the United States District Court for the District of Hawai'i have applied the occurrence rule to determine when a UDAP claim accrues. Malabe v. Ass'n of Apartment Owners of Exec. Centre, CAAP-17-0000145 at *8 (App. Nov. 29, 2018) (SDO) (citing McDevitt v. Guenther, 522 F. Supp. 2d 1272, 1289 (D. Haw. 2007)). Whether we apply the discovery rule or the occurrence rule to UDAP

(continued . . .)

affirm the ICA on its holding that the AOAO's open reliance on a statute that a court later determines to be unavailable does not suffice to toll the statute of limitations. I therefore respectfully dissent.

In Rundgren v. Bank of New York Mellon, 777 F. Supp. 2d 1224 (D. Haw. 2011), the United States District Court for the District of Hawai'i applied equitable tolling by reason of fraudulent concealment[13] to a UDAP claim:

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claims, however, the statute of limitations ran in this case. Under the discovery rule, a cause of action accrues "when the plaintiff 'discovers or should have discovered the negligent act, the damage, and the causal connection between the former and the latter.'" Thomas v. Kidani, 126 Hawai'i 125, 132, 267 P.3d 1230, 1237 (2011) (quoting Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982)). For the same reasons explained herein, taking the Malabes' complaint as true, they knew of the AOAO's reliance on HRS § 667-5, that the AOAO held no mortgage, and of the damage caused by the wrongful use of that statute (i.e., the loss of their property) at the time of the foreclosure, and so the cause of action accrued in 2010 regardless of which rule we apply.

[13] The majority "strongly disagree[s]" with my reliance on Rundgren's articulation of the fraudulent concealment standard but concludes that HRS § 657-20 (2016) does not apply to this claim. Majority at 61 n.36; see also Rundgren, 777 F. Supp. 2d at 1231 ("[F]rom a practical standpoint, if [common law] fraudulent concealment did not apply to toll the statute of limitations on a [HRS Chapter] 480 claim, then a plaintiff would have no remedy whatsoever where a defendant has in fact fraudulently concealed a cause of action from the plaintiff.").

Nonetheless, the elements a plaintiff must show to establish fraudulent concealment under the statute and under the common law as articulated in Rundgren amount to the same: under both the common law and pursuant to our statute, the party pleading fraudulent concealment must plead facts showing some act or deception by the defendant that in fact concealed the existence of a cause of action from the plaintiff. In Au v. Au, 63 Haw. 210, 626 P.2d 173 (1981), we said of fraudulent concealment under HRS § 657-20:

> Fraudulent concealment has been defined as "employment of artifice, planned to prevent inquiry or escape investigation, and misle[a]d or hinder acquirement of information disclosing a right of action. The acts relied on must be of an affirmative character and

(continued . . .)

> To avoid the bar of limitation by invoking the concept of fraudulent concealment, the plaintiff must allege facts showing affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief. Silence or passive conduct of the defendant is not deemed fraudulent, unless the relationship of the parties imposes a duty upon the defendant to make disclosure.

Id. at 1230 (quoting Rutledge v. Boston Woven Hose & Rubber Co., 576 F.2d 248, 250 (9th Cir. 1978)).[14]

> fraudulent." . . . Fraudulent concealment involves the actions taken by a liable party to conceal a known cause of action.
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> In Weast v. Duffie, 272 Mich. 534, 539, 262 N.W. 401, 402 (1935), the Michigan Supreme Court stated:
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> > The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment. . . .
> >
> > It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim.

Id. at 215–16, 626 P.2d 173, 178 (1981) (citations omitted).

[14] The majority claims that this definition imports "'plausibility' pleading standards" that we rejected in Bank of Am., N.A. v. Reyes-Toledo, 143 Hawaiʻi 249, 428 P.3d 761 (2018). Majority at 59–62 n.36. Respectfully, this assertion misreads Rundgren and misapprehends the difference between the substantive elements of a claim and the standard by which a complaint is evaluated. Rundgren held, as a matter of state law, that the equitable principle of fraudulent concealment could toll a statute of limitations that was not otherwise covered by HRS § 657-20. 777 F. Supp. 2d. at 1230–32. It applied this state law conclusion to the federal complaint using the federal pleading standard set forth in Ashcroft v. Iqbal, 556 U.S. 662 (2009), and Bell Atlantic Corp. v. Twombly, 550 U.S. 868 (2009). Rundgren, 777 F. Supp. 2d at 1232. The doctrine of fraudulent concealment described in this opinion has no bearing at all on the standard by which the Rundgren court evaluated the complaint, for it describes the substantive elements of the doctrine. In other words, had the Rundgren court dismissed the complaint because it failed

(continued . . .)

The Malabes' complaint states as follows with regard to fraudulent concealment: "DEFENDANTS fraudulently concealed the wrong they were committing by implying, stating, and/or misrepresenting that they were authorized to use Part I and/or they held a mortgage with a power of sale when in fact they did not." But a review of the complaint makes clear that none of the AOAO's alleged actions amount to fraudulent concealment as a matter of law. Even accepting as true that the AOAO "impl[ied], stat[ed], and/or misrepresent[ed] that they were authorized to use to Part I," asserting statutory authority that is ultimately unavailing does not amount to fraudulent concealment. Indeed, it would be absurd to suggest that the AOAO could somehow conceal the contents of a statute. Likewise, even taking as

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to meet the Twombly/Iqbal standard, the same complaint may have survived in state court under our more relaxed notice pleading standard, even if the elements of fraudulent concealment were identical.

Here, I am not evaluating the complaint under the federal Twombly/Iqbal standard, but under the notice pleading standard we reaffirmed in Reyes-Toledo. Notice pleading requires that the court take all facts alleged in the complaint as true and in the light most favorable to the pleader, but a plaintiff must allege facts that, if true, would meet the elements of their claim – in other words, the plaintiff must "show[ ] that [they] are entitled to relief[.]" Hawaiʻi Rules of Civil Procedure Rule (HRCP) 8(a). I have read the Malabes' complaint, taken all the facts alleged therein as true, construed it in the light most favorable to the Malabes, and nonetheless conclude that they can "prove no set of facts" that would establish the substantive elements of fraudulent concealment to toll the expired statute of limitations. Reyes-Toledo, 143 Hawaiʻi at 257, 428 P.3d at 769 (citation omitted). The Malabes complaint clearly sets forth the factual basis for their claim of fraudulent concealment – that the AOAO suggested it was authorized to use Part I and/or that it held a mortgage with a power of sale. However, those allegations are insufficient as a matter of law. It is not sufficient to invoke, as the majority does, the term "notice pleading" without any further analysis of how the pleaded facts demonstrate that the pleader may be "entitled to relief[.]" HRCP Rule 8(a). This is not, and has never been, what notice pleading means.

true that the AOAO "impl[ied], stat[ed], and/or misrepresent[ed] that . . . they held a mortgage with a power of sale," the complaint is devoid of any allegation as to what, exactly, the AOAO did (either affirmatively or by silence) to imply that it was the Malabes' mortgagee besides invoking HRS § 667-5. Again, mere invocation of a statute that requires a mortgage does not constitute "concealment" of the existence of a mortgage. Taking the facts pleaded as true, no "reasonable person [would] believe that he did not have a claim" at the time of the foreclosure, and the allegation that the AOAO openly relied on HRS § 667-5 – the only fact that the Malabes have alleged to constitute concealment – does not amount to "concealment" as a matter of law.

That alone would warrant dismissal of the complaint, but fraudulent concealment also requires that the plaintiffs "did not discover the facts" which form the basis of their claim. Rungdren, 777 F. Supp. 2d at 1230; Rutledge, 576 F.2d at 249–50 ("To carry that burden [of pleading and proving fraudulent concealment], [the plaintiff] has to plead facts showing that . . . he had neither actual nor constructive knowledge of the facts constituting his claim for relief[.]"). The Malabes allege in their complaint that they "did not discover the claims against DEFENDANTS alleged herein until sometime in or around July of 2016." (Emphasis added.) But

nothing in the complaint alleges that they did not have knowledge of the facts giving rise to their claims until that point.[15] Even assuming that the AOAO's "misrepresentations" about its reliance on Chapter 667 Part I constituted concealment, the Malabes did not plead that they were unaware the AOAO could not foreclose under Part I until they "discovered" their claim in 2016. Nor could they: ignorance of the law does not excuse a failure to timely bring a claim. United State v. Kubrick, 444 U.S. 111, 124 (1979) ("If [a putative plaintiff] fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit[.]"); cf. Office of Disciplinary Counsel v. Au, 107 Hawaiʻi 327, 341, 113 P.3d 203, 216 (2005) ("[M]ere ignorance of the law constitutes no defense to its enforcement." (citation omitted)).

The Malabes also did not plead that they "lacked knowledge of the operative fact[ ] upon which [they] based

[15] For this reason, that the Malabes were "under no duty to discover the truth" is of no matter - they have not pleaded they were ever actually in fact deprived of the truth. Majority at 59 (citing Santiago, 137 Hawaiʻi at 153, 366 P.3d at 645). Even taking their complaint as true, they were aware that the AOAO foreclosed under HRS § 667-5, and they knew that the AOAO never held a mortgage with a power of sale over their unit.

[their] claim" of fraudulent concealment of the existence of a mortgage: the Malabes do not allege that they did not know that the AOAO held no mortgage containing a power of sale. E.W. French & Sons, Inc. v. Gen. Portland Inc., 885 F.2d 1392, 1399 (9th Cir. 1989). In other words, even if they sufficiently alleged that the AOAO somehow misrepresented that it was their mortgagee by its reliance on HRS § 667-5, the Malabes did not plead that they were in fact unaware that the AOAO was no such thing.

"[I]t appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim" of fraudulent concealment such the statute of limitations may be tolled. Bank of Am., N.A. v. Reyes-Toledo, 143 Hawaiʻi 249, 260, 428 P.3d 761, 772 (2018) (citation omitted). The Malabes have alleged nothing that would suffice as a matter of law to toll the statute of limitations because of fraudulent concealment – both because they did not plead facts sufficient to establish fraudulent concealment and because they did not allege that they lacked knowledge of any of the facts giving rise to their claim - and the ICA was correct to affirm the circuit court in dismissing the UDAP count. I therefore respectfully dissent.

III. CONCLUSION

For the foregoing reasons, I concur only in the judgment affirming the ICA on the wrongful foreclosure count. In all other respects, I dissent.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama