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IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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PUBLIC ACCESS TRAILS HAWAIʻI, a Hawaiʻi Nonprofit Corporation, and DAVID BROWN, JOE BERTRAM, III; KEN SCHMITT; for themselves individually, and on behalf of the certified class members, Petitioners/Plaintiffs-Appellants,

vs.

HALEAKALA RANCH COMPANY, a Hawaiʻi Corporation; STATE OF HAWAIʻI, WILLIAM AILĀ JR., in his official capacity as the Director of the State of Hawaiʻi DEPARTMENT OF LAND AND NATURAL RESOURCES and chair of the State of Hawaiʻi BOARD OF LAND AND NATURAL RESOURCES; DEPARTMENT OF LAND AND NATURAL RESOURCES, Respondents/Defendants-Appellees.

DEPARTMENT OF LAND AND NATURAL RESOURCES, State of Hawaiʻi, Respondent/Cross-Claimant-Appellee,

vs.

HALEAKALA RANCH COMPANY, a Hawaiʻi Corporation, Respondent/Cross-Claim Defendant-Appellee.

SCWC-16-0000559

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-16-0000559; CIVIL NO. 11-1-0031(3))

MARCH 15, 2023

CONCURRING OPINION BY McKENNA, J.
WITH WHOM WILSON, J., JOINS

I join the unanimous opinion of the court. I write separately to express my serious concerns about issues not raised on appeal. These issues would not be raised by the parties, because the parties created them by agreeing to nontransparent processes that should not have been approved by the Circuit Court of the Second Circuit ("circuit court").

As indicated in footnote 8 of the opinion, the December 19, 2014 settlement agreement ("Settlement") was redacted as to provisions pertaining to Public Access Trails Hawaiʻi ("PATH"), David Brown, Joe Bertram, III, and Ken Schmitt's (collectively "Petitioners") first motion for attorneys' fees seeking more than $1 million. This redaction contains nine lines. As conceded by the parties at oral argument, this redacted portion of the Settlement was and remains hidden from the circuit court, the Intermediate Court of Appeals ("ICA"), and this court.

Section I provides background information relevant to the serious concerns I express in Section II regarding this redaction.

I. The parties' redacted settlement agreement

As explained in the full court opinion, a jury found in favor of Petitioners and the State of Hawaiʻi ("the State") in

April 2014. On December 16, 2014, Petitioners filed a motion requesting fees in the amount of $1,108,915.30 and costs in the amount of $24,871.00 for a total of $1,133,786.30 pursuant to the private attorney general doctrine. Petitioners submitted hundreds of pages of supporting documents.

The circuit court entered judgment in favor of Petitioners and the State on December 19, 2014. On the same day, Petitioners, Haleakalā Ranch Company ("HRC"), and the State entered into the Settlement.

The terms of the Settlement consist of about one page of handwritten text. The non-redacted terms are as follows:

> All claims in Phase I of the trial are final and nonappealable and HRC may not request a new trial.
>
> All claims for Phase II of the trial are dismissed with prejudice by Plaintiffs.
>
> The parties agree as follows with respect to [Plaintiffs'] attorneys' fees motion:
>
> - The motion will be heard by Judge Cardoza, whose decision may be appealed by either party[.]
> - HRC further agrees that it will not seek any form of land exchange of Haleakala Trail with the State.
> - [Plaintiffs'] motion for attorneys' fees will be heard by Judge Cardoza in his courtroom in the normal course[.]

The Settlement, however, also contains nine redacted lines, which the parties say relate to the first motion for attorneys' fees.

In March 2015, Petitioners filed a motion for court approval of the Settlement. They argued that the Settlement was "fair, reasonable[,] and adequate," and should be approved by

the court in accordance with Hawaiʻi Rules of Civil Procedure ("HRCP") Rule 23(e) (2011).

Petitioners attached to their motion the redacted copy Settlement, saying, "The Settlement was redacted only as to provisions pertaining to *Plaintiffs' Motion for Attorneys' Fees and Costs for the First Phase of Trial*, filed December 16, 2014, as this issue is pending before the Court, and may be the subject of future appeals."

HRC gave approval for Petitioners to attach the redacted version of the settlement. The record does not indicate whether the State approved the redaction, although the State did support the settlement and the proposed settlement procedures.

Petitioners also redacted this portion of the Settlement from the proposed notice form provided to class members. The proposed notice form stated, "[p]ortions of the Settlement relating to attorneys' fees were required to be redacted because the issue is still pending before the Court, and potentially may be the subject of an appeal by either party."

The circuit court preliminarily approved the Settlement in May 2015. The court found that the Settlement was "fair, reasonable, and adequate and in the best interests of the certified class members in this case, who consist of: 'All pedestrians who, as members of the public, have been, or continue to be, denied access to Haleakala [Heleakalā]

Trail . . . .'" The court directed Petitioners to provide notice to class members via PATH's email list, webpage, and Facebook page, and through other nonprofit organizations. The court also approved the proposed notice form, including the redactions to the Settlement. In July 2016, the court issued its final order approving the Settlement, indicating that no objections had been received from class members.

II. Discussion

A. All terms of a settlement involving the State should be disclosed

In the Hawai'i Uniform Information Practices Act, the legislature declared, "[o]pening up the government processes to public scrutiny and participation is the only viable and reasonable method of protecting the public's interest." Hawai'i Revised Statutes ("HRS") § 92F-2 (2012). Therefore "it is the policy of this State that the formation and conduct of public policy—the discussions, deliberations, decisions, and action of government agencies—shall be conducted as openly as possible." Id.

The State is a party to the Settlement. It is unclear what the redacted portion of the Settlement says regarding the first motion for attorneys' fees. If the State agreed to receive or pay anything, the redaction violates the state policy requiring transparency. See id.; cf. Pansy v. Borough of Stroudsburg, 23

F.3d 772, 788 (3d Cir. 1994) (holding that "if a settlement agreement involves issues or parties of a public nature," that should be a factor against confidentiality); Florida Sunshine in Litigation Act, Fla. Stat. § 69.081 (2022) (establishing that any contract that conceals information relating to settlements with state government entities is void and unenforceable).

Even if the State will not receive or make payments under the redacted portion of the Settlement, I do not believe the State should be a party to a confidential settlement agreement absent clear justification. None has been provided.

B. Hidden agreements about attorneys' fees may waste judicial resources

It is unclear what the redacted portion of the Settlement says. Although conjectural, it is possible that it contains a "high-low agreement" regarding the first motion for attorneys' fees. In a high-low agreement, a defendant agrees to pay the plaintiff a minimum amount in return for the plaintiff's agreement to accept a maximum amount regardless of the outcome of the trial or other adjudication. See High-Low Agreement, Black's Law Dictionary (11th ed. 2019). High-low agreements have been increasing in popularity because of their ability to reduce risk for litigants. See Richard Lorren Jolly, Between the Ceiling and the Floor: Making the Case for Required

Disclosure of High-Low Agreements to Juries, 48 U. Mich. J.L. Reform 813, 814 (2015).

Calculating attorneys' fees is a time-intensive process. "The time, expense, and difficulty of proof inherent in litigating the reasonableness of the attorney's fee . . . impose substantial burdens on judicial administration." Thornley v. Sanchez, 9 Haw. App. 606, 618, 857 P.2d 601, 607 (1993) (quoting 22 Am. Jur. 2d Damages § 611 (1988)).

When parties agree to a confidential high-low settlement in litigation, they limit their own risk yet ask the judicial system to expend significant resources adjudicating the issue. Judges are not private arbitrators.[1] A judge could needlessly spend significant time determining a fee award if the judge's award falls outside the high-low range agreed to by the parties.[2] This would waste public resources.[3]

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[1] I have no issue with the use of high-low agreements in arbitration, as parties pay for the time spent by arbitrators.

[2] For example, if the circuit court thought reasonable fees approximated $800,000-900,000, or even above $1 million, but the "high" was $750,000, the circuit court could end up spending many, many hours reviewing the hundreds of pages submitted, cutting some hours billed, and calculating precisely what should be awarded, all for naught.

[3] Hidden high-low settlements could also result in an attorney inadvertently violating the Hawai'i Rules of Professional Conduct ("HRPC"). HRPC Rule 3.1 (2014) provides in part that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . ." This court made a referral to the Office of Disciplinary Counsel in a case where the attorneys failed to notify the court of a settlement agreement that mooted the case. See AIG Haw. Ins. Co. v. Bateman, 82 Hawai'i 453, 460, 923 P.2d 395, 402 (1996), amended on reconsideration in part by 83 Hawai'i 203, 925 P.2d 373 (1996). This court found that counsel may have violated HRPC Rule 3.1 by

Granted, disclosure of high-low agreements can influence decision-making. See Jolly, supra, at 836-41 (describing how a factfinder might be influenced by a high-low agreement according to the psychological phenomena of "anchoring" and "scaling"). However, judges are already required to disregard various matters in decision-making.[4]

C. Hidden agreements about attorneys' fees undermine class action policies

HRCP Rule 23(e) provides that "[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." This language mirrors the 2003 federal rule. See Amendments to the Federal Rules of Civil Procedure ("FRCP"), 215 F.R.D. 158 (2003).

FRCP Rule 23(e) (2018) "was completely rewritten in 2003 to strengthen the process of reviewing proposed class-action settlements, building on the experience gained since Rule 23 was amended in 1966." Mary Kay Kane, 7B Federal Practice and Procedure § 1797 (Charles A. Wright & Arthur E. Miller eds., 3d

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litigating an issue the parties had completely settled, thereby "wasting the time and limited resources of this court and . . . [denying] availability of the court's resources to deserving litigants." 82 Hawai'i at 459-60, 923 P.2d at 401-02 (cleaned up) (quoting In re Solerwitz, 848 F.2d 1573, 1575 (Fed. Cir. 1988)).

[4] For example, judges are required to disregard evidence they may have seen or heard but is not part of the record of the proceeding they are deciding. See Revised Code of Judicial Conduct Rule 2.9(c) (2009).

ed. Supp. 2022). As amended, FRCP Rule 23(e) requires, among other things, that the court find a proposed settlement "fair, reasonable, and adequate[,]" according to eight enumerated factors. Fed. R. Civ. P. 23(e)(2).

Notably, FRCP Rule 23(e) includes "the basic requirement that the parties disclose all terms of the settlement or compromise that the court must approve under Rule 23(e)(1)." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2003 amendment. Moreover, the parties must identify "any agreement made in connection with the [settlement] proposal." Fed. R. Civ. P. 23(e)(3). The purpose of this provision is to identify "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification." Fed. R. Civ. P. 23(e)(2) advisory committee's note to 2003 amendment.[5]

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[5] Overall, the purpose of the amended FRCP Rule 23(e) "is to protect the nonparty class members from unjust or unfair settlements affecting their rights . . . ." Kane, supra § 1797. The federal rules for class action settlement are, of course, the subject of critique and debate. See, e.g., Alexandra Lahav, Fundamental Principles for Class Action Governance, 37 Ind. L. Rev. 65, 85 (2003) (arguing that fairness hearings are flawed); Elizabeth J. Cabraser & Adam N. Steinman, What Is A Fair Price for Objector Blackmail? Class Action Objectors and the 2018 Amendments to Rule 23, 24 Lewis & Clark L. Rev. 549, 555-58 (2020) (critiquing and discussing the process for objections).

This court need not but can consider federal law when interpreting our rules of civil procedure, including our Rule 23. See, e.g., Kalima v. State, 148 Hawai'i 129, 144, 468 P.3d 143, 158 (2020) (holding that class action damages must be capable of measurement across the entire class and noting

In this case, Petitioners sought approval of the class action Settlement, representing that it was "fair, reasonable, and adequate," language appearing in the federal rule, and the circuit court so found. However, the circuit court did not know the terms of the entire Settlement. Moreover, the parties withheld settlement terms from class members. Petitioners even represented to class members that the redacted terms "were required to be redacted" (emphasis added). Yet, the redaction would have been entirely impermissible under the revised federal rules, from which the "fair, reasonable, and adequate" standard was derived. The redaction was not required; it happened only because the parties agreed to it, with the circuit court's approval. The redaction should not have been approved.

D. The circuit court had and still has power to order disclosure of the redacted portion of the Settlement

The circuit court should not have approved this redaction in a class action settlement, especially when it involved the State. On remand, the circuit court is able to order disclosure of the redacted terms before deciding on the proper amount of fees and costs. "It is well-settled that courts have inherent equity, supervisory, and administrative powers as well as inherent power to control the litigation process before them. Inherent powers of the court are derived from the state

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that this rule is "implicit in the Hawai'i statute" in light of United States Supreme Court precedent).

Constitution and are not confined by or dependent on statute." Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawai'i 452, 457–58, 903 P.2d 1273, 1278–79 (1995) (cleaned up). These powers include the "inherent power to curb abuses and promote a fair process . . . ." 79 Hawai'i at 458, 903 P.2d at 1279 (citations omitted).

III. Conclusion

The parties should have disclosed the entire settlement agreement to the circuit court before it approved this class action settlement, especially because it involved the State. Whether or not the redaction involves a high-low agreement, the public interest in transparency outweighs any detriment of disclosure. Although the settlement has been approved and finalized, the circuit court can still order disclosure before addressing fees and costs on remand.[6]

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson

[6] The circuit court also has the option of preliminarily issuing an order to show cause as to why the redacted portion should not be disclosed. In my view, such a preliminary order is not required.