NO. 29919

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

ALBERTA S. DeJETLEY, et al. Plaintiffs-Appellants, v. SOLOMON P. KAHO'OHALAHALA, et al. Defendants-Appellees.	Case No. 08-01-0678(3) APPEAL FROM FINAL JUDGMENT ENTERED JUNE 23, 2009 BY THE CIRCUIT COURT OF THE SECOND CIRCUIT Hon. Judge Joseph E. Cardoza

ANSWERING BRIEF

and

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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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ANSWERING BRIEF

Plaintiffs-Appellants are twenty-one Maui County voters who appeal from the Judgment entered by the Circuit Court of the Second Circuit[1] (circuit court). Appellants are claiming that (1) the Declaratory Judgment Act allows voters to enforce substantive provisions of the Maui County Charter and evade already-existing remedies and procedures for the removal of elected officials; and (2) the circuit court's refusal to allow Appellants to amend their complaint a second time and proceed against Defendant-Appellee Solomon P. Kaho'ohalahala in his official capacity--after agreeing to dismiss the Office of Corporation Counsel (Corporation Counsel)--arose to an abuse of discretion. The circuit court committed no reversible error. The Judgment should be affirmed.

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1 The Honorable Joseph E. Cardoza presided.

I. Statement of the Case

On November 4, 2008, Solomon P. Kaho'ohalahala was elected to the Lanai seat on the Maui County Council. [Record on Appeal (RA) at 47, 58.]. He was sworn into office on January 2, 2009. [RA 49, 58.]. On November 24, 2008, twenty-one voters (Appellants) filed a complaint[2] for declaratory judgment against Mr. Kaho'ohalahala, Roy Hiraga in his official capacity as the County Clerk of the County of Maui, and Kevin Cronin in his official capacity as the Chief Election Officer of the State of Hawai'i. [RA 1-14.]. Appellants wanted the circuit court to declare that Mr. Kaho'ohalahala was not a resident of Lanai "from and after the time he filed nomination papers[.]" [RA 13.]. The complaint was not served upon Mr. Kaho'ohalahala until he took his seat at the Maui County Council. [RA 39, 49, 58.]. Mr. Hiraga was represented by Corporation Counsel. [RA 42.].

On January 9, 2009, Mr. Kaho'ohalahala moved to dismiss the complaint. [RA 44-191.]. Mr. Kaho'ohalahala argued that the circuit court had no jurisdiction on the grounds that the complaint constituted an unlawful appeal from administrative hearings held before the complaint was filed. [RA 54-55.]. Corporation Counsel joined in the motion. [RA 192-209.].

Before the hearing on the motion, Appellants filed an amended complaint for declaratory judgment. [RA 246-274.]. The amended complaint removed Mr. Hiraga and Mr. Cronin from the lawsuit. [RA 246.]. The amended complaint alleged that Mr. Kaho'ohalaha was not qualified to represent Lanai on the Maui County Council and

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[2] The complaint was part of a series of challenges to unseat Mr. Kaho'ohalahala. Many of the Appellants in this case also brought an election challenge before the Hawai'i Supreme Court, which was dismissed. [Record on Appeal (RA) 112-131, 188.].

wanted the circuit court to declare that "Mr. Kaho'ohalahala must immediately forfeit the office" of the Lanai seat on the Maui County Council. [RA 253, 254.].

The hearing on Mr. Kaho'ohalahala's motion to dismiss was held on February 6, 2009. At the hearing, the circuit court acknowledged that the amended complaint conceded arguments raised in Mr. Kaho'ohalahala's motion to dismiss:

> THE COURT:
>
> . . . .
>
> The Court recognizes this motion was actually filed when we had an original complaint. So to a certain extent, some of these arguments are really addressed to the original complaint as opposed to first amended complaint which contains solely one claim for relief, and that is immediate forfeiture of office.
>
> Plaintiffs are no longer contesting or objecting to defendant's eligibility to run for office for the Lanai Maui County council seat. Nor is plaintiff contesting the election result or challenging the defendant's qualification as a candidate. That is evidenced by the filing of the first amended complaint.

[Transcript of Proceedings (TR) on February 6, 2009 at 18.]. The circuit court denied Mr. Kaho'ohalahala's motion. [TR 2/6/09 at 21.]. The circuit court, however, clearly indicated that denial of the motion to dismiss did not foreclose the possibility of later challenges:

> MR. LOWENTHAL: Your Honor, if I may, a point of clarification. In treating the motion to dismiss as applicable to the amended complaint, we believe that the -- that there are points that -- or there are contentions in the first amended complaint that can be brought in another motion to dismiss at a later time, and we would like to reserve that right.

> THE COURT: All right. That's so noted that you have reserved the right. If there's a challenge to this, then we'll deal with that.
>
> MR. LOWENTHAL: Including the challenge of subject matter jurisdiction.
>
> THE COURT: All right. I am not at this point -- at this point in time stating that you be precluded by law from further challenges to the first amended complaint, but rather simply disposing of this particular motion and treating it as a motion to dismiss for the first amended complaint. All right.

[TR 2/6/09 at 22.].

The circuit court issued its order[3] denying Mr. Kaho'ohalahala's motion to dismiss on March 4, 2009. [RA 503-04.]. The circuit court also issued its order dismissing Mr. Hiraga and Mr. Cronin from the lawsuit pursuant to "an agreement between Plaintiffs and Defendants ROY T. HIRAGA and KEVIN B. CRONIN." [RA 501.].

On February 18, 2009, Mr. Kaho'ohalahala filed a motion for judgment on the pleadings. [RA 331-386.]. The motion was made on the grounds that Appellants could not "use the Declaratory Judgment Act to evade the express removal procedures provided by the Maui County Charter." [RA 332.]. Mr. Kaho'ohalahala attached to the motion both the impeachment and the removal procedures provided by the Maui County Charter. [RA 349-51, 352.].

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[3] The form of the circuit court's order was contested. Appellants' proposed order included a conclusion of law that the circuit court had jurisdiction to hear all matters in this case. [RA 495.]. Mr. Kaho'ohalahala objected to the proposed order and submitted his own version. [RA 497.]. Mr. Hiraga joined in Mr. Kaho'ohalahala's objection. [RA 498.]. The circuit court adopted Mr. Kaho'ohalahala's proposed order. [RA 503-04.].

At the hearing on the motion held on March 13, 2009, the circuit court rejected Appellants' claim that the residency provisions in the Maui County Charter were self-executing:

> THE COURT:
>
> . . . .
>
> In this Court's view, the question [is] whether [Maui County Charter] Section 3-3 is a stand-alone provision or works in conjunction with a procedure set forth in Section 12.1[[4]] . . . 12-1 boils down to a question of law, and the question is, in the Court's view: Does the . . . office holder's failure to remove himself from office if he is not a resident constitute nonfeasance?
>
> If not, then section 3-3 is a stand-alone provision, and this Court has jurisdiction. if section 3-3 is intended to work in this particular instance with Section 12-1 triggering of impeachment provisions, then the procedure before the proceedings before this Court should be dismissed. And if there's going to be impeachment proceedings, the provisions of Section 12-1 should be followed.
>
> . . . .
>
> This Court concludes that in this instance what is being alleged is nonfeasance, that is, a failing to forfeit an office if the defendant is not a resident of the island of Lanai.
>
> Under the law, if the defendant [is] not a resident of the island of Lanai, he is under an obligation under Section 3-3 to immediately forfeit his office, and his seat would then thereupon become vacant. It is alleged here that he has failed to perform that act, and in the Court's view that constitutes nonfeasance.
>
> The Court, therefore, concludes that the proper procedure to be followed is that as outlined under Section

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[4] The circuit court's oral ruling incorrectly referred to Maui County Charter § 12-1, which establish removal proceedings. Impeachment proceedings are established in Maui County Charter § 13-13. The correct citation is found in the circuit court's written order issued on March 19, 2009. [RA 771.].

12-1 of the Maui County Charter, and that would be to initiate an impeachment proceeding alleged nonfeasance, the failure to immediately forfeit office, and then those procedures would then apply, and the Court would then ultimately determine whether the defendant should be removed from office.

That requires the petition for impeachment to be signed by not less than five percent of the voters registered in the last general election. It is obvious from the pleadings that--and the record before the Court--and the Court takes judicial notice of the fact that the number of plaintiffs in this proceeding does not constitute five percent of the voters registered in the last general election. It doesn't come anywhere near that number. And as a result, the Court concludes that this proceeding should be dismissed.

So at this time I'm going to grant the motion to dismiss because the Court does conclude that what is alleged here, that is that of nonfeasance, failure to forfeit office when a person is allegedly under an obligation to do so, and that the impeachment proceedings as set forth in Section 12-1 should be followed.

If that is followed, of course, this matter comes back to the Circuit Court, and the Court will conduct or preside over impeachment proceedings. But at the present time, the Court concludes that Section 3-3 is not a stand-alone provision. It is intended to work with Section 12-1, and as a result, the Court at this time dismisses the action[.]

[TR 3/13/09 15-18.]

The circuit court elaborated its ruling after hearing further argument from Appellants:

MR. KUPCHAK: May I just ask for one clarification? I assume that the ruling, therefore, would be the same if it was a felon, and the felon, therefore, wouldn't have to get rid of his office unless five percent of the people filed a petition?

There's no distinction in the statute between the felon and the nonresident under these procedures. If that were the situation it would seem to me that the felon could stay in office until they found five percent to come along. Is that --

> THE COURT: That's--excuse me. First of all, that's not a request for clarification. That's an argument.
>
> So I think you're going beyond your request. . . . But if you think about it, throughout this nation in each--proceedings have initiated in other jurisdictions where individuals have been convicted of a felony have not removed themselves from office and are, therefore, impeached from office. Impeachment procedures are instituted and they are ultimately--the individuals are ultimately removed.
>
> So I think there is a process and procedure that's provided by the Charter. Concluding otherwise in the Court's view under these circumstances really creates a situation where Section 3-3 stands alone without any procedure to support it, and the Court's troubled by that.
>
> It makes sense that Section 12-1 is designed to work with 3-3. There is a procedure provided for by law, and it makes sense that the voters can initiate a proceeding to remove a person from office if a person is in a situation where they are under a legal obligation to forfeit that office but they fail to do so, and that would then constitute nonfeasance.

[TR 3/13/09 18-19.].

The circuit court issued its order granting Mr. Kaho'ohalahala's motion for judgment on the pleadings on March 19, 2009. [RA 769-775.]. The circuit court stated that the "issue presented is whether Maui County Charter § 3-3 allows Plaintiffs to seek removal from office by means of declaratory relief under Hawai'i Revised Statutes § 632-1, or whether Plaintiffs must seek relief through another procedure such as the impeachment provision found in Maui County Charter § 13-13." [RA 771.]. The circuit court concluded that under Maui County Charter § 3-3, Mr. Kaho'ohalahala was under a duty to immediately forfeit his office if he did not meet the proper residency requirements. [RA 773.]. The failure to forfeit would constitute nonfeasance and, thus,

the impeachment procedures under the Maui County Charter governed. [Id.]. Because there was an insufficient number of registered voters to institute impeachment procedures, Appellants could not proceed and Mr. Kaho'ohalaha's motion for judgment on the pleadings was granted. [RA 773-74.]. The circuit court dismissed Appellants' case "without prejudice to [Appellants'] ability to initiate an impeachment or other appropriate proceeding." [RA 774.].

On March 30, 2009, Appellants requested leave to amend the amended complaint. [RA 776-1118.]. Appellants wanted to amend the complaint a second time to proceed against Mr. Kaho'ohalahala in his official capacity in the form of quo warranto relief. [RA 790.]. Mr. Kaho'ohalahala opposed the motion on the grounds that a second amendment would be unduly prejudicial. [RA 1119-54; 1122-25.].

At the hearing on the motion held on April 26, 2009, Mr. Kaho'ohalahala argued that he would be subjected to undergo prejudice by the amended complaint:

MR. LOWENTHAL:

. . . .

> . . . As far as amending the complaint to allow quo warranto action, when you amend a complaint, it can be done, but if there is hardship to the Defendant in the form of undue prejudice, then it should not be granted. . . .
>
> They want to change their theories for jurisdiction under quo warranto. And the cases I cited that go back to the Territory show that in all cases of quo warranto, they are cases where a person is sued in his or her official capacity and that they are entitled to the benefit of representation by State or County government, whatever the case may be.
>
> Note that in this case, the County was originally brought as a party when Mr. Kahoohalahala was a candidate. And the parties--those two parties agreed to dismiss, or they stipulated to a dismissal of the County.

> They wanted to focus solely on Mr. Kahoohalahala. Now, they want to change their jurisdictional theory, so that they can go after him in his official capacity, which then brings the County back in.
>
> And as I mentioned and declared in our memo in opposition, we attempted to tender the defense over to the County at that point in light of their request, and it was refused. So, when we talk about hardship, Plaintiffs have said that they are going to try this case one way or another. If they try it through this action, it is going to be through the hardship and expense of someone paying as if they were sued in their personal capacity, but they're really going after him in his official capacity.

[TR 4/26/09 6-7.].

The circuit court denied Appellants' motion:

> THE COURT:
>
> . . . .
>
> . . . [W]ith respect to the motion to amend, for leave to amend, after the Court's earlier order, in the Court's view, given the Court's previous ruling, given the current status of this case and the history of these proceedings, the proper exercise at the Court's discretion relative to the request for leave to amend is to deny that motion[.]

[TR 4/26/09 8; see also RA 1166-67.].

Judgment for Mr. Kaho'ohalahala was entered on June 23, 2009. [RA 1170-1172.]. Appellants timely appealed on July 6, 2009. [RA 1173-1185]. Transfer to this Court was granted on October 9, 2009.

II. Points of Error

Appellants present two points of error:

(1) The circuit court erred in concluding that the Declaratory Judgment Act does not allow voters to enforce substantive provisions of the Maui County Charter and

evade the already-existing remedies and procedures for the removal of elected officials; and

(2) The circuit court abused its discretion when it refused to allow Appellants to amend their complaint a second time and proceed against Mr. Kaho'ohalahala in his official capacity--after agreeing to dismiss Corporation Counsel.

III. Standards of Review

Judgment on the Pleadings

The granting of a motion for judgment on the pleadings is reviewed de novo. Ruf v. Honolulu Police Dept., 89 Hawai'i 315, 319, 972 P.2d 1081, 1086 (1999) (citing Kruzits v. Okuma Mach. Tool, Inc., 40 F.3d 52, 54 (3d Cir. 1994)).

Amending the Complaint

The circuit court's power to allow leave to amend the complaint lies in Hawai'i Rules of Civil Procedure (HRCP) Rule 15(a). "A denial of leave to amend under HRCP Rule 15(a) is within the discretion of the trial court." Gonsalves v. Nissan Motor Corp. in Hawaii, Ltd., 100 Hawai'i 149, 158, 58 P.3d 1196, 1205 (2002) (citing Federal Home Loan Morg. Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 162, 969 P.2d 1275, 1280 (1998)). The denial of a motion to amend a complaint is reviewed for an abuse of discretion. Id.

> The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Stated differently, an abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law to the substantial detriment of a party litigant.

Chun v. Bd. of Trs. of the Employees Ret. Sys. of the State of Hawai'i, 106 Hawai'i 416, 430, 106 P.3d 339, 353 (2005) (citations omitted.).

IV. Argument

1. The Declaratory Judgment Act does not Allow Voters to Enforce Substantive Provisions of the Maui County Charter and Evade the Already-Existing Remedies and Procedures for the Removal of Elected Officials.

Appellants argue that they can enforce provisions of the Maui County Charter with the declaratory judgment statute, Hawai'i Revised Statutes (HRS) § 632-1. [Appellants' Opening Brief (OB) at 18.]. Appellants are mistaken. Declaratory relief is not available when already-existing remedies and procedures are in place:

> Where . . . a statute provides a special form of remedy for a specific type of case, that statutory remedy shall be followed[.]

HRS § 632-1. Thus, "where such a remedy exists, declaratory judgment does not lie." Punaho v. Sunn, 66 Haw. 485, 487, 666 P.2d 1133, 1134 (1983) (citing Traveler's Ins. Co. v. Hawaii Roofing, Inc., 64 Haw. 380, 641 P.2d 1333 (1982)).

Appellants are twenty-one voters who want to remove Mr. Kaho'ohalahala from the Maui County Council on the grounds that he is not a resident of Lanai and has "immediately forfeited" his seat pursuant to Maui County Charter § 3-3. Removal of elected officials by the voters is a "special form of remedy for a specific type of case." HRS § 632-1. The Maui County Charter empowers voters to bring impeachment proceedings[5] against elected officials who fail to perform their duties:

> **Impeachment of officers.** Appointed or elected officers may be impeached for malfeasance, misfeasance, or nonfeasance in office or violation of the provisions of Article 10. Such impeachment proceedings shall be commenced in the Circuit Court of the Second Circuit, State of Hawai'i. The

[5] The Maui County Charter also provides voters with recall and removal proceedings. Maui County Charter § 12-1 et seq. An elected official can be recalled for any reason. Maui County Charter § 12-7.

> charge or charges shall be set forth in writing in a verified petition for impeachment signed by not less than five percent (5%) of the voters registered in the last general election. A charge or charges alleging violation of Article 10 may be set forth in writing in a verified petition for impeachment signed by a majority of the members of the board of ethics. If the court sustains the charge or charges, such officer shall be deemed removed from office. The officer sought to be impeached and the petitioners seeking the impeachment other than the board of ethics shall bear their own attorney's fees and other costs of such proceedings.

Maui County Charter § 13-13.

Nonfeasance means the failure to act when a person has a duty to act. Black's Law Dictionary 729 (6th ed. 1991). "As respects to public officials, 'nonfeasance' is substantial failure to perform a required legal duty[.]" Id. See also Lee v. Corregedore, 83 Hawai'i 154, 174 n. 1, 925 P.2d 324, 344 n. 1 (1996) (Levinson, J. dissenting) ("Nonfeasance implies the failure to act where a duty to act existed.") (brackets and citations omitted.); Baccus v. Ameripride Services, Inc., 145 Idaho 346, 179 P.3d 309, 350 (Idaho 2008) ("'Nonfeasance' means the omission of an act which a person ought to do").

The Maui County Charter places a duty on sitting council members to forfeit their seat if they fail to maintain their qualifications:

> **Qualifications.** To be eligible for election or appointment to the council, a person must be a citizen of the United States, a voter in the county, a resident of the county for a period of ninety (90) days next preceding the filing of nomination papers and at the time of filing of nomination papers a resident in the area from which the person seeks to be elected. **If a council member** ceases to be a resident of the county, or **ceases to be a resident of the council member's residency area during the council member's term of office**, or if a council member is adjudicated guilty of a felony, **the council member shall immediately forfeit office** and the seat shall thereupon become vacant.

Maui County Charter § 3-3 (emphasis added.).

"The interpretation of the charter is similar to the interpretation of a statute." Maui County Council v. Thompson, 84 Hawai'i 105, 106, 929 P.2d 1355, 1356 (1996). When the charter is plain and unambiguous, the court's "only duty is to give effect to its plain and obvious meaning." Id. (quoting State v. Baron, 80 Hawai'i 107, 113, 905 P.2d 613, 619 (1995)). Courts also examine the overall structure of the statutory scheme. See State v. Fagaragan, 115 Hawai'i 364, 369, 167 P.3d 739, 744 (App. 2007) (court turned to "structure" as well as plain language of statute in order to interpret meaning).

Appellants claim that Mr. Kaho'ohalahala "immediately forfeited office when he ceased to be a resident of the Lanai residency area[.]" [OB at 10.]. Appellants' interpretation departs from the plain language of the Maui County Charter. The charter provides that "the **council person** shall immediately forfeit office." Maui County Charter § 3-3 (emphasis added.). The word "shall" "has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials[.]" Black's Law Dictionary 958 (6th ed. 1991). The plain and obvious meaning of Maui County Charter § 3-3 mandates the "council member" to "immediately forfeit' his or her seat. The language of the charter does not create a self-executing provision that automatically forfeits Mr. Kaho'ohalahala's seat[6].

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[6] Appellants rely on In re Pioneer Mill Co., Ltd., 53 Haw. 496, 498, 497 P.2d 549, 551 (1972). In that case, the Hawai'i Supreme Court examined the following provision in the Hawai'i Constitution: "Any justice or judge who shall become a candidate for an elective office shall thereby forfeit his office." Id. at 498, 497 P.2d at 599. The

Mr. Kaho'ohalahala has a duty to " immediately forfeit" when he is no longer qualified to remain on the Maui County Council. The failure to immediately forfeit would constitute nonfeasance and, therefore, subject him to impeachment proceedings initiated by the voters heard in the circuit court. Maui County Charter § 13-13.

The remedy provided by the impeachment proceedings--removal from office based on non-residency--is identical to the remedy sought by Appellants in their amended complaint. The circuit court granted the motion for judgment on the pleadings, but permitted Appellants to initiate the proper impeachment procedures pursuant to Maui County Charter § 13-13. Appellants cannot attempt to enforce substantive provisions of the Maui County Charter on one hand and evade its procedures on the other.

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constitutional provision differs from the duty imposed on council members. The constitutional provision at issue in Pioneer Mill is structured so that the act of "be[coming] a candidate for an elective office" is also an act of forfeiture.

Maui County Charter § 3-3, however, is not automatic. Under the charter, the council member's obligation to immediately forfeit is contingent upon certain events--conviction of a felony or loss of residency. Maui County Charter § 3-3. Therefore, under the Maui County Charter, forfeiture is not automatically triggered by conduct.

Appellants' reliance cases from foreign jurisdictions is also unavailing. Under our canons of construction, "where the language of the law in question is plain and unambiguous courts must give effect to the law according to its plain and obvious meaning." County of Hawai'i v. C & J Coupe Family Ltd. Partnership, 119 Hawai'i 352, 363, 198 P.3d 615, 626 (2008) (quoting Mikelson v. United Servs. Auto Ass'n, 108 Hawai'i 358, 360, 120 P.3d 257, 259 (2005)). The plain and unambiguous language of Maui County Charter § 3-3 cannot be ignored.

Moreover, even if a felony conviction or non-residency automatically constitutes forfeiture of office, Appellants still cannot seek declaratory relief against Mr. Kaho'ohalahala. The relief sought in Pioneer Mill, Co. was to invalidate a judgment, not the removal of the Land Court judge. Pioneer Mill, Co., 53 Haw. at 497-98, 497 P.2d at 551. Appellants still must comply with the specific statutory remedies and procedures available for the removal of elected officials.

Appellants nonetheless claim that declaratory relief is available here because there is "no **exclusive** judicial remedy for [a] violation of Maui [County] Charter § 3-3." [OB at 20 (emphasis in original).]. Appellants point out that a quo warranto petition seeks the same relief prayed for in their amended complaint. [OB at 20-23.]. Appellants have conceded that already-existing special remedies and procedures exist for their type of case. A "special remedy" need not be exclusive. The quo warranto action--like the procedures provided in the Maui County Charter--is a "special remedy for a specific type of case." HRS § 632-1.

In Kaleikau v. Hall, 27 Haw. 420 (Terr. 1923), William Hall and others filed a complaint for declaratory relief against eighteen officers of the a "beneficial corporation holding a charter from the Territory[.]" Id. at 420. Hall alleged that the officers were ineligible to hold office. Id. at 421. Mary Ann Kaleikau countered with a writ of quo warranto. Id. at 422-23. The Hawai'i Supreme Court determined "whether the circuit court, under the facts set forth in the petition for declaratory judgment, is empowered to entertain jurisdiction of the matter and to grant the relief prayed for." Id. at 423.

After examining the Declaratory Judgment Act, the court posed the following question:

> [W]as it the intention of the legislature that in a case such as is here presented in the ordinary and established rules of procedure need not be followed but that the plaintiffs might resort to this new[[7]] method of procedure?

[7] Hawai'i's declaratory judgment statute was enacted in 1921--two years prior to Kaleikau v. Hall, 27 Haw. 420 (Terr. 1923).

Id. at 425. The court held that declaratory relief cannot replace already-existing procedures such as petitions for quo warranto:

> The obvious purpose of the act is for the decision of questions which could not under the older method be brought to judicial cognizance and not to provide new or additional remedies where remedies already existed. In other words, the intent of the act is to have the courts render declaratory judgments which may guide parties in their future conduct in relation to each other with a view rather to avoid litigation than in aid of it.

Id. at 428. The supreme court held that the declaratory judgment act did not apply to Hall's petition. Id. at 431.

Other jurisdictions agree that declaratory judgment cannot be used to determine if a person should remain in public office.

> Virtually every challenge to another's title to a public office can be phrased as a declaratory relief action seeking interpretation of some underlying constitutional or legislative provision. If that ploy were allowed, counsel could avoid the mandated quo warranto remedy . . . .

Beasley v. City of East Cleveland, 20 Ohio App. 3d 370, 486 N.E.2d 859, 863 (Ohio App. 1984). See also Riley v. Hughes, ___ So.2d ___, 2009 WL 281305 (Ala. 2009) ("the exclusive remedy to determine whether a party is usurping a public office is a quo warranto action . . ., and not an action seeking declaratory judgment."); see also Ex parte James, 684 So.2d 1315 (Ala. 1996) ("Quo warranto, not declaratory judgment, is the exclusive remedy to determine whether or not a party is usurping a public office.") (brackets omitted.); State ex rel. Munroe v. City of Poulsbo, 109 Wash. App. 672, 37 P.3d 319, 324 (Wash. App. 2002) ("The proper and exclusive method of determining the right to public office is through a quo warranto proceeding.") (citations omitted); Nicolopulos v. City of Lawndale, 91 Cal. App. 4th 1221, 1226, 111 Cal. Rptr. 2d 420,

423 (Cal. App. 2001) (title to public office must be brought through quo warranto proceedings and "cannot be tried by mandamus, injunction, writ of certiorari, or petition for declaratory relief."); Madden v. Houck, 403 N.E.2d 1133, 1136 (Ind. App. 1980) ("The proper remedy to determine the question of whether a person elected to office possesses the requisite qualifications for eligibility is by an information in the nature of quo warranto. . . . Because the issuance of declaratory judgment would not completely resolve the controversy, we conclude that the trial court erred in denying Madden's motion to dismiss."); Giannotta v. Milliken, 71 Mich. App. 15, 246 N.W.2d 357, 360 (Mich. App. 1976) (declaratory action dismissed because it "speaks to the procedure required of what we perceive as a clear Quo warranto claim.").

This case is similar to Kaleikau[8]. Appellants cannot seek declaratory relief to evade already-existing remedies and procedures: impeachment, removal, and quo warranto. Declaratory judgment "is neither a general panacea for all legal ills nor a substitute for existing remedies. It is not to be invoked where an adequate remedy already exists." Cooper v. State, 818 S.W.2d 653, 654 (Mo. App. 1991) (citations omitted.). Accordingly, the circuit court did not err in granting Mr. Kaho'ohalahala's motion for judgment on the pleadings.

2. The Circuit Court did not Abuse its Discretion when it Refused to Allow Appellants to Amend Their Complaint a Second time and Proceed Against Mr. Kaho'ohalahala in his Official Capacity.

A complaint should not be amended when it unduly prejudices the opposing party:

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[8] Hawai'i Revised Statutes (HRS) § 632-1 appears to have codified Kaleikau by prohibiting declaratory relief when " a special form of remedy for a specific type of case[.]"

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.--the leave sought should, as the rules require, be "freely given."

Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i 473, 490, 135 P.3d 82, 99 (2006) (quoting Associated Eng'rs & Contractors v. State, 58 Haw. 187, 218-19, 567 P.2d 397, 417 (1977)); accord. Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227 (1962).

Appellants claim that the circuit court abused its discretion because it did not give its reason for denying their request to amend the complaint. [OB at 24[9].]. The record, however, clearly shows that the "apparent or declared reason" for denying Appellants' leave to amend their complaint was based on "undue prejudice to the opposing party by virtue of allowance of the amendment." Tri-S Corp. v. Western World Ins. Co., 110 Hawai'i at 490, 135 P.3d at 99; see also Mayeaux v. Louisiana Health Service and Indem. Co., 376 F.3d 420, 426-27 (5th Cir. 2004) (court's failure to state reason for denial of leave to amend complaint "is unfortunate but not fatal in affirmance" when records shows the "ample and obvious grounds"); Feldman v. Am. Mem'l Life Ins. Co., 196 F.3d 783, 793 (7th Cir. 1999) ("Although the district court did not articulate its basis for decision, denial of a motion to amend pleadings without explanation does not constitute abuse of discretion if the delay and prejudice that would result from such amendment was apparent.").

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9 Appellants' failed to include any argument underlying their second point of error. Instead, the second portion of Appellants' Opening Brief pertained to the Maui County Charter. Because the argument was improperly raised, it should be considered waived. Hawai'i Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued may be deemed waived.").

Mr. Kaho'ohalahala opposed the amendment of the complaint on the grounds that "continuation of this lawsuit reframed as a quo warranto action would result in undue prejudice[.]" [RA at 1123.]. The circuit court agreed.

Federal courts[10] recognize that "the issue of prejudice requires that we focus on the hardship of the defendants if the amendment were permitted." Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001); see also Bechtel v. Robinson, 886 F.2d 644, 652 (3d Cir. 1989) ("prejudice to the non-moving party is the touchstone for the denial of the amendment.") (citations omitted). Amendments that result in additional discovery, costs, and expenses often constitute "undue prejudice." Keiter v. Penn Mut. Ins. Co., 900 F. Supp. 1339, 1342 (D. Haw. 1995) ("Putting the defendants through the time and expense of continued litigation on a new theory, with the possibility of additional discovery, would be manifestly unfair and unduly prejudicial.") (quotation marks and citations omitted.).

Appellants requested leave to amend their complaint to order to change their theory of jurisdiction and bring an action in quo warranto. [RA 776-1118.]. A writ of quo warranto directs "a person who claims or usurps an office of the State or of any subdivision thereof . . . [to] inquir[e] by what authority the person claims the office[.]" HRS § 659-1. The amendment would have altered the nature of the lawsuit against Mr.

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> Rule 15(a) of the Federal Rules of Civil Procedure is functionally identical to Rule 15(a) HRCP. Where a Hawai'i rule of civil procedure is identical to the federal rule, the interpretation of this rule by federal courts is highly persuasive.

Federal Home Loan Mortg. Corp. v. Transamerica Ins. Co., 89 Hawai'i 157, 162 n. 1, 969 P.2d 1275, 1280 n. 1 (1998) (quoting Wong v. Takeuchi, 87 Hawai'i 320, 329, 955 P.2d 593, 602 (1998)) (citations and quotation marks omitted.).

Kaho'ohalahala from one in his personal capacity to a specific statutory proceeding against Mr. Kaho'ohalahala in his official capacity.

Corporation Counsel has a duty to represent "all officers and employees in matters relating to their official duties." Maui County Charter § 8-2.3(2). Therefore, Corporation Counsel has a duty to defend Mr. Kaho'ohalahala in a quo warranto action. See, e.g., In re Application of Ferguson, 74 Haw. 394, 846 P.2d 894 (1993) (Attorney General defended district court judge); In re Application of Thomas, 73 Haw. 233, 832 P.2d 253 (1992) (corporation counsel defended deputy corporation counsels); Okuda v. Ching, 71 Haw. 140, 785 P.2d 943 (1990) (corporation counsel defended prosecuting attorney); Crossley v. Ing, 50 Haw. 470, 442 P.2d 459 (1968) (Attorney General defended lieutenant governor and governor); In re Sherretz, 40 Haw. 366 (Terr. 1953) (county attorney defended city personnel director); In re Jones, 34 Haw. 12 (Terr. 1936) (Attorney General defended commissioner of Territorial Board of Archives).

When Appellants sought declaratory relief against Mr. Kaho'ohalahala in his personal capacity, Mr. Kaho'ohalahala retained private counsel. The Corporation Counsel defended the County Clerk. Appellants subsequently agreed to dismiss the Clerk. Later, however, they attempted to bring an action against Mr. Kaho'ohalahala as a sitting councilmember.

Corporation Counsel refused to tender the defense. [RA 1125, 1126.]. Even in a quo warranto action, Mr. Kaho'ohalahala would have had to resort to a privately-retained counsel as the litigation continued. The additional costs and expenses in retaining private counsel to defend against Mr. Kaho'ohalahala in his official capacity constitute "undue prejudice." The circuit court did not "clearly exceed[] the

bounds of reason or disregard[] the rules or principles of law or practice" in denying Appellants' leave to amend their complaint. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992). Accordingly, there was no abuse of discretion.

V. Conclusion

The circuit court committed no error. Appellants cannot use the Declaratory Judgment Act to remove an elected county official pursuant to the Maui County Charter when already-existing remedies and procedures exist. The circuit court did not abuse its discretion in denying Appellants' request to amend their complaint because changing their theory of recovery by suing Mr. Kaho'ohalahala in his official capacity--after agreeing to dismiss Corporation Counsel--would have resulted in undue prejudice to Mr. Kaho'ohalahala. The Judgment should be affirmed.

DATED: Wailuku, Maui, Hawai'i November 2, 2009

BENJAMIN E. LOWENTHAL
Attorney for Appellee

STATEMENT OF RELATED CASES

Dupree v. Kaho'ohalahala was brought before the Maui County Clerk by Appellant, Michael "Phoenix" Dupree, on October 24, 2009. Mr. Dupree challenged Mr. Kaho'ohalahala's residency claim for voter registration purposes. On October 30, 2009, the County Clerk of Maui County overruled Dupree's challenge and found Mr. Kaho'ohalahala a Lanai resident for voter registration purposes. Dupree has not appealed.

CERTIFICATE OF SERVICE

I hereby certify that two (2) true and correct copies of the foregoing document were duly served upon the following party by mail, on this date.

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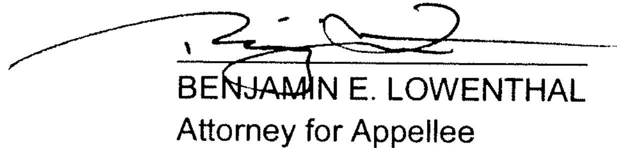

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