NO. 28175

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MAUNALUA BAY BEACH OHANA 28, a Hawaii Non-Profit Corporation, MAUNALUA BAY BEACH OHANA 29, a Hawaii Non-Profit Corporation, and MAUNALUA BAY BEACH OHANA 38, a Hawaii Non-Profit Corporation, individually and on behalf of all others similarly situated, Plaintiffs-Appellees, vs. STATE OF HAWAI'I, Defendant-Appellant.	CIVIL NO. 05-1-0904-05 EEH (Inverse Condemnation) APPEAL FROM THE ORDER GRANTING PLAINTIFF'S AMENDED MOTION FOR PARTIAL SUMMARY JUDGMENT FILED FEBRUARY 13, 2006 (filed Sep. 1, 2006) FIRST CIRCUIT COURT HON. Elizabeth Eden Hifo

BRIEF OF AMICUS CURIAE HAWAII'S THOUSAND FRIENDS

EXHIBIT "A"

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

BRIEF OF AMICUS CURIAE HAWAII'S THOUSAND FRIENDS

I. INTRODUCTION

Amicus Curiae Hawaii's Thousand Friends ("HTF") submits this brief in opposition to the Application for Writ of Certiorari to Review the Judgment on Appeal of the Intermediate Court of Appeals Filed January 26, 2010 ("Plaintiffs' Application"), filed herein on April 22, 2010, by Petitioners-Plaintiffs-Appellees Maunalua Bay Beach 'Ohana 28, et al. ("Plaintiffs").

II. QUESTIONS PRESENTED

The issues before this Court which HTF seeks to address are as follows:

1. Under Hawai'i law, do riparian landowners have a vested property right in the ownership of potential future accretions of land that may or may not accumulate seaward of their property subsequent to May 20, 2003, the effective date of Act 73, Haw. Sess. Laws 2003?

2. Are plaintiffs who prevail in an action for the protection of their own private interests as landowners eligible for an award of attorneys fees as private attorneys general who have vindicated important public rights?

III. STATEMENT OF PRIOR PROCEEDINGS

Act 221, Haw. Sess. Laws (1985), which became effective on June 4, 1985, provided, inter alia, that owners of shoreline lands could initiate an action to establish their ownership of lands formed by accretion

seaward of their property only after the accretion had become "permanent" by having been in place for twenty years. Act 73, Haw. Sess. Laws (2003), which became effective on May 20, 2003, provided, inter alia, that thereafter private owners of shoreline lands would in most cases be barred from registering ownership to lands formed by accretion seaward of their property. Plaintiffs filed suit in circuit court against Defendant State of Hawai'i on May 19, 2005, alleging that Act 73 worked an uncompensated taking of their private property rights in violation of Haw. Const., Art. I, § 20. An interlocutory appeal was taken from the circuit court's Order Granting Plaintiff's Amended Motion for Partial Summary Judgment Filed February 13, 2006, and on December 30, 2009, the Intermediate Court of Appeals of Hawai'i ("ICA") issued its opinion. Maunalua Bay Beach 'Ohana 28 v. State of Hawai'i, 122 Hawai'i 34, 222 P.3d 441 (Hawai'i App. 2009). On April 22, 2010, Plaintiffs filed their Application for Writ of Certiorari to Review the Judgment on Appeal of the Intermediate Court of Appeals Filed January 26, 2010.

IV. STATEMENT OF THE CASE

The ICA adopted the State's classification of the accreted lands at issue into three classes:

> (1) Class I accreted lands—those lands that accreted before the effective date of Act 221, i.e., before June 4, 1985; (2) Class II accreted lands—those lands that accreted after the effective date of Act 221 but before the effective date of Act 73, i.e., between June 4, 1985, and May 19, 2003; and (3) Class III accreted lands—those lands that accreted on or after the effective date of Act 73, i.e., on or after May 20, 2003.

Maunalua, 122 Hawai'i at 54, 222 P.3d at 461. The ICA held that Act 73 worked an uncompensated taking with respect to Class I and Class II accreted lands. Maunalua, 122 Hawai'i at 57, 222 P.3d at 464. It held, however, that "Plaintiffs and the class they represented had no vested property rights to future accretions to their oceanfront land [i.e., Class III accretions] and, therefore, Act 73 did not effect an uncompensated taking of future accretions." Maunalua, at id. The ICA also denied Plaintiffs' subsequent request for attorneys fees and costs as "private attorneys general" in its order dated March 9, 2010. It is the ICA's determinations with regard to Class III accretions and attorneys fees that are the main focus of Plaintiffs' Application for Writ of Certiorari, and it is these topics that HTF will address in this brief.

V. ARGUMENT

A. Plaintiffs have no vested right to ownership of future accretions under Hawai'i law, and thus no such right can have been taken from them.

1. The question of whether riparian landowners have a vested property right in future accretions is a matter of first impression in this jurisdiction.

Although Plaintiffs confidently assert that "The ICA's Decision [with regard to future accretions] is Contrary to the Law of Hawai'i, as Reflected in this Court's Decisions, and Federal Law," Plaintiffs' Application, at 4, the Hawai'i cases upon which they rely say nothing about a landowner's supposed vested rights in future accretions. Nor do the decisions of various federal and state courts they cite bind this Court as it interprets the property law of the State of Hawai'i in what is clearly a matter of first impression in this jurisdiction. In any event, the views of out-of-state courts are considerably less uniform than Plaintiffs suggest as American courts (including the United States Supreme Court) have held that under the law of Louisiana and the U.S.-administered Philippine Islands riparian landowners have no right whatsoever to seashore accretions. Zeller v. Southern Yacht Club, 34 La. Ann. 837, 1882 WL 8688 (La. 1882) (Louisiana law); Ker & Co. v. Couden, 223 U.S. 268 (1912) (Philippine Islands law).

Plaintiffs attempted reliance on Halstead v. Gay, 7 Haw. 587 (1889), In re Sanborn, 57 Haw. 585, 562 P.2d 771 (1977), and State v. Zimring, 58 Haw. 106, 566 P.2d 725 (1977), Plaintiffs' Application at 5, is ill-conceived. Halstead concerns a riparian landowners' claims to accretions that had already formed; it says nothing about the power of the Legislature to change prospectively the rules by which as-yet inchoate claims to ownership of future accretions may vest or, as under Act 73, to declare that in future no such private rights may vest. Sanborn did not concern accreted land at all, but dealt instead with the determination of the boundary of a riparian landowner's land along the existing shoreline. Zimring, like Halstead, concerned the legal effect of past changes in the shoreline (though in Zimring the changes were the result of volcanic activity, not accretion); nothing was said as to supposed rights in future accretions. Nor can Plaintiffs salvage their claims by recasting them as a vested right to an "ambulatory" shoreline, Plaintiffs' Application, at id., as the holding of Zimring that lava extensions belonged to the State, not the riparian landowner, left the former riparian with no access to the sea whatsoever along the affected shoreline.

As the ICA noted, some courts have held that riparian landowners have no vested property right in future accretions. Maunalua, 122 Hawai'i at 53, 222 P.3d at 460 (citing Western Pac. Ry. Co. v. Southern Pac Co., 151 F. 376 (9th Cir. 1907), Cohen v. United States, 162 F. 364 (C.C.N.D. Cal. 1908), and Latourette v. United States, 150 F. Supp. 123 (D. Or. 1957)). The ICA held that this was the law of Hawai'i as well, finding no binding authority that compelled it to adopt the alternative and that its holding was consistent with the public policy of our State. Maunalua, 122 Hawai'i at 52-54, 222 P.3d at 459-61. While other courts in other jurisdictions have ruled to the contrary, the decisions cited in Plaintiffs' Application, at 6, interpreted the laws of other states (e.g., Strand Improvement Co. v. Long Beach, 173 Cal. 765, 161 P. 975 (1916) (California law); Purdie v. Attorney General, 143 N.H. 661, 732 A.2d 442 (1999) (New Hampshire law); Bd. Of Trustees v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. Ct. App. 1973) (Florida law)) or the rights under federal common law of those whose title traces back to a grant from the federal government (Hughes v. State of Washington, 389 U.S. 290 (1967); United States v. Milner, 583 F.3d 1174 (9th Cir. 2009), pet. cert. filed, 78

U.S.L.W. 3419 (Jan. 7, 2010)) and say nothing about the law of Hawai'i.

It is important to recognize that the property law of the State of Hawai'i, though influenced by the English Common Law, has its origin instead in the laws of the independent Hawaiian Nation. See generally Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 903 P.2d 1246 (1995), cert. denied, 517 U.S. 1163 (1996) ("PASH"). The property rights of Hawaii's riparian landowners, whatever their extent may be, vested under and were defined by the laws in effect at the time of the mahele or on whatever subsequent date a particular parcel was first granted into private hands. "The statutory provision (Civ. L., Sec. 1109 [now § 1-1, Hawai'i Revised Statutes (2009)) which took effect January 1, 1893, adopting the common law except in certain cases, would not affect a title which had vested previously." Branca v. Makuakane, 13 Haw. 499, 500 (1901).

The U.S. Supreme Court, when faced with a claim that private property in Hawai'i has been unlawfully taken by government action, has recognized the need to inquire carefully into the particulars of Hawai'i law to determine whether, under that body of law, a private landowner does in fact have a vested right in the property interest he

claims has been taken from him. Damon v. Territory of Hawaii, 194 U.S. 154 (1904) (analyzing status of offshore fisheries as private property under Hawai'i law); Carter v. Territory of Hawaii, 200 U.S. 255 (1906) (same); Kaiser Aetna v. United States, 444 U.S. 164 (1979) (analyzing status of ancient Hawaiian fishpond as private property under Hawai'i law).

In light of the above, this Court need not mimic the law of other jurisdictions but must instead declare the state of the law of Hawai'i prior to the statutory adoption of the common law as precedent in 1893. In doing so it may certainly look to decisions in other American jurisdictions as persuasive authority, but it need not feel bound by them. It may also, however, look for guidance to the decisions upon which the ICA relied (Western Pac. Ry. Co., Cohen, and Latourette) as well as opinions defining the property law of jurisdictions that, like Hawai'i, have a legal heritage separate and apart from the common law. Examples to be considered include Zeller (Louisiana law; for the proposition that Louisiana has not adopted the common law, see Strand Improvement Co., 173 Cal. at 772, 161 P. at 978) and Couden (Philippine Islands law, based on Spanish law (Hughes, 389 U.S. at 293 fn.2)), where courts

have embraced a view of the law similar to that which HTF urges this Court to adopt here.

2. Palazzolo Does not Trump Hawaii's Public Trust Doctrine.

Plaintiffs contend that Palazzolo v. Rhode Island, 533 U.S. 606, 626-27 (2001) bars the ICA's reliance on the "public trust" provision of the Hawai'i Constitution, Haw. Const. art. XI, § 1. Plaintiffs' Application, at 7 fn.5. As the ICA recognized, however, Maunalua, 122 Hawai'i at 41, 222 P.3d at 448, Hawaii's Public Trust Doctrine did not originate with the 1978 constitutional amendment but instead dates from King v. Oahu Railway & Land Co., 11 Haw. 717 (1899). Accordingly, it was part of our law before the Takings Clause of the U.S. Constitution was made applicable here with the enactment of § 5 of the Hawaii Organic Act, 31 Stat. 141 (April 30, 1900) (and before the adoption in 1959 of the predecessor of Haw. Const., Art. I, § 20), and its effects raise no constitutional issue as it is "a pre-existing limitation upon the landowner's title," PASH, 79 Hawai'i at 452, 903 P.2d at 1273 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, [1028-29] (1992)) and a "background principle[] of the State's law of property and nuisance." See Lucas, 505 U.S. at 1029.

3. The ICA's holding that Plaintiffs have no vested property right in future accretions is consistent with this State's public policy and, as it works no unconstitutional taking, should be affirmed.

This Court, in Diamond v. State of Hawai'i, Board of Land and Natural Resources, 112 Hawai'i 161, 145 P.3d 704 (2006), recently reaffirmed that the public policy of our State "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." Id., 112 Hawai'i at 175, 145 P.3d at 718 (quoting County of Hawaii v. Sotomura, 55 Haw. 176, 182, 517 P.2d 57, 61-62 (1973), cert. denied, 419 U.S. 872 (1974)). While there may well be uncertainty regarding the scope of the property rights granted to riparian landowners under the mahele and subsequent grants of land into private hands, this Court should resolve that uncertainty in a manner that furthers rather than obstructs the State's stated public policy.

B. Plaintiffs Prevailing in an Action to Protect Their Purely Private Rights as Landowners are not Private Attorneys General Entitled to an Award Attorneys Fees.

Plaintiffs contend that they "are entitled to fees under HRAP Rule 39(b) as a prevailing party under the private attorney general doctrine," Plaintiffs' Application, at 11-12, noting that this "is an equitable rule that allows courts in their discretion to award

[attorneys'] fees to plaintiffs who have vindicated important public rights." Id., at 11 (quoting Sierra Club v. State of Hawai'i, 120 Hawai'i 181, 218, 202 P.3d 1226, 1263 (2009) ("Superferry II"). Plaintiffs fail to recognize, however, that the doctrine is intended to encourage private litigation to protect "important public rights" (emphasis provided), whereas here Plaintiffs sued to protect their own alleged private rights as landowners. Economic self-interest gave them all the incentive they needed to initiate this action, and any victory they may win vindicates a purely private right wholly unlike the public rights at issue in Superferry II. While it can be argued that the public interest is served by the enforcement of the provisions of the Hawai'i State Constitution, if Plaintiffs have in fact done so, our Legislature has not seen fit to enact a state analogue to 42 U.S.C. § 1988 and this Court has not yet recognized a generally applicable right to attorneys fees when a plaintiff successfully challenges a violation of rights guaranteed under the State Constitution. Cf. Taomae v. Lingle, 110 Hawai'i 327, 333 & fn.14, 132 P.3d 1238, 1245 & fn.14 (2006) (issue raised but not decided).

VI. CONCLUSION

For all of the above reasons, Amicus Hawaii's Thousand Friends asks this Court to reject Plaintiffs' Application for Writ of Certiorari or, in the alternative, to uphold the ICA's conclusions that Plaintiffs have no vested property right in future accretions and are not entitled to attorneys fees as private attorneys general.

DATED: Honolulu, Hawai'i, May 13, 2010.

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