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S.C. NO. CAAP-12-0000434

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

STATE OF HAWAII

Plaintiff-Appellant,

v.

KUI PALAMA,

Defendant-Appellee.

CR. NO. 11-1-0116

APPEAL FROM THE FINDINGS OF
FACT, CONCLUSIONS OF LAW, AND
ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FILED APRIL
26, 2012

FIFTH CIRCUIT COURT,
STATE OF HAWAII

HONORABLE KATHLEEN N.A
WATANABE, JUDGE PRESIDING

REPLY BRIEF OF PLAINTIFF-APPELLANT, STATE OF HAWAII

CERTIFICATE OF SERVICE

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REPLY BRIEF

Pursuant to Hawaii Rules of Appellate Procedure (HRAP) this reply brief is confined to matters presented in the answering brief.

I. Native Hawaiian

The record is void of any conclusive evidence that Palama is a native Hawaiian. If any evidence existed in the record that Palama is a Const. Art. 12, § 7 native Hawaiian, one could point directly to it.

One merely has to search the record for the term "1778".

In the Answering Brief (AB), it appears on pages 3 and 8, i.e., twice. The p. 3 reference is to a "collective" demonstration regarding 1778. The p. 8 reference once again refers to a "collective" demonstration.

It is simply a fact that not everyone who claims to be native Hawaiian qualifies as a Constitution of the State of Hawaii Article 12, § 7 native Hawaiian.

Here, the State disputes that Palama satisfied the first and second of the three prongs of St. v. Hanapi, 89 Haw. 177, 970 P.2d 485 (1998), however, this court will decide those questions.

II. Hawaiian custom

The minimum standard for what is a native Hawaiian custom is found in the analysis the court must undertake when a defendant has made the "minimum" showing from Hanapi. St. v. Pratt, 127 Haw. 206, 207-208, 277 P.3d 300, 301-302 (2012).

First, Palama must be "native Hawaiian". The State's position is that he is not.

Second, his pig hunting (the claimed right) must be "constitutionally protected as a customary or traditional native Hawaiian practice". It is the State's position that pig hunting is a customary practice all over the world and not exclusive to these islands. In any event, the record is silent about pig hunting on the island of Kauai prior to the birth of any of the *Kamaaina* witnesses.

Third the conduct must occur on undeveloped property. *Id.*

It is for this court to determine whether pig hunting on undeveloped private property in the state of Hawaii must be constitutionally protected.

It is the State's position that to do so would reach an absurd and very dangerous result.

When this court considers the State's interest in regulating pig hunting by examining the laws in place on the

subject, it is the State's position that pig hunting is already is regulated for obvious reasons.

The trial court was required to take "judicial notice" of all state statutes. St. v. West, 95 Haw. 22, 26, 18 P.3d 884, 888 (2001).

III. Kuleana Ahupuaa

The record is void of any evidence Palama is a lawful tenant of a *Kuleana Ahupuaa*.

It is undisputed that the land in question here is undeveloped. Therefore, that appropriate use of that land is to be determined on a case by case basis. The claim of traditional rights is determined by balancing the respective interests of the land owners, the public, persons claiming the constitutional right, and the potential for harm once it is established that the application of the custom has continued in a particular area. Pratt, at 214.

Once again, the record is void that pig hunting occurred on the land in question prior to any witnesses' testimony of what they know.

There is no evidence that pig hunting occurred on the subject undeveloped land prior to 1892.

IV. *Kamaaina* and expert testimony

Palama relies upon anecdotal *Kamaaina* testimony in an attempt to sustain his burden of proof on the motion.

No *Kamaaina* exception exists in the Hawaii Rules of Evidence (HRE).

Expert testimony is covered by HRE 702.

If this court finds the individual and collective testimony of Dr. Osorio, Laverne Silva, Elvin Kaiakapu, Herbert Kauahi and Kui Palama to be of assistance, trustworthy, valid, and dispositive of the issues that Palama has the burden of proof of here -- well -- there is little or nothing that can be argued to dissuade that conclusion.

There is reality, and there is the opposite of reality.

There is evidence, and there is argument.

V. Pig Hunting

The trial court was required to take "judicial notice" of state statutes that clearly regulate pig hunting. St. v. West, 95 Haw. 22, 26, 18 P.3d 884, 888 (2001).

Hawaii Revised Statutes and Hawaii Administrative Rules regulate pig hunting for all of the reasons articulated in those laws.

The trial court was required to apply the totality of the circumstances test to the facts of this case.

VI. Conclusion

A balancing of interests weighs in favor of permitting the State to regulate Palama's pig hunting on the private property in question, his argument of privilege notwithstanding. Pratt, at 218. The motion should have been denied by the trial court.

Dated 11.26.12

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PROOF OF SERVICE

I certify that the attached: Reply Brief was served on

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Dated: 11-26-12

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