

**Electronically Filed
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SCAP-22-0000268

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PUALANI KANAKA'OLE KANAHELE,
EDWARD HALEALOHA AYAU, KELI'I W.
IOANE, JR.,

Plaintiffs-Appellants,

v.

STATE OF HAWAI'I; DEPARTMENT OF
TRANSPORTATION; JADE BUTAY, in his
official capacity as director of the Department
of Transportation; DEPARTMENT OF LAND
AND NATURAL RESOURCES; SUZANNE
CASE, in her official capacity as the director
of the Department of Land and Natural
Resources; DEPARTMENT OF HAWAIIAN
HOME LANDS; HAWAIIAN HOMES
COMMISSION; WILLIAM J. AILĀ, JR., in
his official capacity as the Director of the
Department of Hawaiian Home Lands and
Chair of the Hawaiian Homes Commission;
PATRICIA A. KAHANAMOKU-TERUYA,
RANDY K. AWO, PAULINE N. NAMU'O,
ZACHARY Z. HELM, DENNIS L. NEVES.
MICHAEL L. KALEIKINI, RUSSELL K.

(Caption Continued on Next Page)

CIVIL NO. 1CCV-20-0000235

APPEAL FROM THE

- 1) FINAL JUDGMENT, filed and entered
on March 17, 2022;
- 2) ORDER DENYING PLAINTIFFS'
MOTION FOR PARTIAL
SUMMARY JUDGMENT, filed
November 5, 2021; and
- 3) AMENDED ORDER DENYING
PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY JUDGMENT,
filed February 10, 2022

FIRST CIRCUIT COURT

HONORABLE LISA W. CATALDO
Judge

KAUPU, and DAVID B. KA‘APU, in their
official capacities as members of the Hawaiian
Homes Commission,

Defendants-Appellees.

**DEFENDANTS-APPELLEES’ RESPONSE TO
PLAINTIFFS-APPELLANTS’ APPLICATION FOR TRANSFER**

CERTIFICATE OF SERVICE

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K. KAUPU, AND DAVID B. KA‘APU, in their official capacities as members of the Hawaiian
Homes Commission

**DEFENDANTS-APPELLEES' RESPONSE TO
PLAINTIFFS-APPELLANTS' APPLICATION FOR TRANSFER**

I. INTRODUCTION

Defendants-Appellees (collectively “the State”) do not oppose Plaintiffs’ request that this Court accept transfer of this appeal. Although the State disagrees with some of the arguments Plaintiffs make in favor of transfer, the State acknowledges that there is at least a colorable question as to whether the statutory qualifications for transfer under HRS § 602-58 are met here. Nevertheless, the State files this response to Plaintiffs’ Transfer Application to clarify the issues and background facts on appeal such that the Court may make an informed decision on whether to accept transfer.

In this case, Plaintiffs have brought claims against the State Defendants alleging breach of the Hawaiian Home Lands trust regarding the State’s operation of a public road – Mauna Kea Access Road (MKAR) – atop land designated as Hawaiian home lands. Plaintiffs seek, among other things, declarations that the State (through the Department of Transportation (DOT)) has breached its trust duties by using the land underlying MKAR without compensation to the Department of Hawaiian Home Lands (DHHL) and that DHHL has breached its trust duties by failing to redress such use. Plaintiffs also seek an injunction returning of control of the MKAR from DOT to DHHL. ROA Dkt. 12 at PDF 11-12 (First Amended Complaint (FAC)).

The issues in the present appeal, however, are relatively narrow and do *not* raise the question of whether any of the State Defendants ultimately breached their trust duties. Specifically, this appeal arises from the circuit court’s order denying Plaintiffs’ Motion for Partial Summary Judgment (MPSJ),¹ wherein the circuit court ruled that Plaintiffs’ breach of trust claims

¹ After the court denied Plaintiffs’ MPSJ, the parties filed a stipulation to amend the order to reflect that the court already ruled on Plaintiffs’ claims and that “summary judgment be entered in

were precluded by Act 14 of 1995². *See* ROA Dkt. 126 at PDF 6-9 (Order Denying Plaintiffs’ MPSJ) (“[T]he Court determines that Act 14 forecloses Plaintiffs’ HRS ch. 673 claims and the requested relief and accordingly denies the Motion.”).

The State’s argument that Act 14 precludes Plaintiffs’ Chapter 673 breach of trust claims is the *only* argument that the circuit court ruled on, it not being necessary for the court to make any further rulings in light of its conclusion regarding Act 14’s preclusive effect on Plaintiffs’ claims. And that ruling itself was dependent primarily on a determination that Plaintiffs’ breach of trust claims arose prior to July 1, 1988.³ ROA Dkt. 126 at PDF 8 (“Claims and controversies related to the ‘management, administration . . . or disposition’ of the trust lands underlying MKAR arose before July 1, 1988.”). As a result, the resolution of the primary issue on appeal ultimately rests on a narrow question; whether Plaintiffs’ specific claims regarding the State’s control over and use of MKAR as a public road arose before or after July 1, 1988.

favor of Defendants because no genuine issue as to any material fact exists and Defendants are entitled to summary judgment as a matter of law.” ROA Dkt. 155. The court then filed its Amended Order Denying Plaintiffs’ Motion for Partial Summary Judgment, ROA Dkt. 157, and entered its Final Judgment in favor of the State on March 16, 2022. ROA Dkt. 159.

² 1995 1st Spec. Sess. Laws Act 14, at 696-703.

³ July 1, 1988, is a key date in this appeal because if Plaintiffs’ claims arose prior to that date, they are barred by Act 14. Act 14 was intended to be “in full satisfaction and resolution of all controversies at law and in equity, known or unknown, now existing or hereafter arising, established or inchoate, arising out of or in any way connected with the management, administration, supervision of the trust, or disposition by the State or any governmental agency of any lands or interests in land which are or were or are alleged to have been Hawaiian home lands, or to have been covered by the HHCA arising between August 21, 1959 and July 1, 1988.”

II. RELEVANT FACTUAL BACKGROUND⁴

A. Mauna Kea Access Road

MKAR, which is approximately 6 miles long, lies in part over Hawaiian home lands. While MKAR has existed in some form since 1964, during the late 1960s and early 1970s, MKAR underwent various improvements under the supervision of, and paid for by the State, including the “[c]onstruction of a two-lane highway from the Saddle Road in vicinity of Puu Huluhulu to the summit by way of Hale Pohaku.” 1970 Haw. Sess. Laws Act 187, § 1 at 413; *see also* Answering Brief (Ans. Br.) at 3-4. Between 1983 and 2018, MKAR remained under the maintenance jurisdiction of the County of Hawai‘i. ROA Dkt. 94 at PDF 87; Ans. Br. at 4. In 2018, the Department of Transportation took over jurisdiction from the County by designating the 6.27 miles of Mauna Kea Access Road from the intersection with Daniel K. Inouye Highway to a point 125 feet past the Visitor Information Center as a State Highway, Route 210. ROA Dkt. 87 at PDF 23; Ans. Br. at 4. It is not disputed that MKAR is situated on Hawaiian home lands, nor that for years prior to 1988 and continuing today, the public has used MKAR as a public highway. ROA Dkt. 126 at PDF 4.

B. Act 395 of 1988

In 1988, the State Legislature passed the Native Hawaiian Trusts Judicial Relief Act, or Act 395. 1988 Haw. Sess. Laws Act 395, at 942-45 (Act 395). Act 395 provided a limited waiver of the State’s sovereign immunity for “any breach of trust or fiduciary duty resulting from the acts or omissions of its agents, officers and employees in the management and disposition of trust funds and resources of . . . [t]he Hawaiian home lands trust” *Id.* §2, at 943. This waiver of

⁴ A full recitation of the factual and procedural background can be found on pages 2-12 of the State’s Answering Brief. The background set forth here includes only those facts relevant to the Court’s consideration of Plaintiffs’ Application for Transfer.

immunity, however, applied only to causes of action accruing after Act 395's effective date, or July 1, 1988. *Id.* §3; see also 1995 1st Spec. Sess. Laws Act 14 § 1, at 696 ("Act 395 . . . provided a limited waiver of sovereign immunity for breaches of the Hawaiian home lands trust from July 1, 1988 forward.").

In addition, Act 395 expressly preserved the State's immunity as any continuing governmental activities that had begun prior to July 1, 1988:

No action shall be maintained under this Act for any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988.

Id. §4, at 945.

C. Act 14 of 1995

Act 395 also sought to address past controversies that arose prior to July 1, 1988. Act 395 required the Governor to "present a proposal to the legislature" regarding resolution of those controversies. *Id.* §5, at 945. In response to Act 395, the Governor established a task force which ultimately led to the Legislature enacting Act 14 in 1995. *See* Ans. Br. at 5-7. Among many other things, Act 14 was intended to be "in full satisfaction and resolution of all controversies at law and in equity . . . arising out of or in any way connected with the management, administration, supervision of the trust" between August 21, 1959 and July 1, 1988. *Id.* §4. To that end, the Legislature gave Act 14 the effect of *res judicata* as to such claims:

The passage of this Act shall have the effect of res judicata as to all parties, claims, and issues which arise and defenses which have been at issue, or which could have been, or could in the future be, at issue, which arose between August 21, 1959 and July 1, 1988, whether brought against the State or its officials, directly or indirectly, by subrogation, derivative or third party action, tender, federal action, or by any other means whatsoever.

Act 14, §4 (emphasis in original).

As it relates to MKAR, Act 14 provided that “[t]he State, while not admitting the validity of any claims, hereby resolves and satisfies all controversies and claims encompassed by this Act by . . . (2) . . . the initiation of a land exchange to remedy uncompensated use of Hawaiian home lands for state roads claims and highways[.]” *Id.* §6(2). Although Act 14 barred breach of trust claims as to these controversies, the Legislature nevertheless provided a means of relief to enforce the land exchange provisions, making actions to enforce the provisions of the Act the *exclusive* remedy:

Notwithstanding any other law to the contrary, the State and its officials, the members of the board, the members of the Commission and the independent representative shall not be subject to suit by any party on any decision relating to the resolution of these claims, *except for actions to enforce the provisions of this Act.*

Id. §17 (emphasis added).

As of 2019, completion of parts of Act 14’s land transfer and exchange requirements remained outstanding, including compensation of approximately 346.203 acres to satisfy the Act’s roads and highways land exchange requirement. *Id.* DHHL and other State agencies are working on finalizing outstanding matters under Act 14, including finalizing review of whether the Hawaiian home lands trust has in fact received sufficient lands to satisfy Act 14. *See* ROA Dkt. 95 at PDF 131-32.

D. PROCEDURAL HISTORY

Plaintiffs filed their operative First Amended Complaint (FAC) on February 20, 2020, asserting two counts: (1) breach of trust against the DHHL Defendants, and (2) breach of trust against the State. ROA Dkt. 12 at PDF 8-11 (FAC). Plaintiffs seek declaratory and injunctive relief, and damages. Specifically, they seek a declaration that the State has breached its trust duties by using the land underlying MKAR without compensation (and that DHHL has breached

its trust duties by failing to redress such use); the return of control of the MKAR from DOT to DHHL; and damages to remedy the uncompensated use of trust lands for the MKAR. *Id.* at PDF 11-12.

Plaintiffs filed a Motion for Partial Summary Judgment (MPSJ), seeking an order granting their requested declaratory relief. ROA Dkt. 84-87. The State filed a Memorandum in Opposition, ROA Dkt. 92-95, arguing that: (1) pursuant to Act 395 the State had not waived its sovereign immunity as to Plaintiffs' breach of trust claims; (2) Act 14 barred Plaintiffs' claims; (3) Plaintiffs could not maintain an HRS chapter 673 breach of trust claim because they had failed to exhaust administrative remedies under HRS § 673-3; and (4) Plaintiffs had failed to present evidence that the State was in breach of its trust obligations regarding MKAR.⁵ ROA Dkt. 92 at PDF 16-24.

The circuit court denied Plaintiffs' MPSJ, ruling that Act 14 "plain[ly] and unambiguous[ly]" barred their claims:

Based on the plain and unambiguous language of Act 14, the Court finds the intent of the Legislature clear: upon enactment, Act 14 fully and finally resolved the claims referenced therein, including the "uncompensated use of Hawaiian home lands for state roads claims and highways," which arose between August 21, 1959 and July 1, 1988.

.....

Moreover, the State's designation of MKAR as a State Highway in March 2018 does not take Plaintiffs' claims outside Act 14 and give them the right to the requested relief pursuant to HRS ch. 673.

Claims and controversies related to the "management, administration . . . or disposition" of the trust lands underlying MKAR arose before July 1, 1988. Efforts to pave and improve MKAR began in the mid to late 1960s and continued through the early 1970s. When completed in 1974, pursuant to an agreement with DHHL, the County maintained MKAR, and the public has used

⁵ In an earlier motion to dismiss, the State had also argued that Plaintiffs lacked standing to challenge the 2018 designation of MKAR as a state highway. ROA Dkt. 54 at PDF 12-13.

the road for more than 50 years. No compensation has ever been paid for use of the trust lands underlying MKAR. It is that uncompensated use of Hawaiian home lands that warranted MKAR's inclusion into the land exchange contemplated by Act 14. Upon passage of Act 14, the contemplated land exchange was in full satisfaction and resolution of all controversies or claims related to the home lands underlying MKAR.

ROA Dkt. 126 at PDF 6-8 (Order Denying Plaintiffs' MPSJ) (emphasis in original).

The circuit court did not reach any other of the State's arguments in opposition to Plaintiffs' MPSJ, explicitly noting that "[i]n light of the Court's decision, the Court does not address the parties' additional arguments regarding HRS chs. 264 and 673." ROA Dkt. 126 at PDF 9. The circuit court later entered final judgment in favor of Defendants, ROA Dkt. 161 (Final Judgment), and Plaintiffs timely appealed, *see* CAAP Dkt. 1 (Notice of Appeal).

III. STATUTORY QUALIFICATIONS FOR TRANSFER

Plaintiffs argue that this appeal meets the statutory qualifications for both mandatory transfer under HRS § 602-58(a)(1), i.e., that the case involves a "question of imperative or fundamental public importance," and for discretionary transfer under HRS § 602-58(b)(2), i.e., that the case involves a "question of first impression or a novel legal question." Transfer App. at 11. While the State does not disagree that this case raises important questions, the specific issues at issue in this appeal are somewhat narrower than Plaintiffs suggest, which calls into question whether either of these bases for transfer are satisfied.

A. This Appeal Involves Only the Jurisdictional Questions of whether Act 14 or Sovereign Immunity Bars Plaintiffs' Claims

In support of their argument that this case presents "questions of fundamental and imperative public importance," Plaintiffs focus on a description of the State's "high fiduciary duties" in administering the Hawaiian Home Lands trust and a general description of the importance of the State's trust duties under the Hawaiian Home Lands Act. Transfer App. at 12-

14. However, as noted above, in its present posture, this appeal does not present the question of whether the State, through any of its agencies or officers, breached the Hawaiian Home lands trust. Rather, the question is whether the circuit court lacked subject matter jurisdiction over Plaintiffs' claims in light of either Act 14's intent to fully resolve claims regarding public use of Hawaiian home lands starting before July 1, 1988, or Act 395's preservation of the State's immunity for "any existing projects, programs, or any other governmental activities which are continuing, and which were begun, completed, or established prior to July 1, 1988." 1988 Haw. Sess. Laws Act 395 § 4, at 945.

Although Plaintiffs continue to argue on appeal that the State has breached its trust duties, there are two reasons why that issue is not before the Court. First, Act 14 was plainly intended to resolve breach of trust claims regarding existing public uses of Hawaii home lands for public purposes, including for public roads. As to such claims, Act 14 was intended to be "in full satisfaction and resolution of all controversies at law and in equity, known or unknown, now existing or hereafter arising," Act 14 §4. Act 14 resolved those controversies – including the public use of MKAR – by initiating a series of land transfers and exchanges. The remedy available to Plaintiffs, if they believe the land exchange and transfer provisions of Act 14 have not been satisfied, was not to bring a breach of trust claim, as they have done, but instead to bring an action to enforce the terms of Act 14. *See id.* §17 ("Notwithstanding any other law to the contrary, the State and its officials, the members of the board, the members of the Commission . . . shall not be subject to suit by any party on any decision relating to the resolution of these claims, except for actions to enforce the provisions of this Act.").⁶

⁶ Relatedly, the fact that the State has always maintained that there is a remedy available to Plaintiffs under Act 14 belies Plaintiffs' assertion that "[i]f the State's argument is taken to its end, and if the circuit court's ruling is permitted to stand, native Hawaiian beneficiaries will be

Second, even if the Court were to disagree with the circuit court’s reasoning and the State’s arguments on appeal, and conclude that Act 14 does not bar Plaintiffs’ claims, the necessary recourse would be to remand to the circuit court for further proceedings on whether the State has in fact breached its trust duties because the circuit court simply did not reach that question. And it is important to note that, contrary to Plaintiffs’ suggestion, *see* Transfer App. at 1, the State has in fact disputed the assertion that it is in breach of its trust duties, arguing as such below, *see* ROA Dkt. 92 at PDF 22-24 (State’s Opposition to Plaintiffs’ MPSJ), and also asserted that material factual issues remain as to the breach of trust question. *See* ROA Dkt. 106 at PDF 40-41 (Transcript of Hearing on Plaintiffs’ MPSJ).

B. The Determination of Whether Act 14 Bars Plaintiffs’ Claims Rests on a Narrow Question of When Plaintiffs’ Claims Arose

In response to the State’s argument that Act 14 precludes their claims, Plaintiffs have argued that their claims did not arise prior to July 1, 1988, but only in 2018 when the Department of Transportation designated MKAR as a “state highway,” effectively taking over jurisdiction of the road from the County of Hawai‘i. *See* Opening Br. at at 27-28 (“Act 14 only resolved breaches of trust related to the mismanagement of trust lands that occurred between August 21, 1959 and July 1, 1988. Plaintiffs’ claims concern the breaches of trust that occurred forty years later in 2018—acts and omissions related to the designation of the Access Road for inclusion into the State Highways System.”). This is significant because it demonstrates that there is no dispute as to whether Act 14 “resolved breaches of trust related to the mismanagement of trust lands that occurred between August 21, 1959 and July 1, 1988.” Both sides apparently agree on that point. So, the prominent question is ultimately a fairly narrow one: whether Plaintiffs’ specific claims,

prevented from suing to stop the taking of trust lands and breaches of trust in contravention of the clear policy of this Court to permit suits by beneficiaries to enforce the State’s trust duties.” Transfer App. at 1.

such as whether “[a]s trustees, State Defendants are liable for their continued use of the MKAR without paying rent to DHHL Defendants since July 1, 1988,” ROA Dkt. 12 at PDF 10 (First Amended Complaint ¶106), actually arose prior to, or after, July 1, 1988.

Plaintiffs argue that this appeal qualifies for discretionary transfer under HRS 602-58(b)(2) because “this appeal presents the first opportunity for this Court to interpret and clarify specific provisions of two legislative acts concerning the administration and enforcement of the Act.” Transfer App. at 1. This appears to be a reference to Act 14 of 1995 and Act 395 of 1988. And while it is true that this Court has not before directly addressed the effect of these two Acts on a claim like Plaintiffs, the Court has indicated that Act 14’s “plain language indicates a clear intent to settle all ‘title-related’ claims [under HRS Ch. 673] and leave intact the avenue for individual beneficiaries to pursue their claims under Chapter 674.” *Kalima v. State*, 111 Hawai‘i 84, 112, 137 P.3d 990, 1018 (2006). In other words, this Court has already recognized that Act 14 was clearly intended to settle title-related claims like Plaintiffs’. As a result, this appeal is unlikely to require any deep analysis of the legislative intent behind Act 14 or its legal effect, since the plain language of the Act is so “clear.” Instead, the appeal requires the Court to determine the much narrower question of when Plaintiffs’ claims, specifically in regard to MKAR, arose.⁷

DATED: Honolulu, Hawai‘i, December 14, 2022.

/s/ Ewan C. Rayner

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Attorney for Defendants-Appellees

⁷ The secondary argument the State makes on appeal – that Plaintiffs’ claims are barred by sovereign immunity – are similarly narrow since they also hinge first and foremost on a determination of whether Plaintiffs’ claims arose before or after July 1, 1988. *See* Ans. Br. at 27-28.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served electronically (via the Court's JEFS system), or conventionally via U.S. Mail, upon the following parties:

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/s/ Ewan C. Rayner

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