

SCWC-15-0000529

IN THE SUPREME COURT OF THE STATE OF HAWAII

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CHRISTIAN SAKAL,  
  
Respondent -Plaintiff- Appellant,

vs.

ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH;  
  
Petitioner - Defendant-  
Appellee,

JONAH SCOTT KOGEN; K&F 1984 LLC,  
  
Defendants-Appellees,

and

JOHN AND MARY DOES 1-10,  
  
Defendants.

) CIVIL NO. 14-1-1118  
)  
) APPEAL FROM: (1) ORDER GRANTING  
) DEFENDANT JONAH SCOTT KOGEN'S  
) MOTION TO DISMISS COMPLAINT  
) FILED MAY 5, 2014 WITH PREJUDICE,  
) filed October 21, 2014;  
)  
) (2) ORDER GRANTING  
) DEFENDANT ASSOCIATION OF  
) APARTMENT OWNERS OF HAWAIIAN  
) MONARCH'S MOTION TO DISMISS  
) COMPLAINT FILED MAY 5, 2014 WITH  
) PREJUDICE, filed June 16, 2015; and  
)  
) (3) FINAL JUDGMENT, filed August  
) 5, 2015.  
)  
) FIRST CIRCUIT COURT  
)  
) HONORABLE BERT I. AYABE, JUDGE

**MOTION OF THE COMMUNITY ASSOCIATIONS INSTITUTE ("CAI")  
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF  
THE ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH'S  
APPLICATION FOR WRIT OF CERTIORARI**

**EXHIBIT "A"**

**CERTIFICATE OF SERVICE**

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**MOTION OF THE COMMUNITY ASSOCIATIONS INSTITUTE (“CAI”)  
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The Community Associations Institute (“CAI”) moves this court, pursuant to Rules 27 and 28 (g) of the Hawai`i Rules of Appellate Procedure, for leave to file a brief as amicus curiae in support of appellee the Association of Apartment Owners of Hawaiian Monarch’s Application for Writ of Certiorari filed on November 30, 2018.

CAI’s proposed amicus curiae brief is attached as Exhibit “A.”

**I. IDENTITY AND INTEREST OF CAI AS AMICUS CURIAE**

CAI is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI’s more than 40,000 members include homeowners, community associations, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 70 million homeowners who live in more than 344,500 community associations in the United States.

CAI’s Hawai`i chapter has over 400 members, including numerous associations in Hawai`i, as well as other individuals and entities involved in the condominium industry. CAI Hawai`i Chapter participates in the Hawai`i legislative process and has done so for more than two decades through CAI’s Hawai`i Legislative Action Committee.

This appeal involves the intent of three acts passed in 1998, 1999, and 2012. In 1998, the Legislature passed Act 122, (SLH 1998) to create a second nonjudicial foreclosure process

(Hawai'i Revised Statutes Section 667-21 et. seq.). The new law was and is commonly referred to as "Part II" of the foreclosure law. The new law supplemented Hawai'i's existing nonjudicial foreclosure law, HRS § 667-5 which had been in existence for decades.

One year later, in 1999, the Legislature – after clearly stating an intent to assist condominium associations in collecting their delinquencies – passed Act 236 (SLH 1999) to expressly permit condominium associations to engage in nonjudicial foreclosures (as well as take other actions to collect delinquencies). The legislative history of Act 236 (SLH 1999) confirms that the Legislature, deliberately and intentionally, authorized condominium associations to conduct nonjudicial foreclosures to help facilitate their collection of delinquent assessments.

In 2012, Act 182 (SLH 2012) created a whole new part of the foreclosure law dealing only with nonjudicial foreclosures by condominium and non-condominium associations. That new part became Part VI of Hawai'i's foreclosure law. One benefit of the new law was that the confusing terminology and references to loans, mortgages, etc., were eliminated from the new association nonjudicial foreclosure provisions contained in Part VI of the law.

**II. CAI'S ABILITY TO AID IN THE RESOLUTION OF THIS CASE**

In 1998 and 1999, CAI through its Hawai'i Legislative Action Committee, actively supported the bills that became Act 122 (SLH 1998) and Act 236 (SLH 1999). Moreover, in those years, CAI was also actively involved in lobbying the Legislature on behalf of its members to help reduce the losses of condominium associations and improve the collection processes available to them. CAI's knowledge of the circumstances that existed at that time shows that the ICA's interpretation of the legislative intent is not supported by what the Legislature intended when the Legislature authorized associations to conduct nonjudicial foreclosures.

In 2012, CAI, through its Hawai'i Legislative Action Committee, also supported the bill

that became Act 182 (SLH 2012). CAI Hawai'i also had a member on the Condominium-Homeowner Association Working Group of The Mortgage Foreclosure Task Force that the Legislature had convened to review and suggest improvements to Hawai'i's foreclosure laws.

CAI and CAI Hawai'i, as representatives of the condominium and homeowner associations in Hawai'i, were involved in the bills that were passed. CAI supported the legislation in 1998, 1999 and 2012, precisely because associations needed the ability to foreclose nonjudicially without an owner vote or an amendment to the governing documents. The ICA's decision is contrary to the legislative intent and poses a significant, adverse impact on condominiums associations in Hawai'i.

DATED: Honolulu, Hawai'i, November 30, 2018.

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**BRIEF AS AMICUS CURIAE IN SUPPORT OF THE  
ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH'S  
APPLICATION FOR WRIT OF CERTIORARI**

**LIST OF APPENDICIES**

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**BRIEF AS AMICUS CURIAE IN SUPPORT OF THE ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH'S APPLICATION FOR WRIT OF CERTIORARI**

**I. INTRODUCTION**

The Community Associations Institute (“CAI”) submits this brief in support of Defendant-Appellee the Association of Apartment Owners of Hawaiian Monarch’s Application for Writ of Certiorari filed on November 30, 2018. This amicus brief urges the Court to grant certiorari to affirm the decision of the Circuit Court dismissing the claims of Appellant.

**II. QUESTIONS PRESENTED**

A. Did the Intermediate Court of Appeals (“ICA”) commit grave errors of law and fact in holding that a power of sale in favor of a foreclosing condominium association must otherwise exist, in the association’s bylaws or another enforceable agreement with its unit owners, in order for the association to avail itself of the nonjudicial or power of sale foreclosure procedures set forth in Hawai’i Revised Statutes (“HRS”) Chapter 667 despite the provisions of HRS Chapters 514A and 514B which authorize condominium associations to foreclose their liens by nonjudicial or power of sale foreclosure?

B. Did the ICA commit grave errors of law and fact in holding that the Petitioner, Association of Apartment Owners of Hawaiian Monarch, wrongfully foreclosed on Unit 2806-A, when it nonjudicially foreclosed the unit for which Respondent Christian Sakal held title?

**III. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS**

Plaintiff Christian Sakal (“Sakal”) owned unit 2806-A in the Hawaiian Monarch condominium project by virtue of an Assignment of Condominium Conveyance Document recorded on March 31, 2006. ROA<sup>1</sup> at 91. Sakal was delinquent in common assessments. ROA at 217-223. After unsuccessful attempts to collect the delinquency, the Association of Apartment Owners of Hawaiian Monarch (“Hawaiian Monarch”) proceeded with a nonjudicial foreclosure under HRS Chapter 667, Part VI. See ROI at 144. Sakal filed an action seeking an injunction to stay the nonjudicial foreclosure sale which was denied on December 3, 2012. See ROA at 144-145. That same day, Hawaiian Monarch held a public auction for the property subject to the unit’s mortgage. ROA at 143; See ROA at 101. Defendant Jonah Kogen (“Kogen”) was the highest bidder. See ROA at 144. On January 16, 2013, a quitclaim deed to Kogen for Unit 2806-A was recorded. ROA at 43-52.

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<sup>1</sup> ROA refers to the original Record on Appeal (Dkt No. 5); SROA refers to the Supplemental Record on Appeal (Dkt. No. 15).

On May 5, 2014, Sakal filed a complaint against Hawaiian Monarch and Kogen to set aside the foreclosure and for damages. ROA 11-20. Kogen filed a motion to dismiss which was granted on the grounds that Sakal was required to challenge the validity of the foreclosure prior to the recording of the quitclaim deed and that Hawaiian Monarch had the authority to foreclose nonjudicially. ROA at 140. Hawaiian Monarch's motion to dismiss was also granted on similar grounds. ROA at 296.

On appeal, the ICA ruled that Hawaiian Monarch did not have the authority to foreclose nonjudicially because there was no provision in its governing documents or in an agreement with Sakal that expressly provided for a nonjudicial foreclosure. Dkt<sup>2</sup> 53. See the published Opinion of the ICA filed July 26, 2018 attached as Appendix A. The ICA's rationale was that: (1) mortgagees must have authorization to foreclose nonjudicially in the mortgage or other agreement before they can proceed nonjudicially; and (2) the statutes adopted by the Legislature are not specific enough to determine that the Legislature intended to grant the remedy of nonjudicial foreclosure to associations by statute. Dkt 53. The ICA denied Hawaiian Monarch's motion for reconsideration by order filed September 19, 2018. Dkt 65. See Motion for Reconsideration filed August 3, 2018 and Order Denying Motion for Reconsideration attached as Appendix B and C, respectively. The judgment on appeal was entered on October 3, 2018. Dkt 68. See attached Appendix D.

#### IV. ARGUMENT

A. **The ICA's Interpretation of the Law is Inconsistent with Legislative Intent and Plain Meaning of the Law.**

The ICA's decision fails to acknowledge the problems recognized by the Legislature in 1999 resulting from Hawai'i's "first in time, first in right" rule of foreclosure, plus simple arithmetic. In the late 1990s, Hawai'i's foreclosure law stated:

*§667-3 Proceeds, how applied. Mortgage creditors shall be entitled to payment according to the priority of their liens, and not pro rata; and judgments of foreclosure shall operate to extinguish the liens of subsequent mortgages of the same property, without forcing prior mortgagees to their right of recovery. The surplus after payment of the mortgage foreclosed, shall be applied pro tanto to the next junior mortgage, and so on to the payment, wholly or in part, of mortgages junior to the one assessed*

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<sup>2</sup> Dkt refers to the Docket Number on Appeal.

A first mortgage would, in almost all cases, be prior to an association's lien for common expense assessments. This is because a first mortgage is generally recorded against and encumbers the subject property at the time it is conveyed to the owner, while the association's assessment lien will not arise until after the owner becomes delinquent. HRS §667-3 meant that junior lienholders, such as an association could not force "prior mortgagees" to take any action. Similarly, if a prior mortgagee conducted a foreclosure, that foreclosure would "extinguish" the subsequent lien of the association and often result in little or no sale proceeds being applied to the association lien. Without alternative remedies, these circumstances are often fatal to an association's ability to collect unpaid common expense assessments from delinquent owners, leaving other association members responsible for paying the difference.

For example, if an apartment was worth \$250,000 but had a first mortgage of \$300,000, the lender would have first claim to all sales proceeds because, even if the property sold for its full value of \$250,000 – which is unlikely in a distressed sale foreclosure – the lender would lose \$50,000 and the association would receive nothing from the sale proceeds. Similarly, if the association conducted a foreclosure, it would be auctioning a property worth \$250,000 subject to a first mortgage – which would remain on title and be unaffected by the association's foreclosure under HRS §667-3. Under those circumstances, it was very unlikely that anyone would bid on the property with a mortgage larger than the value of the property.

Unfortunately, those circumstances were very much the norm during the mid to late 1990's – most units being foreclosed on were worth less than the amount of their mortgages. This meant that, at best, the association, itself, might be able to buy the property for a relatively small amount and hope that it could rent it out until the lender foreclosed and wiped out the association's lien.

The benefit of a nonjudicial foreclosure in those circumstances was considerable. Generally, a nonjudicial foreclosure cost less than half as much as a judicial foreclosure and took less than half as long, for the same result. This meant that if a lender conducted a nonjudicial foreclosure, the foreclosure would be over sooner, and a paying owner would be in the unit sooner as well. If the association conducted a nonjudicial foreclosure, it would spend far less and take far less time to gain title to the unit and at least attempt to rent it out to cover the maintenance fees it was not receiving while the lender went through its foreclosure.

The legislative statements in Section 1 of Act 236 (SLH 1999) were made in that context and provide in relevant part:

*The legislature finds that associations of apartment owners are increasingly burdened by the costs and expenses connected with the collection of delinquent maintenance and other common expenses.*

*The legislature further finds that the number of foreclosures in this State has greatly increased, and that associations of apartment owners are often required to bear an unfair share of the economic burden when purchasers in foreclosure actions exercise rights of ownership over purchased apartments without paying their share of common maintenance fees and assessments.*

*The legislature further finds that more frequently associations of apartment owners are having to increase maintenance fee assessments due to increasing delinquencies and related enforcement expenses. This places an unfair burden on those non-delinquent apartment owners who must bear an unfair share of the common expenses, and is particularly inequitable when a delinquent owner is also an occupant who has benefited from the common privileges and services.*

*The legislature further finds that there is a need for clarification regarding the authority of associations of apartment owners to use non-judicial and power of sale foreclosure procedures to enforce liens for unpaid common expenses....*

*The purpose of this Act is to: . . . (4) Clarify that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial and power of sale foreclosure procedures, as an alternative to legal action.*  
[Emphasis added.]

The ICA's conclusion is inconsistent with that context of the law and the legislative history. It is not credible that the Legislature, after clearly stating an intent to assist condominium associations in collecting their delinquencies would have included an unstated restriction in Act 236 to limit the ability of condominium associations to use Hawai'i's nonjudicial foreclosure law.

The language quoted above was not just part of a committee report but was written directly into Section 1 of Act 236. The language confirms that condominium associations had been suffering badly in the economic downturn prior to 1999 and needed help to collect their delinquencies. Nowhere in Act 236 did the Legislature give any indication that a condominium association could only use the nonjudicial foreclosure process if it had specific authority to conduct nonjudicial foreclosures in its declaration or bylaws. In fact, the exact opposite is true.

This conclusion is confirmed by reviewing the other changes made by Act 236 in 1999.

In addition to authorizing nonjudicial foreclosure, Act 236 also permitted associations to: (i) demand rent from tenants of delinquent owners and (ii) terminate utilities and common services of delinquent owner-occupants. Nevertheless, as part of adding that authority in two new sections of the condominium law, (now HRS §514B-145 and 514B-146(e)), the Legislature placed limits on their use: before a condominium association could implement either of those two sections to collect delinquencies, the condominium association would have to receive the approval of a majority of the owners.

In contrast, the Legislature imposed no such limit on the right of a condominium association to conduct nonjudicial foreclosures. Instead, the Legislature added language to the condominium law in Act 236 that retroactively incorporated the right to conduct nonjudicial foreclosures into the bylaws of every condominium association in the state. That language, created the agreement or contract that the ICA says is necessary to authorize condominiums to conduct nonjudicial foreclosures under the definition of nonjudicial foreclosure found in HRS Chapter 667.

More specifically, Act 236 amended the condominium law, not just once but twice, to allow associations to use the nonjudicial foreclosure law. In neither instance was there any statement limiting associations to using the nonjudicial foreclosure law only if they had specific authority in their declaration or bylaws to conduct nonjudicial foreclosures. In fact, the opposite was true. Act 236 amended HRS §514A-90(a) to add the following language:

**§514A-90 Priority of lien. (a)**

\* \* \*

*The lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners, in like manner as a mortgage of real property. [Emphasis added.]*

Nothing in this language limited condominium associations from using the nonjudicial foreclosure law unless they had authority in their declaration or bylaws. Act 236 also added HRS §514A-82(b)(13) to the condominium law, to read as follows:

*(13) A lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including non-judicial or power of sale foreclosure procedures authorized by chapter 667, as that chapter may be amended from time to time.*

*The provisions of this subsection shall be deemed incorporated into the*



*bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date.* [Emphasis added.]

This amendment to HRS §514A-82(b)(13) incorporated that authority into their bylaws by operation of law. The right to conduct nonjudicial foreclosures of condominium liens was deemed to be incorporated in every set of condominium bylaws in the State of Hawai`i. This change eliminates the ICA's conclusion that condominium associations lacked a "contract or agreement" between the association and its members that would allow associations to use the nonjudicial foreclosure process.

There is no question about the retroactive effect of adding HRS §514A-82(b)(13) to the condominium law. The Hawai`i Supreme Court has already recognized the prospective and retroactive effects of HRS §514A-82(a) and (b) in Taniguchi v Association of Apartment Owners of King Manor, 114 Haw. 37, 155 P 3d 1138 (2007). In 1999, the Legislature, itself, was aware of the prospective and retroactive effect of Section 514A-82(b). Twelve years before, in Act 277 (SLH 1987), the Legislature established the retroactive application of section 514A-82(b). The Conference Committee Report for SB No. 24 (1987), which became Act 277 (SLH 1987), stated:

The purpose of this bill is to establish subsection (b) of Section 514A-82, Hawaii Revised Statutes, setting forth the requirements of the contents of condominium bylaws. The new subsection would identify those provisions of the bylaws which would have retrospective application, beginning January 1, 1988.<sup>3</sup>

Act 277 then went on to lay out the specific sections that the Legislature was proposing to make retroactive as of January 1, 1988. (Currently, there are 18 prospective subsections in 514A-82(a) and 14 retroactive subsections in 514A-82(b).) By adding HRS §514A-82(b)(13) in 1999, the Legislature intended to retroactively incorporate the right to conduct nonjudicial foreclosures into every set of condominium bylaws in the State to ensure that associations could use Hawai`i's nonjudicial foreclosure laws.

Although HRS Chapter 514B became law in 2006, HRS § 514A-82(b)(13) remained in full force and effect at the time of the foreclosure in this case. In fact, HRS Chapter 514A is not scheduled to be repealed until January 1, 2019. See Act 181 (SLH 2017).

The wording of HRS § 667-40, which was passed as part of Act 122 in 1998, a year

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<sup>3</sup> Conf. Comm. Rep. No. 36, in 1987 House Journal, at 1007 and Conf. Comm. Rep. No. 29 in 1987 Senate Journal, at 822-823.

before Act 236, also confirms that by 1999 the Legislature had concluded that authority to conduct nonjudicial foreclosures could be by established specific agreement or authorized by law:

*§667-40 Use of power of sale foreclosure in certain non-mortgage situations. A power of sale foreclosure under this part may be used in certain non-mortgage situations where a law or a written document contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure. These laws or written documents are limited to those involving time share plans, condominium property regimes, and agreements of sale. [Emphasis added.]*

In other words, a year before enacting Act 236, the Legislature had already decided that the authority to conduct nonjudicial foreclosures did not have to be stated in a written agreement but could also be authorized in a law. This principle was reiterated by the Legislature in Part VI of Chapter 667 (which was adopted in 2012). As recognized by the ICA, “HRS 667-101(a)(1) mandates that “[a]fter the public sale is held, the association shall sign an affidavit under penalty of perjury [s]tating that the power of sale foreclosure was made pursuant to the power of sale provision **in the law or association documents**[.]” Sakal v. Association of Apartment Owners of Hawaiian Monarch, 143 Hawai‘i 219, 225–26, 426 P.3d 443, 449–50 (App. 2018), recon. den’d, No. CAAP-15-0000529, 2018 WL 4483207 (App. Sept. 19, 2018). (Emphasis added). For decades prior to 1999, condominium associations had been using the foreclosure authority for lenders under HRS §667-1 (renumbered as section 667-1.5 in 2012) to conduct judicial foreclosures. That was done even though HRS §667-1 mentioned nothing at all about condominium associations conducting judicial foreclosures. That is because the authority to foreclose was granted by statute. See HRS § 514A-90. Indeed, this statutory authority to foreclose was granted as early as 1963. See Revised Laws of Hawai‘i § 170A-22 (1963). Upon the adoption of Act 236, the statutory authority to foreclose condominium association liens was made applicable to both judicial and nonjudicial foreclosures, and was not made contingent upon having a bylaw provision authorizing the same. If a bylaw provision is a prerequisite to exercising the remedy of nonjudicial foreclosure, then the reference to conducting a power of sale foreclosure “pursuant to the power of sale provision in the law,” as stated in HRS § 667-101(a)(1) would be meaningless. This Court must give meaning to the words of a statute. See State v. Demello, 136 Hawai‘i 193, 195, 361 P.3d 420, 422 (2015) discussed below (“Courts are bound, if rational and practicable, to give effect to all parts of a statute and no clause, sentence or

word shall be construed as superfluous, void or insignificant if construction can be legitimately found which will give force to and preserve all words of the statute.”).

The new condominium statute adopted in 2006 as HRS Chapter 514B also included statutory authority for associations to conduct nonjudicial foreclosures. HRS §514B-146(a) states that: “[t]he lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667 . . . .” Once again, this provision does not limit nonjudicial foreclosure to associations with governing documents that specifically include the right to proceed nonjudicially.

The lack of a new provision in the new condominium law similar to HRS §514A-82(b)(13) does not mean that the Legislature intended to suddenly limit foreclosure options after 2006. In drafting the new condominium law, the Hawaii Real Estate Commission's commentary in its December 31, 2005 "Final Report to the Legislature, Recodification of Chapter 514A, Hawai'i Revised Statutes (Condominium Property Regimes) included the following statement following “section<sup>4</sup> 5-8” (which later became section 514B-108, stating requirements for the bylaws under Chapter 514B):

Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, certain provisions currently in HRS §514A-82(a) and (b) have been incorporated in more appropriate statutory sections.<sup>5</sup>

In other words, rather than having statutory provisions which state that the provisions of HRS § 514A-82(b) are deemed to be in governing documents of associations, the Legislature just amended the law and made it applicable to all condominium associations. The Legislature did so by adopting HRS §514B-146(a) and §667-40.

**B. The ICA Ignored this Court's Cardinal Canons of Statutory Interpretation.**

The ICA ignored this Court's cardinal canons of statutory interpretation by not interpreting HRS §§ 514B-146, 514A-90, and 514A-82(b)(13) as “granting” or “conferring” a

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<sup>4</sup> This report is located on the Hawaii Real Estate Commission website: [http://cca.hawaii.gov/reb/condo\\_ed/condo\\_recod/condo\\_workingrecod/recod\\_final](http://cca.hawaii.gov/reb/condo_ed/condo_recod/condo_workingrecod/recod_final) and relevant pages are attached as Exhibit G to Hawaiian Monarch's Application for Writ of Certiorari.

<sup>5</sup> When the Legislature approved HRS Chapter 514B, it stated in Section 1 of Senate Bill No. 2210, S.D.2, H.D.1, C.D.1 (2004) that the Hawaii Real Estate Commission's “Final Report to the Legislature, Recodification of Chapter 514A, Hawaii Revised Statutes (Condominium Property Regimes)” dated December 31, 2003, should be used as an aid in understanding and interpreting the Condominium Property Act.

power of sale. In Seki ex rel. Louie v. Hawaii Gov't Employees Ass'n, AFSCME Local No. 152, AFL-CIO, 133 Hawai'i 385, 328 P.3d 394 (2014), this Court recognized the following rules:

It is well-established that the “fundamental starting point for statutory interpretation is the language of the statute itself.” ... “[W]here the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning.” ... Moreover, “implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.” ... “[A] rational, sensible and practicable interpretation of [a statute] is preferred to one which is unreasonable or impracticable[.]”

Id. at 400-01, 328 P.3d at 409-10 (citations omitted). This Court went on to state:

It is a cardinal *canon* of statutory interpretation that "this court cannot change the language of the statute, supply a want, or enlarge upon it in order to make it suit a certain state of facts. This is because we do not legislate or make laws."

Id. at 408, 328 P.3d at 417 (citations omitted). In State v. Demello, 136 Hawai'i 193, 361 P.3d 420 (2015), this Court recognized that:

"*Courts* are bound, if rational and practicable, to give effect to all parts of a statute and no clause, sentence or word shall be construed as superfluous, void or insignificant if construction can be legitimately found which will give force to and preserve all words of the statute." ... Additionally, "this court must presume that the legislature meant what it said and is further barred from rejecting otherwise unambiguous statutory language." ...

*[W]here there is no ambiguity in the language of a statute, and the literal application of the language would not produce an absurd or unjust result, clearly inconsistent with the purposes and policies of the statute, there is no room for judicial construction and interpretation, and the statute must be given effect according to its plain and obvious meaning.*

Id. at 195, 361 P.3d 422 (citations omitted). Moreover, this court has stated that “[e]ven when the court is convinced in its own mind that the [l]egislature really meant and intended something not expressed by the phraseology of the [a]ct, it has no authority to depart from the plain meaning of the language used.” State v. Klie, 116 Hawai'i 519, 525, 174 P.3d 358, 364 (2007).

HRS § 1-14 provides that “[t]he words of a law are generally to be understood in their most known and usual signification, without attending so much to the literal and strictly grammatical construction of the words as to their general or popular use or meaning” and HRS §

1-15 provides that where the words of a law are ambiguous:

- (1) The meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.
- (2) The reason and spirit of the law, and the cause which induced the legislature to enact it, may be considered to discover its true meaning.
- (3) Every construction which leads to an absurdity shall be rejected.

Based on the foregoing, this Court must first give effect to the plain and unambiguous wording of the HRS §§ 514A-90, 514A-82(b)(13), and 514B-146 and not supply a want or enlarge upon it in order to make it suit a certain set of facts. To the extent that it finds any ambiguity, it is to look to the reason and spirit of the law and the cause which induced the Legislature to enact it and reject every construction that leads to an absurdity. The clear and unambiguous wording of HRS §§ 514A-90 and 514B-146 is that condominium associations may enforce their liens by nonjudicial and power of sale foreclosures, without regard to whether they have a bylaw provision authorizing such action and, even if the need for a bylaw provision could be inferred, such a bylaw provision exists, by virtue of HRS § 514A-82(b)(13) in every condominium association ever governed by HRS Chapter 514A. The clear purpose of these laws was to empower condominium associations to enforce their liens by nonjudicial and power of sale foreclosures.

**C. Statutory Language Authorizing Nonjudicial Foreclosures or Real Property Tax Liens is Similar to HRS Chapters 514A and 514B.**

The language authorizing condominium associations to foreclose nonjudicially or by power of sale under HRS §§ 514A-82(b)(13), 514A-90, and 514B-146, is similar to language used by the Legislature and the counties to authorize nonjudicial foreclosure of real property tax liens. For example, Section 8-5.2 of the Revised Ordinances of Honolulu (“ROH”) provides that, “[a]ll real property on which a lien for taxes exists may be sold by way of foreclosure without suit by the director[.]”. ROH Section 8-5.2 is based upon HRS § 246-56 (repealed), where the Legislature also used the word “may” to authorize nonjudicial foreclosures of real property tax liens. The ICA’s conclusion that HRS §§ 514A-82(b)(13), 514A-90, and 514B-146 did not authorize condominium associations to foreclose nonjudicially or by power of sale therefore calls into question the power of counties to foreclose tax liens. There is no reason to treat condominium associations any different from counties in this respect. Like counties, condominium associations are not lenders and do not have the option to review the ability of

potential owners to afford a property before they become members of the association. In addition, similar to counties which regulate the maintenance and use of property subject to their jurisdiction, condominium associations in Hawai‘i are empowered to regulate the use, maintenance, repair, replacement, and modification of common elements, among other things. See, e.g., HRS § 514B-104(a)(6). (However, unlike counties, condominium association liens are subject to both first mortgages and real property tax liens, which is an additional reason why the efficient remedy of nonjudicial foreclosures is so important to the healthy operation of condominium associations. See HRS § 514B-146(a).) The ICA’s interpretation of HRS §§ 514A-82(b)(13), 514A-90, and 514B-146 is plainly erroneous, and should be reversed.

**D. Malabe v. Association of Apartment Owners of Executive Centre (11/29/18).**

On November 29, 2018, the ICA rendered an unpublished decision in Malabe v. Association of Apartment Owners of Executive Centre, CAAP-17-0000145 (Nov. 29, 2018)(SDO). See Appendix “E”. The ICA’s decision is largely based on the decision in this case and on this Court’s decision in Santiago v. Tanaka, 137 Hawai‘i 137, 154, 366 P.3d 612, 629 (2016). In Santiago, this Court held that “no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract.” Id. (quoting Lee v. HSBC Bank USA, 121 Hawai‘i 287, 292, 218 P. 3d 775, 780 (2009)). The ICA’s reliance upon Santiago is misplaced. Both Santiago and Lee involved nonjudicial foreclosures of mortgages, not statutory liens of condominium associations. Unlike mortgagees, condominium associations are creatures of statute. See State Sav. & Loan Ass’n v. Kauaian Dev. Co., Inc., 50 Haw. 540, 546, 445 P.2d 109, 115 (1968). As creatures of statute, condominium associations derive numerous duties, obligations, rights, powers, and remedies by statute. By failing to recognize the significant difference between condominium associations and mortgagees and that condominium associations have been granted the remedy of nonjudicial foreclosure by statute, the ICA erroneously concluded in Malabe that “in order for an association to invoke this authority and utilize the procedures outlined in HRS § 667-5, there must have existed an agreement that independently provides for a power of sale.” Id. at page 4. The ICA also failed to recognize in Malabe, as well as in this case, that condominium associations created prior to July 1, 2006 have, by virtue of HRS § 514A-82(b)(13), a bylaw provision expressly authorizing them to proceed with nonjudicial foreclosure. The ICA has failed to recognize that the very bylaw provision that it states must exist does, indeed, exist in the bylaws of every condominium association that existed prior to July 1, 2006, including Hawaiian Monarch. Finally, the ICA

failed in Malabe and in this case to consider the mandate of HRS § 514B-10 that **the remedies provided in Chapter 514B are to be “liberally administered” . . . and the “bylaws shall be liberally construed to facilitate the operation of the condominium property regime.”**<sup>[1]</sup> HRS § 514B-10. HRS §§ 514B-146, 514A-90, and 514A-82(b)(13) are remedial statutes because they provide the remedy of nonjudicial or power of sale foreclosures and should be liberally construed to advance those remedies.

## V. CONCLUSION

For the foregoing reasons, CAI urges this Court to vacate the ICA’s Judgment on Appeal and the portions of the ICA’s Opinion that vacated portions of the Circuit Court’s Judgment. CAI urges that the Circuit Court Judgment be affirmed in its entirety.

DATED: Honolulu, Hawai`i, \_\_\_\_\_ November 30, 2018 \_\_\_\_\_.

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<sup>[1]</sup> HRS § 514B-10 does not apply to all condominium associations, as it is not a retroactive provision. However, a great number of associations have voted to make this provision applicable and, as of January 1, 2019, it shall apply to all condominium associations in Hawai`i when HRS Chapter 514A is repealed. See Act 181 (SLH 2017).

# APPENDIX "A"



143 Hawai'i 219  
Intermediate Court of Appeals of Hawai'i.

Christian SAKAL, Plaintiff-Appellant,  
v.

ASSOCIATION OF APARTMENT OWNERS OF  
HAWAIIAN MONARCH; Jonah Scott Kogen; and  
K&F 1984 LLC, Defendants-Appellees,  
and

John and Mary Does 1-10, Defendants.

NOS. CAAP-15-0000529 and CAAP-15-0000573

JULY 26, 2018

### Synopsis

**Background:** Owner of condominium unit brought action against apartment owners association alleging wrongful foreclosure and for quiet title and trespass. The Circuit Court, First Circuit, No. 14-1-1118, Bert I. Ayabe, J., granted motion to dismiss complaint in favor of association. Owner appealed.

**Holdings:** The Intermediate Court of Appeals, Leonard, J., held that:

[1] foreclosures statute does not grant a lienholder association with a power of sale over a unit owner's property;

[2] condominium property regime statutes do not authorize an association to conduct a nonjudicial or power of sale foreclosure;

[3] association's bylaws did not authorize nonjudicial power of sale foreclosure of condominium owner's unit;

[4] unit owner was barred from making any claim to title of unit itself; and

[5] unit owner stated valid claim against association for wrongful foreclosure.

Affirmed in part, vacated in part, and remanded.

### [1] Common Interest Communities

☞Lien foreclosure; other remedies and proceedings for nonpayment

Foreclosures statute does not grant a lienholder association a power of sale over a unit owner's property; rather, such power of sale must otherwise exist by a clear legislative act, or by express authorization that is binding on affected parties in order for association to lawfully avail itself of nonjudicial foreclosure alternative. Haw. Rev. Stat. § 667-1 et seq.

Cases that cite this headnote

### [2] Powers

☞Sale, exchange, or mortgage

A "power of sale" is an authority reserved by or granted to a person or entity to dispose of another person's vested property interest, for the first party's own benefit or the benefit of a third party.

Cases that cite this headnote

### [3] Common Interest Communities

☞Lien foreclosure; other remedies and proceedings for nonpayment

Condominium property regime statutes do not authorize an association to conduct a nonjudicial or power of sale foreclosure other than as provided under the foreclosures statute, which in turn does not authorize a nonjudicial power of sale foreclosure absent an otherwise existing power of sale. Haw. Rev. Stat. §§ 514A-90, 667-1 et seq.

Cases that cite this headnote

### [4] Common Interest Communities

☞Lien foreclosure; other remedies and proceedings for nonpayment

Association's bylaws did not authorize nonjudicial power of sale foreclosure of condominium owner's unit, where bylaws generally referred to remedies provided by statute but did not unambiguously grant power of sale to association. Haw. Rev. Stat. §§ 514A-90, 667-1 et seq.

Cases that cite this headnote

<sup>151</sup> **Common Interest Communities**

☞Lien foreclosure; other remedies and proceedings for nonpayment

Following association's nonjudicial power of sale foreclosure of condominium unit and sale of unit at public auction, unit owner was barred from making any claim to title of unit itself, where owner failed to challenge foreclosure prior to recordation of grantor's affidavit of nonjudicial foreclosure under power of sale and quitclaim deed conveying property to purchaser. Haw. Rev. Stat. § 667-102(b)(2).

Cases that cite this headnote

<sup>161</sup> **Common Interest Communities**

☞Lien foreclosure; other remedies and proceedings for nonpayment

Condominium unit owner stated valid claim against association for wrongful foreclosure by seeking damages resulting from wrongful nonjudicial foreclosure and subsequent eviction of owner from his home, even though foreclosure statute barred any claim "in and to the unit and every part of the unit." Haw. Rev. Stat. § 667-102.

Cases that cite this headnote

**\*\*444 APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT (CIVIL NO. 14-1-1118)**

**Attorneys and Law Firms**

On the briefs:

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GINOZA, CHIEF JUDGE, FUJISE and LEONARD, JJ.

**Opinion**

OPINION OF THE COURT BY LEONARD, J.

**\*220** Plaintiff-Appellant Christian Sakai (**Sakai**) appeals from the Final Judgment (**Judgment**) entered by the Circuit Court of the First Circuit (**Circuit Court**),<sup>1</sup> on August 5, 2015, in favor of Defendants-Appellees the Association of Apartment Owners of Hawaiian Monarch (**the AOA**) and Jonah Scott Kogen (**Kogen**) (collectively, **Appellees**). Sakai also challenges the Circuit Court's (1) Order Granting Defendant Jonah Scott Kogen's Motion to Dismiss Complaint, filed October 21, 2014 (**Order Dismissing Kogen**), and (2) Order Granting Defendant Association of Apartment Owners of Hawaiian Monarch's Motion to Dismiss Complaint, filed June 16, 2015 (**Order Dismissing the AOA**).

This case presents difficult and consequential questions concerning whether an association of apartment owners must have a power of sale over its units in order to foreclose on a lien against a unit through the nonjudicial power of sale foreclosure procedures set forth in the Hawai'i Foreclosures statute. After an exhaustive review, we have concluded that over a number of years the Legislature has worked to craft workable, nonjudicial foreclosure procedures, available to associations as well as lenders, but at no point did the Legislature take up the issue of whether to enact a blanket grant of powers of sale over all condominiumized properties in Hawai'i. Accordingly, we conclude that a power of sale in favor of a foreclosing association must otherwise exist, in the association's bylaws or another enforceable agreement with its unit owners, in order for the association to avail

itself of the nonjudicial power of sale foreclosure procedures set \*\*445 \*221 forth in Hawaii Revised Statutes (HRS) chapter 667. As discussed herein, under the circumstances of this case, we conclude that Sakai may not regain title and possession of the subject property, but that the Circuit Court erred in dismissing Sakai's claims against the AOA for wrongful foreclosure.

### I. BACKGROUND

On May 5, 2014, Sakai filed a three-count Complaint seeking relief against the AOA for wrongful foreclosure, and against all named defendants for quiet title and trespass. The Complaint includes, *inter alia*, the following factual allegations:

It is alleged that, on January 17, 1979, the developer of the Hawaiian Monarch Condominium Project adopted the Bylaws of the Association of Apartment Owners of Hawaiian Monarch (**Bylaws**) and that the Bylaws provided, "the Developer hereby declares that all of the property (of the Hawaiian Monarch) is held and shall be held, conveyed, mortgaged, encumbered, leased, rented, used, occupied and improved subject to the following Bylaws ... [.]" Article VI of the Bylaws, entitled "Common Expenses, Apartment Expenses, Taxes and Accounting," Section 4, entitled "Default in Payment of Assessments," allegedly states:

In the event of a default or defaults in payment of any such assessment or assessments and in addition to any other remedies the Board of Directors may have, the Board of Directors may enforce each such obligation as follows:

(a) By suit or suits to enforce such obligations...

(b) ... [T]he Board may file a claim of lien against the Apartment of such delinquent Owner. ... Upon recordation of a duly executed original or copy of such claim of lien with the Office of the Assistant Registrar of the Land Court of the State of Hawaii, the Board shall have all remedies provided in Section 514A-90, HRS.

The Bylaws were reportedly amended in the 1990s, but the amendments, Sakai alleged, did not grant the AOA "any additional power regarding the foreclosure of an association lien."

On March 31, 2006, Sakai was assigned a leasehold

interest in 444 Niu Street, Unit 2806-A, in the Hawaiian Monarch Condominium Project (**Property**), as a tenant in severalty in an "Assignment of Condominium Conveyance Document" (**Assignment of Conveyance**) registered with the Office of the Assistant Registrar, Land Court of the State of Hawai'i (**Land Court**).<sup>2</sup>

On March 16, 2012, the AOA filed a "Notice of Lien" (**Lien Notice**) against Sakai in the Land Court, claiming a lien for unpaid assessments in the amounts of \$11,417.91 and \$10,589.42, and on June 20, 2012, the AOA filed a "Notice of Default and Intention to Foreclose" (**Default Notice**) against Sakai in the Land Court, which stated:

(i) if the default is not cured by the deadline stated in this notice, the entire unpaid balance of moneys owed to the association will be due and the association intends to conduct a power of sale foreclosure to sell the property at a public sale without any court action and without going to court, and the association or any other person may acquire the property at the public sale.

It appears that on October 11, 2012, the AOA filed an "Amended Notice of Default and Intention to Foreclose" with the Land Court, and on October 15, 2012, the AOA filed a "Notice of Association's Non-Judicial Foreclosure Under Power of Sale" (**Power of Sale Notice**) with the Land Court, stating that a public auction would be held on December 3, 2012, at the State Capitol Building "pursuant to Sections 514B-146 and 667-21 through 667-42, HRS, as amended."

Sakai asserts that, on November 30, 2012, he filed a Motion for Preliminary Injunction Staying Non-Judicial Foreclosure Sale of Property with the Circuit Court in Civil No. 12-1-0686, which was denied on December 3, \*\*446 \*222 2012.<sup>3</sup> Also on December 3, 2012, the AOA reportedly held a public auction offering the Property for sale. On January 8, 2013, the AOA filed a "Grantor's Affidavit of Non-judicial Foreclosure Under Power of Sale" with the Land Court (**Affidavit**).<sup>4</sup> On January 16, 2013, a quitclaim deed (**Quitclaim Deed**), which conveyed the Property from the AOA to Kogen for \$50,500, was recorded in the Land Court.

It appears that, on April 2, 2013, Kogen filed an ejectment action against Sakai in the District Court of the First Circuit (**District Court**) in Case No. 1RC-13-1-02405. The District Court entered a Judgment for Possession and

Writ of Possession in favor of Kogen on May 5, 2013.<sup>5</sup>

Sakai filed the Complaint herein on May 5, 2014. The AOA filed an answer on June 12, 2014. Kogen did not file an answer and instead, on August 11, 2014, filed a motion to dismiss the claims against him in Counts 2 and 3 of the Complaint pursuant to Rule 12(b) (6) of the Hawai'i Rules of Civil Procedure (HRCP).

Citing Aames Funding Corp. v. Mores, 107 Hawai'i 95, 110 P.3d 1042 (2005), Kogen primarily argued that Sakai's claim for relief from, the nonjudicial foreclosure was untimely because Sakai was required to challenge the validity of the foreclosure proceedings prior to the date of the recordation of the Quitclaim Deed. In opposition, Sakai argued that: (1) HRS chapter 501, which was at issue in Aames, does not apply to the property interest in this case; (2) unlike in Aames, no new Transfer Certificate of Title (TCT) was issued to Kogen; (3) the nonjudicial foreclosure conducted by the AOA pursuant to HRS chapter 667 was illegal because the AOA did not hold a power of sale; (4) implying a power of sale would be an unreasonable impairment of contract, and thus contrary to HRS § 514B-22; and (5) a nonjudicial foreclosure is void and unenforceable where the foreclosing entity does not have a power of sale. In reply, Kogen argued, *inter alia*, that the AOA had the authority to "foreclose by power of sale" and that the Bylaws granted the AOA the remedy of nonjudicial foreclosure because they authorize the Board of Directors to use "any other remedies it may have" to enforce assessments. At the hearing on Kogen's motion, the Circuit Court orally granted the motion, stating: "The Court finds that HRS [§ 514B-146] provides the association with broad powers, including foreclosure and [it] doesn't make any sense for the association to have to amend its bylaws every time the Legislature amends the law. Also HRS 667-102(b) claims by the unit owners are barred if not made before the affidavit and conveyance documents are filed." (Format altered). The Order Dismissing Kogen was entered on October 21, 2014.

On March 10, 2015, the AOA filed its motion to dismiss the Complaint in its entirety, pursuant to HRCP Rule 12(b)(6). The AOA's motion was supported by a declaration of counsel, the Quitclaim Deed, and a transcript of the hearing on Kogen's motion to dismiss. The AOA's arguments mirrored those in Kogen's motion to dismiss. On March 23, 2015, Sakai filed a memorandum in opposition, which was supported by a declaration of counsel, the Assignment of Conveyance, and the Lien Notice. After a hearing on March 31, 2015, the Circuit Court entered the Order Dismissing the AOA on June 16, 2015.

On July 16, 2015, Sakai filed a notice of appeal in CAAP-15-0000529. On August 5, 2015, the Circuit Court entered the Judgment. \*\*447 \*223 On August 11, 2015, Sakai filed a second notice of appeal in CAAP-15-0000573. The appeals were consolidated into CAAP-15-0000529 on August 17, 2015.

## II. POINT OF ERROR

Sakai raises a single point of error, contending that the Circuit Court erred when it dismissed his Complaint for failure to state a claim because the AOA conducted a wrongful power of sale nonjudicial foreclosure without having a valid power of sale.

## III. APPLICABLE STANDARD OF REVIEW

This court reviews a trial court's ruling on a motion to dismiss *de novo*. Isobe v. Sakatani, 127 Hawai'i 368, 375, 279 P.3d 33, 40 (App. 2012) (citing Kamaka v. Goodwill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008)).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. This court must, therefore, view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternate theory. Consequently, in reviewing the circuit court's order dismissing the plaintiffs' complaint in this case, our consideration is strictly limited to the allegations of the complaint, and we must deem those allegations to be true.

Id. at 376, 279 P.3d at 41 (citations and quotation marks omitted).

#### IV. DISCUSSION

##### A. Nonjudicial Power of Sale Foreclosure

This wrongful foreclosure action is based on the premise that a foreclosing association of apartment owners, like a mortgagee, must have a power of sale for the unit owner's unit in order to foreclose on a lien against the unit by the nonjudicial power of sale foreclosure procedures set forth in HRS chapter 667.<sup>6</sup> Sakai alleges that the AOA has not been granted a power of sale, either by contract or by statute, and therefore, the nonjudicial foreclosure of his unit was unlawful, the sale of his unit to Kogen was invalid, and he is entitled to have the sale of the unit declared void, as well as being entitled to other remedies. Appellees do not argue that a power of sale has been directly conferred on the AOA in the Bylaws. Instead, they argue, variously, that the Bylaws provide the AOA with broad authority to enforce a lien against the unit/apartment of a delinquent owner, and that the available remedies include nonjudicial power of sale foreclosure pursuant to HRS § 514A-90, HRS § 514B-146(a), or both.

##### 1. Hawai'i foreclosure law

We first consider the Hawai'i Foreclosures statute, HRS chapter 667 (2016), as Sakai's claim is essentially that the AOA's foreclosure on the Property was not authorized under Hawai'i law. HRS chapter 667 is entitled "Foreclosures" and governs both judicial and nonjudicial foreclosures in Hawai'i. This statute has undergone significant reorganization and amendment over the years, most notably in 2012. Because the AOA's nonjudicial power of sale foreclosure on Sakai's unit was conducted in the latter part of 2012, unless otherwise noted, we refer to HRS chapter 667 as it was amended by Act 182 of 2012, which took effect on June 28, 2012.<sup>7</sup>

Part I of HRS chapter 667 now states "General Provisions" and includes HRS § 667-1, entitled "Definitions," which provides definitions that are applicable to the entire chapter. Part IA of HRS chapter 667 \*\*448 \*224 now governs "Foreclosure by Action," which is judicial foreclosure. Part II of HRS chapter 667 provides a "Power of Sale Foreclosure Process," which delineates the procedures that must be followed in order to effectuate a nonjudicial power of sale foreclosure, which is a foreclosure that is not conducted under court

supervision and pursuant to court orders. Part VI of HRS chapter 667 now provides an "Association Alternate Power of Sale Foreclosure Process," which closely parallels the Power of Sale Foreclosure Process in Part II; however, Part VI is drafted to specifically reflect that the foreclosing party is an association, rather than a mortgagee.

Prior to Act 182 of 2012, Part I of HRS chapter 667 addressed both "Foreclosure by Action" and "Foreclosure by Power of Sale." Within the "old" Part I, HRS § 667-5 (repealed in 2012) provided a procedure through which a mortgagee could foreclose upon a property, without filing suit, in conjunction with the exercise of a power of sale provision contained in a mortgage. Prior to 2012, Part II provided an "Alternate Power of Sale Foreclosure Process," as an elective alternative to the Foreclosure Under Power of Sale provision that existed in HRS § 667-5 (repealed in 2012). Both of these nonjudicial foreclosure processes were founded upon the existence of a power of sale provision. HRS § 667-40 (2016), which is contained in Part II of HRS chapter 667, specifically provided, and still provides, that a power of sale foreclosure pursuant to Part II can be conducted in certain non-mortgage situations where a law or written document "contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure."<sup>8</sup> Part VI of HRS chapter 667, which provides an alternative power of sale foreclosure procedure specifically tailored to associations, did not exist prior to 2012.

HRS chapter 667 defines "nonjudicial foreclosure" and "power of sale" or "power of sale foreclosure" as follows:

"Nonjudicial foreclosure" means **foreclosure under power of sale.**

....

"Power of sale" or "power of sale foreclosure" means a nonjudicial foreclosure **when the mortgage contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a non-judicial foreclosure.**

HRS § 667-1 (emphasis added).

Notably, HRS § 667-1 specifically defines nonjudicial foreclosure with reference to a power of sale. The Hawai'i Supreme Court has described a power over property as follows:

A power over property is defined as liberty or authority reserved by, or

limited to, a person to dispose of real or personal property for his own benefit, or for the benefit of others, and operating on an estate or interest, vested either in himself or in some other person; the liberty or authority, however, not being derived out of such estate or interest, but overreaching or superseding it, either wholly or partially. Such a power has also been defined as an authority enabling one person to dispose of the interest which is vested in another.

Victoria Ward, Ltd. v. Zion Securities Corp., 36 Haw. 614, 630 (1944) (citation and quotation marks omitted).

As noted above, the definition of a nonjudicial foreclosure as a power of sale foreclosure is applicable to the entirety of HRS chapter 667, including Parts II and VI. Thus, any nonjudicial foreclosure under Part II is by definition a foreclosure under a power of sale, and an association's nonjudicial foreclosure under Part VI also is a foreclosure under a power of sale.

**\*\*449 \*225** Prior to 2012, from the time that Part II was added to HRS chapter 667,<sup>9</sup> the definitions for "power of sale" or "power of sale foreclosure" were stated in HRS § 667-21 (Supp. 2011), which was the first provision in Part II of HRS chapter 667, rather than in HRS § 667-1. In 2011, as part of the first legislative step in a comprehensive review and reform of foreclosures in Hawai'i, the definition of "nonjudicial foreclosure" was added to HRS § 667-21, presumably to clarify or confirm that a nonjudicial foreclosure was in fact a foreclosure under a power of sale. 2011 Haw. Sess. Laws Act 48, § 20 at 106-07. All of the HRS chapter 667 definitions, including those previously found in HRS § 667-21, were moved to HRS § 667-1 in 2012. 2012 Haw. Sess. Laws Act 182, § 3 at 636.

The Hawai'i Foreclosures statute sets forth the procedures for foreclosure in Hawai'i and does not create a right to foreclose, either through a judicial process or a nonjudicial process. For example, Part II of HRS chapter 667, entitled "Power of Sale Foreclosure Process," states that "[t]he power of sale process in this part is an alternative to the foreclosure by action in part IA." HRS § 667-21 (2016) (emphasis added). Similarly, Part VI of HRS chapter 667, entitled "Association Alternate Power of Sale Foreclosure Process," states that "[t]he power of sale process in this part is an alternative to the foreclosure

by action in part IA and the foreclosure by power of sale in part II." HRS § 667-91 (2016) (emphasis added).

In reviewing a nonjudicial foreclosure conducted pursuant to HRS § 667-5 (repealed in 2012), the Hawai'i Supreme Court recognized that no Hawai'i statute, including HRS chapter 667, provides mortgagees the right to proceed by nonjudicial foreclosure; rather, HRS § 667-5 only allows for the creation of a power of sale, if the parties choose to do so, within the four corners of a contract. Santiago v. Tanaka, 137 Hawai'i 137, 155, 366 P.3d 612, 630 (2016), citing Lee v. HSBC Bank USA, 121 Hawai'i 287, 289, 218 P.3d 775, 777 (2009); see also Apao v. Bank of N.Y., 324 F.3d 1091, 1095 (9th Cir. 2003) (finding that HRS § 667-5 "did not confer the power of sale, but merely authorized the parties to contract for the express terms of foreclosure upon default"). Although Santiago, Lee v. HSBC, and Apao specifically addressed HRS § 667-5 (repealed in 2012), the principles stated therein are equally applicable to nonjudicial power of sale foreclosures conducted under Part II or Part VI of HRS chapter 667. No provision of Part II or Part VI, or any other part of the Foreclosures statute, establishes powers of sale for mortgagees, or associations, or provides for any form of nonjudicial foreclosures in the absence of such powers. A search of the legislative history, as well as the text, of HRS chapter 667 from the time that Part II was enacted in 1998 and through the time that Part VI was enacted in 2012 reveals no legislative purpose or intent to grant any class of persons or entities with a power of sale over the property of others through the amendment of HRS chapter 667. Thus, we conclude that the supreme court's observation that HRS § 667-5 (repealed in 2012) does not provide the right to proceed by nonjudicial foreclosure is applicable to Parts II and VI of HRS chapter 667, as well as to HRS § 667-5 (repealed).

<sup>14</sup>Indeed, as noted above, HRS § 667-40 specifically allows an association to conduct a nonjudicial power of sale foreclosure under Part II only where a law or written document "contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure." This language is identical to the HRS § 667-1 definition of a power of sale or power of sale foreclosure, except that HRS § 667-1 refers to a "mortgage" rather than a "law or written document." Part VI of HRS chapter 667 contains neither a grant of a power of sale nor an express limitation like the one set forth in Part II, in HRS § 667-40. However, other requirements stated in Part VI of HRS chapter 667 make clear that the association's power must come from some other provision of law or the association's own controlling documents. For example, HRS §

667-101(a)(1) mandates that “[a]fter the public sale is held, the association shall sign an affidavit under **\*\*450 \*226** penalty of perjury [s]tating that the power of sale foreclosure was made pursuant to the power of sale provision in the law or association documents[.]” (Emphasis added; format altered).<sup>10</sup>

<sup>12</sup>As stated above, a power of sale is an authority reserved by or granted to a person or entity to dispose of another person’s vested property interest, for the first party’s own benefit or the benefit of a third party. See *Victoria Ward*, 36 Haw. at 630. We will not infer that such significant powers have been granted over an entire class of property in the absence of a clear legislative act or, with respect to a particular association or property, by express authorization in a contract entered into by, or otherwise binding on, the affected parties. HRS chapter 667 provides for various alternative processes or procedures through which a lienholder might foreclose on a property, but it does not grant a lienholder association with a power of sale over a unit owner’s property. Rather, such power of sale must otherwise exist in order for the association to lawfully avail itself of the nonjudicial foreclosure alternative.

Thus, we turn to the condominium statutes cited by Appellees.

## 2. Hawai’i condominium property regime statutes

HRS chapter 514A applies to all “[c]ondominiums created prior to July 1, 2006, except as provided in ... sections 514B-22 and 514B-23,” and other exceptions not applicable here. HRS § 514A-1.5(a)(2)(A) (Supp. 2017).<sup>11</sup> HRS Chapter 514B applies to “all condominiums created within this State after July 1, 2006.” HRS § 514B-21 (2006). HRS § 514B-22 provides that certain enumerated provisions in HRS chapter 514B, including HRS § 514B-146, apply to all condominiums created before July 1, 2006, but “only with respect to events and circumstances occurring on or after July 1, 2006,” provided that their application does not “invalidate existing provisions of the declaration, bylaws ... or be an unreasonable impairment of contract.” HRS § 514B-22 (2006).<sup>12</sup>

As the Complaint alleges that the subject condominium project was developed prior to July 1, 2006, we first consider the relevant provisions of HRS chapter 514A. The Bylaws allegedly were signed and became effective

in 1979. At that time, and until 1999, HRS § 514A-90 (1993) provided, in relevant part, that “[t]he lien of the association of apartment owners may be foreclosed by action by the manager or board of directors, acting on behalf of the apartment owners, in like manner as a mortgage of real property.” (Emphasis added.) In 1999, this part of HRS § 514A-90 was clarified regarding associations’ authority to use nonjudicial or power of sale foreclosure proceedings to enforce liens. See 1999 Haw. Sess. Laws Act 236, §§ 1-7, at 723-30.<sup>13</sup> Pursuant to Act 236, HRS § 514A-90 then provided, in relevant part, that “[t]he lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association of apartment owners, in like manner as a mortgage of real property.”<sup>14</sup> (Emphasis **\*\*451 \*227** added.) Thus, the 1999 amendment clarified that associations could avail themselves of HRS chapter 667 nonjudicial or power of sale procedures, like mortgages. It is clear, however, that mortgagees could conduct a nonjudicial power of sale only if, *inter alia*, the subject mortgage contained a power of sale. See generally HRS § 667-5 (repealed in 2012) and HRS chapter 667, Part II; see also, e.g., *Lee v. HSBC*, 121 Hawai’i at 292, 218 P.3d at 780 (“no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract”).

Appellees rely on HRS § 514A-90(a), and the identical provision in HRS § 514B-146(a), by disregarding the language indicating that associations were being given access to nonjudicial power of sale foreclosure procedures, like mortgagees, and that associations were not being granted heretofore non-existent statutory powers of sale, now available only to associations.<sup>15</sup> The 1999 amendment to HRS § 514A-90 did not purport to enact a blanket grant of powers of sale to all associations over all apartments/units within those associations. There is nothing in the legislative history of Act 236 of 1999 to suggest that a grant of powers of sale was even contemplated. The text of Act 236 of 1999 specifically states that this amendment was intended to clarify that associations could avail themselves of less burdensome procedures, i.e., the alternative power of sale foreclosure procedures enacted the prior year. See 1999 Haw. Sess. Laws Act 236, § 1 at 723-24. As stated earlier, we will not infer that the power to extrajudicially sell another person’s property was granted, in the absence of a clear legislative act doing so.

The relevant part of HRS § 514A-90 was further amended in 2012 as part of a major legislative mortgage reform, Act 182, Session Laws of Hawai’i 2012. Act 182 was the

final result of Act 162, Session Laws of Hawai'i 2010, which created a Mortgage Foreclosure Task Force (**Task Force**) to study mortgage foreclosure policies and to recommend improvements. See 2012 Haw. Sess. Laws Act 182, § 1 at 630. In 2011, the Task Force's focus was divided into three major issues, which were addressed in the first instance by groups formed within the Task Force. Group #2 of the Task Force was tasked with "[m]atters involving condominium and other homeowner associations, including association liens and the collection of unpaid assessments." Final Report of the Mortgage Foreclosure Task Force to the Legislature for the Regular Session of 2012 (December 2011), available at <http://lrbhawaii.info/reports/legrpts/2012/mart.pdf> at 6 (**Final Task Force Report**).<sup>16</sup> The Final Task Force Report was 288 pages long and included, *inter alia*, descriptive summaries of the Task Force's substantive recommendations, as well as presented the recommendations in standard legislative bill format. Each part of the proposed legislation was preceded by a Comment, which briefly explained what was recommended and why the Task Force was recommending that particular proposed legislation. In addition, the Final Task Force Report included certain Minority Reports from Task Force members who remained concerned about how matters were resolved or left unresolved due to different views among the Task Force members. See generally *id.*

<sup>13</sup>Most notably, Group #2 of the Task Force recommended that the Legislature "[a]mend chapter 667 by adding a new part to establish an alternate power of sale process specifically for condominium and other homeowner associations and modeled after the process set forth in part II of chapter 667, as amended by the recommendations of \*\*452 \*228 the task force." *Id.* at 17 & 36-53. In recommending related amendments to HRS § 514A-90, the Task Force highlighted limits to be placed on association liens. *Id.* at 54. Without comment, with respect to the part of HRS § 514A-90 that is most relevant here, the Task Force recommended deleting "in like manner as a mortgage of real property." *Id.* at 55.<sup>17</sup> It is clear that, with the addition of a new part to HRS chapter 667 (Part VI) establishing an alternative power of sale process specifically for associations, which was modeled after but not identical to the process set forth in Part II of HRS chapter 667, the reference to "like manner as a mortgage of real property" became superfluous, if not confusing. This Task Force recommendation was adopted in Act 182. See 2012 Haw. Sess. Laws Act 182, § 9 at 653. However, the Task Force's recommended amendment to HRS § 514A-90 did not purport to enact a blanket grant of powers of sale to all associations over all apartments/units within those associations. There is

nothing in the extensive Final Task Force Report or the legislative history of Act 182 to suggest that the authority to conduct a power of sale foreclosure in the absence of an existing power of sale was ever contemplated. Thus, we conclude that HRS § 514A-90 does not authorize an association to conduct a nonjudicial or power of sale foreclosure other than as provided in HRS chapter 667, which in turn does not authorize a nonjudicial power of sale foreclosure absent an otherwise existing power of sale.

As noted above, HRS § 514B-146 generally applies to all condominiums, including those created before July 1, 2006, with respect to events occurring thereafter. See HRS § 514B-22. HRS § 514B-146 was enacted in 2004 and mirrored HRS § 514A-90. 2004 Haw. Sess. Laws Act 164, § 2 at 756. In 2012, when Part VI was added to HRS chapter 667, HRS § 514B-146 was amended in parallel to the above-referenced amendment to HRS § 514A-90. Thus, we conclude that, like HRS § 514A-90, HRS § 514B-146 does not authorize an association to conduct a nonjudicial or power of sale foreclosure other than as provided in HRS chapter 667, which does not authorize a nonjudicial or power of sale foreclosure absent a power of sale.

Finally, Sakai correctly notes that other jurisdictions that have granted a power of sale statutorily have done so explicitly; and, Sakai argues that, had the Hawai'i Legislature intended to grant such powers, it would have specifically said as much. See, e.g., D.C. Code § 42-1903.13(c)(1) (Westlaw through 2017 legislation) ("The unit owners' association **shall have the power of sale** to enforce a lien for an assessment against a condominium unit if an assessment is past due. **By accepting a deed to a condominium unit, the owner shall be irrevocably deemed to have appointed** the chief executive officer of the unit owners' **association as trustee for the purpose of exercising the power of sale provided for herein.**") (emphasis added); Minn. Stat. § 515B.3-116(h)(1) (2017) ("[T]he association's lien may be foreclosed in a like manner as a mortgage containing a power of sale pursuant to chapter 580, or by action pursuant to chapter 581. The **association shall have a power of sale** to foreclose the lien pursuant to chapter 580.") (emphasis added); Tex. Prop. Code § 82.113(d) (Westlaw through 2013 legislation) ("**By acquiring a unit, a unit owner grants to the association a power of sale** in connection with the association's lien.") (emphasis added); N.C. Gen. Stat. § 47F-3-116(f) (Westlaw through 2013 legislation) ("[T]he association, acting through the executive board, may foreclose a claim of lien in like manner as a mortgage or deed of trust on real estate under power of sale, as provided in Article 2A of Chapter 45 of



the General Statutes. ... **The association shall be deemed to have a power of sale for purposes of enforcement of its claim of lien.**”) (emphasis added). Appellces point to no such statutory language in Hawai'i law and we find none.<sup>18</sup>

**\*\*453 \*229 3. The Bylaws**

<sup>14</sup>On appeal, Kogen contends that Article VI of the Bylaws, as alleged in the Complaint, provides the AOA with the authority to use “any other remedies that the [AOAO] may have,” which Kogen argues includes the remedy of nonjudicial foreclosure. The AOA points to the part of Article VI of the Bylaws stating that “the [AOAO] shall have all remedies provided in Section 514A-90, HRS.” Section 4 of Article VI of the Bylaws, as alleged in the Complaint, states as follows:

In the event of a default or defaults in payment of any such assessment or assessments and in addition to any other remedies the [AOAO] may have, the [AOAO] may enforce each such obligation as follows:

(a) By suit or suits to enforce such obligations...

(b) ... [T]he [AOAO] may file a claim of lien against the Apartment of such delinquent Owner. ... Upon recordation of a duly executed original or copy of such claim of lien with the Office of the Assistant Registrar of the Land Court of the State of Hawaii, the [AOAO] shall have all remedies provided in Section 514A-90, HRS.

(Emphasis added).

Addressing the interpretation of condominium bylaws, the supreme court has stated:

Indeed, bylaws generally establish the rules governing the condominium. See Raines v. Palm Beach Leisureville Cmty. Ass'n, 413 So.2d 30, 32 (Fla.1982) (“[A] condominium association derives its powers, duties, and responsibilities from [Florida Statutes] chapter 718 and from the association’s declaration of restrictions and bylaws.”); Bradford Square Condo. Ass’n v. Miller, 258 Ga.App. 240, 573 S.E.2d 405, 409 (2002) (“The condominium instruments, including the bylaws and the sales agreement, are a contract that governs the legal rights between the [a]ssociation and unit owners.”); Chapman Place Ass’n. Inc. v. Prokasky, 507 N.W.2d 858, 863 (Minn.Ct.App.1993) (“[T]he

condominium act, in conjunction with the [d]eclaration and the [a]ssociation’s by-laws, governs the rights of the [a]ssociation and condominium unit owners.”); Lion Square Phase II & III Condo. Ass’n v. Hask, 700 P.2d 932, 934 (Colo.Ct.App.1985) (“A condominium association may exercise its powers only within the constraints of its condominium declaration and bylaws.”).

Ass’n of Apartment Owners of Maalaea Kai, Inc. v. Stillson, 108 Hawai'i 2, 9, 116 P.3d 644, 651 (2005).

Contracts and agreements must be construed as a whole, not from any particular word, phrase, or clause. Santiago, 137 Hawai'i at 155, 366 P.3d at 630 (citing **\*\*454 \*230 Ching v. Hawai'ian Rests., Ltd.**, 50 Haw. 563, 565, 445 P.2d 370, 372 (1968)). Ambiguity is construed against the drafter. Id. (citing Luke v. Gentry Realty, Ltd., 105 Hawai'i 241, 249, 96 P.3d 261, 269 (2004)).

In Santiago, the supreme court examined whether a power of sale was contained in a mortgage, in conjunction with a nonjudicial power of sale foreclosure conducted pursuant to HRS § 667-5 (repealed in 2012). Id. at 155-56, 366 P.3d at 630-31. The subject mortgage in Santiago stated that, upon a default on the mortgage, the lender may foreclose on the mortgage by court proceeding or “as now or then provided by law, by advertisement and sale of the mortgaged property ... at public auction[.]” Id. at 155, 366 P.3d at 630. The supreme court found this phrase ambiguous when read in conjunction with HRS § 667-5, explaining that, *inter alia*, “[t]he plain language of the Mortgage creates a chicken-and-egg situation where it is not clear whether the power of sale is created within the document (as required by the statute) or created within the statute (as contemplated by the Mortgage).” Id. Construing the ambiguity against the drafter, the supreme court concluded that the subject mortgage only allowed nonjudicial foreclosure as provided by law, that the applicable foreclosure law required that a power of sale be contained in a mortgage, and, as there was no power of sale in the mortgage, the nonjudicial foreclosure sale in that case was unlawful. Id. at 155-56, 366 P.3d at 630-31.

Here, like in Santiago, the Bylaws generally refer to the remedies provided under the law, namely HRS § 514A-90. Because, as discussed above, HRS § 514A-90 and HRS § 514B-146 do not grant a power of sale to the AOA, and the applicable nonjudicial power of sale foreclosure laws require a power of sale provision be provided by law or in the governing documents, the reference to HRS § 514A-90 creates a similar “chicken-and-egg” problem as in Santiago. We construe the ambiguity against the drafter—the AOA—and conclude that the Bylaws do not unambiguously give the

AOAO a power of sale over its units and, as discussed above, HRS §§ 514A-90 and 514B-146 allow associations to utilize nonjudicial power of sale foreclosure procedures, as well as to proceed by judicial action, but do not grant associations powers of sale over all condominium units. Thus, the AOA's nonjudicial power of sale foreclosure of Sakai's unit was not authorized by the Bylaws.

Accordingly, as neither the Bylaws nor the statutes relied on by Appellees contain a grant of a power of sale, we conclude that the Circuit Court erred in concluding that Sakai failed to state any legally-cognizable claim for relief based on the theory that the AOA's nonjudicial foreclosure sale of the Property was unauthorized and unlawful.

**B. HRS § 667-102**

<sup>15</sup>Appellees also argue, and the Circuit Court further concluded, that HRS § 667-102(b) (2016) bars Sakai's claims because they were not made before the Affidavit and the Quitclaim Deed were filed. That section of Part VI of the Foreclosures statute provides, in relevant part:

§ 667-102 Recordation of affidavit, conveyance document; effect. (a) The affidavit required under section 667-101 and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. ...

(b) When both the affidavit and the conveyance document are recorded:

(1) The sale of the unit is considered completed:

(2) All persons claiming by, through, or under the unit owner and all other persons having liens on the unit junior to the lien of the association shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the unit and every part of the unit, except as otherwise provided by law;

(3) The lien of the association and all liens junior in priority to the lien of an association shall be automatically extinguished from the unit; and

**\*\*455 \*231** (4) The purchaser shall be entitled to immediate and exclusive possession of the unit.

HRS § 667-102(a) & (b) (emphasis added).

Sakai argues, however, that he is not barred from asserting his right to title and interest in the subject property based on the "except as otherwise provided by law" clause in HRS § 667-102(b)(2). Relying principally on the supreme court's decision in Lee v. HSBC, Sakai contends that for a nonjudicial foreclosure sale to be valid, the foreclosing party must strictly comply with the requirements of the subject contract and statute. With respect to his claim to the subject Property, we reject Sakai's contention. Lee v. HSBC is distinguishable. In that case, the plaintiff was the high bidder at a foreclosure auction. 121 Hawai'i at 288, 218 P.3d at 776. However, prior to the auction (unbeknownst to the lender's attorney), and prior to the auctioned property being conveyed, the mortgagors cured their delinquency on the mortgage loan. Id. Under the power of sale clause in the subject mortgage, the mortgagee could only exercise its power of sale if the mortgage loan was in default and, therefore, the sale was invalid pursuant to HRS § 667-5, which required the mortgage agreement to be in breach in order to conduct a nonjudicial power of sale foreclosure. Id. at 290-91, 218 P.3d at 778-79. Accordingly, the supreme court held that the nonjudicial foreclosure sale was void and unenforceable by the plaintiff/high bidder. Id. at 292, 218 P.3d at 780.<sup>19</sup>

The most significant distinction between the case at bar and Lee v. HSBC is that the conveyance of the subject property to the high bidder in Lee v. HSBC had not yet occurred. We also recognize that the nonjudicial power of sale foreclosure sale in Lee v. HSBC was conducted pursuant to HRS § 667-5 (repealed in 2012) and not Part II of HRS chapter 667. Even if the nonjudicial power of sale foreclosure had been conducted pursuant to Part II, the recordation referenced in HRS § 667-33—which is the exact parallel provision in Part II of HRS chapter 667 that HRS § 667-102 was modeled after—had not yet occurred.<sup>20</sup> Thus, Lee v. HSBC does not establish or explicate an exception to HRS § 667-33 and HRS § 667-102. We reject, however, the AOA's assertion that Lee v. HSBC is irrelevant solely because it involved a mortgage foreclosure, rather than an association lien foreclosure. As discussed above, Appellees have cited no authority for the proposition that the Legislature intended to provide associations with nonjudicial foreclosure powers other than pursuant to a power of sale, like mortgagees, and we find none. Indeed, our review of the development of the nonjudicial foreclosure laws applicable to associations confirms that the Legislature intended to provide associations with essentially the same nonjudicial foreclosure procedures available to mortgagees, which were then better tailored for

associations in Act 182 with the provisions now set forth in Part VI of HRS chapter 667.

Turning back to HRS § 667-102, set forth above, we conclude that the statutory language is clear and unambiguous. Having failed to challenge the nonjudicial power of sale foreclosure of the Property prior to the recordation of the Affidavit and the Quitclaim Deed, Sakai is now barred by HRS § 667-102(b)(2) from any claim to the Property itself. The Hawai'i Supreme Court has upheld a similar limit contained in \*\*456 \*232 HRS § 501-118 (2006), which bars any challenge to the transfer of title of foreclosed land court property after the issuance of a new TCT. See Aames Funding Corp. v. Mores, 107 Hawai'i 95, 110 P.3d 1042. Although not directly applicable here, because no new TCT was issued upon the conveyance of the Property to Kogen, Aames supports the enforceability of a bar to a challenge to a completed transfer of title such as the one in HRS § 667-102.<sup>21</sup>

<sup>16</sup>The AOA appears to further argue that HRS § 667-102 operates as a complete bar to any claim by Sakai for wrongful foreclosure, and not just Sakai's claim to title to the Property. This argument is without merit. HRS § 667-102 plainly bars any claim "in and to the unit and every part of the unit." It does not bar, generally, all claims arising out of wrongful and unlawful nonjudicial foreclosure by associations. The supreme court recently recognized the viability of wrongful foreclosure claims arising out of an allegedly unlawful nonjudicial power of sale foreclosure, albeit based on alleged failures to comply with requirements not at issue in this case. See Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 402-04, 391 P.3d 1, 9-11 (2017); see also Santiago,

137 Hawai'i at 158, 366 P.3d at 633 (where a nonjudicial foreclosure sale is wrongful, but the sale to an innocent purchaser for value has been completed, an action at law for damages is generally the appropriate remedy). Here, Sakai's complaint seeks, *inter alia*, "damages resulting from the wrongful nonjudicial foreclosure and subsequent eviction of Mr. Sakai from his home." It appears that Sakai has stated a claim for wrongful foreclosure against the AOA upon which some relief may be granted. Thus, we conclude that the Circuit Court erred in dismissing Sakai's complaint in its entirety against the AOA.<sup>22</sup>

#### V. CONCLUSION

For the reasons stated above, the Circuit Court's August 5, 2015 Judgment is affirmed in part and vacated in part. We affirm the Circuit Court's dismissal of all claims against Kogen, as well as all claims, at law or in equity, against the AOA that seek any right, title, or interest in and to the Property. We vacate the Circuit Court's dismissal of Sakai's claims for damages against the AOA arising out of wrongful foreclosure and remand this case for further proceedings consistent with this Opinion.

#### All Citations

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#### Footnotes

- 1 The Honorable Bert I. Ayabe presided.
- 2 All filings in the Land Court referenced herein were filed under the same certificate of title number—320,047.
- 3 It does not appear that Sakai appealed or otherwise sought relief from the denial of his motion for an injunction.
- 4 The Bylaws, Default Notice, Power of Sale Notice, Amended Notice of Default and Intention to Foreclose, and Affidavit are not in the record on appeal. For the purposes of this appeal, however, it does not appear that Appellees dispute the material facts alleged in the Complaint.
- 5 Although it appears from the District Court's minutes that Kogen's claim for money damages against Sakai was to be dismissed, it does not appear that a final written order or judgment was entered. However, it also appears that Sakai did not file an affidavit, pursuant to the District Court Rules of Civil Procedure Rule 12.1, seeking to interpose a defense to the jurisdiction of the District Court to the effect that title to real estate was involved, prior to the Trial Re: Possession and the entry of the Judgment for Possession and Writ of Possession.

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- 6 HRS § 667-1 (2016) defines "Association" by reference to the definition in HRS §§ 421J-2 & 514B-3. HRS § 514B-3 (2006), which is part of the Condominium Property Act, states that " 'Association' means the unit owners' association organized under section 514B-102 or under prior condominium property regime statutes." It is undisputed that the AOA is an "association" within the meaning of HRS chapters 514B and 667. Sakai was a "unit owner," and the Property is a "unit," within the meaning of the applicable statutes. See HRS §§ 667-1 & 514B-3.
- 7 See 2012 Haw. Sess. Laws Act 182, § 69 at 689. Section 69 of Act 182 also contains certain exceptions regarding the effective date that are not relevant here.
- 8 Part II of HRS chapter 667 was enacted through Act 122 of 1998, in order to address certain shortcomings in HRS § 667-5 (repealed in 2012). HRS § 667-40, which is applicable only to time share plans, condominium property regimes, and agreements of sale, remains in effect as enacted in 1998 (with subsequent amendments), notwithstanding the addition of Part VI, as well as Part IV, which pertains to the foreclosure of a time share interest where a time share interest mortgage, loan, agreement, or contract contains a power of sale.
- 9 See 1998 Haw. Sess. Laws Act 122, § 1 at 468.
- 10 There is no reference anywhere in Part VI or elsewhere in HRS chapter 667 to a particular provision of law that in fact grants a power of sale to all associations or any subset of associations.
- 11 HRS chapter 514A was repealed by 2017 Haw. Sess. Laws Act 181 § 2, effective January 1, 2019.
- 12 HRS § 514B-22 was repealed by 2017 Haw. Sess. Laws Act 181 § 4, effective January 1, 2019. On January 1, 2019, HRS chapter 514A will be repealed and HRS chapter 514B will apply to all condominiums in Hawai'i regardless of their creation date, "provided that such application shall not invalidate existing provisions of the declaration, bylaws, condominium map, or other constituent documents of those condominiums if to do so would invalidate the reserved rights of a developer." HRS § 514B-21 (Supp. 2017).
- 13 The Legislature specifically stated that part of the purpose of Act 236 was to "[c]larify that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial and power of sale foreclosure procedures, as an alternative to legal action[.]" 1999 Haw. Sess. Laws Act 236, § 1 at 723-24.
- 14 In the prior year, 1998, the Hawai'i Legislature enacted Part II of HRS chapter 667, creating an alternative power of sale foreclosure process, *i.e.*, an alternative to foreclosure under power of sale pursuant to HRS § 667-5, See 1998 Haw. Sess. Laws Act 122, §§ 1 & 2.
- 15 In their references to HRS §§ 514A-90, 514B-146, and chapter 667, Appellees fail to address the statutory references to "in a like manner as a mortgage of real property," the subsequent developments in the statutes, the definitions of "nonjudicial foreclosure," "power of sale" and "power of sale foreclosure," or provide any support for their assertion that HRS §§ 514A-90 & 514B-146 were intended to confer powers of sale upon associations, rather than provide associations with access to a power of sale foreclosure process.
- 16 The cited page numbers reflect the .pdf pages, rather than the page numbers assigned within the Final Task Force Report.
- 17 Pursuant to Act 182, HRS § 514A-90(a) (Supp. 2017) now simply provides, in relevant part, that "[t]he lien of the association of apartment owners may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board of directors, acting on behalf of the association apartment owners."
- 18 We recognize that our holding does not harmonize every aspect of the statutes affecting nonjudicial power of sale foreclosures by associations. For example, in HRS § 667-1, "power of sale" or "power of sale foreclosure" is defined in terms of a "mortgage" that "contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure," whereas in HRS § 667-40 and certain provisions of Part VI of HRS chapter 667, refers to "a law or written document" that "contains, authorizes, permits, or provides for a power of sale, a power of sale foreclosure, a power of sale remedy, or a nonjudicial foreclosure." If a law provided powers of sale to all associations, there would be no need to reference other written documents; however, the language suggests that such a law might exist, but we found none. We note, however, that the nonjudicial power of sale procedures in Part II of HRS chapter 667 are expressly made available to associations through

HRS § 667-40, where such powers exist, but other parts of Part II are an ill fit for associations. *See, e.g.,* HRS § 667-32(a)(1) (requiring “the foreclosing mortgagee” to file an affidavit under penalty of perjury stating, *inter alia*, “that the power of sale foreclosure was made pursuant to the power of sale provision in the mortgage”). Especially in light of other aspects of Part II of HRS chapter 667 that cannot be read literally as to association foreclosures, we conclude that the ambiguous references to “a law or written document” is too thin a reed on which to support a statutory power of sale. Nevertheless, we delved further into the history of statutory lien rights of associations, from when they were first enacted as part of the first Horizontal Property Act in 1961, when they were amended in 1963, and through the present. *See* 1961 Haw. Sess. Laws Act 180, § 15 at 276; 1963 Haw. Sess. Laws Act 101, § 22 at 88; HRS § 514-24(a)(1968) (repealed in 1977); HRS §§ 514A-90 and 514B-146. Nothing in the legislation or legislative history of Hawai'i condominium law supports a conclusion that, at any time, the Legislature enacted or intended to enact a statute granting powers of sale over all condominiums in the State to their respective associations.

- 19 The supreme court concluded that the plaintiff/high bidder was only entitled to reimbursement of his down payment with interest. *Lee v. HSBC*, 121 Hawai'i at 296, 218 P.3d at 784.
- 20 HRS § 667-33 (2016) provides, in relevant part:  
§ 667-33 Recordation of affidavit, conveyance document; effect. (a) The affidavit required under section 667-32 and the conveyance document shall be recorded no earlier than ten days after the public sale is held but not later than forty-five days after the public sale is held. The affidavit and the conveyance document may be recorded separately and on different days. ...  
(b) When both the affidavit and the conveyance document are recorded:  
(1) The sale of the mortgaged property is considered completed;  
(2) All persons claiming by, through, or under the mortgagor and all other persons having liens on the mortgaged property junior to the lien of the foreclosing mortgagee shall be forever barred of and from any and all right, title, interest, and claims at law or in equity in and to the mortgaged property and every part of the mortgaged property, except as otherwise provided by law;
- 21 On appeal, Kogen no longer claims that HRS § 501-118 and the holding in *Aames* are directly applicable to bar Sakai's claims.
- 22 Although arguably sufficient for notice pleading standards, Sakai's claim for damages is not particularly clear. However, Sakai does not argue, and cites no authority for the proposition, that he can bring a wrongful foreclosure claim against the buyer of the foreclosed property. Indeed, in light of HRS § 667-102(b)(4), cited above, Kogen's actions in evicting Sakai from the Property were authorized by statute and not wrongful.

# **APPENDIX "B"**

Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000529  
03-AUG-2018  
03:48 PM

CAAP-15-0000529 (Consolidated with CAAP-15-000573)

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

CHRISTIAN SAKAL ,

Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; K&F 1984 LLC,

Defendants-Appellees,

and

JOHN AND MARY DOES 1-10, ,

Defendants.

CIVIL NO. 14-1-1118

APPEAL FROM:

(1) ORDER GRANTING DEFENDANT  
JONAH SCOTT KOGEN'S MOTION TO  
DISMISS COMPLAINT FILED MAY 5,  
2014 WITH PREJUDICE, filed October  
21, 2014;

(2) ORDER GRANTING DEFENDANT  
ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH'S  
MOTION TO DISMISS COMPLAINT  
FILED MAY 5, 2014 WITH PREJUDICE,  
filed June 16, 2015; and

(3) FINAL JUDGMENT, filed August 5,  
2015.

FIRST CIRCUIT COURT

HONORABLE BERT I. AYABE, JUDGE

670261.1[5705.010]

**DEFENDANT-APPELLEE ASSOCIATION OF APARTMENT OWNERS OF  
HAWAIIAN MONARCH'S MOTION FOR RECONSIDERATION PURSUANT TO RULE  
40, H.R.A.P.**

**DECLARATION OF COUNSEL**

**CERTIFICATE OF SERVICE**

Of Counsel:

CLAY CHAPMAN IWAMURA PULICE & NERVELL

ROBERT E. CHAPMAN #2679

CARLOS D. PEREZ-MESA, JR. #5448

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Attorneys for Defendant-Appellee  
ASSOCIATION OF APARTMENT OF  
OWNERS OF HAWAIIAN MONARCH



CAAP-15-0000529 (Consolidated with CAAP-15-000573)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CHRISTIAN SAKAL ,

Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; K&F 1984 LLC,

Defendants-Appellees,

and

JOHN AND MARY DOES 1-10, ,

Defendants.

CIVIL NO. 14-1-1118

APPEAL FROM:

(1) ORDER GRANTING DEFENDANT  
JONAH SCOTT KOGEN'S MOTION TO  
DISMISS COMPLAINT FILED MAY 5,  
2014 WITH PREJUDICE, filed October  
21, 2014;

(2) ORDER GRANTING DEFENDANT  
ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH'S  
MOTION TO DISMISS COMPLAINT  
FILED MAY 5, 2014 WITH PREJUDICE,  
filed June 16, 2015; and

(3) FINAL JUDGMENT, filed August 5,  
2015.

FIRST CIRCUIT COURT

HONORABLE BERT I. AYABE, JUDGE

**DEFENDANT-APPELLEE ASSOCIATION OF  
APARTMENT OWNERS OF HAWAIIAN MONARCH'S MOTION  
FOR RECONSIDERATION PURSUANT TO RULE 40, H.R.A.P.**

COMES NOW Defendant-Appellee ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH ("Defendant-Appellee AOA"), through its counsel, Clay Chapman Iwamura Pulice & Nervell, pursuant to Rule 40, Hawaii Rules of Appellate Procedure ("HRAP"), and hereby respectfully seeks reconsideration of the published opinion of the Court filed herein on July 26, 2018 (the "Opinion"). This motion is brought

because the Court has overlooked, misapprehended, or failed to reconcile, a key provision of Haw. Rev. Stat. §514A-82(b)(13), which states as follows:

§514A-82 Contents of bylaws. (b) In addition to the requirements of subsection (a), the bylaws shall be consistent with the following provisions:

.....

(13) A lien created pursuant to section 514A-90 may be enforced by the association in any manner permitted by law, including nonjudicial or power of sale foreclosure procedures authorized by chapter 667.

.....

The provisions of this subsection shall be deemed incorporated into the bylaws of all condominium projects existing as of January 1, 1988, and all condominium projects created after that date. (emphasis added).

This amendment to the Hawaii Statutes was enacted as part of Act 236 (Session Laws 1999). This legislation authorized condominium projects, retrospectively and prospectively, to conduct nonjudicial or power of sale foreclosures, incorporating the terms into the bylaws. To read subsection §514A-82 (b)(13), in concert with the court's analysis in the Opinion of the word "procedures," would require every association to amend their bylaws and/or declaration, in order to pursue a nonjudicial/power of sale foreclosure. That result was clearly not contemplated by the legislature, given the legislative findings quoted in fn.13 of the Opinion, that "the purpose of Act 236 was to '[c]larify that associations of apartment owners may enforce liens for unpaid common expenses by non-judicial and power of sale foreclosure procedures, as an alternative to legal action[.]'"<sup>1</sup>

---

<sup>1</sup> The Opinion cites 1999 Haw. Sess. Laws Act 236, §1 at 723-24. The legislative findings also note the burden placed on associations and the non-delinquent owners brought on by the expense of enforcement. Id.

As a result, Defendant-Appellee AOA respectfully suggests that the premise of the Opinion, which is based on the perceived lack of the appropriate terminology in the bylaws of Defendant-Appellee AOA, was misapprehended by this Honorable Court, and should be withdrawn, and the case below should be affirmed in its entirety, rather than remanded for any proceeding regarding damages.

### **ARGUMENT**

It cannot be disputed that the Opinion of this Honorable Court caught the attention of the hundreds of homeowner associations in Hawaii, as well as their legal counsel, by surprise. It purports to invoke a material change in Hawaii foreclosure law and practice. In effect, this Court's Opinion effectively precludes most, if not all, homeowner associations from conducting non-judicial/power of sale foreclosures in the manner which they have been doing for years.<sup>2</sup> The opinion should be vacated, in its entirety, and the lower court ruling affirmed.

To start with, the statute cited above, Haw. Rev. Stat. §514A-82(b)(13) is directly, and unequivocally, applicable to the Defendant-Appellee AOA, Hawaiian Monarch. That is because the Hawaiian Monarch was, and has always been, under the guidance of Haw. Rev. Stat. chapter 514A. As noted in the Opening Brief, at p.11, the Bylaws were enacted in 1979, and followed chapter 514A at that time. Further, as noted by Appellant, the most recent revision to the Bylaws occurred in 1990 (O.B. at p.14), and they have not been amended since then. That fact is admitted, i.e. it is not disputed. Clearly, then,

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<sup>2</sup> The 1999 enactment was the subject of a lengthy article and explanation of the judicial vs. nonjudicial processes in the "Hawaii Condominium Bulletin," Vol. 8, No.3 (Feb. 2000). It is posted and available on the website of the Department of Commerce and Consumer Affairs/Real Estate Branch website, at: [http://cca.hawaii.gov/reb/condo\\_ed/condo\\_bull2/cb\\_96\\_00/](http://cca.hawaii.gov/reb/condo_ed/condo_bull2/cb_96_00/).

chapter 514A is the controlling statute. As noted above, the legislature, in 1999, inserted and deemed incorporated in the bylaws, by Act 236 and codified as Haw. Rev. Stat. §514A-82(b)(13), the provision that associations could enforce the appropriate liens by nonjudicial or power of sale foreclosures. Therefore, Defendant-Appellee AOA has, and had at the time of the foreclosure, the power of sale authority.

More compelling to its effectiveness, the legislature required no action on the part of any association in order to invoke the process of sale. In comparison to the legislative enactment by which the nonjudicial or power of sale terminology was deemed to be incorporated in the bylaws of all condominium associations, the legislature has provided other remedies to the associations, but made them contingent upon securing a majority vote of the owners. See, e.g. Haw. Rev. Stat. §514A-90(e) and (f) (terminating access to common elements), and Haw. Rev. Stat. §514A-90.5(a) and (g) (collecting unpaid common expenses from tenants). Had the legislature not intended the automatic incorporation into bylaws of the power of sale/nonjudicial foreclosure authority by its plain language, it would have also made that contingent upon securing the approval of owners. It did not.

The Opinion, as filed, affects condominium associations under three categories: (1) those, like the Hawaiian Monarch, which were established and remain under Haw. Rev. Stat. 514A; (2) those that were established under Haw. Rev. Stat. 514A, but have opted into Haw. Rev. Stat. 514B; and (3) those that were established under Haw. Rev. Stat. 514B. Because the facts of this case only apply to those condominiums in the first category (i.e. those currently subject to Haw. Rev. Stat. 514A), the Opinion should be vacated, regardless. It would be premature to make any ruling which affected the other

categories. However, even if this Court proposed to address those condominiums, it should be to affirm that the language of Haw. Rev. Stat. §514A-82(b)(13) is valid across the board.

Specifically, the legislature confirmed the authority to conduct nonjudicial foreclosures in chapter 514A by retroactively adding that authority in the bylaws of every condominium in the state. See HRS §514A-82(b), last paragraph. This legislative intent did not disappear when the legislature enacted chapter 514B. For example, in the Real Estate Commission's final report to the legislature on the recodification and enactment of chapter 514B, the Hawaii Real Estate Commission's comment on the new section governing bylaws, section 514B- 108, states as follows:

*HRS §514A-81, in part, is the source of subsection (a). UCA/UCIOA §3-106, modified, and HRS §§514A82(a)(1)(E), identical, and 514A-82(a)(2), in part, are the sources of subsections (b) and (d). HRS §414D-136 is the source of subsection (c). 514A-82(b)(2), essentially identical, is the source of subsection (e). Consistent with the goal of eliminating the artificial approach regarding bylaws in HRS §514A-82(a) and (b), and to help reduce the statutory requirements for condominium governing documents, certain provisions currently in HRS §514A-82(a) and (b) have been incorporated in more appropriate statutory sections.<sup>3</sup>*

In other words, the adoption of chapter HRS §514B did not eliminate the requirements stated in section HRS §514A-82 for bylaws, including the language specifically authorizing associations to conduct nonjudicial foreclosures. Instead, those requirements were directly incorporated or deemed to be incorporated into other sections of chapter 514B. In this case, the language found in section 514B-146 (a) is intended to allow condominium associations to continue to conduct nonjudicial foreclosures in accordance

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[http://files.hawaii.gov/dcca/reb/condo\\_ed/condo\\_recod/condo\\_workingrecod/recod\\_prog/2003-recod-report.pdf](http://files.hawaii.gov/dcca/reb/condo_ed/condo_recod/condo_workingrecod/recod_prog/2003-recod-report.pdf). See Appendix G, sec. -5-8, page 9-10.

with the specific wording found in that section: "*The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667 . . . .*"

Essentially, the legislature decided that the language found in that section of the condominium law was sufficiently clear to require no additional language in the statute on that issue. The legislative intent is clear; the appellate court "derives legislative intent primarily from the language of [the] statute and follows the general rule that in the absence of clear legislative intent to the contrary, the plain meaning of the statute will be given effect." State v. Rapozo, 123 Haw. 329, 338, 235 P.3d. 325, 334 (2010), citing State v. Akina, 73 Haw. 75, 78, 828 P.2d 269, 271 (1992). The legislature's decision regarding the language of §514B-146(a) does not eliminate the original legislative intent to clearly authorize condominiums to conduct nonjudicial foreclosures by inserting language retroactively into the bylaws. Thus, that legislative intent lives on in the wording of section §514 B- 146 (a), and thus applicable to those condominiums in the latter two categories identified above.

Further, for those condominiums existing in the second category, i.e. those established under Haw. Rev. Stat. 514A, but having opted in to Haw. Rev. Stat. 514B, carried with them the bylaws legislated in Haw. Rev. Stat. §514A-82(b)(13), i.e. the power of sale/nonjudicial foreclosure became part of the contract with the owners. Haw. Rev. Stat. §514B-22<sup>4</sup> states that "nothing in Part VI (which includes 514B-146), shall invalidate any existing provisions of the bylaws ... or be an unreasonable impairment of contract."

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<sup>4</sup> This statute is still on the books; its repeal is not effective until January 1, 2019, concurrent with the scheduled repeal of Haw. Rev. Stat. chapter 514A.

Finally, the legislature has stated that the remedies provided in Haw. Rev. Stat. 514B are to be “liberally administered” .... and the “bylaws shall be liberally construed to facilitate the operation of the condominium property regime.” Haw. Rev. Stat. 514B-10. The Opinion fails this mandate.

**CONCLUSION**

Defendant-Appellee AOA therefore respectfully requests that this Honorable Court withdraw the Opinion and issue an opinion affirming the court below.

DATED: Honolulu, Hawaii, August 3, 2018.

DATED: Honolulu, Hawaii, August 3, 2018.

/s/ Mary Martin  
ROBERT E. CHAPMAN  
CARLOS D. PEREZ-MESA, JR.  
MARY MARTIN  
Attorneys for Defendant-Appellee  
ASSOCIATION OF APARTMENT OF  
OWNERS OF HAWAIIAN MONARCH

CAAP-15-0000529 (Consolidated with CAAP-15-000573)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CHRISTIAN SAKAL ,

Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; K&F 1984 LLC,

Defendants-Appellees,

and

JOHN AND MARY DOES 1-10, ,

Defendants.

CIVIL NO. 14-1-1118

APPEAL FROM:

(1) ORDER GRANTING DEFENDANT  
JONAH SCOTT KOGEN'S MOTION TO  
DISMISS COMPLAINT FILED MAY 5,  
2014 WITH PREJUDICE, filed October  
21, 2014;

(2) ORDER GRANTING DEFENDANT  
ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH'S  
MOTION TO DISMISS COMPLAINT  
FILED MAY 5, 2014 WITH PREJUDICE,  
filed June 16, 2015; and

(3) FINAL JUDGMENT, filed August 5,  
2015.

FIRST CIRCUIT COURT

HONORABLE BERT I. AYABE, JUDGE

**DECLARATION OF COUNSEL**

I, Mary Martin, declare as follows:

1. I am an attorney with the law firm of Clay Chapman Iwamura Pulice & Nervell, and am one of the attorneys working on this appeal on behalf of Defendant-Appellant Association of Apartment Owners of Hawaiian Monarch.

2. Appellants bring this motion for good cause, in good faith, and not for any purposes of delay.



I, Mary Martin, declare under penalty of perjury that the foregoing is true and correct.

DATED: Honolulu, Hawaii, August 3, 2018.

/s/ Mary Martin  
MARY MARTIN

CAAP-15-0000529 (Consolidated with CAAP-15-000573)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CAAP-15-0000529 (Consolidated with CAAP-15-000573)

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

CHRISTIAN SAKAL ,

Plaintiff-Appellant,

vs.

ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; K&F 1984 LLC,

Defendants-Appellees,

and

JOHN AND MARY DOES 1-10, ,

Defendants.

CIVIL NO. 14-1-1118

APPEAL FROM:

(1) ORDER GRANTING DEFENDANT  
JONAH SCOTT KOGEN'S MOTION TO  
DISMISS COMPLAINT FILED MAY 5,  
2014 WITH PREJUDICE, filed October  
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(2) ORDER GRANTING DEFENDANT  
ASSOCIATION OF APARTMENT  
OWNERS OF HAWAIIAN MONARCH'S  
MOTION TO DISMISS COMPLAINT  
FILED MAY 5, 2014 WITH PREJUDICE,  
filed June 16, 2015; and

(3) FINAL JUDGMENT, filed August 5,  
2015.

FIRST CIRCUIT COURT

HONORABLE BERT I. AYABE, JUDGE

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on this date a true and correct copy of the foregoing will be duly served upon the parties shown below, through the auspices of the JEFS system:

GARY VICTOR DUBIN, ESQ.  
FREDERICK J. ARENSMEYER, ESQ.  
ANDREW D. CHIANESE, ESQ.  
Dubin Law Offices  
55 Merchant Street, Suite 3100  
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Attorneys for Plaintiff  
CHRISTIAN SAKAL

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Miller Shea LLLC  
1001 Bishop Street, Suite 2925  
Honolulu, Hawaii 96813  
Attorney for Defendant  
JONAH SCOTT KOGEN

DATED: Honolulu, Hawaii, August 3, 2018.

/s/ Mary Martin  
ROBERT E. CHAPMAN  
CARLOS D. PEREZ-MESA, JR.  
MARY MARTIN  
Attorneys for Defendant-Appellee  
ASSOCIATION OF APARTMENT OF  
OWNERS OF HAWAIIAN MONARCH

# APPENDIX "C"

Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000529  
19-SEP-2018  
10:22 AM

NOS. CAAP-15-0000529 and CAAP-15-0000573

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

CHRISTIAN SAKAL, Plaintiff-Appellant,  
v.  
ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; and K&F 1984 LLC,  
Defendants-Appellees,  
and  
JOHN AND MARY DOES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 14-1-1118)

ORDER DENYING MOTION FOR RECONSIDERATION  
(By: Ginoza, Chief Judge, Fujise and Leonard, JJ.)

Upon consideration of Defendant-Appellee Association of Apartment Owners of Hawaiian Monarch's "Motion for Reconsideration Pursuant to Rule 40, H.R.A.P.", filed on August 3, 2018 (**Motion**), Plaintiff-Appellant Christian Sakal's Response to the Motion, and the records and files herein,

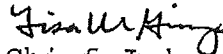
FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

IT IS HEREBY ORDERED that the Motion is denied.

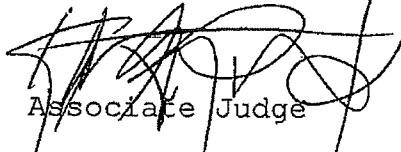
DATED: Honolulu, Hawai'i, September 19, 2018.

On the motion:

Robert E. Chapman,  
Carlos D. Perez-Mesa, Jr.,  
Mary Martin,  
(Clay Chapman Iwamura Pulice  
& Nervell),  
for Defendant-Appellee.

  
Chief Judge

  
Associate Judge

  
Associate Judge

# APPENDIX "D"

Electronically Filed  
Intermediate Court of Appeals  
CAAP-15-0000573  
03-OCT-2018  
07:59 AM

NOS. CAAP-15-0000529 and CAAP-15-0000573

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

CHRISTIAN SAKAL, Plaintiff-Appellant,  
v.  
ASSOCIATION OF APARTMENT OWNERS OF HAWAIIAN MONARCH;  
JONAH SCOTT KOGEN; and K&F 1984 LLC,  
Defendants-Appellees,  
and  
JOHN AND MARY DOES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 14-1-1118)

JUDGMENT ON APPEAL  
(By: Leonard, J., for the court)<sup>1</sup>

Pursuant to the Opinion of the Intermediate Court of Appeals of the State of Hawaii entered on July 26, 2018, the Circuit Court of the First Circuit's August 5, 2015 Final Judgment is affirmed in part and vacated in part. The Circuit Court's dismissal of all claims against Jonah Scott Kogen, as well as all claims, at law or in equity, against the Association of Apartment Owners of Hawaiian Monarch ("AOAO") that seek any right, title, or interest in and to the subject property is affirmed. The Circuit Court's dismissal of Christian Sakal's claims for damages against the AOAO arising out of wrongful foreclosure is vacated. This case is remanded for further

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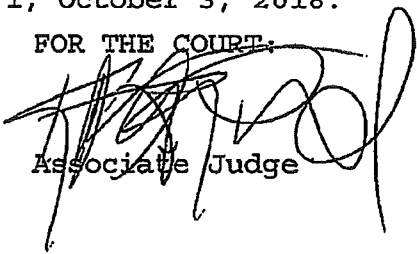
<sup>1</sup> Ginoza, Chief Judge, Fujise and Leonard, JJ.



proceedings consistent with this Opinion. Judgment is hereby entered on this appeal.

DATED: Honolulu, Hawai'i, October 3, 2018.

FOR THE COURT:

A handwritten signature in black ink, consisting of several overlapping loops and strokes, positioned over the text 'FOR THE COURT:' and 'Associate Judge'.

Associate Judge

# APPENDIX "E"

Electronically Filed  
Intermediate Court of Appeals  
CAAP-17-0000145  
29-NOV-2018  
08:04 AM

NO. CAAP-17-0000145

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

GILBERT V. MALABE and DAISY D. MALABE, Plaintiffs-Appellants,  
v. ASSOCIATION OF APARTMENT OWNERS OF EXECUTIVE CENTRE,  
by and through its Board of Directors, Defendant-Appellee,  
and DOE DEFENDANTS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 16-1-2256)

SUMMARY DISPOSITION ORDER

(By: Fujise, Presiding Judge, Leonard and Reifurth, JJ.)

Plaintiffs-Appellants, Gilbert and Daisy Malabe (the **Malabes**) appeal from the Final Judgment (**Judgment**) entered by the Circuit Court of the First Circuit (**Circuit Court**),<sup>1</sup> on February 17, 2017, in favor of Defendant-Appellee the Association of Apartment Owners of Executive Centre (the **AOAO**). The Malabes also challenge the Circuit Court's Order Granting Defendant AOAO's Motion to Dismiss Complaint, filed December 13, 2016 (**Order Granting the AOAO's Motion**).

---

<sup>1</sup> The Honorable Rhonda A. Nishimura presided.

On appeal, the Malabes assert eight points of error,<sup>2</sup> contending that the Circuit Court erred in granting the motion to dismiss (1) as to the wrongful foreclosure claim, by failing to rule against the AOA for various violations of statutory and procedural requirements in the 2010 Foreclosure Act, and (2) as to the Malabes' claims for unfair or deceptive acts or practices (UDAP), by failing to recognize the Malabes's standing to bring the action as well as their compliance with the statute of limitations.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the Malabes' points of error as follows:

(1) The Malabes assert that the Circuit Court erred in failing to recognize the validity of their claim that the AOA unlawfully invoked Hawaii Revised Statutes (HRS) § 667-5 (Supp. 2010) (repealed 2012)<sup>3</sup> in conducting a nonjudicial foreclosure on

---

<sup>2</sup> Although the Malabes identify eight separate points of error, their argument is structured, and can be fairly addressed, in accordance with the two points outlined above.

<sup>3</sup> The applicable enactment of HRS § 667-5 (amended in 2011 and repealed 2012) stated, in relevant part:

§ 667-5 Foreclosure under power of sale; notice; affidavit after sale. (a) When a power of sale is contained in a mortgage, and where . . . any person authorized by the power to act in the premises, desires to foreclose under power of sale upon breach of a condition of the mortgage, the . . . person shall be represented by an attorney who is licensed to practice law in the State and is physically located in the State. The attorney shall:

- (1) Give notice of the . . . person's intention to foreclose the mortgage and of the sale of the mortgaged property, by publication of the notice

(continued...)

their unit (the **Apartment**) at the Executive Centre in Honolulu for which the AOA is the apartment owners' association. In the Complaint, the Malabes asserted that the "AOAO was not authorized or entitled to conduct a nonjudicial foreclosure or power of sale under Part I and the sale that occurred was unlawful and constituted a wrongful foreclosure." On appeal, the Malabes contend that HRS § 667-5 may be used only when a power of sale is contained in a mortgage or other governing document, and that because such a power of sale was not present in this case, the foreclosure was not permitted by Hawai'i law.

The Hawai'i Supreme Court has held that "[p]rior to its repeal in 2012, HRS § 667-5 authorized the non-judicial foreclosure of mortgaged property only '[w]hen a power of sale is contained in a mortgage.'" Santiago v. Tanaka, 137 Hawai'i 137, 154, 366 P.3d 612, 629 (2016) (emphasis added; footnote omitted) (citing HRS § 667-5(a) (repealed 2012)). In Santiago, the supreme court reiterated its prior holding that HRS § 667-5 "[did] not independently provide for a power of sale." Id. at

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<sup>3</sup>(...continued)

once in each of three successive weeks . . . ;  
and

- (2) Give any notices and do all acts as are authorized or required by the power contained in the mortgage.

(c) Upon the request of any person entitled to notice . . . , [the] attorney shall disclose the requestor the following information:

- (1) The amount to cure the default, together with the estimated amount of the foreclosing mortgagee's attorneys' fees and costs . . . ;  
and  
(2) The sale price of the mortgaged property once auctioned.

155, 366 P.3d at 630. Moreover, "'no state statute creates a right in mortgagees to proceed by non-judicial foreclosure; the right is created by contract.'" Id. (quoting Lee v. HSBC Bank USA, 121 Hawai'i 287, 292, 218 P.3d 775, 780 (2009)).

We recently recognized this holding, specifically in the context of apartment owner associations, in our analysis of the amended Chapter 667 and concluded that "[a] search of the legislative history, as well as the text, of HRS chapter 667 from the time [§ 667-5] was enacted in 1998 . . . reveals no legislative purpose or intent to grant any class of persons or entities with a power of sale over the property of others." Sakal v. Ass'n of Apartment Owners of Hawaiian Monarch, 143 Hawai'i 219, 225, 426 P.3d 443, 449 (App. 2018). Instead, HRS § 667-5 merely "authorize[d] a sale," where such a power is independently provided by an agreement between the parties. Santiago, 137 Hawai'i at 155, 366 P.3d at 630; see also Sakal, 143 Hawai'i at 225, 426 P.3d at 449 ("The Hawai'i Foreclosures statute sets forth the procedures for foreclosure in Hawai'i and does not create a right to foreclose..."). Accordingly, in order for an association to invoke this authority and utilize the procedures outlined in HRS § 667-5, there must have existed an agreement that independently provides for a power of sale.

Here, the AOA did not argue that it had a power of sale under a mortgage or pursuant to its bylaws or some other agreement containing a power of sale. Instead, the AOA asserts

that the plain text of HRS § 514B-146 (2006)<sup>4</sup> authorizes the AOA to conduct a nonjudicial foreclosure on the Apartment under HRS § 667-5, without regard to a power of sale provision. HRS § 514B-146 provides an apartment owners' association with a priority lien over a unit in the case of any unpaid share of common expenses chargeable to that unit, which "may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667 . . . in like manner as a mortgage of real property." HRS § 514B-146(a) (amended 2012). The AOA asserts that this constitutes a legislative grant of authority for it to use the nonjudicial foreclosure procedures in HRS § 667-5 and that a power of sale arises from this legislative authority.

We reject this argument as it disregards the plain language and legislative intent of both HRS § 667-5 and § 514B-146(a). See Sakai, 143 Hawai'i at 225-28, 426 P.3d at 449-52. As noted, HRS § 667-5 (repealed 2012) did not grant a power of sale but merely authorized use of certain nonjudicial procedures in order to effect a foreclosure only "[w]hen a power of sale [was] contained in a mortgage." HRS § 667-5(a) (repealed 2012);

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<sup>4</sup> HRS § 514B-146 (amended 2012), stated, in relevant part:

[§ 514B-146] Association fiscal matters; lien for assessments. (a) All sums assessed by the association but unpaid for the share of the common expenses chargeable to any unit shall constitute a lien on the unit with priority over all other liens .

The lien of the association may be foreclosed by action or by nonjudicial or power of sale foreclosure procedures set forth in chapter 667, by the managing agent or board, acting on behalf of the association, in like manner as a mortgage of real property.

Santiago, 137 Hawai'i at 154, 366 P.3d at 629; Lee, 121 Hawai'i at 289, 218 P.3d at 777. As we have previously stated, the phrase "in like manner as a mortgage of real property"<sup>5</sup> was intended to clarify that associations could avail themselves of less burdensome procedures, but was not a grant of heretofore non-existent statutory powers of sale. Sakal, 143 Hawai'i at 227, 426 P.3d at 451 (analyzing the correlative and identical provision to HRS § 514B-146(a), prior to the 2012 amendments). Thus, here, as in Sakal, "we will not infer that the power to extrajudicially sell another person's property was granted, in the absence of a clear legislative act doing so." Id.

Accordingly, we conclude that the Malabes stated a cognizable claim for wrongful foreclosure against the AOA for which some relief may be granted.<sup>6</sup> See Sakal, 143 Hawai'i at

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<sup>5</sup> This language was removed from the statute in 2012 with the addition of an alternate power of sale process specifically for associations. See HRS § 514B-146(a) (Supp. 2017); see also Sakal, 143 Hawai'i at 228, 426 P.3d at 452 (Discussing the post-2012 statutory scheme, we explained that "[i]t is clear that, with the addition of a new part to HRS chapter 667 (Part VI) establishing an alternative power of sale process specifically for associations, which was modeled after but not identical to the process set forth in Part II HRS chapter 667, the reference to 'like manner as a mortgage of real property' became superfluous, if not confusing.").

<sup>6</sup> While the Circuit Court does not appear to have dismissed the wrongful foreclosure claim on the basis of the statute of limitations, we reject the AOA's request for us to conclude that a cause of action for wrongful foreclosure is subject to the two-year statute of limitations provision under HRS § 657-7. See, e.g., Hungate v. Law Office of David B. Rosen, 139 Hawai'i 394, 400, 391 P.3d 1, 7 (2017) (wherein the supreme court recognized the validity of a wrongful foreclosure claim in a complaint filed four years after the foreclosure sale at issue).

Additionally, because we conclude that the Malabes' claim for wrongful foreclosure may proceed on the basis that the AOA was not authorized to conduct the foreclosure pursuant to HRS § 667-5 without a power of sale, we do not reach the Malabes' argument that the AOA is bound by, and purportedly violated, the duties set forth in Ulrich v. Sec. Inv. Co., 35 Haw. 158 (Haw. Terr. 1939). See, e.g., Kondaur Capital Corp. v. Matsuyoshi, 136 Hawai'i 227, 240, 361 P.3d 454, 467 (2015) ("Ulrich requires mortgagees to exercise their right to non-judicial foreclosure under a power of sale in a manner that is

(continued...)



232, 426 P.3d at 456. Therefore, the Circuit Court erred in granting the AOA's motion to dismiss as to Count I.<sup>7</sup>

(2) The Malabes also assert that the Circuit Court erred in dismissing their UDAP claim, contending that they are consumers for UDAP purposes, that the AOA was engaged in trade or commerce by facilitating the real estate transaction of a nonjudicial foreclosure, and that the AOA engaged in wrongful and deceptive conduct, resulting in the Malabes' loss of the Apartment. In response, the AOA argues, *inter alia*, that the Malabes' UDAP claim is time-barred under HRS § 480-24 (2008).<sup>8</sup>

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<sup>6</sup>(...continued)

fair, reasonably diligent, and in good faith, and to demonstrate that an adequate price was procured for the property.").

<sup>7</sup> In the Answering Brief, the AOA requests, if this court rejects their position that the relevant statutory scheme grants them a power of sale, that on remand the AOA be permitted to present the AOA's governing documents to the Circuit Court. Unlike in Sakal, the AOA's bylaws and/or other governing documents are not before us in this appeal. See Sakal, 143 Hawai'i at 229-30, 426 P.3d 453-54. On remand, the AOA is free to establish that its bylaws and/or other governing documents confer a power of sale over the Apartment.

<sup>8</sup> HRS § 480-24, provides, in relevant part:

§ 480-24 Limitation of actions. (a) Any action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues, except as otherwise provided in subsection (b). . . . For the purpose of this section, a cause of action for a continuing violation is deemed to accrue at any time during the period of the violation.

(b) The following shall toll the time for commencement of actions by the State under this chapter if at any time:

- (1) Any cause of action arising under this chapter accrues against any person, the person is out of the State . . . .
- (2) Any cause of action arising under this chapter accrues against any person, the person has petitioned for relief under the bankruptcy code . . . .
- (3) Any cause of action arising under this chapter accrues against any person, there is a criminal action pending which arises out of the same occurrence . . . .

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HRS § 480-24(a) provides that "[a]ny action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues." We have previously recognized and adopted federal court rulings that "a cause of action for unlawful business practices accrues upon occurrence of alleged violation, rather than when plaintiff discovers the violation." Reyes v. HSBC Bank USA, Nat'l Ass'n, 2015 WL 3476371, \*5 (Haw. App. May 29, 2015) (SDO) (emphasis added) (citing McDevitt v. Guenther, 522 F.Supp.2d 1272, 1289 (D. Hawai'i 2007)); see also Kersh v. Manulife Fin. Corp., 792 F.Supp.2d 1111, 1122 (D. Hawai'i 2011); Heejoon Chung v. U.S. Bank, N.A., 250 F.Supp.3d 658, 671-73 (D. Haw. 2017).

The Malabes' cause of action accrued on or about December 17, 2010, when the AOA "collect[ed] [the] debt," i.e., conducted the foreclosure sale and submitted the winning bid to purchase the Apartment. As the Malabes filed their Complaint on December 13, 2016, nearly six years after the purportedly unlawful foreclosure, their claims are time-barred by HRS § 480-24.

The Malabes argue that, regardless of the plain language of HRS § 480-24, equitable tolling applies "because [the] AOA falsely represented that it was authorized to use § 667-5 to conduct the nonjudicial foreclosure" and thus the Malabes were "not aware of their claims."

We have recognized that equitable tolling may be available to toll the statute of limitations for a UDAP claim where it is based on allegations of fraudulent concealment. Reyes, 2015 WL 3476371, at \*6. Fraudulent concealment "involves the actions taken by a liable party to conceal a known cause of action." Au v. Au, 63 Haw. 210, 215, 626 P.2d 173, 178 (1981).

Here, the Complaint alleges that the AOA "fraudulently concealed the wrong they were committing by implying, stating and/or misrepresenting that they were authorized to use [§ 667-5] and/or that they held a mortgage with a power of sale when in fact they did not." In other words, the Malabes allege that simply by virtue of relying on HRS § 667-5, the AOA fraudulently concealed the Malabes' cause of action.

We reject this argument. As alleged in the Complaint, the AOA "published notice that they would sell the Apartment at a public sale pursuant to Section 667-5." The Malabes cite no authority for the proposition that reliance on a statutory authority, even if that reliance later proves to be wrong, constitutes fraudulent concealment, and we find none. The Complaint contains no allegations that the AOA concealed or misrepresented its use of HRS § 667-5. We decline to characterize the Malabes' later-developed, but cognizable and ultimately successful, legal theory as stating a claim for fraudulent concealment by the AOA at the time the AOA relied on HRS § 667-5. Therefore, we conclude that the Malabes failed to

allege fraudulent concealment sufficient to state a claim to equitable tolling of the statute of limitations on their UDAP claim.

Accordingly, we conclude that the Circuit Court did not err in dismissing Count II of the Malabes' Complaint.<sup>9</sup>

In accordance with the above, the Circuit Court's February 17, 2017 Judgment is vacated in part, with respect to the dismissal of Count I of the Complaint, and affirmed in part, with respect to the dismissal of Count II of the Complaint. This case is remanded to the Circuit Court for further proceedings.

DATED: Honolulu, Hawai'i, November 29, 2018.

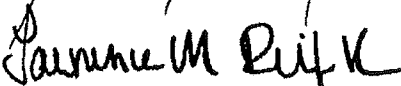
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Presiding Judge

  
Associate Judge

  
Associate Judge

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<sup>9</sup> Because we affirm the dismissal of Count II as time-barred, we do not address the other arguments made concerning the Malabes's UDAP claim.

**CERTIFICATE OF SERVICE**

IT IS HEREBY CERTIFIED that on this date a true and correct copy of the foregoing will be duly served upon the parties shown below, at their respective last known addresses, by depositing same electronically or in the U.S. Mail, postage prepaid:

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