# RULING

First Circuit Court, State of Hawai‘i

RE: State v. O’Shea; Civ. No. 17-1-1543 (JPC) (Environmental Court)

RE: State’s MPSJ (motion filed 3/8/21, Dkt. 103)

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1. The above motion was heard on the record remotely via Zoom on 4/9/21, 6/4/21, and 7/14/21. Supplemental submissions were filed and considered. The court took the motion under advisement, and now issues its ruling.

2. This ruling is intended as a broad explanation or outline for the court’s ruling. It is not intended as an all-encompassing document that includes all legal citations, reasons, and exhibits underlying the court’s ruling.

3. The Motion is GRANTED IN PART and DENIED IN PART.

4. Courts rarely grant summary judgment. Summary judgment is a drastic remedy which must be cautiously invoked in order ‘[t]o avoid improperly depriving a party to a lawsuit of the right to a trial on disputed factual issues[.]’” Ocwen Fed. Bank, FSB v. Russell, 99 Hawaii 173, 182 (App. 2002), quoting GECC Financial Corp. v. Jaffarian, 79 Hawaii 516, 521 (App. 1995). Any doubt should be resolved in favor of the non-moving party. Id., 79 Hawaii at 521; Indy Mac Bank v. Miguel, 117 Hawaii 506, 519 (App. 2008). The evidence and inferences must be viewed in the light most favorable to the party opposing the motion.” Ralston v. Yim, 129 Haw. 46, 56, 292 P.3d 1276, 1286 (2013) (*citing* First Ins. Co. of HI v.

A & B Props, Inc., 126 Haw 406 (2012). The judge ruling on a Rule 56 motion cannot decide facts, cannot grant judgment even when one party's facts appear far more plausible than the other party's facts, and cannot grant judgment even if convinced movant will win at trial. If the evidence presented on the motion is subject to conflicting interpretations, or reasonable people may disagree on its significance, summary judgment is improper. Kajiya v. Dep't of Water Supply, 2 Haw. App. 221, 224, 629 P.2d 635, 638-39 (1981) (quoting 10 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil§ 2725 (1973)).

5. When adjudicating a motion for summary judgment, trial courts must "carefully scrutinize the materials submitted by the moving party." Wells Fargo Bank v. Fong, 149 Haw 249, 255 (2021) (citation omitted) (MSJ reversed because the ledger submitted had ambiguous entries so there was no way to tell what amounts were truly owed.) Even when certain evidence is not objected to, or when a motion for summary judgment is completely unopposed, the court is not constrained by the failure to object. The motion should only be granted when movant submits facts establishing there is no genuine issue of material fact and that the motion should be granted as a matter of law. U.S. Bank v Verhagen, 149 Haw. 315, 328 (footnote 12).

6. This is apparently a case of first impression which could affect other cases involving seawalls. Rising sea levels are expected to impact many coastal properties in Hawai'i. When a case presents questions of public importance, prudent judicial administration restrains a trial court considering a Rule 56 motion. *See, e.g.,* Credit Assoc. v. Leong, 56 Haw. 104 (1974).

7. The general factual context is that the O'Shea Defts own a property on the shoreline near Sunset Beach. The "original" seawall collapsed. The O'Sheas started to build a new seawall mauka of the former seawall. Defts did not obtain any permit, authorization, or variance from either the State or the County before starting construction of their new seawall.[1] The State obtained a TRO from this court (entered 9/22/17) to

[1] Except it appears a permit was initially authorized and then almost immediately vacated after allegedly inaccurate information was apparently noted in Defts' permit application. In any event, Defts do not dispute that they had no permit, variance, or other authorization for the seawall they eventually constructed.

prevent further construction activity. The State for unexplained reasons allowed the TRO to expire, and the O'Sheas then went ahead and built their new 13-foot high seawall (again, without any permit, authorization or variance from either the State or County). The State now seeks to have the new seawall removed by summary adjudication under Rule 56. The State's primary argument is that the new seawall was built on State land because the "highest wash of the waves" reaches the new seawall.

8. Several legal issues arise in this motion:

A. Where is the boundary between public and private land on the shoreline? In most states, private title of the shoreline is defined by the mean high water and mean low water marks. Hawai'i is different. Here, beachfront property lines run along *the highest wash of the waves, other than storm or seismic waves, at high tide during the season when the highest wash occurs, usually shown by the vegetation line or debris lines*. See Application of Ashford, 50 Haw. 314, 315 (1968); Application of Sanborn, 57 Haw. 585, 588 (1977). The shoreline is dynamic and changing, and the boundary between public land (beach) and private land is therefore subject to change and may always be altered by erosion. Hawaii County v. Sotomura, 55 Haw. 176, 180 (1973). There is no requirement that the erosion be permanent in order for the State to own the land up to the highest wash of the waves. Sanborn, 57 Haw. at 590. *See also*, Maunalua Bay Beach Ohana v. 28 v State, 122 Haw 34, 45-46 (App. 2009). Generally, a seawall in and of itself does not serve as the demarcation line. Just as an artificial vegetation line cannot usually set the boundary (Diamond II, 132 Haw 9, 33 (2014)), neither can an artificial seawall usually set the boundary in and of itself. (Unless perhaps the seawall has been approved by a government agency. See HRS 205A-42 (a)).

B. Does this court have jurisdiction to declare whether or not the new seawall was built on State land? Answer: yes. Defts argue this court lacks jurisdiction to decide where the highest wash of the waves is. This argument rests on Defts' interpretation of the CZMA, HRS 205A *et seq*. However, the State is not asking for a shoreline set-back decision from this court. The CZMA's "shoreline" determination for set-back purposes under HRS 205A-42 and -45 is not the same legal event as determining the highest wash of the waves per the Ashford decision, 50

Haw. 314 (1968). Further, HRS 205A-1 essentially sets the same definition as Ashford (see above). The Ashford boundary is based on both common law and the public trust doctrine. It is intended to preserve and enforce beach access and public use of beaches, and prevent private interference and private appropriation of the shoreline. A trial court has authority to decide the Ashford boundary. While the issue could be decided in Land Court, the trial court is not obligated to send the case to Land Court for determination. Hawaii County v. Sotomura, 55 Haw. 176, 181-184 (1973). This court concludes as a matter of law that the CZMA does not supplant Ashford and Sotomura for purposes of deciding where the shoreline property boundary lies. Common law doctrines are not abrogated by statute absent express legislative direction or intent. In re Water Use Permit Applications, 94 Haw 97, 130 (2000); Gold Coast Neighborhood Ass'n v. State, 140 Haw 437, 454 (2017). The court is not aware of any clear intent that in passing HRS 205A/CZMA, the legislature intended to abrogate the common law or the public trust doctrine regarding determining shoreline property boundaries.

C. Can the O'Sheas' new seawall be used to define the upper wash of the waves? A new seawall could theoretically be used for a shoreline determination and to define the upper wash of the waves. However, as a matter of law this possibility is not available to Defts because the O'Sheas went ahead and engaged in self-help, building the new 13-foot seawall without approval from any government authority. At minimum, it appears a variance was required by HRS 205A-42(a). The O'Sheas try to circumvent this requirement by arguing their old seawall could be non-conforming, and therefore they may have a vested right to "repair" it pursuant to ROH Section 23-1.6, especially if it was more than 50% destroyed. However, Pltfs admitted in their own interrogatory response that the new seawall was built "separate and apart" from the old seawall:

> Is it your position that the current seawall was constructed entirely within the boundary lines of the subject property?
>
> ANSWER: See General Objections, which are incorporated by reference as if fully set forth. Without waiving objections, Defendant James O'Shea respond as follows:

> Yes, the property stabilization measures were constructed entirely within the boundary lines of the subject property, separate and apart from the State's seawall.

(See Interrogatory # 7, Pltf's Exh. 1, p. 007; and Exh 16, Mr. O'Shea's verification page.) The court is not aware of any admissible evidence in the record of this motion that a) Defts' answer to Interrogatory # 7 was mistaken or amended, or b) the new seawall was in fact a repair of the "original" seawall, as opposed to a completely new and different seawall. In other words, the above interrogatory response # 7 met the State's initial burden to show the new seawall was not a repair of a non-conforming use, and Defts did not carry their responsive burden on summary judgment to establish a genuine issue of material fact on the issue.

9. Factual issues. Several facts are relevant to the relief requested, as follows:

A. Exhibit 18 (December, 2020 video of waves hitting wall). For several photographic or video exhibits (including State's 14, 15, and 17), the O'Sheas argue a genuine issue of material fact exists, namely, whether waves are washing up against a neighbor's wall or the O'Sheas' own new seawall. However, State's Exhibit 18 is a video taken from a drone directly overhead. From left to right looking from the ocean side, it shows the neighbor's home with the blue roof (Mooney residence), and then the O'Sheas' white roof home, and then the third home (formerly owned by 3rd-party Deft Oberlohr) which has/had multiple "burrito" barriers between it and the ocean. The video shows a wave washing up against the O'Sheas' seawall. The video is properly authenticated by the witness who actually took the video using the drone. There is no doubt in the court's mind that the drone video shows the O'Sheas' home and seawall.[2] Therefore, the court finds and concludes there is no genuine issue of material fact that waves in fact hit the O'Sheas' seawall.

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[2] If there is such a dispute, the court concludes there is no genuine issue of material fact on that issue. See the O'Sheas' Exhibits I and J showing the major damage to the "original" seawall and the corresponding descriptions in Mr. O'Shea's declaration, as well as the State's Exhibits 19-28 and the supplemental declarations filed 6/25/21 by Shellie Habel and Ms. Chun (State's counsel).

B. The season of the highest wash of the waves. If not adequately established elsewhere in the record, the court takes judicial notice that the winter season on the North Shore of Oahu is "the season when the highest wash occurs." (See also paragraph 8 of the Declaration of Dr. Shellie Habel, filed herein 4/30/21 as part of the State's Supplemental Memorandum.) Therefore, the court finds that waves in fact hit the O'Sheas' seawall during the winter season, which is when the highest wash of the waves occurs. (As discussed in the case law cited above, it is immaterial that a beach exists and no waves hit the seawall during other times of the year. See Deft O'Sheas' Exhibits B and C, and State's Exhibit 8, bates S00602).

C. Storm waves. Included in the legal definition of "highest wash of the waves" is a requirement that the waves are not due to storm or seismic activity. For a Rule 56 motion, this places an affirmative burden on the State to show that the ocean waves hitting the seawall in Exhibit 18 are not due to storm or seismic waves. The Declaration of Dr. Habel filed 4/30/21 does not establish this through admissible evidence. Rather, Dr. Habel apparently relies on information from the Central Pacific Hurricane Center (paragraph 9) and from the Pacific Tsunami Warning Center (paragraph 10). Without more, such statements are hearsay and not within an exception. Apparently recognizing there was an evidentiary issue, the State filed supplemental declarations on 6/25/21, referring the court to the websites of various government agencies which track weather events, with corresponding screenshots (Exhibits 23-28). These exhibits are admissible as records of public agencies pursuant to HRE Rule 803(b)(8), and are self-authenticating as being on the agency website. However, the court concludes it cannot make a factual finding that the wave shown in Exhibit 18 was not due to a storm. The court would have to draw inferences from the exhibits. The court is not allowed to make such inferences against the non-moving party on summary judgment.

D. Further, the court is not aware of any evidence or legal authority in the record that "storm" waves must come from a "named" storm.

E. Additionally, as the court understands it, the State's position at oral argument was that any storm has to be visible from shore to cause a "storm" wave for purposes of negating the highest wash of the waves. The court is not aware of any legal authority to this effect, and the

argument seems counter-intuitive, since it is well-known that storms cause ocean waves from hundreds and even thousands of miles away.

F. Finally, there is the Declaration of Patrick Caldwell, filed by the O'Sheas 7/2/21. Although there are potential issues with the admissibility of the Exhibit V attached to Mr. Caldwell's declaration (Mr. Caldwell is apparently not the official custodian of the document), the court is not aware of any information that Exhibit V is not what it purports to be, namely, a surf forecast and expert opinion that a "hurricane-force" system was the source of surf arriving in Hawai'i on 12/2/20 -- the date the Exhibit 18 video was taken. Given what is at stake in this case (on both sides), and given the apparent disagreement between Dr. Habel and Mr. Caldwell's conclusions, the court declines to make a dispositive ruling at this time, on this record, that the wave in Exhibit 18 is not due to a storm.

10. Pursuant to Rule 56(d), the court has the authority to make partial findings on a Rule 56 motion. Based on but not limited to the above analysis, the court therefore grants the motion in part as follows:

A. There is no genuine issue of material fact disputing that 1) ocean waves wash up to and hit the O'Sheas' new seawall during the winter season, and 2) the winter season on the North Shore of Oahu is when the highest wash occurs, and includes 12/2/20 (the date of the wash of the waves in State's Exhibit 18).

B. The O'Sheas' new seawall was built separate and apart from the original seawall. The original seawall totally collapsed (Interrogatory 7 contained in the State's Pltf's Exh. 1, p. 007, and Defts' photo Exhibits I and J).

C. If it is established that the wave in Exhibit 18 was not caused by a storm, then the O'Sheas' new seawall was built on State land. This conclusion results from simple logic: if the waves are hitting the seawall, the highest wash is mauka of the seawall.

D. 1) The O'Sheas have thus far failed to establish a genuine issue of material fact exists allowing them to build their new seawall on State (or City) land without authorization, and 2) it is undisputed that the O'Sheas built their new seawall without <u>any</u> State or County permit, variance, or other authorization.

E. The legal issues determined in paragraphs 8 A-C above.

F. To the extent other aspects of the motion are not addressed in this ruling, they were considered and denied, without prejudice.

11. Movant shall submit a proposed order per the usual Rule 23 process. If the parties cannot agree on the form of an order, rather than spend time on resolving differences between the parties' respective proposed orders, the court prefers to sign a short form order that simply states the outcome, and adds language such as "for reasons including but not limited to those stated on the record at the hearings on this motion, or in the court's written Ruling dated 9/14/21." If the parties prefer to submit opposing orders, that is acceptable as well and the court will then settle the order per Rule 23.

Dated: 9/14/21. /s/Jeffrey.P.Crabtree.
/END

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