

NO. 26200

IN THE SUPREME COURT OF THE STATE OF HAWAII

HOLO HOLO CHARTERS, INC., a Hawai'i corporation,  
Plaintiff-Appellant,

vs.

DEPARTMENT OF LAND AND NATURAL RESOURCES, STATE OF HAWAII;  
PETER T. YOUNG,<sup>1</sup> Director of the Department of Land and Natural  
Resources and Chairperson of the Board of Land and Natural  
Resources, State of Hawai'i; MASON YOUNG, Acting Administrator,  
Division of Boating and Ocean Recreation, Department of Land and  
Natural Resources, State of Hawai'i; and VAUGHAN E. TYNDZIK,  
Kauai District Manager, Division of Boating and Ocean Recreation,  
Department of Land and Natural Resources, State of Hawai'i,  
Defendants-Appellees.

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 02-1-2818)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff-Appellant Holo Holo Charters, Inc. ("HHCI")  
appeals from the judgment of the Circuit Court of the First  
Circuit<sup>2</sup> ("circuit court") filed on October 13, 2003, following  
the grant of summary judgment in favor of Defendants-Appellees  
Department of Land and Natural Resources, State of Hawai'i  
("DLNR"), and DLNR officials Peter T. Young, Mason Young and  
Vaughan E. Tyndzik, all of whom were sued in their official  
capacities for purposes of this appeal (all four defendants-  
appellees will be collectively referred to as "the DLNR  
Defendants"). On summary judgment, the circuit court ruled that

<sup>1</sup> Pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule  
43(c) (2000), Peter T. Young has been substituted as a party to the instant  
appeal in place of Gilbert Coloma-Agaran.

<sup>2</sup> The Honorable Eden Elizabeth Hifo presided.

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(1) all of HHCI's tort claims against the DLNR Defendants for recovery of \$115,022.24 in ocean recreation management area ("ORMA") fees were barred by Hawai'i Revised Statutes ("HRS") § 662-15(3) (Supp. 1999)<sup>3</sup> (exceptions to State of Hawai'i's general waiver of sovereign immunity for tort claims) because HHCI had an alternative remedy under HRS § 40-35 (1993);<sup>4</sup> (2) however, the statute of limitations had run on that HRS § 40-35 claim; and (3) the ocean recreation management permit ("ORMA permit") was a license, rather than a contract, such that (a) the court did not possess subject matter jurisdiction over HHCI's contract claims

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<sup>3</sup> HRS § 662-15 lists seven enumerated exceptions to the State of Hawai'i's express waiver of sovereign immunity for the torts of its employees. Specifically, HRS § 662-15(3) states that HRS chapter 662 does not apply to "[a]ny claim for which a remedy is provided elsewhere in the laws of the State[.]"

<sup>4</sup> HRS § 40-35 provides, in pertinent part:

(a) Any disputed portion of moneys representing a claim in favor of the State may be paid under protest to a public accountant of the department, board, bureau, commission, or other agency of the State with which the claimant has the dispute. The protest shall be in writing, signed by the person making the payment, or by the person's agent, and shall set forth the grounds of protest. If any payment, or any portion of any payment, is made under protest, the public accountant to whom the payment is made shall hold that portion of the moneys paid under protest in a trust account in the state treasury for a period of thirty days from the date of payment.

(b) Action to recover moneys paid under protest or proceedings to adjust the claim may be commenced by the payer or claimant against the public accountant to whom the payment was made, in a court of competent jurisdiction, within thirty days from the date of payment. If no suit or proceeding is brought within the thirty-day period, the money paid under protest shall be deposited into the appropriate account in the treasury of the State by the accountant and the amount deposited shall thereupon become a government realization. Any action to recover payment of taxes under protest shall be commenced in the tax appeal court.

(Emphases added.)

under HRS § 661-1 (1993)<sup>5</sup> (state's general waiver of sovereign immunity for contract claims), and (b) "[HRS § 40-35] was [HHCI's] exclusive remedy to contest any ORMA fee payments made by [HHCI] to the [DLNR Defendants]."

On appeal, HHCI contends that: (1) the circuit court erroneously dismissed HHCI's claims on the basis of lack of subject matter jurisdiction, because "[HHCI's] claims sounded in contract and are cognizable in the circuit court pursuant to HRS § 661-1[.]" ; (2) the circuit court erroneously found HRS § 40-35 to be the sole basis of HHCI's potential remedies, because "[t]he remedies afforded by [HRS § 40-35] do not supplant the common law remedies available in a contract dispute over which the circuit court has subject matter jurisdiction under HRS § 661-1[.]" (3) the circuit court erroneously ruled that HHCI's tort claims were barred by HRS § 662-15(3), because HRS § 40-35 is only a basis for relief in the tax appeal court, and the ORMA permit fees at issue are not within that tax appeal court's jurisdiction; and (4) HHCI's claims are not time-barred.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that our recent decision in Captain Andy's Sailing, Inc. v. Dep't of Land and Natural Res., State of Hawai'i, No. 25378 (hereinafter

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<sup>5</sup> HRS § 661-1 provides in pertinent part:

The several circuit courts of the State and, except as otherwise provided by statute or rule, the several state district courts shall, subject to appeal as provided by law, have original jurisdiction to hear and determine the following matters . . . .

(1) All claims against the State founded upon . . . . any contract, expressed or implied, with the State . . . .

"Captain Andy's"), is controlling.

In Captain Andy's, we held that: (1) HRS § 40-35, when read together with its legislative history, clearly encompasses the disputed ORMA permit fees in issue such that it was the statute under which relief had to be sought; (2) on account of this alternate remedy at law, the circuit court properly found Captain Andy's Sailing, Inc.'s tort claims barred under HRS § 662-15(3); (3) HRS § 661-1 is inapplicable because the ORMA permit under which fees are due is a revocable license, rather than a contract; and (4) the plaintiff-appellant in that case, also a passenger-carrying boating company, had not filed a claim pursuant to HRS § 40-35 within the 30-day statute of limitations, such that any claim made thereunder is time-barred.

Upon review of the record, we find that the instant appeal involves (1) the same issues as in the Captain's Andy's case; (2) the same ORMA where the United States District Court for the District of Hawai'i found that permit fees for that ORMA were being unconstitutionally assessed as an impermissible duty of tonnage, see Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157, 1174 (D. Haw. 2001); (3) substantively identical ORMA permits; and (4) an expired HRS § 40-35 statute of limitations, inasmuch as HHCI's complaint was filed more than one year after its last alleged ORMA permit fee payment. Because our holdings in Captain Andy's are squarely on point, we hold that the circuit court properly granted summary judgment in favor of the DLNR Defendants.

As with the Captain Andy's case, we are not without sympathy for HHCI's plight, inasmuch as (1) HHCI alleged that a

total of \$115,022.24 in ORMA permit fees had been paid to DLNR, and (2) an extremely short statute of limitations within an admittedly obscure, near-100-year-old statute has effectively barred all of HHCI's claims for relief. However, we must hold that HRS § 40-35 unmistakably governs the instant appeal, and that the DLNR Defendants (and by extension, the State of Hawai'i) cannot be legally compelled to refund any fees that HHCI may have paid as to that ORMA addressed in Captain Andy's Sailing, Inc. v. Johns, 195 F. Supp. 2d 1157 (D. Haw. 2001), notwithstanding the federal district court's explicit and unchallenged finding that such fees were unconstitutionally exacted as applied to that ORMA. Therefore,

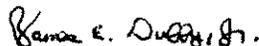
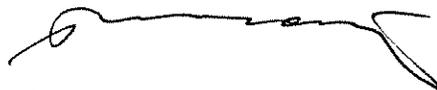
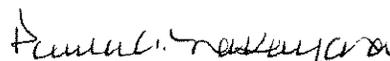
IT IS HEREBY ORDERED that the judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, October 26, 2006.

On the briefs:

Dennis Niles, William M. McKeon  
and Tom Pierce (of Paul, Johnson,  
Park & Niles) for Plaintiff-  
Appellant Holo Holo Charters, Inc.

Michael Q. Y. Lau, and Sonia  
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for Defendant-Appellee State of  
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Sonia E. Faust, Jr.