NO. SCWC-17-0000806

IN THE SUPREME COURT OF HAWAI'I

PETER J. WINN, WESTMINSTER REALTY, INC. Respondents/Plaintiffs-Apellants, vs. WADE BRADY, et al., Defendants, JAMES E. SPENCE, BEVERLY C. SPENCE, Petitioners/Intervenors-Appellees, STEPHEN R. SPENCE, and VALORIE A. SPENCE, Intervenors-Appellees.	CIVIL NO. 12-1-0087(1) (Contract) APPEAL FROM THE ORDER GRANTING INTERVENORS JAMES E. SPENCE, BEVERLY C. SPENCE, STEPHEN R. SPENCE, AND VALORIE A. SPENCE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING JUDGMENT CREDITORS PETER J. WINN AND WESTMINSTER REALTY, INC.'S EX PARTE MOTION FOR FIRST ALIAS WRIT OF EXECUTION, filed OCTOBER 11, 2017 Circuit Court of the Second Circuit Hon. Rhonda I.L. Loo

PETITIONERS' REPLY TO PLAINTIFFS-APPELLANTS-RESPONDENTS' RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

KOBAYASHI SUGITA & GODA, LLP
JOSEPH A. STEWART 7315-0
AARON R. MUN 9779-0
REECE Y. TANAKA 11841-0
999 Bishop Street, Suite 2600
Honolulu, Hawaii 96813
Telephone: (808) 535-5700
Facsimile: (808) 535-5799
Email: jas@ksglaw.com; arm@ksglaw.com; ryt@ksglaw.com
Attorneys for Intervenors-Appellees
James E. Spence and Beverly C. Spence

PETITIONERS' REPLY TO PLAINTIFFS-APPELLANTS-RESPONDENTS' RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

Petitioners/Intervenors-Appellees JAMES E. SPENCE and BEVERLY C. SPENCE ("***Spences***"), by and through their counsel Kobayashi Sugita & Goda, LLP, respectfully submit their Reply to Plaintiffs-Appellants-Respondents' Response to Petitioner's Application for Writ of Certiorari filed March 18, 2024 ("***Response***"). PETER J. WINN and WESTMINSTER REALTY, INC. ("***Respondents***") responded to James and Beverley Spences' Application for a Writ of Certiorari, filed March 18, 2024 ("***certiorari application***"), which sought review of grave errors manifest in the Intermediate Court of Appeals' ("***ICA***") decision in *Winn v. Brady*, 153 Hawai`i 433, 541 P.3d 653 (App. 2023). This reply is submitted pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 40.1(e).

I. ARGUMENT

A. *The ICA Impermissibly Created New Law by Ignoring the Clear Language of Hawai'i Revised Statutes ("HRS") § 651-43, Thus Effectively Finding that Undisputed Compliance with the Statute Does Not Provide Adequate Notice for Due Process Purposes.*

Respondents contend that the ICA did not create new law because "[f]rom the time of the Hawaiian Kingdom to the present, Hawai'i has required adequate notice in order for procedures to comport with due process – whether they appear in a particular statute or court rule." Response at 1. Respondents rely on *Davis v. Bissen*, SCAP-22-0000368 and *Eto v. Muranaka*, 99 Hawai'i 488, 57 P.3d 413 (2002), among other cases, for the proposition that due process requires "adequate" notice, SCAP-22-0000368 at *12, which is notice "reasonably calculated . . . to apprise interested parties of the pendency of the action[,]" 99 Hawai'i at 498, 57 P.3d at 423. Respondents further argue that *State v. Bloss*, 64 Haw. 148, 637 P.2d 1117 (1981) is not applicable because the ICA "neither attempted to rewrite HRS § 651-43 nor invalidate the statute as unconstitutional." Response at 3. These arguments miss the crux of the issue.

The Spences do not claim that the general concept of constitutional due process is a novel one, or that "adequate" notice is not required. Instead, the ICA gravely erred by ignoring the unambiguous language of HRS § 651-43, and effectively finding that it did not provide Respondents with adequate notice for due process purposes. The statute, which the Spences undoubtedly satisfied, was enacted as written by the legislature: it required the Spences to advertise the execution sale "by posting a written or printed notice in three conspicuous places within the district where the property is situated." HRS § 651-43. The legislature *could* have easily included an exception in the statute to require actual notice to be given to known "judgment creditors," "junior lienholders," "unsecured creditors," or, as Appellants refer to themselves, "interested parties." But the legislature did not, and thus must have deemed notice under the statute to constitute adequate notice reasonably calculated to apprise interested parties of the pendency of the action.

What *is* novel is the ICA's deviation from HRS § 651-43 based on a narrow and particular set of facts. By requiring the Spences to provide Respondents with actual/personal notice, the ICA engaged in improper judicial law-making by essentially rewriting the law to add an exception to HRS § 651-43 so that it now requires notice to be posted in three places *except that if the identity or contact information of a junior lienholder is known or ascertainable through reasonable diligence, actual notice of the execution sale must be given to the junior lienholder. See Keanini v. Akiba*, 84 Hawai'i 407, 414, 935 P.2d 122, 129 (App. 1997) (holding that recognizing a new doctrine would require the court to rewrite a clear statute to add a new provision "that the legislature did not see fit to include[,]" which would constitute judicial law-making.). In other words, in holding that the satisfaction of the statute governing notice of

execution sales was insufficient for due process purposes, the ICA narrowed the established definition of "adequate" notice.

It is important to note that, even though the ICA did not *literally* rewrite HRS § 651-43 or declare it as unconstitutional, it effectively did so by going through the back door. Under the ICA's decision, the statute, as written, no longer applies to all situations, which undermines the legislature's intent. Instead, the ICA created two standards: (1) notice given pursuant to HRS § 651-43 satisfies due process, but only with respect to unknown lienholders; and (2) *for known lienholders, HRS § 651-43 does not satisfy due process, which can only be satisfied through actual/personal notice*. As established in *Keanini*, the creation of a new standard "would require [the court] to rewrite the [governing] statute." 84 Hawai'i at 414, 935 P.2d at 129. The ICA did not engage in the interpretation of ambiguous language of the statute; it wrote entirely new (and burdensome) requirements into it. Therefore, *Bloss* establishes grave error on the part of the ICA, given that "[i]t is not the role of the courts to rewrite statutes or ordinances in order to cure constitutional defects." 64 Haw. at 166, 637 P.2d at 1130.

B. ***The ICA's Application of the New Law Would Greatly Prejudice the Spences.***

Further, the ICA's retroactive application of this new law was unfair to the Spences, a point which Respondents do not dispute. As explained in the certiorari application, the ICA's imposition of a requirement of actual notice to lienholders was issued nearly nine years after the Spences relied on the unambiguous language of HRS § 651-43. It would be unjust to punish the Spences for faithfully following the law as it existed at the time, as they could not have reasonably foreseen that a court would one day re-write that statute and retroactively apply it to their prejudice. As this Court has articulated, "where substantial prejudice results from the retrospective application of new legal principles to a given set of facts, the inequity may be avoided by giving the guiding principles prospective application only." *State v. Ikezawa*, 75

Haw. 210, 220-21, 857 P.2d 593, 597-98 (1993) (footnote omitted). The ICA acted in contravention of the "concept of fairness" implicit in this Court's decisions on the issue of retroactive application and its decision would greatly prejudice the Spences, a point on which Respondents are tellingly silent. *See id.* at 220, 857 P.2d at 598. Thus, the ICA's decision should be reversed.

II. CONCLUSION

Based on the foregoing, and on their certiorari application, the Spences respectfully request that this Court grant their application for a writ of certiorari, and reverse the ICA's decision.

DATED: Honolulu, Hawai'i, April 11, 2024.

/s/ Aaron R. Mun
JOSEPH A. STEWART
AARON R. MUN
REECE Y. TANAKA

Attorneys for Petitioners/Intervenors-Appellees
James E. Spence and Beverly C. Spence

NO. SCWC-17-0000806

IN THE SUPREME COURT OF HAWAI'I

PETER J. WINN, WESTMINSTER REALTY, INC. Respondents/Plaintiffs-Apellants, vs. WADE BRADY, et al., Defendants, JAMES E. SPENCE, BEVERLY C. SPENCE, Petitioners/Intervenors-Appellees, STEPHEN R. SPENCE, and VALORIE A. SPENCE, Intervenors-Appellees.	CIVIL NO. 12-1-0087(1) (Contract) APPEAL FROM THE ORDER GRANTING INTERVENORS JAMES E. SPENCE, BEVERLY C. SPENCE, STEPHEN R. SPENCE, AND VALORIE A. SPENCE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING JUDGMENT CREDITORS PETER J. WINN AND WESTMINSTER REALTY, INC.'S EX PARTE MOTION FOR FIRST ALIAS WRIT OF EXECUTION, FILED OCTOBER 11, 2017 Circuit Court of the Second Circuit Hon. Rhonda I.L. Loo

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing document was served upon the following parties by electronic court filing (JEFS) or by mailing said copy by U.S. mail, postage prepaid (U.S. MAIL), on this date:

Lance Collins, Esq. — JEFS
P.O. Box 782
Makawao, HI 96768
Attorney for Respondents/Plaintiffs-Appellants

Lars Peterson, Esq. — JEFS
677 Ala Moana Blvd., Suite 1009
Honolulu, HI 96813
Attorney for Defendants

[Document continues on the next page]

STEPHEN R. SPENCE and VALORIE A. SPENCE 3031 Old Haleakala Hwy Makawao, HI 96768 steve@idsmaui.com valorie@idsmaui.com Appellees	U.S. Mail and Email

Dated: Honolulu, Hawai‘i April 11, 2024.

/s/ Aaron R. Mun
JOSEPH A. STEWART
AARON R. MUN
REECE Y. TANAKA

Attorneys for Petitioners/Intervenors-Appellees
James E. Spence and Beverly C. Spence