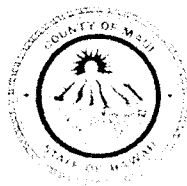


**MICHAEL P. VICTORINO**  
Mayor

**MOANA M. LUTEY**  
Corporation Counsel

**RICHELLE M. THOMSON**  
First Deputy

**LYDIA A. TODA**  
Risk Management Officer



**DEPARTMENT OF THE CORPORATION COUNSEL  
COUNTY OF MAUI**

**200 SOUTH HIGH STREET, 3<sup>RD</sup> FLOOR  
WAILUKU, MAUI, HAWAII 96793**

**EMAIL: CORPCOUN@MAUICOUNTY.GOV  
TELEPHONE: (808) 270-7740  
FACSIMILE: (808) 270-7152**

August 31, 2020

MEMO TO: Mike Molina, Chair  
Governance, Ethics, and Transparency Committee

FROM: Richelle K. Kawasaki, Deputy Corporation Counsel

SUBJECT: **Litigation Matter - Case Status GET-11  
NORIYOSHI MAKABE AND MASAMI MAKABE AS CO-  
CONSERVATORS OF HAYATO MAKABE, AN INCAPACITATED  
PERSON v. PARKS AND RECREATION DEPARTMENT, ET AL.;  
CIVIL NO 18-1-0346(1)**

Our Department is requesting the opportunity to discuss the above-referenced case with the Committee and to provide status of the litigation and discuss settlement options. We would like this matter to be heard at the next committee meeting.

A copy of Plaintiffs' Complaint as well as the County's Third-Party Complaint are attached.

Should you have any questions or concerns, please do not hesitate to contact our office.

cc: Karla Peters, Director of Parks and Recreation

# Resolution

No. \_\_\_\_\_

AUTHORIZING SETTLEMENT OF NORIYOSHI MAKABE  
AND MASAMI MAKABE AS CO-CONSERVATORS OF  
HAYATO MAKABE, AN INCAPACITATED PERSON V.  
PARKS AND RECREATION DEPARTMENT, ET AL.; CIVIL 18-1-0346(1)

WHEREAS, Plaintiffs Noriyoshi Makabe and Masami Makabe as co-conservators of Hayato Makabe, an incapacitated, person filed a lawsuit against Parks and Recreation Department, County of Maui in the Circuit Court of the Second Circuit, State of Hawaii, on August 16, 2018, Civil No. 18-1-0346(1), alleging negligence, premise liability, emotional distress, and public nuisance; and

WHEREAS, the County of Maui, filed a Third-Party Complaint against Pacific Ohana Masonry & Landscaping, Inc. on April 8, 2020 for indemnification, defense, negligence, and contribution; and

WHEREAS, the County of Maui, to avoid incurring expenses and the uncertainty of a judicial determination of the parties' respective rights and liabilities, will attempt to reach a resolution of this case by way of a negotiated settlement or Offer of Judgment; and

WHEREAS, the Department of the Corporation Counsel has requested authority to settle this case under the terms set forth in an executive meeting before the Governance, Ethics, and Transparency Committee; and

**Resolution No. \_\_\_\_\_**

WHEREAS, having reviewed the facts and circumstances regarding this case and being advised of attempts to reach resolution of this case by way of a negotiated settlement or Offer of Judgment by the Department of the Corporation Counsel, the Council wishes to authorize the settlement; now, therefore

BE IT RESOLVED by the Council of the County of Maui:

1. That it approves settlement of this case under the terms set forth in an executive meeting before the Governance, Ethics, and Transparency Committee;
2. That it authorizes the Mayor to execute a Release and Settlement Agreement on behalf of the County in this case;
3. That it authorizes the Director of Finance to satisfy said settlement of this case; and
4. That certified copies of this resolution be transmitted to the Mayor, the Director of Finance, the Director of Parks and Recreation, and the Corporation Counsel.

APPROVED AS TO FORM  
AND LEGALITY:

  
\_\_\_\_\_  
RICHELLE K. KAWASAKI  
Deputy Corporation Counsel  
County of Maui  
LIT-5908

RECEIVED  
CORPORATION COUNSEL

2018 OCT 19 PM 4:16

Rec'd via  
courtyacht

KELLEY & WILKINS  
A Limited Liability Company

MATSON KELLEY 8129  
ALEX WILKINS 10276  
24 N. Church Street, Suite 312  
Wailuku, Hawaii 96793  
Telephone: (808) 244-4994  
Facsimile: (800) 948-7344

2018 AUG 16 PM 2:51

V. ISHIHARA, CLERK  
U.S. CIRCUIT COURT  
SOUTHERD DISTRICT

Attorneys for Plaintiffs  
NORIYOSHI MAKABE and MASAMI MAKABE  
as CO-CONSERVATORS of HAYATO MAKABE

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

## STATE OF HAWAII

NORIYOSHI MAKABE and MASAMI MAKABE as CO-CONSERVATORS of HAYATO MAKABE, an incapacitated person.

Plaintiffs,

VS.

PARKS AND RECREATION DEPARTMENT,  
COUNTY OF MAUI; DOES 1-5; JANE DOES  
1-5; ROE CORPORATIONS 1-5; ROE NON-  
PROFIT CORPORATIONS 1-5 AND ROE  
GOVERNMENTAL AGENCIES 1-5.

Defendants.

) CIVIL NO. 18-1-0346 (1)  
 ) (Other Non-Vehicle Tort)  
 )  
 ) COMPLAINT; SUMMONS

## COMPLAINT

Comes now, Plaintiffs NORIYOSHI MAKABE and MASAMI MAKABE as CO-CONSERVATORS of HAYATO MAKABE, an incapacitated person (collectively, "Plaintiffs"), by and through their counsel, the Law Offices of Kelley & Wilkins, and hereby submits the following Complaint against Defendants PARKS AND RECREATION DEPARTMENT, COUNTY OF MAUI; DOES 1-5; JANE DOES 1-5; ROE CORPORATIONS 1-5; ROE NON-

I hereby certify that this is a full, true and correct copy of the Original.

Clerk, Second Circuit Court

PROFIT CORPORATIONS 1-5 AND ROE GOVERNMENTAL AGENCIES 1-5, (Collectively "Defendants"), and complains and alleges as follows:

PARTIES AND JURISDICTIONAL ALLEGATIONS

1. This lawsuit seeks compensation for the serious personal injuries and financial losses suffered by HAYATO MAKABE as a result of the negligent maintenance of Defendants' premises.

2. At all times relevant herein, Co-Conservators NORIYOSHI MAKABE and MASAMI MAKABE were residents of the County of Maui, State of Hawaii, the natural parents of HAYATO MAKABE ("Hayato"), and court-appointed legal co-guardians and co-conservators responsible for Hayato's legal affairs.

3. Hayato has the genetic disorder Down Syndrome.

4. Defendant COUNTY OF MAUI ("Defendant COUNTY") is, and at all relevant times herein was, a duly organized municipal corporation organized and existing under the laws of the State of Hawaii, and within the jurisdiction of the Circuit Court of the Second Circuit, State of Hawaii.

5. At all times relevant herein, the PARKS and RECREATION DEPARTMENT was a public agency and/or department of Defendant COUNTY.

6. Defendants DOES 1-5, JANE DOES 1-5, ROE CORPORATIONS 1-5, ROE NON-PROFIT CORPORATIONS 1-5 AND ROE GOVERNMENTAL AGENCIES 1-5 are sued herein under fictitious names for the reason that their true names and identities are presently unknown to Plaintiff, except that they were connected in some manner with named Defendants and/or were persons, corporations, entities, agents, representatives, business entities, associations, employers or employees, responsible for the operation and maintenance of the

premises involved herein, or were involved in the handling of products or maintenance at the site involved herein, and/or were in some manner presently unknown to Plaintiff engaged in the activities alleged herein, and/or were in some manner responsible for the injuries and damages to Plaintiff. Said John and Jane Does acted with willful wanton disregard for the safety and well being of Plaintiff and approved and ratified all acts of each of the Defendants and each of them. Plaintiff will identify the true names and capacities, activities and/or responsibilities when the same are ascertained.

7. Plaintiffs have made diligent and good-faith efforts to ascertain the identities of those responsible.

8. At all times relevant herein, Defendants, or any of them, managed, controlled, maintained, or otherwise had some control over the premises in question which caused Plaintiff's injury.

9. The circumstances that give rise to this action involve an occurrence on October 3, 2017 in the County of Maui, State of Hawaii, so that this Court has jurisdiction over the subject matter and parties herein pursuant to Hawaii Revised Statutes ("HRS") § 634-35, and venue is proper.

#### FACTUAL ALLEGATIONS

10. Defendant COUNTY is the landowner, lessor, manager and/or occupier of the real property commonly known as Kanaha Beach Park, identified as real property tax number (2) 3-8-001-119 ("property" or "Kanaha Beach Park") and occupied, managed, controlled, maintained, or otherwise exerted influence over and, thus, was responsible for the condition and maintenance of said property.

11. On March 30, 2014 a large Ironwood Tree Branch, approximately 150 feet in length, fell and injured two young children who were visiting Kanaha Beach Park.

12. On May 30, 2014 a Hazardous Tree Assessment ("Assessment") was performed of Kanaha Beach Park for Defendant COUNTY.

13. The aforementioned Assessment identified Kanaha Beach Park as one of the tree "Hot Spots" due to several activities, including the disposal of charcoal by Kanaha Beach Park users, the location of Kanaha Beach Park in a wet land zone that historically gets inundated with brackish and salt water, heavy rains, heavy exposure to trade winds carrying salt mist, constant exposure to wind, improper maintenance of Kanaha Beach Park eliminating the understory shrub layer, damage from weed whackers, and windthrow of trees along the exterior that have allowed wind to sweep within the interior of Kanaha Beach Park to impact trees that have not adapted in growth form to the wind.

14. On or about October 3, 2017, Hayato was visiting Kanaha Beach Park on a day trip with the Easter Seals, and was picnicking in a grassy area located near the public parking lot. This area of Kanaha Beach Park is open to and commonly used by the public.

15. Without warning, a large branch from an Ironwood tree broke and struck Plaintiff as it fell to the ground.

16. Defendants, and each of them, were on actual, constructive and/or implied notice that the Ironwood tree was dangerous, in need of maintenance and/or need of removal of dead branches and/or dead limbs, that the tree posed an unreasonable risk to harm to users of Kanaha Beach Park, including Hayato, and/or that it is a foreseeable and common occurrence that Ironwood trees, such as those at Kanaha Beach Park, experience branch breakage due to top-heavy branches and exposure to wind.

17. As a result of being struck by the large branch at Kanaha Beach Park, Plaintiff suffered severe and permanent injuries.

COUNT I  
NEGLIGENCE

18. Plaintiffs restate the allegations contained in the preceding paragraphs and incorporate those paragraphs by reference as if fully restated herein.

19. On or about October 3, 2017, Hayato was struck by a branch from a large Ironwood tree situated on Defendants' property.

20. At all times relevant hereto, Defendants, and each of them, were responsible for the care, upkeep, inspection, maintenance, monitoring, cleaning and/or warnings with respect to the property and this tree in particular.

21. Defendants, and each of them, had a duty to users of Kanaha Beach Park, including Hyato, to protect them from or warn against any hazards on the property which presented an unreasonable risk of harm.

22. Prior to the incident complained of herein, Defendants, and each of them, knew or should have known of the unreasonable risk of harm presented by the condition and/or advanced decay of the subject Ironwood tree located on their property.

23. Defendants, or any of them, had actual knowledge of the deteriorating tree and failed to take any steps to eliminate the danger.

24. Defendants, and each of them, negligently breached their duty to Hayato and the injuries he sustained were directly and proximately caused by the negligence of Defendants.

25. The negligence of Defendants, and each of them, include but not limited to the following:

- a. Permitting an unreasonable risk of harm to exist on their property;



b. Failing to properly inspect, monitor, supervise, maintain or otherwise oversee their property, including the subject Ironwood tree, so as to prevent or eliminate the unreasonable risk of harm;

c. Permitting or allowing the subject Ironwood tree to remain standing on their property; and

d. Failing to warn, advise, or otherwise provide notice to users of Kanaha Beach Park, including Hayato, regarding the unreasonable risk of harm.

26. The actions of the Defendants, individually and in concert, as alleged herein, were negligent and subject to joint and severable liability.

27. The negligence of each Defendant was a substantial factor in causing the injuries and losses sustained by Plaintiffs. Such injuries and losses include, but are not limited to, loss of mobility, loss of income, loss of enjoyment of life, and pain and suffering.

28. Defendants' are vicariously liable to Plaintiffs for the aforesaid negligence/gross negligence of its employees and/or agents under the doctrine of *respondeat superior* and/or principles of agency liability.

29. The negligent acts and/or omissions of Defendants, and each of them, were the direct and proximate causes of Plaintiffs' injuries and damages.

## COUNT II PREMISES LIABILITY

30. Plaintiffs restate the allegations contained in the preceding paragraphs and incorporate those paragraphs by reference as if fully restated herein.

31. Defendants, and each of them, owned, occupied, maintained, controlled and/or managed Kanaha Beach Park, including the subject tree and surrounding property.

32. Defendants, and each of them, had a duty to eliminate, prevent or warn users of Kanaha Beach Park, including Hayato, of unreasonable risks of harm existing on the property.

33. Defendants, and each of them, breached their duty to eliminate, prevent or warn users of Kanaha Beach Park, including Hayato, of the unreasonable risk of harm posed by the subject tree.

34. Defendants', and each of their, negligence includes, but is not limited to, their failure to control, test, maintain, supervise, repair, inspect and/or eliminate or warn against the unreasonable risks of harm upon the property.

35. Defendants', and each of their, negligence is the direct and legal cause of Plaintiffs' injuries and resulting damages.

COUNT III  
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

36. Plaintiffs restate the allegations contained in the preceding paragraphs and incorporate those paragraphs by reference as if fully restated herein.

37. Defendants and each of their agents and/or employees had a duty of care to users of Kanaha Beach Park, including Hayato, to protect them from hazards on the property that presented an unreasonable risk of harm.

38. Defendants and each of their agents and/or employees negligently breached their duty to users of Kanaha Beach Park, including Hayato, and the injuries he sustained were directly and proximately caused by the negligence of Defendants.

39. As a result of Defendants' conduct, or that of any of them, Plaintiffs sustained emotional distress and will continue to experience emotional distress well into the future.

40. The conduct of Defendants, and each of them, was the direct and proximate cause of Plaintiffs' severe emotional distress, including mental worry, anxiety, anguish, suffering and grief, and all other damages to which Plaintiffs may be entitled.

COUNT IV  
PUBLIC NUISANCE

41. Plaintiffs restate the allegations contained in the preceding paragraphs and incorporate those paragraphs by reference as if fully restated herein.

42. The tree branch which struck Hayato fell from an Ironwood tree located in a public place where members of the public, such as Hayato, were invited and commonly visited.

43. The subject Ironwood tree posed a unreasonable risk of harm and/or hazardous condition in a public place and, therefore, constituted a public nuisance.

44. Defendants, through their employees and/or agents, created, permitted and/or maintained the public nuisance on Defendants' property.

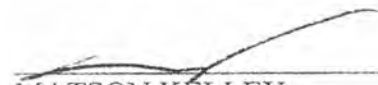
45. Defendants', through their employees and/or agents, knew or reasonably should have known of the public nuisance posed by the subject Ironwood tree, and failed to remove it or safeguard Kanaha Beach Park users, including Hayato, against it.

46. As a direct and proximate result of Defendants' public nuisance, Plaintiffs sustained severe and permanent injuries, suffered severe and long-lasting mental and emotional distress, and have incurred and will continue to incur substantial medical and rehabilitative expenses, and experienced extreme pain and suffering, loss of enjoyment of life, loss of familial consortium, and loss of future earning capacity.

WHEREFORE, upon a hearing hereof, Plaintiffs pray that judgment be entered in their favor and against Defendants, jointly and severally, for such special, general, punitive and other damages to which they shall be entitled, including prejudgment interest, post-judgment interest,

attorney's fees, costs of Court and such other and further relief as to which they shall be entitled pursuant to Rule 54 of the Hawai'i Rules of Civil Procedure.

DATED: Wailuku, Maui, Hawai'i, August 16, 2018.



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MATSON KELLEY  
ALEX WILKINS  
Attorneys for Plaintiffs  
NORIYOSHI MAKABE and MASAMI MAKABE  
as CO-CONSERVATORS of HAYATO MAKABE

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

NORIYOSHI MAKABE and MASAMI	) CIVIL NO.
MAKABE as CO-CONSERVATORS of	) (Other Non-Motor Vehicle Tort)
HAYATO MAKABE, an incapacitated person,	)
	) SUMMONS
Plaintiffs,	)
	)
vs.	)
	)
PARKS AND RECREATION DEPARTMENT,	)
COUNTY OF MAUI; DOES 1-5; JANE DOES	)
1-5; ROE CORPORATIONS 1-5; ROE NON-	)
PROFIT CORPORATIONS 1-5 AND ROE	)
GOVERNMENTAL AGENCIES 1-5,	)
	)
Defendants.	)

SUMMONS

To the Above-Named Defendants:

You are hereby summoned and required to file with the court and serve upon the Law Offices of Kelley & Wilkins, whose address is 24 N. Church St., Suite 312, Wailuku, Maui, Hawai'i 96793, an answer to this Complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

This summons shall not be personally delivered between 10:00 p.m. and 6:00 a.m. on premises not open to the general public, unless a judge of the district or circuit courts permits, in writing on this summons, personal delivery during those hours. A failure to obey this summons may result in an entry of default and default judgment against the disobeying person or party.

DATED: Wailuku, Maui, Hawaii

Aug 16 2018  
/sgd/ V. ISHIHARA (seal)

CLERK OF THE ABOVE-ENTITLED COURT

DEPARTMENT OF THE  
CORPORATION COUNSEL 205

MOANA M. LUTEY 6385

Corporation Counsel

RICHELLE K. KAWASAKI 6400

THOMAS KOLBE 7679

Deputies Corporation Counsel

200 South High Street

Wailuku, Maui, Hawaii 96793

Telephone No.: (808) 270-7741

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**Electronically Filed**  
**SECOND CIRCUIT**  
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**08-APR-2020**  
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Attorneys for Defendant  
PARKS AND RECREATION DEPARTMENT,  
COUNTY OF MAUI

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT

STATE OF HAWAII

NORIYOSHI MAKABE and MASAMI  
MAKABE as CO-CONSERVATORS of  
HAYATO MAKABE, an incapacitated  
person,

Plaintiffs,

vs.

PARKS AND RECREATION  
DEPARTMENT, COUNTY OF MAUI;  
DOES 1-5; JANE DOES 1-15; ROE  
CORPORATIONS 1-5; ROE NON-PROFIT  
CORPORATIONS 1-5 AND ROE  
GOVERNMENTAL AGENCIES 1-5,

Defendants.

CIVIL NO. 18-1-0346(1)  
(Other Non-Vehicle Tort)

DEFENDANT AND THIRD-PARTY  
PLAINTIFF PARKS AND RECREATION  
DEPARTMENT, COUNTY OF MAUI'S  
THIRD-PARTY COMPLAINT;  
SUMMONS

Honorable Judge Rhonda I.L. Loo

Trial Date: October 13, 2020

**DEFENDANT AND THIRD-PARTY PLAINTIFF PARKS AND RECREATION  
DEPARTMENT, COUNTY OF MAUI'S THIRD-PARTY COMPLAINT**

Defendant and Third-Party Plaintiff Parks and Recreation Department, County of Maui, ("County"), by and through its attorneys, MOANA M. LUTEY, Corporation Counsel, and RICHELLE K. KAWASAKI and THOMAS KOLBE, Deputies Corporation Counsel, hereby submits its Third-Party Complaint against Third-Party Defendant Pacific Ohana Masonry & Landscaping, Inc. (hereinafter "Third-Party Defendant"), and alleges as follows:

1. County is a political subdivision of the State of Hawaii.
2. At all times relevant herein, Plaintiffs NORIYOSHI MAKABE and MASAMI MAKABE as CO-CONSERVATORS of HAYATO MAKABE, incapacitated person (hereinafter collectively referred to as "Plaintiffs"), were residents of the County of Maui, State of Hawaii.
3. At all times relevant herein, Third-Party Defendant PACIFIC OHANA MASONRY & LANDSCAPING, INC. was, and is, a corporation duly organized under the laws of the State of Hawaii that contracted with the County to provide tree trimming and maintenance services at Kanaha Park.
4. Pursuant to agreements with the County, PACIFIC OHANA MASONRY & LANDSCAPING, INC., an independent contractor, agreed to indemnify the County and provide defense to claims related to their contractual work at Kanaha Park.
5. PACIFIC OHANA MASONRY & LANDSCAPING, INC. conducted tree trimming and maintenance services at Kanaha Park.
4. On or about October 3, 2017, Plaintiff HAYATO MAKABE was injured when a tree branch fell on him at Kanaha Park, in the County of Maui (hereinafter "the incident").

5. Plaintiffs filed a Complaint on August 16, 2018 against County, the allegations of which are incorporated herein by reference.

6. All events material to the Complaint occurred within the County of Maui, State of Hawaii, and within the jurisdiction of the Circuit Court of the Second Circuit;

**COUNT I**  
**INDEMNIFICATION AND DEFENSE**

7. County repeats and realleges the allegations contained in paragraphs 1 through 6 above.

8. Prior to October 3, 2017, Third-Party Defendant provided tree-trimming and maintenance services at Kanaha Park as an independent contractor for County. The agreements for services included indemnification and defense provisions in favor of County.

9. County did not engage in any acts or omissions which in any way caused or contributed to the injuries and damages alleged by Plaintiffs.

8. If Plaintiff HAYATO MAKABE was injured and/or damaged as alleged in the Complaint, the injuries and/or damages were a proximate result of the negligence, failure to warn, strict liability, nuisance, breach of duty and/or other wrongful acts or omissions of Third-Party Defendant, and were not the result of any conduct of County.

10. The negligence or other fault of Third-Party Defendant was active and primary, while the negligence of the Third-Party Plaintiff, if any, was passive and secondary and, therefore, Third-Party Plaintiff County is entitled to indemnity and defense from Third-Party Defendant.

WHEREFORE, County prays as follows:



A. That County have judgment against Third-Party Defendant for general damages, special damages, prejudgment interest, punitive damages and reasonable attorney's fees and costs as shall be proven.

B. That if Plaintiffs are found entitled to any judgment in their favor, the judgment be entered solely against Third-Party Defendant and not against County.

C. That if Plaintiffs should recover judgment against County, the County have judgment against Third-Party Defendant for the entire amount of any such judgment against Third-Party Plaintiff County, together with costs, attorney's fees and expenses of this action.

D. That if it is determined that County and Third-Party Defendant were jointly negligent herein for the claims of Plaintiffs, that the relative degree of fault of each tort feisor be determined, and that County be liable only for its share.

E. That this Court grant Third-Party Plaintiff County any other relief as it deems proper.

DATED: Wailuku, Maui, Hawaii, April 8, 2020.

MOANA M. LUTEY  
Corporation Counsel  
Attorneys for Defendant  
PARKS AND RECREATION, DEPARTMENT  
COUNTY OF MAUI

By /s/ Richelle K. Kawasaki  
RICHELLE KAWASAKI  
THOMAS KOLBE  
Deputies Corporation Counsel