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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

COUNTY OF HAWAI'I, a municipal corporation,

Plaintiff-Appellee,

vs.

C&J COUPE FAMILY LIMITED PARTNERSHIP,

Defendant-Appellant,

and

ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*,

Defendants.

COUNTY OF HAWAI'I, a municipal corporation,

Plaintiff-Appellee,

vs.

ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; C&J COUPE FAMILY LIMITED PARTNERSHIP; MILES HUGH WILSON, *et al.*,

Defendants-Appellants.

) CIVIL NO. 05-1-015K
) (Kona) (Condemnation)
)
) APPEAL FROM FIRST AMENDED
) FINAL JUDGMENT
) (filed September 27, 2007)

) THIRD CIRCUIT COURT
)
) Honorable Ronald Ibarra, Judge

)
) CIVIL NO. 00-1-181K
) (Kona) (Condemnation)
)
) APPEAL FROM THE DENIAL OF THE
) POST-JUDGMENT MOTION OF
) DEFENDANT C&J COUPE FAMILY
) LIMITED PARTNERSHIP FOR
) STATUTORY DAMAGES PURSUANT
) TO HAW. REV. STAT. § 101-27 (FILED
) OCT. 11, 2007)

) THIRD CIRCUIT COURT
)
) Honorable Ronald Ibarra, Judge

**PLAINTIFF-APPELLEE COUNTY OF HAWAI'I'S MEMORANDUM IN OPPOSITION
TO DEFENDANT-APPELLANT'S REQUEST FOR STATUTORY DAMAGES**

Plaintiff-Appellee County of Hawai'i ("County"), by and through its undersigned counsel, hereby opposes Defendant-Appellant C&J Coupe Family Limited Partnership's ("Coupe") Request for Statutory Damages as follows:

I. INTRODUCTION

On February 8, 2008, Coupe filed its Notice of Appeal in Civil No. 00-1-181K of the denial of the Motion for Statutory Damages on the grounds that the trial court is deemed to have denied the motion by not ruling on it within 90 days pursuant to Rule 4(a)(3), Hawai'i Rules of Appellate Procedure ("HRAP"). (Record on Appeal, Volume 43, Document 00542). On December 24, 2008, this Court filed its Opinion which held that Coupe is entitled to damages under Hawai'i Revised Statutes ("HRS") § 101-27, including reasonable attorneys' fees.

See page 14 of the Opinion.

Pursuant to Rule 39, HRAP, and HRS § 101-27, Coupe seeks an award of attorney's fees and costs in the following amounts: \$45,383.50 for attorneys' fees; \$5,775.59 for total costs (including messenger fees of \$60.00, legal research costs of \$2,115.61, and \$2,369.00 for copying costs at 20¢ per page); \$2,098.07 for general excise tax; and \$1,900.35 for interest on the fees amount.

"Generally, under the 'American Rule,' each party is responsible for paying his or her own litigation expenses." *DFS Group L.P. v. Paiea Properties*, 110 Hawai'i 217, 219, 131 P.3d 500, 502 (2006) (citations and internal quotation marks omitted). Consequently, "[n]o attorneys' fees may be awarded as damages or costs unless as provided by statute, stipulation, or agreement." *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, 58 Haw. 606, 618, 575 P.2d 869,

878 (1978) (citations omitted); *see, also, Chun v. Board of Trustees of Employees' Retirement Sys.*, 92 Hawai'i 432, 439, 992 P. 2d 127, 134 (2000).

Rule 39(c) and (d)(1), HRAP, in pertinent parts, provide that:

(c) *Costs defined.* Costs in the appellate courts are defined as: (1) the cost of the original and one copy of the reporter's transcripts if necessary for the determination of the appeal; (2) the premiums paid for supersedeas bonds or other bonds to preserve rights pending appeal; (3) the fee for filing the appeal; (4) the cost of printing or otherwise producing necessary copies of briefs and appendices, provided that copying costs shall not exceed 20¢ per page; (5) necessary postage, cost of facsimiles, intrastate travel, long distance telephone charges; and (6) any other costs authorized by statute or rule.

(d) *Request for fees and costs; objections.*

(1) A party who desires an award of attorney's fees and costs shall request them by submitting an itemized and verified bill of fees and costs, together with a statement of authority for each category of items and, where appropriate, copies of invoices, bills, vouchers, and receipts[.]

And HRS § 101-27 provides that Coupe may recover costs of court, reasonable attorneys' fees and other reasonable expenses.

County specifically opposes Coupe's Request for Statutory Damages as to the following:

1. No Attorneys' Fees for unsuccessful claims;
2. Attorneys' fees and costs as itemized in the January 24, 2008 bill should be denied;
3. Costs for legal research should be disallowed;
4. Messenger Fees, general excise tax and interest are not appropriate court costs;
and
5. Photocopying costs are excessive.

II. DISCUSSION

A. No Attorneys' Fees For Unsuccessful Claims.

Coupe has the burden of establishing that they are entitled to an award of reasonable attorney's fees. *Hamada v. Wescott*, 102 Hawai'i 210, 217, 74 P.3d 33, 40 (2003) (given the American Rule, party seeking attorneys' fees has the burden of establishing that applicable statute expressly applies to allow an award of reasonable attorneys' fees).

Porter v. Hu, 116 Hawai'i 42, 67-68, 169 P.3d 994, 1019-20 (App.2007) held as follows:

In *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), the United States Supreme Court addressed the issue of 'whether a partially prevailing plaintiff may recover an attorney's fee for legal services on unsuccessful claims.' *Id.* at 426, 103 S.Ct. 1933. **According to *Hensley*, the trial court must determine (1) whether or not unsuccessful claims are related to successful claims, see *id.* at 434, 103 S.Ct. 1933, and (2) whether or not 'the plaintiff achieved a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award [.]' *Id.* Unsuccessful claims are deemed unrelated if they are 'distinctly different claims for relief that are based on different facts and legal theories.' *Id.* Thus, 'even where the claims are brought against the same defendants, counsel's work on one claim may be unrelated to his or her work on another claim,' *id.* at 434-35, 103 S.Ct. 1933, 'work on such an unsuccessful claim cannot be deemed to have been expended in pursuit of the ultimate result achieved,' *id.* at 435, 103 S.Ct. 1933 (internal quotation marks and citations omitted), and 'the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee.' *Id.* at 440, 103 S.Ct. 1933.**

On the other hand, if 'the plaintiff's claims for relief involve a common core of facts or are based on related legal theories and much of counsel's time is devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis,' *id.* at 435, 103 S.Ct. 1933, 'such a lawsuit cannot be viewed as a series of discrete claims.' *Id.* In that situation, 'a plaintiff who has won substantial relief should not have his or her attorney's fee reduced simply because the trial court did not adopt each contention raised.' *Id.* at 440, 103 S.Ct. 1933.

As to the required level of success, 'where a plaintiff has obtained excellent results, his or her attorney should recover a fully compensatory fee' because 'litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.' *Id.* at 435, 103 S.Ct. 1933. ***If, on the other hand, a***

plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.'

(emphasis added).

In addition, in *Schefke v. Reliable Collection Agency, Ltd.*, 96 Hawai'i 408, 444-45, 32 P.3d 52, 88-89 (2001), the Hawai'i Supreme Court remanded and directed the trial court to engage in a *Hensley* analysis to determine whether it was reasonable to award attorney's fees for the entire time spent on the case, noting that time spent on unsuccessful claims unrelated to the plaintiff's successful claims could not be part of any award of "'reasonable attorney's fees' under Hawai'i fee-shifting statutes." *Schefke*, 96 Hawai'i at 445, 32 P.3d at 89. The court directed that the trial court "consider whether Plaintiff's successful and unsuccessful claims 'involved a common core of facts or were based on related legal theories,' *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933[.]" *Schefke*, 96 Hawai'i at 445, 32 P.3d at 89 (brackets omitted).

In this case, Coupe sought appeal on three points and prevailed on two out of the three. However, the abatement point that Coupe did not prevail on was a point that Coupe discussed extensively in its briefs. Moreover, the abatement issue is totally unrelated and do not involve the same common core of facts or legal theories to the HRS § 101-27 statutory damages issue or the pretext public purpose issue. Therefore, all of the attorneys' fees expended on the abatement issue should be excluded. In addition, those billings that are not clear enough to identify what issue they relate to should be excluded because Coupe has the burden of proving any entitlement to reimbursement for attorneys' fees and cost.

B. Attorneys' Fees and Costs For January 24, 2008 Bill Should Be Denied.

Upon review of Exhibit "A" of Coupe's Request for Statutory Damages, the first three pages, for the bill dated January 24, 2008, the description of the professional services rendered involved only those services provided prior to the filing of the Notice of Appeal, which is, prior to February 8, 2008. For example, it is clear that the following descriptions for professional services should be disallowed because there is no evidence that those services were done solely for the instant appeal:

1. Attorney Kudo-Chock billed 7.5 hours and \$1,087.50 in connection with a Motion to Disburse Deposit. *See* entries 12/05/07, 12/07/07 and 12/10/07.
2. Attorney Kupchak billed 1 hour and \$335.00 to review the Motion for release of deposit. *See* entry 12/07/07.
3. Attorney Murakami billed 3.9 hours and \$858.00 for "develop issues and strategy for applying for funds deposited with court." *See* entry 12/10/07.

So, all of the fees (\$11,999.00) and costs (\$910.87) from the January 24, 2008 bill should be denied because the professional services provided involved the proceedings that was still before the trial judge.

C. Costs for Computer Legal Research Should Be Denied.

Coupe seeks costs for computer research in the sum of \$2,115.61. *See* Exhibits "B.4" and "B.5" of Coupe's Request for Statutory Damages.

Neither Rule 39, HRAP, nor HRS § 101-27 specifically allow for costs associated with legal research searches on-line through a computerized service, such as, Lexis Nexis and Westlaw.

In *Bjornen v. State Farm Fire and Cas. Co.*, 81 Hawai'i 105, 109, 912 P.2d 602, 606 (App. 1996), the Intermediate Court of Appeals concluded that disbursements for computerized legal research such as Westlaw are a component of attorney fees and are not taxable. Such legal research costs "are properly reflected as part of the law firm's overhead and, as such, are a factor to be included in the setting of attorneys fees as opposed to ordinary costs." *Id.*, 81 Hawai'i at 107, 912 P.2d at 604.

This Court has adopted the position that "disbursements for computerized legal research . . . are a component of attorney fees and are not taxable costs." *DFS Group L.P. v. Paiea Properties*, 110 Hawai'i at 224, 131 P.3d at 507.

Being that the costs for legal research is part of the law firm's overhead costs, the request for \$2,115.61 as legal research services costs should be denied as not taxable.

D. Messenger Fees, General Excise Tax and Interest Should Be Denied.

Coupe further seeks to recover \$60.00 for messenger fees. *See* page 4 of Exhibit "B.1" of Coupe's Request for Statutory Damages. Absent extraordinary circumstances, the cost of "messenger fees for the routine task of delivering a party's documents to court is categorically outside the concept of costs." *Hawai'i Ventures, LLC v. Otaka, Inc.*, 116 Hawai'i 465, 479, 173 P.3d 1122, 1136 (2007) (citation and internal quotation marks omitted). Since Coupe has failed to establish any extraordinary circumstances in using a messenger, this Court should deny Coupe's request for messenger fees.

Coupe's request for the recovery of excise tax of \$2,098.07 should also be denied. Coupe does not cite any statutory or case authority for an award of excise tax.

Neither has Coupe cited any statutory nor case authority for an award of interest of \$1,900.35. Coupe simply stated that as a form of damage, pursuant to HRS § 101-27,

prejudgment interest is warranted; however, HRS § 101-27 does not specifically allow prejudgment interest. Hence, the award of interest of \$1,900.35 should also be denied.

E. Photocopying Costs Are Excessive.

Coupe seeks photocopying costs in the total amount of \$2,369.00. *See* Exhibit “B.1” of Coupe’s Request for Statutory Damages, pages 1 and 2. At 20 cents per page, Coupe had copied 11,845 pages, with 6,802 pages at a total cost of \$1,160.40 being an itemized charge on page 2 of the March 24, 2008, bill, *see* Exhibit “A” of Coupe’s Request for Statutory Damages. In any event, this is a lot of sheets of paper, seemingly out of line for this appeal.

As indicated earlier, Rule 39(c)(4), HRAP, allows recovery for “the cost of printing or otherwise producing necessary copies of briefs and appendices, provided that copying costs shall not exceed 20¢ per page.” It is doubtful that the 11,845 pages or 6,802 pages would be the cost of printing the necessary copies of briefs and appendices. Because Coupe has failed to establish the reasonableness of the appropriate taxable costs for photocopying costs, Coupe’s request for such costs should be denied.

III. CONCLUSION

For the reasons stated above, we respectfully request this Court to deny Coupe’s Request for Statutory Damages for the following:

1. No Attorneys’ fees for unsuccessful claims;
2. Attorneys’ fees of \$11,999.00 and costs of \$910.87 that are itemized in the January 24, 2008, bill;
3. Costs for legal research totaling \$2,115.61;

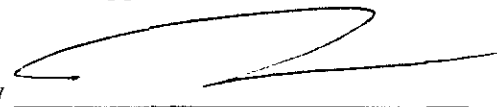
4. Messenger Fees of \$60.00, general excise tax of \$2,098.07 and interest of \$1,900.35; and

5. Photocopying costs of \$2,369.00.

Dated: Hilo, Hawai'i, January 30, 2009.

COUNTY OF HAWAII,
Plaintiff-Appellee

By



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