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Governor Neil Abercrombie

SCWC NO. 13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

OAHU PUBLICATIONS, INC., ) CIVIL NO. 11-1-1871-08 KKS  
dba Honolulu Star-Advertiser, ) (Other Civil Action)  
Plaintiff-Appellee )  
vs. ) APPEAL FROM THE  
NEIL ABERCROMBIE, in his official )  
capacity as Governor of the State of )  
Hawai'i, ) 1) AMENDED ORDER GRANTING  
Defendant-Appellant, ) OAHU PUBLICATIONS, INC., dba  
and ) HONOLULU STAR-ADVERTISER'S  
DOE GOVERNMENTAL AGENCIES ) MOTION FOR ATTORNEYS' FEES  
1-10, ) AND COSTS, FILED NOVEMBER 28,  
Defendants. ) 2011, filed December 12, 2012  
 ) 2) SECOND AMENDED FINAL  
 ) JUDGMENT IN FAVOR OF PLAINTIFF  
 ) OAHU PUBLICATIONS, INC., dba  
 ) STAR-ADVERTISER ON ALL COUNTS  
 ) OF THE COMPLAINT, filed  
 ) February 8, 2013  
 ) FIRST CIRCUIT COURT  
 )  
 ) HONORABLE KARL K. SAKAMOTO  
 ) Judge

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DEFENDANT-APPELLANT GOVERNOR ABERCROMBIE'S RESPONSE IN OPPOSITION  
TO PLAINTIFF-APPELLEE'S APPLICATION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

	<u>Page</u>
<b><u>CASES</u></b>	
<u>County of Hawaii v. C&amp;J Coupe Family, Ltd.</u> 125 Hawaii 400, 208 P.3d 713 (2009) .....	4, 5
<u>Food Pantry, Ltd., v. Waikiki Bus. Plaza, Inc.</u> , 58 Haw. 606, 575 P.2d 869 (1978) .....	7
<u>Hawaiian Association of Seventh-Day Adventists v. Wong</u> , 130 Hawaii 36, 305 P.3d 452 (2013) .....	8
<u>S.A. Healey Co. v. Milwaukee Metropolitan Sewerage Dist.</u> , 60 F3d 305 (7 <sup>th</sup> Cir. 1995) .....	5
<b><u>STATUTES</u></b>	
Haw. Rev. Stat. § 92F-15(d) .....	passim
Haw. Rev. Stat. § 602-11 .....	4, 5
42 U.S.C. § 1983 .....	6
42 U.S.C. § 1988 .....	5, 6
<b><u>RULES</u></b>	
Haw. R. App. Proc. 39 .....	passim
Haw. R. App. Proc. 39(d) .....	1, 4, 6
Haw. R. App. Proc. 39 (d)(1) .....	1, 2
Haw. R. App. Proc. 39 (d)(2) .....	1, 2
Fed. R. Civ. Proc. 54(d) .....	6

Page

DEFENDANT-APPELLANT GOVERNOR ABERCROMBIE'S RESPONSE IN OPPOSITION  
TO PLAINTIFF-APPELLEE'S APPLICATION FOR WRIT OF CERTIORARI

Plaintiff-Appellee Oahu Publications, Inc. ("Star-Advertiser") has filed a petition for certiorari ("Petition") "to correct grave errors" it asserts the Intermediate Court of Appeals ("ICA") made in denying the attorneys' fees and costs it requested for its counsels' work in CAAP No. 12-0000625. The Star-Advertiser argues that the ICA's imposition of Haw. R. App. Proc. 39's procedural deadline for filing requests for fees and costs on appeal was grave error because the fee-shifting statute of the Uniform Information Practices Act ("UIPA"), i.e., Haw. Rev. Stat. § 92F-15(d), provides that "[i]f the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation," and a court cannot apply court rules to condition how or when requests for fees and expenses are made under that section.

The Star-Advertiser's application for a writ of certiorari should not be accepted. There is no basis for the Star-Advertiser's claim that the ICA erred, gravely or otherwise. The ICA's ruling was based solely and only on the plain language of Haw. R. App. Proc. 39(d): "(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, . . . ." and "(2) [a] request for fees and costs or necessary expenses must be filed with the appellate clerk, with proof of service, no later than 14 days after the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided." Haw. Rev. Stat. § 92F-15(d) does not prescribe procedures for its implementation, and none of its provisions conflict with the procedures in Rule 39(d) for assessing fees and costs on appeal against a noncompliant government agency.

The ICA denied the request for fees and costs for the appeal in CAAP No. 12-0000625 because the request was filed almost a year after the legal work was performed. Most critically,

the request was not filed within 14 days after the Governor's motion for reconsideration of the order dismissing his first appeal in CAAP No. 12-0000625 was denied on January 10, 2013. Once that appeal was dismissed, nothing prevented the Star-Advertiser from filing a request for fees and costs on appeal under Haw. Rev. Stat. § 92F-15(d), Haw. R. App. Proc. 39(d)(1) and (2), or both, as the prevailing party on the issue of disclosure of the Judicial Selection Commission's judicial nomination lists, or the reasonableness of the fees it was awarded, below.

## I. CHRONOLOGY OF PERTINENT EVENTS

A chronology of pertinent events over the nearly two years that the appeals in CAAP Nos. 12-0000625 and 13-0000127 were pending may be helpful to understanding that the Star-Advertiser's petition for certiorari should not be accepted.

7/6/2012	Notice of Appeal from June 8, 2012 Order Granting [Star-Advertiser's] Motion For Attorneys' Fees and Costs in the Circuit Court, and June 29, 2012 Final Judgment in Favor of [Star-Advertiser] filed to initiate CAAP No. 12-0000625
8/24/2012	Order Granting Governor's Motion for Stay Pending Appeal attached as Exhibit A entered (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 7)
10/9/2012	Governor's Opening Brief filed
11/16/2012	Star-Advertiser's Answering Brief filed
11/30/2012	Order Granting [Star-Advertiser's] Motion for Leave to Correct Clerical Mistake in Judgment (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 45)
12/1/2012	Governor's Reply Brief filed
12/12/2012	Amended Order Granting [Star-Advertiser's] Motion for Attorneys' Fees and Costs entered in the Circuit Court (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 47)
12/27/2012	Order Dismissing Appeal for Lack of Jurisdiction entered (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 60)

1/6/2013 Governor's Motion for Reconsideration of Order Dismissing Appeal filed

1/7/2013 Star-Advertiser's Joinder in Governor's Motion for Reconsideration filed

1/10/2013 Order Denying Governor's Motion for Reconsideration entered

2/8/2013 Second Amended Final Judgment in Favor of [Star-Advertiser] entered in the Circuit Court (CAAP No. 13-0000127 JEFS Dkt. 29 ROA 5 of 5 at PDF 64)

2/27/2013 Notice of Entry of Second Amended Final Judgment entered in the Circuit Court (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 89 )

3/1/2013 Notice of Appeal from 12/12/2012 Amended Order Granting [Star-Advertiser's] Motion for Attorneys' Fees and Costs, and 2/8/2013 Second Amended Final Judgment in Favor of [Star-Advertiser] filed (CAAP No. 13-0000127 JEFS Dkt. 1 )

3/12/2013 Stipulation to Stay 12/12/2012 Amended Order Granting [Star-Advertiser's] Motion for Attorneys' Fees and Costs, and 2/8/2013 Second Amended Final Judgment in Favor of [Star-Advertiser] if Governor Appeals, filed (CAAP No. 13-0000127 JEFS Dkt. 29, ROA 5 of 5 at PDF 91)

3/25/2013 Stipulation Regarding Filing of Briefs and Order entered (CAAP No. 13-0000127 JEFS Dkt. 11)

4/23/2013 Governor's Opening Brief filed

4/29/2013 Star-Advertiser's Answering Brief filed

5/2/2013 Governor's Reply Brief filed

10/18/2013 Summary Disposition Order, J. Ginoza Dissenting, Affirming Circuit Court's Award of Attorneys' Fees and Vacating as to photocopying costs

11/10/2013 Star-Advertiser's Request for Fees and Expenses filed

11/20/2013 Governor's Opposition to Request for Fees and Expense filed

11/27/2013 Star-Advertiser's Reply Memo filed

1/6/2014 Order Denying Requests for Fees and Costs for CAAP No. 12-000625 With Prejudice; All Other Requests for Fees and Costs Without Prejudice With leave to Submit Amended Request entered

1/15/2014	Star-Advertiser's Amended Request for Fees filed
1/15/2014	Star-Advertiser's Motion for Reconsideration or Clarification of Order Denying Fees and Costs for CAAP No. 12-000625 filed
1/24/2014	Governor's Memorandum in Opposition to Amended Request for Fees filed
1/24/2014	Order Granting in Part Star-Advertiser's Motion for Reconsideration or Clarification – Clarifies Fees and Costs for CAAP No. 12-000625 Denied, Request Untimely entered
2/24/2014	Order Awarding Appellate Attorneys' Fees of \$1,810.20 In Favor of Star-Advertiser and Against Governor Abercrombie entered
3/3/2014	ICA Judgment on Appeal entered

## II. ARGUMENT

The Star-Advertiser did not file a request for attorneys' fees and costs in CAAP No. 12-0000625 after the appeal was dismissed for lack of jurisdiction, despite (1) the plain language in Rule 39(d) that requests for attorneys' fees and costs on appeal "must be filed . . . no later than 14 days after the time for filing a motion for reconsideration expires or a motion for reconsideration has been denied," and (2) expiration of the stay to which the circuit court's June 8, 2012 order awarding attorneys' fees and costs to the Star-Advertiser was subject under the stay pending appeal order it agreed to and the circuit court entered on August 24, 2012. Instead, it waited until after the ICA issued its Summary Disposition Order in CAAP No. 13-0000127, to request fees and costs for the appeal in CAAP No. 12-000625. It offers two rationale for why the ICA's application of Rule 39's deadline to its request for fees and expenses on appeal in CAAP No. 12-0000625 was grave error. Neither is persuasive, and the Star-Advertiser's petition for certiorari should be rejected.

Citing to County of Hawaii v. C&J Coupe Family Ltd., 120 Hawaii 400, 405-406, 208 P.3d 713, 718-719 (2009), and Haw. Rev. Stat. § 602-11, see Petition at pp. 6-7, the Star-

Advertiser argues first that Rule 39's deadline cannot be applied to an application for fees in a UIPA judicial enforcement action under section Haw. Rev. Stat. § 92F-15(d) because (1) that fee shifting statute literally requires a court to assess against the losing government agency, the fees and expenses incurred by the complainant in that litigation, (2) Haw. Rev. Stat. § 92F-15(d) does not limit or prescribe when or how the fee assessment against the losing agency assessment can or needs to be made, and (3) under Haw. Rev. Stat. § 602-11, a court rule cannot abridge or modify section Haw. Rev. Stat. § 92F-15(d)'s fee-shifting mandate. The argument is not persuasive because it is not supported by this Court's opinion in C&J Coupe Family as the Star-Advertiser claims.

In C&J Coupe Family, this Court recognized that "where a statute and a rule merely overlap but do not irreconcilably conflict, effect should be given to both if possible," and held that if a fee shifting statute "and HRAP Rule 39 can be read *in pari materia* without conflict, then this court should give effect to both." Id. This Court then went on to conclude that the procedures in Rule 39 should be used to assess the fees authorized to be shifted under the fee-shifting statute presented there because that statute did not specify which court was to adjudicate requests for fees on appeal, and "[Rule 39] specifically requires that requests for fees and costs on appeal should be applied for in this court." Id. The provisions of Haw. Rev. Stat. § 92F-15(d) similarly overlap but do not conflict with the provisions of Rule 39, and do not specify or preclude the ICA or this Court from using Rule 39's procedures to adjudicate requests for fees and expenses on appeals heard in the two courts made pursuant to Haw. Rev. Stat. § 92F-15(d).

The Star-Advertiser's first argument is also not persuasive because since 1993, the same 14 day deadline for filing claims for attorneys' fees and costs upon claims specified in Rule 39(d), has applied to claims for fees and expenses made pursuant to what is likely the most

frequently invoked fee-shifting statute today, 42 U.S.C. § 1988, S.A. Healey Co. v. Milwaukee Metropolitan Sewerage Dist., 60 F.3d 305 (7<sup>th</sup> Cir. 1995) (“When the attorney’s fees are taxed as costs, which is the usual way in which a prevailing party obtains such fees, see, e.g., 42 U.S.C. § 1988, the deadline for seeking them is 14 days, Fed.R.Civ.P. 54(d)(2)(B)”), without any notable reduction in the number of 42 U.S. C. § 1983 civil rights actions are filed annually to assure state adherence to the federal constitution and federal laws.<sup>1</sup>

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<sup>1</sup>Fed. R. Civ. Proc. 54(d) was amended in 1993 to provide a procedure for adjudicating requests for fees and costs under statutes and contracts that permit fees to be awarded. Like Haw. R. App. Proc. 39(d), it provides in pertinent part:

- (d) Costs; Attorney’s Fees.  
\* \* \*
- (2) Attorney’s Fees.
  - (A) Claim to Be by Motion. A claim for attorney’s fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.
  - (B) Timing and Contents of the Motion. Unless a statute or a court order provides otherwise, the motion must:
    - (i) be filed no later than 14 days after the entry of judgment; . . . .

The Advisory Committee Notes for the 1993 Amendments explain that paragraph (2) was added to subdivision (d) “to provide for a frequently recurring form of litigation not initially contemplated by the rules – disputes over the amount of attorneys’ fees to be awarded in the large number of actions in which prevailing parties may be entitled to such awards . . . [paragraph 2] establishes a procedure for presenting claims for attorneys’ fees, whether or not denominated as ‘costs.’” The Notes go on to explain that

[s]ubparagraph (B) provides a deadline for motions for attorneys’ fees --- 14 days after final judgment unless the court or a statute specifies some other time. One purpose of this provision is to assure that the opposing party is informed of the claims before the time for appeal has elapsed. Prior law did not prescribe any specific time limit on claims for attorneys’ fees . . . In many nonjury cases the court will want to consider attorneys’ fee issues immediately after rendering its judgment on the merits of the case . . . .”

The Committee’s Notes also pointed out that “Prompt filing affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind.” This last point is particularly pertinent where, as was the case here,

The Star Advertiser's second basis for claiming that application of Haw. R. App. Proc. 39 to requests for fees and expenses under Haw. Rev. Stat. § 92F-15(d) constitutes grave error should be rejected because it is wrong as a matter of law. The Star-Advertiser's assertion that it was not a prevailing party until the ICA issued its summary disposition order in CAAP No. 13-0000127 affirming the circuit court's fee award in its favor, misapprehends the law. This Court has said that "[i]n general, a prevailing party is a party who has prevailed on the disputed main issue." Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 620, 575 P.2d 869, 879 (1978).

While it may be that the circuit court's fee award could have been increased or decreased as a result of the appeals the Governor filed in CAAP Nos. 12-0000625 and 13-0000127, there was no way that the appeals would change the Star-Advertiser's status as the "prevailing party" in the case. The main issue in the case was whether Governor Abercrombie was required to disclose the names of the nominees on the lists the Judicial Selection Commission presented to him to use to fill judicial vacancies, not what constituted a reasonable award of fees and costs for work performed by the Star-Advertiser's counsel in the circuit court. Thus, nothing would have prevented the Star-Advertiser from filing a request for fees and costs on appeal after the appeal in CAAP Nos. 12-0000625 was dismissed, because the appeal was not from the circuit court's holding on the main issue, i.e., whether the Governor was required to disclose, and the order dismissing the appeal did not alter the summary judgment entered in the Star-Advertiser's favor with respect to the obligation to disclose.

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2013 hourly rates were used to calculate the fees requested for work performed in both CAAP No. 12-0000625 and CAAP No. 13-0000127, even though, as the Star-Advertiser's counsel asserts, 93% of the fees requested were performed in CAAP No. 12-0000625, and almost all of that work was completed in 2012, almost one year before the request for fees was made in November 2013.

The Star-Advertiser's reliance on Hawaiian Association of Seventh-Day Adventists v. Wong, 130 Hawaii 36, 305 P.3d 452 (2013), is misplaced because here, both because the order granting summary judgment on the disclosure issue was not before the ICA in the appeals, and the fee orders that were the subject of the appeals that were dismissed were amended to correct technical errors but not substantively reduced or vacated. The Star-Advertiser incorrectly assumed that it needed to prevail in the fee appeal in order to claim fees on appeal in CAAP No. 12-0000625 after the appeal was dismissed. While the Star-Advertiser clearly relinquished its ability as the prevailing party in the case to enforce the circuit court's fee order by agreeing to stay its effect while the appeal from the order was pending in CAAP No. 12-0000625, the ICA's dismissal of that appeal for lack of jurisdiction did not diminish or alter the Star-Advertiser's as the "prevailing party" in the case – it did not lose any ground with respect to the disputed main issue of the case, i.e., disclosure, and dismissal of the appeal restored its ability to enforce the fee order at least until it again agreed to stay the order pending disposition of the Governor's second fee appeal in CAAP No. 13-0000127.

For the foregoing reasons, therefore, Governor Abercrombie respectfully requests that the Court not accept the Star-Advertiser's Petition for Certiorari.

DATED: Honolulu, Hawaii, May 17, 2014.

David M. Louie  
Attorney General  
State of Hawaii

/s/ Charleen M. Aina  
Charleen M. Aina  
Deputy Attorney General

Attorneys for Governor Neil Abercrombie

CAAP NO. 13-0000127

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAI'I

OAHU PUBLICATIONS, INC.,  
dba Honolulu Star-Advertiser,  
Plaintiff-Appellee  
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 ) GRANTING PLAINTIFF OAHU  
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 ) FOR ATTORNEYS' FEES AND COSTS,  
 ) FILED NOVEMBER 28, 2011  
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 ) HONOLULU STAR-ADVERTISER ON  
 ) ALL COUNTS OF THE COMPLAINT,  
 ) filed February 8, 2013  
 )  
 ) FIRST CIRCUIT COURT  
 )  
 )  
 ) HONORABLE KARL K. SAKAMOTO  
 ) Judge

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CERTIFICATE OF SERVICE

I hereby certify that on this date a true and correct copy of the foregoing Defendant-Appellant Governor Abercrombie's Response in Opposition to Plaintiff-Appellee's

Application for Writ of Certiorari will be served upon the following counsel for the Plaintiff-Appellee Oahu Publications, Inc., dba Honolulu Star-Advertiser, electronically (through JEFS):

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DATED: Honolulu, Hawai'i, May 17, 2014.

/s/ Charleen M. Aina  
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Neil Abercrombie,  
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