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Jean Kikumoto  
NORMA TAKARA  
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STATE OF HAWAII

FILED

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

CITY AND COUNTY OF HONOLULU,  
a municipal corporation of the State of  
Hawaii,

Plaintiffs-Appellee,  
Cross-Appellee,

vs.

JAMES M. SHERMAN, also known as James  
Malcolm Sherman, and AKIKO S.  
SHERMAN, also known as Akiko Sakiyama  
Sherman, as Trustees under that certain  
unrecorded James M. Sherman and Akiko S.  
Sherman Revocable Trust dated May 2, 1989;  
JAN CAMILLE BELLINGER, Trustee under  
the Jan Camille Bellinger Revocable Living  
Trust, under that certain unrecorded Trust  
Agreement dated November 23, 1993,  
CLARENCE K. LEE, as Trustee of and for  
the Clarence K. Lee Revocable Trust, under  
that certain unrecorded Trust Agreement  
dated January 28, 1992, as amended;  
MYRNA P. CHUN-HOON, Trustee under  
that certain unrecorded Revocable Trust of  
Myrna P. Chun-Hoon, dated October 11,  
1984, as amended; GEORGE B. GARIS, also  
known as George Benjamin Garis, as Trustee  
under that certain unrecorded George B. Garis  
Revocable Trust dated November 28, 1989, as  
amended; KAREN WILLSON ROSA;  
ELIZABETH W. TAKAHASHI, Trustee of  
the Elizabeth W. Takahashi Revocable Living  
Trust under that certain unrecorded Trust  
Agreement dated July 14, 1993; STUART  
EDWIN GROSS, as Trustee under that  
certain unrecorded Trust Agreement known as  
The Stuart B. Gross Trust dated February 19,  
1985; MARCIA KURZWEIL GROSS, as  
Trustee under that certain unrecorded Trust  
Agreement known as The Marcia K. Gross

CIVIL NO. 03-1-0963

APPEAL FROM THE

1) FINAL JUDGMENT, filed on  
December 11, 2007

2) FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT FIRST UNITED  
METHODIST CHURCH'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT ON THE ISSUE OF  
LESSEE QUALIFICATIONS, FILED  
SEPTEMBER 7, 2006, filed on  
December 26, 2006

CROSS-APPEAL FROM THE

1) FINAL JUDGMENT, filed on  
December 11, 2007

2) FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER GRANTING IN  
PART AND DENYING IN PART  
DEFENDANT FIRST UNITED  
METHODIST CHURCH'S MOTION  
FOR PARTIAL SUMMARY  
JUDGMENT ON THE ISSUE OF  
LESSEE QUALIFICATIONS, FILED  
SEPTEMBER 7, 2006, filed on  
December 26, 2006

3) ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT  
FIRST UNITED METHODIST  
CHURCH'S MOTION FOR AN ORDER  
DETERMINING AMOUNT OF  
DAMAGES INCURRED BY  
MOVANTS PURSUANT TO HAWAII

Trust dated February 19, 1985; KENNETH )  
GRAHAM PATTERSON and LILLIAN )  
PAPACOLAS PATTERSON; MOSES )  
MOSAI LO and SHEILA DICKENSON LO; )  
FRANK K. MIN, also known as Frank Kui )  
Pong Min, and ELAINE N. MIN, also known )  
as Elaine Nam Min, Trustees under that )  
certain Trust Agreement dated April 9, 1985; )  
ELAINE N. MIN, also known as Elaine Nam )  
Min and FRANK K. MIN, also known as )  
Frank Kui Pong Min, Trustees under that )  
certain Trust Agreement dated April 9, 1985; )  
ARTHUR R. KING, JR., and RUTH )  
MILDRED KING, Co-Trustees of the )  
unrecorded Arthur R. King, Jr. Trust )  
Agreement dated May 18, 1990; RUTH )  
MILDRED KING and ARTHUR R. KING, )  
JR., Co-Trustees of the unrecorded Ruth )  
Mildred King Trust Agreement dated May 18, )  
1990; RAMEZ BASSIR; PAUL JOHN )  
CASEY, as Trustee under that certain )  
unrecorded Self-Trusteed Trust dated August )  
31, 1987; JANICE YOKO CASEY, as )  
Trustee under that certain unrecorded Self- )  
Trusteed Trust dated May 20, 1988; )  
GEORGE HENRY LUMSDEN and JoANNE )  
CHUN LUMS DEN; ANN )  
TAKAKO YAMAMOTO, as Trustee of the )  
Self-Trusteed Trust Agreement of Ann )  
Takako Yamamoto, under unrecorded Trust )  
Agreement of Ann Takako Yamamoto dated )  
April 10, 2000; FRANCES M. WATANABE, )  
Trustee under that certain unrecorded Frances )  
M. Watanabe Revocable Trust dated April 2, )  
1993; MEREDITH KWOCK LEONG )  
PANG; NEIL SIMMS BELLINGER, Trustee )  
under that certain unrecorded Neil S. )  
Bellinger Revocable Living Trust dated )  
November 20, 2002; WALLACE LEE )  
YOUNG and ERNESTINE CHING YOUNG; )  
JOYCE A. HAGIN and LAWRENCE )  
REICH; DAVID PATRICK KELLY and )  
KEIKO KELLY; PATRICIA CARLEEN )  
BROWN, Trustee for the Patricia Carleen )  
Brown Revocable Trust Agreement dated )  
January 21, 1993; RANDY NEIL YEAGER )

REVISED STATUTES § 101-27, filed on )  
March 28, 2007 )  
FIRST CIRCUIT COURT )  
HONORABLE VICTORIA S. MARKS )  
Judge )

and SUSAN KAYCIE YEAGER; and GAIL )  
 SUZANNE KOGLMAN, )  
 )  
 Defendants- )  
 Appellants, )  
 Cross-Appellees, )  
 )  
 and )  
 )  
 FIRST UNITED METHODIST CHURCH, a )  
 Hawaii non-profit corporation, )  
 )  
 Defendant-Appellee, )  
 Cross-Appellant, )  
 )  
 and )  
 )  
 JOHN DOE 1-200; MARY DOE 1-200; DOE )  
 PARTNERSHIP 1-100; DOE )  
 CORPORATION 1-100; DOE NON-PROFIT )  
 CORPORATION 1-100; DOE ENTITY 1- )  
 100, )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

**PLAINTIFF-APPELLEE/CROSS-APPELLEE CITY AND COUNTY OF HONOLULU'S  
 ANSWERING BRIEF**

**APPENDICES "1"- "3"**

**and**

**CERTIFICATE OF SERVICE**

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 LEX R. SMITH 3485-0  
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**PLAINTIFF-APPELLEE/CROSS-APPELLEE CITY AND COUNTY OF  
HONOLULU'S ANSWERING BRIEF**

**I. COUNTER-STATEMENT OF THE CASE**

**A. Counter-Statement Of Facts And Issues**

Pursuant to Rule 28 of the Hawai'i Rules of Appellate Procedure ("HRAP"), Plaintiff-Appellee/Cross-Appellee the CITY AND COUNTY OF HONOLULU (the "City") hereby submits its Answering Brief to Defendant-Appellee/Cross-Appellant FIRST UNITED METHOD CHURCH'S ("Lessor") Opening Brief on Cross-Appeal.

Lessor alleges error based on the Circuit Court's denial of Lessor's misguided request for fees and costs incurred in the previous appeal in this case. Lessor unsuccessfully argued below that attorneys' fees incurred on appeal are recoverable under Hawaii Revised Statutes ("HRS") Section 101-27, regardless of the result on appeal and of the timeliness of the request. What Lessor failed to mention in its brief is that Lessor *lost* the appeal and thus never moved for fees and costs within the statutory fourteen (14) day deadline after the time for filing a motion for reconsideration had expired under HRAP Rule 39(d)(2). Not surprisingly, there is no authority under the applicable appellate rules or the applicable statute for a losing party in an appeal to collect its attorneys' fees and costs.

Accordingly, Lessor lacked requisite authority to move this Court for fees and costs under HRAP Rule 39 after losing the former appeal in this case and thus failed to make a request for fees and costs within the deadline in HRAP Rule 39(d)(2). The Circuit Court therefore correctly denied Lessor's request for fees and costs incurred on appeal, determining that it was without jurisdiction or authority to grant Lessor its appellate fees under the circumstances. See Record on Appeal ("ROA") 28:103-06.

In seeking to overturn the Circuit Court's ruling on this issue, Lessor carries the burden of proving that the Circuit Court abused its discretion – or, more specifically, that the Circuit Court “clearly exceeded the bounds of reason or disregarded rules or principals of law” – in denying Lessor's fees and costs incurred in an appeal it lost. Enoka v. AIG Hawaii Insurance Co., 109 Hawaii 537, 544, 128 P.3d 850, 857 (2006).

As discussed in more detail below, Lessor cannot meet this burden. Lessor does not challenge the Circuit Court's reasoning and application of the law presented to it in denying Lessor's request for fees incurred in the first appeal. Rather, Lessor's entire appeal of this issue is based upon a case never presented to the Circuit Court - the Nelson v. University of Hawaii decision – which, even if considered in the first instance by this Court on appeal, is completely inapplicable and does not alter the analysis or result reached by the Circuit Court.

As discussed in more detail below, the Nelson decision concerned a prevailing party's request for fees and costs after appeal under the former repealed HRAP Rule 53(b), which allowed for requesting attorneys' fees within 14 days after entry of *judgment*. Nelson v. University of Hawaii, 99 Hawaii 262, 269, 54 P.3d 433, 440 (2002). The term “judgment” was construed in Nelson to mean a trial court judgment, and thus allowed for the trial court in that case to consider the movant's request for an award of appellate attorneys' fees *subsequent* to the appellate court being divested of jurisdiction. Id. at 269-70, 54 P.3d at 440-41.

However, HRAP Rule 53 was repealed in January 2004, and the applicable HRAP Rule 39(d)(2) would have required in this case (had Lessor prevailed on appeal) that Lessor request attorneys' fees within 14 days after the time for filing a motion for reconsideration had expired, which Lessor understandably did not do. See HRAP Rule 39(d)(2).

Equally important, the Nelson decision did not concern a *non-prevailing* party's request for fees and costs incurred on appeal, as here. Lessor has never cited any authority, and the City is not aware of any, allowing for an award of attorneys' fees to the party who loses an appeal under the circumstances in this case.

Based on the foregoing, and as the record will clearly reflect, the Circuit Court correctly denied Lessor's request for attorneys' fees and costs incurred in the former appeal and this Honorable Court should therefore affirm the Circuit Court's ruling on this alleged point of error.

**B. Procedural History**

On May 8, 2003, the City filed its Complaint for condemnation of the leased fee interest in Admiral Thomas. ROA 1:1-163. The City filed an Amended Complaint on February 12, 2004. ROA 3:97-290. Lessor filed its Answer to the First Amended Complaint and Counterclaim against the City on March 10, 2004. ROA 4:47-66. Defendants-Appellants/Cross-Appellees JAMES M. SHERMAN, also known as James Malcolm Sherman and AKIKO S. SHERMAN, also known as Akiko Sakiyama Sherman, as Trustees under that certain unrecorded James M. Sherman and Akiko S. Sherman Revocable Trust dated May 2, 1989, et al. (the "Lessees") filed their Answer to the City's Amended Complaint on June 23, 2004. R. 1:344-354. The City filed its reply to Lessor's Counterclaim on March 31, 2004. R. 4:92-102.

The Circuit Court adjudicated the parties' respective summary judgment motions and final judgment was entered on September 21, 2004. ROA 22:50-56. Specifically, the Circuit Court held in part that (a) there were not qualified applicants for at least twenty-five leasehold units, and (b) that the Admiral Thomas project was a "mixed use" project and was therefore not eligible to utilize the benefits of ROH ch. 38. Id. The Circuit Court's above rulings, if upheld, would have effectively terminated the City's condemnation complaint.

The parties subsequently filed appeals and/or cross-appeals from the September 2004 final judgment. ROA 22:176-201, 300-317.

On February 28, 2006, the Hawaii Supreme Court issued its opinion on the parties' appeals and cross-appeals in City and County of Honolulu v. Sherman et al., 110 Hawaii 39, 129 P.3d 542 (2006) ("Sherman"). The Hawaii Supreme Court vacated in part the Circuit Court's judgment, including the Circuit Court's rulings on the "mixed use" and "number of qualified applicants" issues, and remanded the case for further proceedings consistent with its decision to determine whether there were sufficient qualified units for conversion to fee simple, and, if so, to consider evidence of the fair market value of the leased fee interested being acquired. Id., 110 Haw. at 53, 77, 129 P.3d at 556, 580.

Lessor did not move for reconsideration of the Sherman decision under HRAP Rule 40. ROA 23:79-120, 121-122, 123-127. Lessor likewise did not file a request for fees and costs under HRAP Rule 39(d)(2).<sup>1</sup> Id.

Subsequent to the Supreme Court's remand, on October 10, 2006, the Circuit Court granted in part and denied in part *Defendant First United Methodist Church's Motion for Partial Summary Judgment on the Issue of Lessee Qualifications*, filed on December 26, 2006. ROA 27:123-32. Shortly thereafter, Lessor filed a *Motion for an Order Determining Amount of Damages Incurred By Movants Pursuant to Haw. Rev. Stat. §101-27*. ROA 27:137-266. Within Lessor's motion for damages, Lessor sought its attorneys' fees incurred in the first appeal. See id. The City opposed the motion and filed a *Memorandum in Opposition to Defendant First*

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<sup>1</sup> As discussed herein, it can reasonably be assumed that Lessor did not move for fees under HRAP Rule 39(d)(2) since Lessor ultimately lost the appeal and thus had no basis for requesting fees under the circumstances.

*United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Haw. Rev. Stat. §101-27, filed on January 23, 2007. ROA 27:267-98.*

The Circuit Court granted in part and denied in part Lessor's motion. See Order Granting in Part and Denying in Part Defendant First United Methodist Church's Motion for an Order Determining Amount of Damages Incurred by Movants Pursuant to Haw. Rev. Stat. §101-27 (the "Fees Order"). Specific to Lessor's cross-appeal, the Circuit Court denied Lessor's request for an award of its attorneys' fees and costs incurred in the first appeal. ROA 28:103-06.

The Circuit Court entered its Final Judgment on December 11, 2007. ROA 28:131-40. Lessees filed a timely notice of appeal on January 9, 2008. ROA 28:143-72. Lessor filed a timely notice of cross-appeal on January 23, 2008. ROA 28:179-208.

## **II. COUNTER-ARGUMENT**

### **A. The Circuit Court Correctly Denied Lessor's Request For Its Attorneys' Fees Incurred In The First Appeal**

#### **1. The Circuit Court Lacked Jurisdiction To Award Lessor's Appellate Attorneys' Fees Incurred On Appeal, Which Were Not Timely Requested Under HRAP Rule 39(d)(2)**

Attorneys' fees incurred on appeal must be timely requested, considered and determined by the Hawaii Supreme Court pursuant to its jurisdiction and authority under HRAP Rule 39(d). Specifically, HRAP Rule 39(d)(1) provides in pertinent part as follows:

(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. Requests for indigent fees and necessary expenses shall be submitted in a form that substantially complies with Form 7 in the Appendix of Forms and shall be accompanied by a copy of the order appointing counsel. Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted in a form that substantially complies with Form 8 in the Appendix of Forms. A failure to provide authority for the award of

attorney's fees and costs or necessary expenses will result in denial of that request.

(Emphasis added). Thus, a party who desires its attorneys' fees and costs incurred on appeal must request them by submitting an itemized request, along with a statement of authority for the items requested under HRAP Rule 39. As expressly stated in HRAP Rule 39(d), the "authority" for requesting attorney's fees and costs under HRAP Rule 39(d) is based on "statute or contract". See HRAP Rule 39(d) ("Requests for non-indigent attorney's fees and costs allowed by statute or contract shall be submitted....").

Additionally, HRAP Rule 39(d)(2) sets forth the following deadline for requesting appellate fees:

(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. An untimely request for fees and costs or necessary expenses may be denied.

(Emphasis added).

Therefore, if Lessor desired an award of its attorneys' fees incurred in the first appeal, it was required to submit its request to the appellate clerk no later than 14 days after the time for filing a motion for reconsideration had expired, and, among other things, was required to provide a statement of authority for the fees sought under the circumstances. In other words, if Lessor believed it had a basis for recovering its attorneys' fees incurred in the first appeal (notwithstanding the fact that it ultimately lost the first appeal), it was required to request such fees within the substantive framework and timing requirements imposed under HRAP Rule 39.

In the present case, Lessor never made a timely HRAP Rule 39 request for its attorneys' fees incurred in the first appeal, having failed to ever file a HRAP Rule 39 request for

attorneys' fees much less within the prescribed 14-day deadline after the time for filing a motion for reconsideration had expired in March 2006. ROA 23:79-120, 121-22, 123-27.

Thus, after Lessor subsequently moved the Circuit Court for its fees and costs upon remand and after final judgment at trial, the Circuit Court correctly determined it lacked jurisdiction to grant Lessor its request for fees and costs for Lessor's appellate work in the first appeal. ROA 28:103-106. The Circuit Court was correct, given that Lessor was required and failed to request its appellate fees and costs pursuant to the requirements in HRAP Rule 39. Lessor's belated attempt to recover attorneys' fees incurred in the first appeal ultimately seeks to bypass and ignore the requirements of HRAP Rule 39. This Honorable Court should therefore affirm the Circuit Court's ruling in denying Lessor's improper request for attorney's fees incurred in the first appeal based on Lessor's noncompliance with HRAP Rule 39.

**2. As The Non-Prevailing Party In The First Appeal, Lessor Had No Basis For Requesting Its Attorneys' Fees Incurred In The First Appeal**

Lessor's failure to request attorney's fees within the HRAP Rule 39 time restraints was presumably due to the fact that Lessor was not the prevailing party in the first appeal. A request for attorneys' fees under HRAP Rule 39 assumes that the requesting party was the prevailing party in the appeal.

Specifically, a request for non-indigent attorney's fees pursuant to HRAP Rule 39(d) requires that the request be submitted in a form that substantially complies with Form 8 in the HRAP Appendix of Forms. Form 8 requires the following statement from the declarant-counsel that the Appellant/Appellee was the prevailing party:

REQUEST AND DECLARATION OF COUNSEL

1. **(Appellant or Appellee) (name) prevailed in this appeal.**

See Form 8 in the HRAP Appendix of Forms, a true and correct copy of which is attached hereto as Appendix “1” (emphasis added). Accordingly, a request for attorneys’ fees under HRAP Rule 39 presupposes that the requesting party prevailed on appeal.

In the first appeal, the Hawaii Supreme Court vacated in part the trial court’s judgment in favor of Lessor and remanded the case for further proceedings consistent with its decision to determine whether there were sufficient qualified units for conversion to fee simple, and, if so, to consider evidence of the fair market value of the leased fee interested being acquired. Sherman, 110 Haw. at 77, 129 P.3d at 580.

Therefore, as the non-prevailing party in the first appeal, Lessor lacked the requisite authority to make a proper HRAP Rule 39 request for its attorneys’ fees incurred in the first appeal, even had it actually sought to comply with the timing requirements in HRAP Rule 39. HRS Section 101-27, under which Lessor claims attorneys’ fees, does not provide for collecting attorneys’ fees on appeal notwithstanding the result. Regardless, however, if Lessor believes HRS Section 101-27 should be construed so broadly as to entitle Lessor to claim attorneys’ fees under HRAP Rule 39 as the non-prevailing party on appeal, Lessor was required to submit a timely request pursuant to HRAP Rule 39 to the appellate clerk and present authority for this position prior to expiration of the period of time prescribed in HRAP Rule 39(d)(2).

Since Lessor was the non-prevailing party in the first appeal and lacked authority for seeking its attorneys’ fees under the circumstances, and because Lessor failed to file a timely request for fees under HRAP Rule 39(d) as discussed above, the Circuit Court’s denial of Lessor’s attorneys’ fees incurred in the first appeal should be affirmed for this additional reason.

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### 3. The Nelson Decision Is Inapplicable

Lessor does not take issue with the trial judge's application of the law presented in denying Lessor's request for attorneys' fees incurred in the first appeal, but argues that the trial judge's unawareness of the Nelson opinion - which was never presented to or considered by the trial judge and is being presented for the first time in Lessor's opening brief - resulted in an abuse of discretion by the trial judge.

As an initial matter, Lessor has cited no authority for the position that a trial court's failure to consider a case which was never presented to it constitutes "exceeding the bounds of reason or disregarding rules or principals of law" under the abuse of discretion standard. Enoka, 109 Hawaii at 544, 128 P.3d at 587 (on quoted material). The trial judge did not "disregard" rules or principles of law since the Nelson decision was never presented to the trial judge. The term "disregard" means to "treat as unworthy of regard or notice," which thus indicates a decision to ignore the rule or principle of law at issue. See Webster's New Collegiate Dictionary (1980). The trial judge did not make a decision, conscious or otherwise, to ignore the Nelson decision since the Nelson decision was never presented to her. Moreover, a trial judge does not "exceed the bounds of reason" or otherwise abuse its discretion by considering the facts and law presented to it and making a reasoned and well-supported ruling on the issue, as here.

More importantly, however, even if this Honorable Court takes the Nelson decision into consideration in the first instance in this appeal, the Nelson decision does not alter the analysis or conclusions reached by the trial judge regarding Lessor's appellate attorney's fees. The Nelson decision is inapplicable because: (1) the Nelson Court's ruling on attorney's fees was based on the repealed HRAP Rule 53, which allowed for requesting appellate attorney's

fees at any time prior to *judgment* (which was deemed to mean the trial court's final judgment); (2) the requesting party in Nelson was the *prevailing* party in that appeal; and (3) a *timely* request for appellate attorneys' fees was made in that case. Nelson, 99 Haw. at 268-69, 54 P.3d at 439-440.

In Nelson, a former assistant professor sued the University of Hawaii ("University") and faculty members (collectively, the "Defendants") based on various tort theories. Id. at 264, 54 P.3d at 435. Following jury verdict for the professor on one of the tort theories and for the Defendants on the remaining tort theories, the professor appealed. Id.

The Supreme Court reversed and remanded for a new trial on the professor's remaining tort theories. Id. The professor filed a timely motion with the appellate clerk seeking costs and attorneys' fees incurred on appeal. Id.

The applicable appellate rule for requesting appellate attorneys' fees at that time, HRAP Rule 53 (which was repealed effective January 1, 2004), provided in pertinent part as follows:

(b) Non-Indigent Representation. Parties claiming attorneys' fees pursuant to statute or contract may submit requests for the fees no later than 14 days after entry of judgment.

Id. at 269 n.5, 38 P.3d at 440 n.9 (See HRAP Rule 53(b), repealed effective January 1, 2004 (emphasis added)). A true and correct copy of the repealed HRAP Rule 53 is attached hereto as Appendix "2". The professor's request for appellate fees was made pursuant to HRS Section 378-5(c), which allowed for the recovery of attorneys' fees for a "judgment" received during the action. Id. at 264, 54 P.3d at 434.

The Supreme Court held that since the case had only been remanded and not yet decided on the merits, the professor was not yet a prevailing party and had not received a

judgment under HRAP Rule 53. Id. at 267-69, 54 P.3d at 438-440. The Court reasoned that the professor's request was premature since the trial court had jurisdiction, pursuant to HRAP Rule 53(b) (together with Hawaii Rules of Civil Procedure ("HRCP") Rule 54(b) and HRS Section 378-5(c)) to award the professor's appellate attorneys' fees upon a timely motion filed within 14 days from final judgment at trial:

**We note that HRAP Rule 53(b) requires that parties moving for attorneys' fees pursuant to a statute must do so within fourteen days of entry of judgment.** In this case, the term "judgment" in HRAP Rule 53(b) is given the same meaning as the term "judgment" in HRS § 378-5(c). **Thus, for example, in a case such as this one, Nelson would not be required to file her motion for fees performed during this appeal unless and until she obtains a HRS § 378-5(c) "judgment."** **Once she obtains such a judgment, however, she must file the motion within fourteen days in whatever court has jurisdiction of the case at the time.** (Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d) also requires that parties moving for attorneys' fees pursuant to statute must do so within fourteen days after entry of "judgment" and, in this context, the term "judgment" in HRCP Rule 54(d) also carries the same meaning as the term in HRS § 378-5(c).) **As in this case, premature fee requests will be denied without prejudice to the litigant's right to be awarded fees in the future.**

Id., 113 Hawaii at 269 n.5, 38 P.3d at 440 n.9 (emphasis added). Consequently, the Supreme Court determined that the trial court would be in a better position at the appropriate time to evaluate the reasonableness of any fees sought after final judgment at trial. Id. at 268-69, 54 P.3d at 439-440.

Thus, pursuant to the holding in Nelson and HRAP Rule 53, a party moving for appellate attorneys' fees under the then-existing HRAP Rule 53(b) was actually *required* to wait until after obtaining final judgment. The professor's request for attorneys' fees in Nelson was thus determined premature under the then-existing HRAP Rule 53(b). Id. at 268-69, 54 P.3d at 439-440.

As outlined above, HRAP Rule 53 was repealed effective January 1, 2004. The former timing requirements for requesting appellate attorneys' fees under HRAP Rule 53 were ultimately replaced by the new language in HRAP Rule 39(d)(2)<sup>2</sup>, which provides as follows:

(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. An untimely request for fees and costs or necessary expenses may be denied.

(Emphasis added). A true and correct copy of the relevant portion of the amendment to HRAP Rule 39 is attached hereto as Appendix "3".

Accordingly, unlike the situation in Nelson under the old HRAP Rule 53 - where a request for appellate attorneys' fees could be made up to 14 days after final judgment at trial - a party desiring its attorneys' fees incurred on appeal under HRAP Rule 39(d)(2) must make the request "no later than 14 days after the time for filing a motion for reconsideration has expired or the motion for reconsideration has been decided." In this case, Lessor has never made an HRAP Rule 39 request for its attorneys' fees in the first appeal, much less a timely request.

Additionally, unlike the situation in Nelson - where the professor's request for attorneys' fees was made as the prevailing party on appeal - Lessor lacked a proper basis after the first appeal under HRAP for requesting its attorneys' fees since it was the non-prevailing party in the first appeal. Sherman, 110 Haw. at 53, 77, 129 P.3d at 556, 580.

Based on the foregoing authority, Lessor's reliance on the Nelson decision to allege an abuse of discretion by the trial judge in denying Lessor's attorneys' fees incurred in the first appeal is entirely misplaced. Put simply, the Nelson decision does not change the analysis and result reached by the trial judge, and most certainly does not constitute an abuse of discretion

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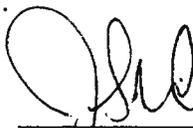
<sup>2</sup> The amendment to HRAP Rule 39(d) was made effective January 1, 2006, and was thus made effective prior to Supreme Court's March 2006 decision in the first appeal.

by the trial judge for not considering an inapplicable decision which was never presented to her when denying Lessor's request for attorneys' fees in the first appeal.

**III. CONCLUSION**

On the basis of the foregoing arguments, the City respectfully requests that this Honorable Court affirm the Circuit Court's ruling and hold that the Circuit Court did not abuse its discretion when it denied Lessor's request for attorneys' fees incurred in the first appeal.

DATED: Honolulu, Hawaii, June 27, 2008.



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and

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