

NO. 28945

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

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STATE OF HAWAII

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FILED

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

Plaintiff-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, Successor Trustee under that certain unrecorded Revocable Trust of Albert C.K. Chun-Hoon dated October 11, 1984, as amended, and 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; CHINH TRONG LE; KAREN WILSON 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 E. Gross Trust dated February 19, 1985, and MARCIA KURZWEIL GROSS, as Trustee under that certain

) 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  
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unrecorded Trust Agreement known as The )  
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 and MOLLIE SPERRY, Co-Trustees of the ) HONORABLE VICTORIA S. MARKS Judge  
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YEAGER and SUSAN KAYCIE YEAGER; )  
and GAIL SUZANNE KOGLMAN, )

Defendants-Appellants, )  
Cross-Appellees, )

and )

FIRST UNITED METHODIST CHURCH, a) )  
Hawaii non-profit corporation, )

Defendant-Appellee, )  
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and )

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PARTNERSHIP 1-100; DOE CORPORATION )  
1-100; DOE NON-PROFIT CORPORATION )  
1-100; DOE ENTITY 1-100, )

Defendants. )

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DEFENDANT-APPELLEE / CROSS-APPELLANT  
FIRST UNITED METHODIST CHURCH'S  
REPLY BRIEF TO  
PLAINTIFF-APPELLEE / CROSS-APPELLEE  
CITY AND COUNTY OF HONOLULU'S  
ANSWERING BRIEF ON CROSS-APPEAL

and

CERTIFICATE OF SERVICE

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FIRST UNITED METHODIST CHURCH

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DEFENDANT-APPELLEE / CROSS-APPELLANT  
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CITY AND COUNTY OF HONOLULU'S  
ANSWERING BRIEF ON CROSS-APPEAL

Defendant-Appellee / Cross-Appellant FIRST UNITED METHODIST CHURCH ("First Church"), timely submits its Reply Brief regarding its cross-appeal, in response to the Answering Brief of Plaintiff-Appellee / Cross-Appellee CITY AND COUNTY OF HONOLULU ("City") filed on June 27, 2008. This Reply Brief is filed pursuant to Hawaii Rules of Appellate Procedure ("HRAP") Rules 25, 28(d) and 32 and is based on the Record on Appeal ("the Record," cited as "R").

The original date for filing of this Reply Brief was July 11, 2008. Pursuant to HRAP Rule 29(a) on July 1, 2008 the appellate clerk granted First Church an extension of time to and including July 21, 2008.

**I. THE CITY MISCONSTRUES THE NELSON DECISION AND ITS APPLICATION TO THIS CASE**

**A. The City is Incorrect in Its Construction of the *Nelson* Case**

The City's argument regarding *Nelson v. University of Hawaii*, 99 Hawai'i 262, 54 P.3d 433 (2002) ("*Nelson*"), misconstrues what that case was about. The City argues that the case revolves around repealed HRAP Rule 53:

[T]he Nelson decision concerned a prevailing party's request for fees and costs after appeal under the former repealed 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.

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 the *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.

City's Answering Brief at 2-3 (emphasis in original).

A review of the *Nelson* case shows it had nothing to do with whether or not HRAP Rule 53 was in effect rather than HRAP 39(d)(2). The Court held that under the statute at issue, Haw. Rev. Stat. § 378-5(c), the plaintiff would be entitled to be awarded her attorneys' fees once there was a favorable "judgment," whether in the trial court or on appeal. There had not yet been a determination in her favor on the merits, however:

[T]he statute [Haw. Rev. Stat. § 378-5(c)] requires the allowance of fees for "any judgment" received during the action. Thus, attorneys' fees may be awarded for work on appeal in appropriate cases . . .

However, in this case, the judgment on appeal simply vacated the trial court's judgment in favor of UH and remanded the case for a new trial on the merits. . . [C]onsidering HRS § 378-5(c) as a whole, the phrase "judgment awarded to the plaintiff" refers generally to favorable relief or damages that follow as a result of a finding that the defendant engaged in a discriminatory practice. Consequently a judgment on appeal that merely vacates a trial court judgment unfavorable to the plaintiff and places the plaintiff back where the plaintiff started does not, in itself, provide any grounds for an award of fees to the plaintiff. . .

In this case, this court's judgment permitted Nelson to retry her case. She has not established that any discrimination occurred, and she is legally in the same position as she was before trial. Consequently, she has not been awarded a "judgment" within the meaning of HRS § 378-5(c).

99 Hawai‘i at 265-66, 267, 54 P.3d at 436-37, 438.

The Court stated that should plaintiff prevail on remand and recover a judgment, the statute would be triggered and she would then be entitled to a recovery of her attorneys’ fees, both at trial and those incurred in the prior appeal. At that point, however, she would need to file the motion for fees in the trial court:

Nelson suggests that she may win some or all of her claims on remand. If so, she will certainly be entitled, *inter alia*, to an award of reasonable attorneys’ fees incurred during the present appeal, which would have been necessary in order for her ultimately to secure the trial judgment. However, because this court will no longer have jurisdiction over the case in such an instance, the trial court will then have to determine the reasonableness of fees incurred during the present appeal.

99 Hawai‘i at 268, 54 P.3d at 439 (italicized emphasis in original, underlined emphasis added) (footnote omitted). The Court so held, because it was obtaining the judgment that would trigger the requirement to file a motion for fees in whatever court had jurisdiction at that time. Any request before then was premature:

We note that HRAP Rule 53 (b) requires that parties moving for attorneys’ fees pursuant to statute must do so within fourteen days of entry of judgment. In this case, the term “judgment” in HRAP Rule 53(b) is giving 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(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 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 HRCF 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.

99 Hawai‘i at 268 n. 5, 54 P.3d at 439 n. 5 (emphasis added).

The Court in *Nelson* considered the ability to seek fees in light of the specific statute giving the right to recover fees. There, Haw. Rev. Stat. § 378-5(c) specifically said that the right to fees would not be triggered until there was a favorable judgment. At that time, as the Court noted, the right to all of the fees incurred would be determined, including the fees for the prior appeal.

**B. First Church's Right to Fees Did Not Accrue Until It Prevailed in the Trial Court.**

The applicable statute in this case is similar to the fees statute in *Nelson*, in that it is only triggered when there has been a discontinuance of eminent domain proceedings:

**§ 101-27. Defendant allowed damages upon abandonment or dismissal of proceedings.**

Whenever any proceedings instituted under this part are abandoned or discontinued before reaching a final judgment, or, if, for any cause, the property concerned is not finally taken for public use, a defendant who would have been entitled to compensation or damages had the property been finally taken, shall be entitled, in such proceedings, to recover from the plaintiff all such damages as may have been sustained by the defendant by reason of the bringing of the proceedings and the possession by the plaintiff of the property concerned if the possession has been awarded including the defendant's costs of court, a reasonable amount to cover attorney's fees paid by the defendant in connection therewith, and other reasonable expenses . . .

(Emphasis added.) First Church's right to fees and costs was triggered when the trial court, on remand, again ruled that the City could not proceed because there were not enough qualified lessees. This would include fees and costs incurred when the City first began administrative steps to take First Church's property and to issue a condemnation resolution, through when the condemnation suit was first filed, up through the first appeal, and then in the subsequent remand. Under Hawaii law, "proceeding" has a broader meaning than "suit" or "action." Further, an appeal is part of the same "proceeding":

An appeal is a continuation of an original proceeding and not a new action. *Pennsylvania Ins. Guaranty Ass'n v. Sikes*, 590 So.2d 1051, 1052 (Fla. Dist. Ct. App. 1991); *People ex rel. Pennsylvania Railroad Co. v. Commerce Comm'n*, 40 Ill.2d 58, 237 N.E.2d 514, 516 (1968). The term "proceeding" is broader than the word "action." *In re Application of Kaye*, 212 N.J. Super. 703, 515 A.2d 1311, 1313 (N.J. Super. L. 1986). As ordinarily used, it is broad enough to include all methods of invoking the action of courts and is generally applicable to any step taken to obtain the interposition or action of a court. *Hill v. Martin*, 296 U.S. 393, 403, 56 S.Ct. 278, 80 L.Ed. 293 (1935); *Zellerino v. Brown*, 235 Cal.App.3d 1097, 1105, 1 Cal.Rptr.2d 222 (1991); *State in the Interest of J.S.*, 273 N.J. Super. 450, 642 A.2d 430, 434 (Ch. 1994); *Second Injury Fund v. Lupachino*, 45 Conn.App. 324, 695 A.2d 1072, 1084 n. 15 (1997).

*Leslie v. Estate of Tavares*, 93 Hawai'i 1, 4, 994 P.2d 1047, 1050 (2000).

Whether or not First Church was the prevailing party in the first appeal is irrelevant to the right to recover fees and costs now. There was no final determination on the merits of whether the condemnation was valid. The Hawaii Supreme Court remanded the case for further consideration of whether there were enough qualified lessees. On remand, the trial court again determined there were not, and reaffirmed that the condemnation lacked public purpose and must be discontinued. The Hawaii Supreme Court has held that in that situation, First Church as condemnee is entitled to be put back in the position it would have been in had the condemnation not been commenced:

[P]ursuant to section 8-25<sup>[1]</sup>, a defendant who would have been entitled to compensation or damages if the property had been finally taken, is allowed damages upon the abandonment of the proceedings. Our statute guarantees to those who are entitled to compensation or damages in the event of a final taking, that if the proceeding is not completed, damages sustained by reason of the bringing of the proceeding and the taking of possession will be paid.

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<sup>1</sup>The predecessor statute to Haw. Rev. Stat. 101-27, which is identical in relevant part, see First Church's Opening Brief on Cross Appeal at 25 n. 13.

*City & County of Honolulu v. Bishop Trust Co.*, 49 Haw. 494, 502, 421 P.2d 300, 305 (1966) (emphasis added). The damages sustained by reason of the bringing of the condemnation proceedings included those fees and costs incurred by First Church in the first appeal, and the statute guarantees that these are to be paid back to First Church

**II. THE APPLICABLE PRINCIPLES OF LAW WERE BROUGHT TO THE ATTENTION OF THE TRIAL COURT**

The City argues that the trial court did not abuse its discretion because the *Nelson* case was not cited to it. The circumstances of why *Nelson* was not found at the time of the original motion for fees are detailed in First Church's Opening Brief at page 23, note 11 (namely that the case was not indexed in the Hawaii Digest under the normal headings for attorneys' fees and costs). Nevertheless, the principles underlying the *Nelson* case were outlined to the trial court in First Church's reply memorandum in support of its fees motion, filed on February 12, 2007 ("Reply"). (Record ("R") Vol. 28, pp. 1-102.)

As in *Nelson*, First Church argued that the right to fees is determined by what the statute provides. Reply at 3 (R Vol. 28 at 3.) The right to fees matures when there was a discontinuance of eminent domain proceedings before reaching final judgment. *Id.* First Church further asserted that the statute included fees incurred on appeal because it provided that the condemnee should recover "all such damages as may have been sustained by the defendant by reason of bringing of the proceedings' '[w]henver any proceedings instituted under this part are abandoned or discontinued before reaching a final judgment[.]'" *Id.* (emphasis in original) First Church further argued that nothing in the statute excluded or restricted the trial court's ability to award such fees. Finally, the wording of the statute that the right to fees would be triggered any time "before reaching a final judgment" would include fees incurred on interlocutory appeals. Reply at 5, n. 3. (R Vol. 28 at 5.) *Cf.*, *State v. Heirs of Kapahi*, 50 Haw. 237, 240, 437 P.2d 321,

323 (1968) (“[r]eviewing [Revised Laws of Hawaii 1955] §§ 8-23, 8-25 and 8-30, which are in pari materia, we feel compelled to conclude that the term ‘final judgment’ as used in § 8-23 should be interpreted to mean the judgment which is entered after the disposition of an appeal to this court”).

In short, even though *Nelson* was not before the trial court, the arguments made by counsel as to why appellate fees are included paralleled the reasoning set forth by the Hawaii Supreme Court in *Nelson*. The *Nelson* decision confirms that the arguments made by First Church to the trial court below were correct.

### III. CONCLUSION

As set forth in First Church’s opening brief on this cross-appeal, this Court should remand this action to the trial court for the limited purpose of determining the amount of attorneys’ fees and costs to be awarded First Church for the first appeal of this case, or alternatively, this Court should itself determine and award to First church its attorneys’ fees and costs incurred in the first appeal.

DATED: Honolulu, Hawaii; July 21, 2008.

  
\_\_\_\_\_  
JAMES K. MEE  
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