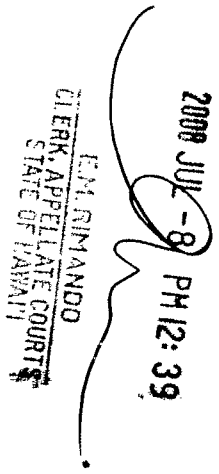
ORIGINAL

NO. 29035

IN THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawaii; et al., Plaintiffs/Appellants/ Cross-Appellees, vs. THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAII; HAWAII SUPERFERRY, INC., et al., Defendants/Appellees/ Cross-Appellants.	Hawaii Second Cir. Ct. Civil No. 05-1-0114(3) (Declaratory Judgment) Judge Joseph E. Cardoza



FILED

OPENING BRIEF OF STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION

APPENDICES 1 - 4

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771

TABLE OF CONTENTS

777

TABLE OF AUTHORITIES

CASES:

773

STATUTES:

OTHER AUTHORITIES:

774

STATEMENT OF THE CASE

1. Introduction; Nature of the Case

Plaintiffs are environmental organizations. Defendants are the Hawaii Department of Transportation and two of its officers (collectively "the Department" or "the State") and Hawaii Superferry, Inc.

This is the second time this case has been on appeal.

The primary issue on the first appeal was whether the Department correctly determined in February 2005 that the proposed improvements at Kahului Harbor to accommodate Superferry were sufficiently minor to justify exemption from the environmental assessment requirements of HRS chapter 343. The Hawaii Supreme Court resolved that issue adversely to the Department.[1]

This appeal arises from the remand proceedings resulting from the first appeal. On remand, the circuit court entered its final judgment dismissing all five counts of plaintiffs' first

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[1] On the first appeal, the Hawaii Supreme Court (1) held that plaintiffs had established standing to sue; (2) held that the Department's exemption determination was erroneous as a matter of law; (3) reversed the circuit court's entry of summary judgment in favor of the Department with instructions to enter summary judgment in favor of plaintiffs; and (4) remanded to the circuit court for such and further disposition of any remaining claims as may be appropriate. Sierra Club v. Department of Transp., 115 Haw. 299, 167 P.3d 292 (Aug. 31, 2007) (Sierra Club I); 2007 WL 2428467 (Order, Aug. 23, 2007)(5R 1552).

amended complaint, four of them for mootness because the governing law had changed and the fifth for voluntary dismissal by plaintiffs. (11R 3718 [Judg., Jan. 31, 2008]). The final judgment was entered "in favor of Defendants" and "against Plaintiffs". (Id. at 3719)

Despite the fact that plaintiffs did not prevail on any of their claims, the final judgment authorized plaintiffs to seek attorneys' fees and costs. Id. Plaintiffs did so, and the court ultimately awarded attorneys' fees and costs "based upon HRS § 607-25 and the Private Attorney General Doctrine . . . ." (12R 4116 [Order, Mar. 27, 2008]).

On this appeal, the Department challenges any award of fees or costs to non-prevailing plaintiffs because there is no legal basis for such an award.

2. Post-Remand Circuit Court Proceedings; Facts[2]

The August 23, 2007 order of the Hawaii Supreme Court instructed the circuit court to enter summary judgment in favor of plaintiffs on their claim for an environmental assessment. The circuit court did so on August 24. (5R 1554 [S.J. Order]).

[2] This is one of those appeals where the procedural facts are the case facts. The opinion in Sierra Club I contains the case facts relevant to plaintiffs' standing and to the Department's 2005 exemption of the Kahului Harbor improvements from the environmental assessment requirement of chapter 343.

On August 27, 2007, plaintiffs moved for preliminary and permanent injunction.[3] The Department and Superferry separately opposed the motion for injunction on August 29, 2007. (5R 1788 [Ferry Opp'n]; 5R 1928 [State Opp'n]).

The evidentiary hearing on the motion for injunction commenced September 10 and concluded October 9, 2007. (Trs.). On October 9, 2007, the court ruled from the bench, granting a permanent injunction and voiding the 2005 operating agreement between the Department and Superferry. (Tr.). Later in the day the court entered a written order to the same effect. (7R 2273 (App. 1) at 2278-80).

The October 9, 2007 bench ruling and written order authorized plaintiffs, as the prevailing parties, to seek reasonable fees and costs. (Tr., Oct 9, 2007 at 31; 7R 2273 [Order])(App. 1). Specifically, Paragraph D of the order states: "Plaintiffs, as the prevailing parties, may, by separate motion, file a request for the reimbursement of their reasonable attorneys' fees and costs incurred in this case." (App. 1 at 8)(emphasis added).

[3] The full title of the motion was "Motion to enforce judgment requiring environmental assessment by prohibiting implementation of Hawaii Superferry Project, for temporary, preliminary and/or permanent injunction." (5R 1577 [Mot., Aug. 27, 2007]).

777

On November 9, 2007, the court entered its findings of fact, conclusions of law and order granting plaintiffs' motion for injunction.

In the interval between (1) the October 9, 2007 bench ruling and written order on plaintiffs' motion for injunction; and (2) the November 9, 2007 FOF/COL/Order on that same motion, the 2007 Legislature passed Act 2 of its second special session. (App. 2). Act 2 took effect November 2, 2007.

Act 2 allows large capacity ferry vessels to operate and use harbor improvements subject to the conditions of Act 2, notwithstanding any requirements of chapter 343. (App. 2 at § 3 p. 10).

After Act 2 was enacted, the Department and Superferry each moved to dissolve the injunction and to vacate the order voiding the operating agreement. (8R 2544 [Superferry], 2551 [State] Nov. 5, 2007). Plaintiffs opposed the motions. (9R 2974 [Opp'n, Nov. 13, 2007].

On November 14, 2007, the circuit court heard and granted the defense motions to dissolve and vacate. (Tr.; 10 R 3336 [Order]). The order granting the motions to dissolve and vacate specifically provided that Paragraph D of the October 9, 2007 order (authorizing plaintiffs as the prevailing parties to seek reimbursement of reasonable fees and costs) remained in effect. (10R 3336, 3339).

The circuit court entered its final judgment on January 31, 2008. (11R 3718)(App. 3). Counts I, III, IV, and V of the first amended complaint were dismissed with prejudice as moot in light of Act 2. Count II was dismissed without prejudice in light of plaintiffs' successful motion for voluntary dismissal.[4]

The final judgment was entered in favor of defendants and against plaintiffs. (11R 3718, 3719 [Jan. 31, 2008]). The final judgment incorporated Paragraph D from the October 9, 2007 (pre-Act 2) order authorizing plaintiffs (who at that earlier time had prevailed on their motion for injunction) to move for reimbursement of reasonable attorneys' fees and costs. (App. 3 at 3).

Plaintiffs filed their fee/cost motion on January 15, 2008. (10R 3517). The Department opposed the fee/cost motion based on: (1) plaintiffs' status as non-prevailing parties under the final judgment; (2) the State's non-waiver of its sovereign immunity; and (3) the non-availability of the private attorney general doctrine. (11R 3724 [Feb.4, 2008]).

Superferry opposed the fee/cost motion based on plaintiffs' status as non-prevailing parties and on the non-applicability to

[4] The order granting plaintiffs' motion for voluntary dismissal of any remaining, residual claims was filed the same day the final judgment was filed. (11R 3704 [Jan. 31, 2008]).

Superferry of either HRS § 607-25 or the private attorney general doctrine. (11R 3755 [Feb. 4, 2008]).

The circuit court heard the fee/cost motion on February 13, 13, 2008 and ruled that "plaintiffs were entitled to attorneys' fees and costs, both under HRS § 607-25, and under the Private Attorney General Doctrine." (Tr. at 41). The court entered its written order granting the fee/cost motion on March 27, 2008. (12R 4115)(App. 4).

While the court's fee/cost order refers generally to HRS § 607-25 and the private attorney general doctrine without differentiating between defendants, it is clear that plaintiffs sought fees against the Department based only on the private attorney general doctrine and not based on HRS § 6-7-25:

> [Plaintiffs' counsel]: Judge, we've asked for an award of attorneys' fees against Hawaii Superferry based on HRS 607-25 and Private Attorney General's [doctrine] and against HDOT based on the Private Attorney General doctrine.
>
> . . . .
>
> With respect to HRS 607-25, that's against not the State, but against Hawaii Superferry.

(Tr., Feb. 13, 2008 at 3, 5)(emphasis added).[5] And in their written motion, plaintiffs argued that the court could award fees

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[5] By its terms, HRS § 607-25 authorizes a fee/cost award only to the prevailing party in a suit brought by one private party against another. In 1999, the Hawaii legislature rejected a proposed bill (S.B. 90) that would have expanded HRS § 607-25 to allow civil actions (and possible attorneys' fees) by a private party against a public agency as well as against another private party.
www.capitol.hawaii.gov/session1999/bills/sb90_.htm

and costs against Superferry pursuant to HRS § 607-25(e). (10R 3517, 3532 [Fee Mot., Jan. 15, 2008]).

The Department appealed from the final judgment entered January 31, 2008 and appealed from the fee/cost award order entered March 27, 2008. (11R 3936 [Notice, Mar. 13, 2008]; 12R 4124 [Notice, Apr. 3, 2008]).

STATEMENT OF THE POINT OF ERROR

Plaintiffs ultimately did not prevail on any of their claims. They obtained preliminary and permanent injunctive relief for thirty-six days from October 9, 2007 to November 14, 2007.[6] The circuit court entered final judgment in favor of the Department and Superferry and against all plaintiffs. (App. 3). Defendants Department and Superferry were the prevailing parties. Plaintiffs were the non-prevailing parties.

The circuit court erred in awarding fees and costs to the non-prevailing parties, whether that award was made under a purported application of the private attorney general doctrine or some other theory.

The court's error is reflected in its comments at hearing on November 14, 2007 after dissolving the injunction based on chapter 343 in light of the effect of Act 2: "[T]he fact that the legislature in reaction to the defendants Hawaii Superferry losing in court chose to change the law and render the plaintiffs' claims moot, in this court's view, should not change

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[6] Immediately following the remand from the Hawaii Supreme Court, plaintiffs obtained an ex parte temporary restraining order prohibiting Superferry from operating (other than to return stranded passengers to their ports of origin). (5R 1570 [Order, Aug. 27, 2007]). On plaintiffs' motion, the ex parte TRO was extended through the resolution of the motion for preliminary and permanent injunction (8R 2935 [Order, Nov. 7, 2007]).

the fact that it was plaintiffs prevailing in this matter that brought about the change in law." (Tr. at 86-87).

The court's error is reflected in the portion of the January 31, 2008 final judgment (importing Paragraph D from the October 9, 2007 order granting plaintiffs' motion for injunction) authorizing plaintiffs to move for reimbursement of reasonable fees and costs. (App. 3 at 3).

The court's error is reflected in its bench ruling that "The Court deems it appropriate to conclude that the plaintiffs should be awarded their attorneys' fees and costs, both under 607-25, and under the Private Attorney General doctrine." (Tr. Feb. 13, 2008 at 41).

The court's error is reflected in its March 27, 2008 order granting plaintiffs' motion for reimbursement of reasonable fees and costs. (App. 4).

The Department objected to any award of fees and costs to plaintiffs at the hearing on November 14, 2007 (Tr. at 64-65), in the Department's opposition to plaintiffs' fee/cost motion (11R 3724 [Feb. 4, 2008]), and at the February 13, 2008 hearing on the fee/cost motion (Tr. at 25-31).

STANDARDS OF REVIEW

The Hawaii appellate courts review the trial court's grant or denial of attorneys' fees and costs under the abuse of discretion standard. The trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Enoka v. AIG Hawaii Ins. Co., 109 Haw. 537, 544, 128 P.3d 850, 857 (2006) (citation omitted).

ARGUMENT

The Circuit Court Erred In Awarding Attorneys' Fees/Costs To The Non-Prevailing Parties

1. Plaintiffs Did Not Prevail.

The dispositive fact of this appeal is that the Department is a prevailing party to this litigation and plaintiffs are the non-prevailing parties. The dispositive legal principle is that the exceptions to the American Rule (under which each party bears its own litigation expenses, including attorneys' fees) are fee-shifting devices by which the losing party pays the attorneys' fees of the prevailing party. Kemp v. State of Hawaii Child Support Enforcement Agency, 111 Haw. 367, 388, 141 P.3d 1014, 1035 (2006)(emphasis added). The circuit court expressly entered final judgment in favor of the Department and Superferry and against plaintiffs. (App. 4 at 2).

This litigation commenced in March 2005. (1R 1 [Compl.]). Plaintiffs had litigation successes along the way, primarily the judgment from the Hawaii Supreme Court (7R 2233 [Oct. 3, 2007) on the first appeal and, following remand to the circuit court, the injunction (App. 1) prohibiting Superferry from operating.

But plaintiffs' successes were short-lived. The appellate judgment came equipped with built-in remand proceedings. (7R

2233-34). The injunction based on HRS ch. 343 could not withstand the force of Act 2.[7]

Prevailing party status is not based on what happens at the way stations along the road to final judgment. Rather, prevailing party status is based on what happens at the clearly-defined finish line of the final judgment: "Usually the litigant in whose favor judgment is rendered is the prevailing party...." Wong v. Takeuchi, 88 Haw. 46, 49, 961 P.2d 611, 614 (1998) (citing Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2667 (1983)

The holding in Wong has been twice reaffirmed by the Hawaii Supreme Court, first in Blair v. Ing, 96 Haw. 327, 330, 31 P.3d 184, 187 (2001), and more recently in Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Haw. 92, 122, 176 P.3d 91, 121 (2008) ("This court has held that for purposes of HRS § 607-14, the party in

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[7] In Sole v. Wyner, 127 S.Ct. 2188 (2007), the Court held that prevailing party status--a requirement for fee awards in federal civil rights litigation--is not achieved by a preliminary injunction that is reversed, dissolved, or otherwise undone by the final decision in the same case. See also Rhodes v. Stewart, 488 U.S. 1, 4 (1988)(summarizing that "The case was moot before judgment issued, and the judgment therefore afforded the plaintiffs no relief whatsoever. In the absence of relief, a party cannot meet the threshold requirement of [42 U.S.C.] § 1988 that he prevail, and in consequence he is not entitled to an award of attorney's fees.").

whose favor judgment was entered is the prevailing party.")(citing Blair).

Wong, Blair, and Kamaka considered the concept of prevailing party status under HRS § 607-14, allowing attorneys' fees in actions in the nature of assumpsit. HRS § 607-14 falls within the "authorized by statute" exception to the American Rule. See Kemp, 111 Haw. at 388, 141 P.3d at 1035. The fact that the fees in this case were awarded against the Department under a "private attorney general" exception to the American Rule, rather than under HRS § 607-14, does not affect the logic of the proposition that the prevailing party is the party in whose favor judgment was entered.

The various exceptions to the American Rule do not require prevailing parties to pay the fees of non-prevailing parties. Rather, the exceptions allow fee awards to prevailing parties who would otherwise bear their own litigation expenses. See Ruckelshaus v. Sierra Club, 463 U.S 680, 683-84 (1983) (noting that under the American Rule, even the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.)(emphasis in original).

Neither plaintiffs, in requesting attorneys' fees from the prevailing parties, nor the circuit court, in awarding such fees, has identified any basis for a fee award from the prevailing to the non-prevailing party.

Even indulging the assumption that the private attorney general doctrine applies to this case--and it does not-- nothing in that doctrine supports the payment of attorneys' fees by the prevailing party to the non-prevailing party.[8]

2. The Private Attorney General Doctrine Does Not Apply To This Case

Moreover, the assumption that the private attorney general doctrine applies to this case is incorrect. The Hawaii Supreme Court has twice recognized in the abstract the existence of the private attorney general doctrine in other jurisdictions but has never recognized the doctrine by actual application in Hawaii. Maui Tomorrow v. State, 110 Haw. 234, 244-245, 131 P.3d 517, 527-28 (2006); In re Water Use Permit Applications, 96 Haw. 27, 25 P.3d 802 (2001)(Waiahole II).

The United States Supreme Court rejected the private attorney general doctrine in Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240 (1975). The facts of Alyeska parallel the facts of this case, in that the merits of the litigation were terminated by new legislation. The court

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[8] For example, California has a codified private attorney general doctrine that authorizes a fee award to a "successful party." (Cal. Code Civ. P. § 1021.5). As applied by the California Court of Appeal, "'[S]uccessful' is synonymous with 'prevailing.'" Protect Our Water v. County of Merced, 30 Cal.Rptr.3d 202, 206 (Cal. App. 2005) (citation omitted).

rejected the private attorney general doctrine, holding that only Congress, not the courts, may authorize such an exception to the American Rule.

The majority of states, like the United States Supreme Court, have not adopted the doctrine. See Waiahole II, 96 Haw. at 30-31, 25 P.3d at 805-06; see also Ann K. Wooster, Annotation, Private Attorney General Doctrine--State Cases, 106 ALR 5th 523 (2003).

The private attorney general doctrine cannot be applied in this case for two reasons. The first reason is that application of the private attorney general doctrine against the State would infringe its sovereign immunity. The legislature has purposefully not authorized a claim for money damages, much less for attorneys' fees, against the State under HRS ch. 343. The second reason--surplusage after the first--is that this case does not meet the criteria customarily required to establish private attorney general status.

A. Sovereign Immunity

It is beyond dispute that "[T]he sovereign State [of Hawaii] is immune from suit for money damages, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued." Taylor-Rice v. State, 105 Haw. 104, 109-110, 94 P.3d 659, 665-666 (2004) (citations omitted).

Although plaintiffs did not seek money damages from the Department for their substantive claims, plaintiffs did seek attorneys' fees. (1R 55, 99 [First Am. Compl.]). And, "an award of costs and fees . . . is inherently in the nature of a damage award." Fought & Co., Inc. v. Steel Eng'g and Erection, Inc., 87 Haw. 37, 51, 951 P.2d 487, 501 (1998) (summarizing cases from other jurisdictions).

Taylor-Rice confirms both that a waiver of sovereign immunity must be unequivocally expressed in statutory text, and that a court may not extend the waiver of sovereign immunity more broadly than has been directed by the legislature. 105 Haw. at 110, 94 P.3d at 665.

The State has nowhere waived its sovereign immunity from an award of attorneys' fees in this case. Plaintiffs have not and cannot identify any statutory text, much less unequivocal statutory text, waiving the State's sovereign immunity for attorneys' fees under HRS ch. 343.[9]

Exactly the opposite is true. In HRS § 607-25, the legislature has specifically authorized attorneys' fees in

[9] By contrast, the legislature has unequivocally waived the State's immunity for fees up to $7500 for certain small business plaintiffs under HRS § 661-12, and the legislature has unequivocally allowed a percentage-capped payment for attorneys' fees from a judgment or settlement amount payable by the State under HRS § 662-12.

certain cases under HRS ch. 343, but only against private parties. And, tellingly, the legislature has specified in HRS § 607-24 that costs reimbursable by the State when it is not the prevailing party do not include attorneys' fees.

In sum, even if plaintiffs were prevailing parties--and clearly they are not--the legislature has not generally waived the State's immunity for money damages in the form of attorneys' fees and has specifically not waived sovereign immunity for suits under HRS ch. 343.

Certainly in these circumstances, for the courts to apply the private attorney general doctrine against the State would overstep separation of powers boundaries and violate the Taylor-Rice principle that the courts may not extend a waiver of immunity beyond the waiver directed by the legislature.

The widespread nationwide rejection of the private attorney general rule--in all federal courts and in the large majority of state courts--is founded in the government bedrock of separation of powers.[10] In Alyeska, the Court noted that it is the prerogative of the legislative branch to determine when attorneys' fees should be allowed:

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[10] Of the minority of states that have adopted the private attorney general doctrine, some have done so by legislative rather than judicial action. See e.g. Cal. Code Civ. P. § 1021.5. That does not raise separation of powers issues. But the Hawaii legislature has not so waived the State of Hawaii's sovereign immunity.

> It appears to us that the [private attorney general] rule suggested here and adopted by the Court of Appeals would make major inroads on a policy matter that Congress has reserved for itself. Since the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule that federal courts cannot award attorneys' fees beyond the limits of 28 U.S.C. § 1923, those courts are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of the public policies involved in particular cases.

421 U.S. at 269.

In enacting HEPA (HRS ch. 343) in 1979, the legislature did not include a provision for attorneys' fees. In 1986, the legislature authorized attorneys' fees in certain circumstances for non-compliance with chapter 343, but only in litigation between private parties. HRS § 607-25. The legislature has spoken. For the court to adopt the private attorney general doctrine against the State in this case would encroach on the province of the legislature to allow attorneys' fees for some statutes (or, as in HRS § 607-24 for some types of cases brought under a specific statute) and not for others. For the court to adopt the private attorney general doctrine in this case would impermissibly rewrite existing legislation. Plaintiffs are seeking attorneys' fees when they are not the prevailing party and they are seeking those fees under a statute that does not authorize fees.

B. Criteria

The courts in other jurisdictions that apply the private attorney general doctrine consider three factors: (1) the strength or societal importance of the public policy vindicated by the litigation, (2) the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff, (3) the number of people standing to benefit from the decision. Maui Tomorrow, 110 Haw. at 244, 131 P.3d at 527, Waiahole II, 96 Haw at 29, 25 P.3d at 804.

The circuit court in this case did not make any findings as to whether or why any of these factors applied in this case. Rather, as set out above, the circuit court authorized plaintiffs to request fees in October 2007 (in the interlude when the court had granted plaintiffs' motion for injunction and plaintiffs were temporarily the prevailing party). (App. A at 8; Tr. Oct. 9, 2007 at 31). That authorization was incorporated in the final judgment on January 31, 2008 (although by then plaintiffs had entirely lost their prevailing party status when the court granted the defense motions to dissolve the injunction).

Plaintiffs do not meet any of the three criteria for an award of fees under the private attorney general doctrine. The first criterion--the strength or societal importance of the public policy vindicated by the litigation--is inapplicable here. First, the underlying public policy of the Hawaii Environmental

Policy Act (HEPA), HRS ch. 343, was never at risk in this litigation. In applying the policy, the Department simply made an erroneous determination as to the applicability of the exemptions allowed under the governing administrative rules.

Second, plaintiffs' lawsuit did not vindicate the public policy of HEPA. The legislature, in adopting Act 2, specifically found that the Hawaii Supreme Court's determination under chapter 343 was "not consistent with the intent of the legislature." (App. 2 at 2).

Further, every challenge under HRS chapter 343 addresses the same public policy issue. Returning to Alyeska, the courts are not free in awarding fees to make value judgments about the importance of legislation or "to pick and choose among plaintiffs and the statutes under which they sue." 421 U.S. at 269. Here, the legislature has already declined to authorize an award of attorneys' fees even to a prevailing party under HRS ch. 343.

The second criterion is "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff." Plaintiffs cannot meet this criterion either. It is entirely unremarkable that plaintiffs sought private enforcement against the Department. The very structure of HEPA requires government agency approval of exemptions from environmental assessment requirements (HRS § 343-7(a)) without authorizing

attorneys' fees even to persons prevailing against the government.

And, the burden on plaintiffs of litigating this action was relatively minor. First, there were three separate plaintiff organizations to share the expenses for attorneys' fees and costs. Second, plaintiffs Sierra Club and Maui Tomorrow litigate because litigation is one of their purposes. (1R 55 [1st Am. Compl. at 6 ¶20 [Sierra Club], 7 ¶25 [Maui Tomorrow]). There is no showing that this particular lawsuit in furtherance of their purposes posed a greater burden than any other. Third, plaintiffs were the beneficiaries of ongoing fee discounts from their attorney. (11R 3781, 3783 [Hall Ltr., Jan 30, 2008]).

Finally, the third criterion--the number of people standing to benefit from the decision--likewise cuts against plaintiffs. Their theory of benefit is based on the Hawaii Supreme Court decision that was supplanted by Act 2. (11R 3787 [Pls. Fee Mot, Feb. 7, 2008]). In Act 2, the legislature found that "it is clearly in the public interest that a large capacity ferry vessel service should commence as soon as possible, and that harbor improvements continue to be constructed and allowed to be used, while any environmental studies, including any environmental

assessments or environmental impact statements, are conducted." (App. 2 at 3).[11]

[11] Plaintiffs' theory is also contradicted by pre-litigation events. The Hawaii Public Utilities Commission approved Superferry's application for a certificate of public convenience and necessity to operate as an interisland water carrier of passengers and property between four harbors: Honolulu, Oahu; Kawaihae, Hawaii; Kahului, Maui; and Nawiliwili, Kauai. (2R 139 Ex. 7 [Certif.]). As to all four harbors, the Department determined that no environmental assessment was required for the harbor improvements to accommodate Superferry. No citizen of Oahu or Hawaii--the two most populous islands with about 84% of the population--even challenged the Department's exemption determination.

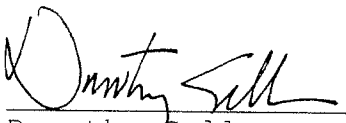
CONCLUSION

Because plaintiffs were not prevailing parties, the circuit court erred in awarding them any attorneys' fees or costs.

Further, the State of Hawaii's sovereign immunity precluded any award of fees against the State. The private attorney general doctrine does not apply in Hawaii and in any event would be inapplicable to this case.

This court should reverse (1) the portion of the January 31, 2008 circuit court judgment that authorizes plaintiffs to file a request for reimbursement of reasonable attorneys' fees and costs and (2) the circuit court's March 27, 2008 order awarding fees and costs.

Respectfully submitted,



Dorothy Sellers
State Solicitor General