NO. 29035

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

THE SIERRA CLUB, a California non-profit corporation registered to do business in the State of Hawai'i; et al.,

Plaintiffs/Appellants/
Cross-Appellees,

vs.

THE DEPARTMENT OF TRANSPORTATION OF THE STATE OF HAWAI'I; HAWAII SUPERFERRY, INC., et al.,

Defendants/Appellees/
Cross-Appellants.

CIVIL NO. 05-1-0114 (3)
(Declaratory Judgment)

APPEAL AND **CROSS-APPEAL** FROM (A) FINAL JUDGMENT, filed January 31, 2008;

(B) ORDER GRANTING 1) DEFENDANT STATE OF HAWAII'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT; AND 2) DEFENDANT HAWAII SUPERFERRY, INC.'S MOTION TO DISSOLVE INJUNCTION AND VACATE ORDER VOIDING OPERATING AGREEMENT, filed November 14, 2007;

(C) ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION, filed October 9, 2007;

(D) FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER IN SUPPORT OF ORDER GRANTING PLAINTIFFS' MOTION TO ENFORCE JUDGMENT REQUIRING ENVIRONMENTAL ASSESSMENT BY PROHIBITING IMPLEMENTATION OF HAWAII SUPERFERRY PROJECT, FOR TEMPORARY, PRELIMINARY AND/OR PERMANENT INJUNCTION, filed November 9, 2007; and

(E) ORDER GRANTING PLAINTIFFS' MOTION FOR REIMBURSEMENT OF REASONABLE ATTORNEY'S FEES AND

COSTS [FILED ON JANUARY 15, 2008], filed March 27, 2008

SECOND CIRCUIT COURT

HONORABLE JOSEPH E. CARDOZA
Judge

OPENING BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT HAWAII SUPERFERRY, INC.

APPENDICES

STATEMENT OF RELATED CASES

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872

TABLE OF CONTENTS

874

TABLE OF AUTHORITIES

PAGE

Federal Cases

State Cases

TABLE OF AUTHORITIES
(continued)

PAGE

Federal Statutes

State Statutes

State Rules

OPENING BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT HAWAII SUPERFERRY, INC.

Defendant/Appellee/Cross-Appellant Hawaii Superferry, Inc. ("Hawaii Superferry") hereby submits its Opening Brief pursuant to Rule 28 of the Hawai`i Rules of Appellate Procedure.

I. CONCISE STATEMENT OF THE CASE

This case involves a challenge to the State of Hawai`i Department of Transportation's determination that certain improvements at Kahului Harbor related to Hawaii Superferry's operations conformed with the intended use and purpose of the harbor and met conditions that permitted exemption from environmental review pursuant to Haw. Rev. Stat. Chapter 343. The factual history is set forth in *Sierra Club v. Dept. of Transportation*, 115 Haw. 299, 167 P.3d 292 (2007).

The concise statement below sets forth the facts material to the court's rulings regarding attorney's fees, which are the subject of Hawaii Superferry's appeal and cross-appeal.

A. Course and Disposition of the Proceedings Below

Plaintiffs Sierra Club, Maui Tomorrow, Inc. and Kahului Harbor Coalition (collectively "Plaintiffs") filed this litigation in 2005 seeking an environmental assessment for certain improvements relating to Hawaii Superferry at Kahului Harbor in Maui. Following the Hawai`i Supreme Court's remand of this case from the previous appeal, R5:1552-53; R6:1953-2056,[1] the Second Circuit entered summary judgment in favor of Plaintiffs on August 24, 2007 "on their claim as to the request for an environmental assessment." R5:1554-56. The Supreme Court's opinion was filed on September 4, 2007 and its judgment on appeal was subsequently filed on October 3, 2007. R6:1953-2056; R7:2233-2236.

On August 27, 2007, the Second Circuit issued a temporary restraining order prohibiting the use of certain improvements at Kahului Harbor for Hawaii Superferry's operations. R5:1570-76; R6:1942-45. Following several weeks of well-publicized hearings on Plaintiffs'

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[1] The Record on Appeal in Civil No. 05-1-0114 (3), as amended, is cited with reference to its PDF page number. The Record is cited as R[volume]: [PDF page number(s)]. Transcripts are cited as xx/xx/xx Tr. at [page(s)]:[line(s)]. Hawaii Superferry's exhibits are cited as HSF-xx at [PDF page number(s).] Appendices attached to this Opening Brief are referenced as "App. [letter]."

preliminary injunction motion, on October 9, 2007 the circuit court granted injunctive relief to Plaintiffs. 10/09/2007 Tr. at 30:24 – 31:7; R7:2273-81 ("Injunction Order") (App. C). The Injunction Order allowed Plaintiffs "as prevailing parties" to "file a request for the reimbursement of their reasonable attorney's fees and costs incurred in this case." R7:2280 (App. C).

Less than one month after the Injunction Order, the Legislature passed SB1, SD1 (Second Special Session of 2007) on October 31, 2007. Governor Lingle signed the bill into law on November 2, 2007 as Act 2 ("Act 2") (App. B). Both Hawaii Superferry and the State moved to dissolve the injunction based on Act 2. R8:2551-2833 (State's motion); R8:2544-50 (Hawaii Superferry's motion). On November 14, 2007, the Second Circuit dissolved the injunctions verbally and by written order. 11/14/2007 Tr. at 88:6-7; R10:3336-40 ("Order Dissolving Injunction") (App. D). The Order Dissolving Injunction stated that the portion of the Injunction Order authorizing Plaintiffs as the prevailing parties to request their attorney's fees and costs would "remain in effect."

Final Judgment, entered on January 31, 2008, resolved all claims against Plaintiffs. R11:3718-22 (App. F). Counts I, III, IV and V were determined to be "moot and dismissed with prejudice in [their] entirety" by virtue of the Legislature's enactment of Act 2. Count II was dismissed without prejudice in its entirety after Plaintiffs conceded that it could be voluntarily dismissed. R9:3073. Despite the fact that it entered judgment against Plaintiffs on all counts, the judgment also allowed to "remain in effect" that portion of the Injunction Order authorizing the Plaintiffs as the "prevailing parties" to request their attorney's fees and costs. R11 at 3720.

Before final judgment was entered, Plaintiffs filed a motion on January 15, 2008 seeking their attorney's fees and costs pursuant to Haw. Rev. Stat. § 607-25(e)(1) and the private attorney general doctrine. R10:3517-3643. Plaintiffs' total fee request, including general excise tax, was $189,181.20. Although counsel had billed Plaintiffs at the rate of $190 per hour, Plaintiffs sought fees at an "enhanced" rate of $300 per hour. Plaintiffs also sought fees dating back to early 2005, even before their complaint was filed. The costs requested by Plaintiffs totaled $5,442.44.

Both Hawaii Superferry and the State opposed Plaintiffs' motion for fees and costs. R11:3724-54 (State's Opposition); R11:3755-86 (Hawaii Superferry's Opposition). The State

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argued that the Plaintiffs were not the prevailing parties, that Haw. Rev. Stat. § 607-25 was not applicable to the state, that fees could not be awarded pursuant to the private attorney general doctrine, that $300 was not a reasonable hourly rate, and that the requested hours were not reasonable. Hawaii Superferry argued that Plaintiffs were not the prevailing parties, they were not entitled to fees and costs from Hawaii Superferry pursuant to Haw. Rev. Stat. § 607-25 or the private attorney general doctrine, that Plaintiffs' fee request was unreasonable and that Plaintiffs sought several categories of improper costs.

At the hearing on Plaintiffs' motion, the court concluded that the Plaintiffs "should be awarded their attorney's fees and costs, both under 607-25, and under the Private Attorney General doctrine." 2/13/08 Tr. At 41:12-15. The written order, filed March 27, 2008, awarded fees and costs as follows:

> 2. The Court hereby grants Plaintiffs' Motion for Reimbursement of Reasonable Attorney's Fees and Costs [Filed on January 15, 2008], in part, based upon HRS § 607-25 and the Private Attorney General Doctrine, and awards Plaintiffs, with the exceptions noted on the record, attorney's fees, at the hourly rate of $200 per hour, and costs, both commencing as of August 24, 2007. The total amount of attorney's fees hereby awarded is $86,270.28. The total amount of costs hereby awarded is $5,442.44. The total amount of attorney's fees and costs hereby awarded is $91.712.72. Defendants HSF [Hawaii Superferry] and HDOT [State] shall pay this total amount of attorney's fees and costs to Plaintiffs.

R12:4116-17 (App. G).

II. CONCISE STATEMENT OF POINTS OF ERROR

1. The trial court erred in determining that Plaintiffs were the prevailing parties. 10/9/07 Tr. at 31:6-7, R7:2273-2281 (App. C), 11/14/07 Tr. at 88:3-4, R10:3366-3340 (App. E), R11:3718-3722 (App. F), 2/13/08 Tr. 41:9-17, R12:4115-4117 (App. G).

2. The trial court erred in awarding Plaintiffs their attorney's fees and costs against Hawaii Superferry pursuant to Haw. Rev. Stat. § 607-25. R12:4115-17 (App. G).

3. The trial court erred in awarding Plaintiffs their attorney's fees and costs against Hawaii Superferry pursuant to the private attorney general doctrine. R12:4115-17 (App. G).

4. The trial court erred in awarding attorney's fees at the rate of $200 per hour. R12:4115-17 (App. G).

5. The trial court erred in awarding costs in the amount of $5,442.44. R12:4115-17 (App. G).

III. STANDARDS OF REVIEW

The trial court's interpretation, pursuant to Haw. Rev. Stat. § 607-25, that Plaintiffs were "prevailing parties" must be reviewed *de novo* under the right/wrong standard. *Narmore v. Kawafuchi*, 112 Haw. 69, 80, 143 P.3d 1271, 1282 (2006)("'[t]he interpretation of a statute is a question of law. Review is *de novo,* and the standard of review is right/wrong.'")(citing *Sugarman v. Kapu*, 104 Haw. 119, 123, 85 P.3d 644, 648 (2004)). This standard of review applies to the first and second points of error raised by Hawaii Superferry above.

"The trial court's grant or denial of attorneys' fees and costs is reviewed under the abuse of discretion standard." *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Haw. 92, 105, 176 P.3d 91, 104 (2008) (citing *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Haw. 251, 266, 151 P.3d 732, 747 (2007)) (brackets omitted). *See also Maui Tomorrow v. State of Hawai'i*, 110 Haw. 234, 242, 131 P.3d 517, 525 (2006)(citing *Chun v. Bd. of Trs. of Employees' Ret. Sys. of State of Hawai'i*, 106 Haw. 416, 431, 106 P.3d 339, 354 (2005)). "[A]n abuse of discretion . . . occurs when the trial court clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant," *Kamaka*, 117 Haw. at 122, 176 P.3d at 121 (citing *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Haw. 309, 315, 47 P.3d 1222, 1228 (2002)), or when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Maui Tomorrow*, 110 Haw. at 242, 131 P.3d at 525 (citing *Canalez v. Bob's Appliance Serv. Ctr. Inc.*, 89 Haw. 292, 299, 972 P.2d 295, 302 (1999)). This standard of review applies to the second, third, fourth and fifth points of error raised by Hawaii Superferry above.

IV. SUMMARY OF THE ARGUMENT

Under the American Rule, each party is responsible for his or her own litigation expenses. *DFS Group L.P. v. Paiea Props.*, 110 Haw. 217, 219, 131 P.3d 500, 502 (2006). Attorney's fees and costs may only be awarded to the prevailing party pursuant to statute, rule or precedent, and must be reasonable. *Kemp v. State of Hawai'i Child Support Enforcement Agency*, 111 Haw. 367, 388, 141 P.3d 1014, 1036 (2006)(Hawai'i observes the "American Rule"). Plaintiffs' recovery of any attorney's fees is precluded by the fact that they are not the

"prevailing parties" in this case because they have not prevailed on a single claim.

The court erred in awarding attorney's fees and costs pursuant to Haw. Rev. Stat. § 607-25 because Hawaii Superferry did not violate Chapter 343, and it relied on a written exemption determination from the State.

The court erred in awarding fees based on the private attorney general doctrine because the Hawai'i Supreme Court has never adopted the doctrine, and assuming it had, Plaintiffs fail to meet its criteria. In any event, fees awarded pursuant to the private attorney general doctrine can only be assessed against governmental entities and not private parties.

The court erred in awarding attorney's fees in an amount greater than the amount Plaintiffs agreed to pay their attorney for the particular services involved.

The award to Plaintiffs of the entire amount of costs they requested was also erroneous.

V. ARGUMENT

A. The Court Erred in Awarding Attorney's Fees to Plaintiffs because Plaintiffs Were Not The Prevailing Parties

There has never been a determination by any court in this jurisdiction that Hawaii Superferry acted erroneously. Rather, the Supreme Court found that the *State's* exemption determination for improvements at Kahului Harbor was "erroneously granted." *Sierra Club*, 115 Haw. at 343, 167 P.3d at 336. As a result of the Second Circuit's Injunction Order, Hawaii Superferry was enjoined from using Kahului Harbor. There was *never* a finding that Hawaii Superferry violated Chapter 343 or any other law.

Subsequently, Act 2 of the Second Special Session of 2007 was signed into law on November 2, 2007. The express purpose of the Act was to change prior law so that, going forward, large capacity ferry vessels may operate "during the period in which any required environmental review and studies, including environmental assessments or environmental impact statements, are prepared, and also following their completion." Act 2, section 1(b) (App. B). Consequently, on November 14, 2007, the Second Circuit entered its Order Dissolving Injunctions. R10:3336-40.

The Final Judgment, filed January 31, 2008, provided that, "*final judgment be and hereby is entered in favor of* [State Defendants and] *Hawaii Superferry, Inc. and against Plaintiffs . . . .*" R11:3718-22 at 3719 (emphasis added) (App. F). Notwithstanding that this Court granted Plaintiffs permission "to . . . *file*" a request for attorney fees, R11:3718-22 at 3720 (emphasis

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added), the Final Judgment made clear that Hawaii Superferry and the State, not Plaintiffs, were the prevailing parties.

The Final Judgment specifically addressed and dismissed each of the five counts of the First Amended Complaint. Four of the five counts were dismissed "with prejudice." R11:3718-22 at 3719-20 (App. F). With respect to these four counts, this Court ruled: "by virtue of the Legislature's enactment of Act 2 and this Court's Order Granting Motions to Dissolve, [the count] is now moot and *dismissed with prejudice in its entirety*." *Id.* (emphasis added). As to the remaining count, Plaintiffs moved for, and were granted, voluntary dismissal of Count II of their complaint. R8:2834-41; R11:3704-08 (App. F).[2]

Under Hawai'i law, Hawaii Superferry and the State, not Plaintiffs, were the prevailing parties because judgment was entered in their favor. "The party in whose favor judgment was entered is the prevailing party." *Kamaka*, 117 Haw. at 126; 176 P.3d at 125 (awarding attorney fees under Haw. Rev. Stat. 607-14 to defendant in whose favor judgment was entered notwithstanding the verdict).[3] As the Hawai'i Supreme Court has noted:

> "Usually the litigant in whose favor judgment is rendered is the prevailing party.... Thus, a dismissal of the action, whether on the merits or not, generally means that defendant is the prevailing party." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 2667 (1983). There is no requirement that the judgment in favor of the prevailing party be a ruling on the merits of the claim.

Wong v. Takeuchi, 88 Haw. 46, 49, 961 P.2d 611, 614 (1998); *Mist v. Westin Hotels, Inc.*, 69 Haw. 192, 201, 738 P.2d 85, 92 (1987)(no abuse its discretion in awarding costs to defendants as prevailing parties when judgments were entered in favor of defendants and against plaintiffs).

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[2] There can be no dispute that Plaintiffs' voluntary dismissal of Count II of their Complaint was sufficient to confer prevailing party status as to Hawaii Superferry and the State as to that claim. *Ranger Ins. Co. v. Hinshaw*, 103 Haw. 26, 31, 79 P.3d 119, 124 (2003)(plaintiff's voluntary dismissal of a declaratory judgment action was sufficient to render defendant the "prevailing party" for purposes of Haw. R. Civ. P. 54(d)).

[3] Although Plaintiffs here seek to recover pursuant to Haw. Rev. Stat. § 607-25 rather than pursuant to § 607-14, the two are not materially different in this context. Both concern the award of reasonable attorneys' fees and costs of the suit to the "prevailing party" for certain types of cases.

887

Where judgment was entered in favor of Hawaii Superferry and the State, it was an abuse of discretion for the Second Circuit to allow Plaintiffs their fees and costs as the "prevailing parties" under Hawai'i law.

Hawai'i law is clear and controlling as to "prevailing party" determinations before Hawai`i courts. Federal law further supports the conclusion that Plaintiffs here are not prevailing parties. Under federal law, a party who obtains a preliminary injunction but subsequently loses on the merits is not entitled to prevailing party status:

> Wyner is not a prevailing party, we conclude, for her initial victory was ephemeral. A plaintiff who "secur[es] a preliminary injunction, then loses on the merits as the case plays out and judgment is entered against [her]," has "[won] a battle but los[t] the war." *Watson v. County of Riverside,* 300 F.3d 1092, 1096 (C.A.9 2002).

Sole v. Wyner, 127 S.Ct. 2188, 2196 (2007). *See also Farrar v. Hobby*, 506 U.S. 103, 112-113 (1992) ("Of itself, 'the moral satisfaction [that] results from any favorable statement of law' cannot bestow prevailing party status."); *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988)(where case became moot before judgment was issued after remand, the judgment "afforded the plaintiffs no relief whatsoever," and plaintiffs were not "prevailing parties" entitled to fees under federal statute); *Fenneman v. Town of Gorham*, 802 F.Supp. 542 (D. Me. 1992)(for purposes of a prevailing party determination under federal statute, where the plaintiff prevails on an interlocutory ruling which, in the face of a final judgment against the plaintiff, cannot be used to change the behavior of the defendant, he or she cannot be considered a prevailing party).

Under Hawai`i law, it is unambiguous that Plaintiffs were not the prevailing parties because judgment was entered against them. The trial court therefore abused its discretion when it determined that Plaintiffs were the prevailing parties.

B. The Court Erred in Awarding Attorney's Fees And Costs Pursuant To Haw. Rev. Stat. § 607-25

The Second Circuit erred in awarding Plaintiffs their fees and costs pursuant to Haw. Rev. Stat. § 607-25. Under § 607-25, attorney's fees may be awarded to two types of parties: (1) a member of the public who prevails against a private party who has been or is undertaking development without obtaining all permits or approvals required by law from government agencies; and (2) a defendant private party who prevails against a plaintiff who has brought a

883

frivolous action. *Kahana Sunset Owners Ass'n v. Maui County Council*, 86 Haw. 132, 135, 948 P.2d 122, 125 (1997). Clearly, Plaintiffs were not a "defendant private party" entitled to fees under prong two.

Plaintiffs were not entitled to fees under the first prong. First, they could only be entitled to fees if they "prevailed." Plaintiffs did not prevail because judgment was entered against them. Second, even assuming that Plaintiffs had prevailed, a party must prevail "against a private party who has been or is undertaking development without obtaining all permits or approvals required by law from government agencies," a description not applicable to Hawaii Superferry as further discussed below. Haw. Rev. Stat. § 607-25(e). Third, § 607-25 grants a "safe harbor" for developers who do not obtain permits or approvals in good faith reliance on written governmental assurances, and all the evidence in the record was that Hawaii Superferry relied in good faith on the State's Chapter 343 exemption determination. Haw. Rev. Stat. § 607-25(e)(3).

Hawaii Superferry was not a "private party who . . . undertook any development without obtaining all permits or approvals required by law from government agencies," as Plaintiffs admitted in their complaint. *See* R1:71 at ¶ 70 ("HDOT is responsible for the development of such infrastructure as is necessary to accommodate the ferries and its employees and passengers at the respective ports."). The main claim in Count I of the First Amended Complaint, namely, that an environmental assessment was required because the Hawaii Superferry project was an applicant action under Chapter 343, *was rejected* by the Hawai'i Supreme Court. *Sierra Club v. Dept. of Transp.*, 115 Haw. at 338, 167 P.3d at 331. The Hawai'i Supreme Court in *Sierra Club* specifically stated that the Hawaii Superferry is not an "action" subject to compliance with Chapter 343,

> Appellants have produced no argument to demonstrate that the Superferry project itself is an "action" – either because it was initiated by an agency or an applicant. Appellants have not identified an official request for approval that was required in order for the project to proceed, making Superferry itself a "project . . . initiated by an . . . applicant."

Id.

As the Hawaii Superferry was neither an "action" or a "project . . . initiated by an . . . applicant," Hawaii Superferry was not required to obtain permits or approvals to comply with Chapter 343. Therefore, neither the Second Circuit nor the Supreme Court ruled that Plaintiffs

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prevailed on any claims against Hawaii Superferry. Nor did they rule that Hawaii Superferry violated Chapter 343. Accordingly, Hawaii Superferry cannot be deemed a "private party who has been or is undertaking any development without obtaining all permits or approvals required by law from government agencies."

Even assuming that Hawaii Superferry was a private party that undertook development without required permits or approval, which it was not, an award of fees and costs against Hawaii Superferry is prohibited by Haw. Rev. Stat. § 607-25(e)(3) which reads in full:

> Notwithstanding any provision to the contrary in this section, *the court shall not award attorneys' fees and costs to any party* if the party undertaking the development without the required permit or approval failed to obtain the permit or approval *due to reliance in good faith upon a written statement, prepared prior to the suit on the development, by the government agency responsible for issuing the permit or approval* which is the subject of the civil action, that the permit or approval was not required to commence the development. The party undertaking the development shall provide a copy of the written statement to the party bringing the civil action not more than thirty days after receiving the written notice of any violation of a requirement for a permit or approval.

(emphasis added). Plaintiffs did not dispute that they were in possession of the "written statement," in this case, the State's February 23, 2005 exemption determination, as this statement was the basis for Plaintiffs' complaint. Plaintiffs offered no evidence that they provided any "written notice of any violation of a requirement for a permit or approval." Where a party relies in good faith upon a written statement by a government agency responsible for issuing the permit or approval that the permit or approval was not required to commence the development, the prohibition against an award of fees against that party pursuant to Haw. Rev. Stat. § 607-25 is mandatory and unwavering.

On February, 23, 2005, the Hawai`i State Department of Transportation ("HDOT"), the government agency responsible for issuing the permit or approval, prepared a written statement that a permit or approval was not required to commence development at Kahului Harbor. Exh. HSF 1-C at 1681-82 ("[HDOT has] determined that the operation of Hawaii Superferry at Kahului Harbor conforms with the intended use and purpose of the harbor and meets conditions that *permit exemption from environmental review. . .*")(emphasis added). Hawaii Superferry was aware of the exemption, and of the Second Circuit's ruling against Plaintiffs regarding their

challenge to that exemption. 10/04/07 Tr. p.m. at 61:4-7. Earlier, on November 23, 2004, the Office of Environmental Quality Control ("OEQC") wrote to HDOT stating "we believe the Department of Transportation has authority to declare the [development] as exempt from the requirement to prepare an environmental assessment." R2:827-28. Based on its good faith reliance on the exemption and the circuit court's entry of judgment against Plaintiffs, Hawaii Superferry closed its financing in October 2005, 10/04/07 Tr. p.m. at 59:18 - 60:19, and in 2006 moved forward with construction of the vessel, building the business, hiring management, and developing facility design and layout. 10/04/07 Tr. p.m. at 63:6-64:14. In 2007, Hawaii Superferry's vessel, the Alakai, was launched, sea trials were conducted, the vessel arrived in Hawai`i and an additional 270 people were hired. 10/04/07 Tr. p.m. at 69:18-23. Plaintiffs did not ask to admit any evidence that Hawaii Superferry's reliance was not in good faith.

Although Plaintiffs argued, based on documents downloaded from a newspaper website, that Hawaii Superferry did not rely in good faith upon the State's exemption determination R11:3787-3840 at 3788-3791, these documents were never properly authenticated or admitted into the record and the court was bound by the record that was before it. 2/13/08 Tr. at 21:2–22:6. The circuit court therefore noted that it "would be inappropriate for this Court to place any weight on the exhibits or to make any findings based on those exhibits," 2/13/08 Tr. at 40:3-5, and that it would be inappropriate to "take on those exhibits . . . without the benefit of any type of evidentiary hearing." 2/13/08 Tr. at 41:1-4. In any event, the only one of these documents purportedly addressed to Hawaii Superferry was dated October 27, 2004, R11 at 3810, well in advance of either OEQC's indication that the State had the authority to declare the proposed actions exempt, R2 at 818-23, or the State's issuance of its exemption, R2 at 946-48, and would be insufficient to establish that Hawaii Superferry's reliance on the exemption was not "in good faith."

Accordingly, the trial court erred in awarding fees and costs to Plaintiffs given that Hawaii Superferry relied in good faith upon written statements by HDOT, OEQC and the July 12, 2005 Judgment of the Second Circuit that a permit or approval was not required. Consequently, the trial court erred when it awarded Plaintiffs fees against Hawaii Superferry contrary to the prohibition in Haw. Rev. Stat. § 607-25(e)(3).

C. The Trial Court Erred in Awarding Fees Against Hawaii Superferry Pursuant to the Private Attorney General Doctrine

1. The Private Attorney General Doctrine Has Not Been Applied by Hawai`i Courts, Nor Should it be Applied in Chapter 343 Litigation

The trial court erred in awarding Plaintiffs fees against Hawaii Superferry and the State pursuant to the private attorney general doctrine. The Hawai'i Supreme Court has ***never*** awarded, or upheld an award of, attorneys' fees under the private attorney general doctrine. *Maui Tomorrow v. State, Bd. of Land and Natural Resources of State of Haw.* 110 Haw. 234, 244, 131 P.3d 517, 527 (2006) (doctrine considered but not adopted or applied); *In re Water Use Permit Applications*, 96 Haw. 27, 31-32, 25 P.3d 802, 806-7 (2001) ("*Waiahole II*") ("Having reviewed the background of the private attorney general doctrine, and assuming *arguendo* that we were to embrace the doctrine as a general matter, we hold that the doctrine does not apply to the particular circumstances of the present case.").

The United States Supreme Court and a majority of state courts have *rejected* the private attorney general doctrine. See *Waiahole II*, 96 Haw. at 30, 25 P.3d at 805 (list of rejecting courts). In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 269 (1975) the Court noted that it is Congress's role to determine where attorney's fees should be allowed. If the courts were to arrogate this task to themselves, it could lead to a standardless favoring of certain claims over others.

> It appears to us that the 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. Nor should the federal courts purport to adopt on their own initiative a rule awarding attorneys' fees based on the private-attorney-general approach when such judicial rule will operate only against private parties and not against the Government.

Alyeska, 421 U.S. at 269.

In Hawai'i, it is the role of the Hawai'i Legislature to determine when and whether attorney's fees should be allowed in Chapter 343 litigation. The Legislature made this determination when it adopted Haw. Rev. Stat. § 607-25 in 1986. When allowing fees and costs against a private party based on the failure to obtain "permits or approvals," the Legislature included Chapter 343 within the "approvals" encompassed by the statute. Haw. Rev. Stat. § 607-25 provides,

> (c) For purposes of this section, the permits or approvals required by law shall include compliance with the requirements for permits or approvals established by chapters 6E, 46, 54, 171, 174C, 180C, 183, 183C, 184, 195, 195D, 205, 205A, 266, 342B, 342D, 342F, 342H, 342J, 342L, and 343 and ordinances or rules adopted pursuant thereto under chapter 91.
>
> (d) For purposes of this section, compliance with the procedural requirements established by chapter 343 and rules pursuant to chapter 343 constitute a discretionary agency approval for development.

The Hawaii Supreme Court has recognized that, in enacting 607-25, the legislature made a conclusive determination as to when fees against private parties under the private attorney general doctrine are appropriate. *Kahana Sunset Owners*, 86 Haw. at 134-135, 948 P.2d at 125 (1997)("From the legislative history [of Haw. Rev. Stat. § 607-25], we are able to determine that the legislature intended that individuals and organizations would help the state's enforcement of laws and ordinances controlling development *by acting as private attorneys general* and suing developers who did not comply with the proper development laws.")(emphasis added). Therefore, it was improper for the trial court to use the private attorney general doctrine as an alternative basis to award fees against Hawaii Superferry where the plain language of § 607-25 would otherwise have prohibited such an award.

The trial court erred when it arrogated to itself an expansion of Haw. Rev. Stat. § 607-25 neither contemplated nor adopted by the Legislature under the guise of the private attorney general doctrine. The Hawai'i Supreme Court has ruled, "[T]he power to decide what the policy of the law shall be rests with the legislature; 'and if it has intimated its will, . . . that will should be recognized and obeyed." *Barcena v. Hawaiian Ins. & Guar. Co.*, 67 Haw. 97, 103, 678 P.2d 1082, 1087 (1984) (citing *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)); *Nagle v. Bd.*

888

of Educ., 63 Haw. 389, 395, 629 P.2d 109, 113 (1981) ("we hold that this court must continue to exercise limited judicial review over matters within the prerogative of the legislature."); *State v. Cotton,* 55 Haw. 148, 151, 516 P.2d 715, 718 (1973) ("enactment of laws is the prerogative of the legislature and it is not for the judiciary to second-guess the legislature or substitute its judgment for that of the legislature"). There was no basis for the trial court to use the private attorney general doctrine as a means to expand upon the limited circumstances under which the Legislature allowed fees to be awarded in Chapter 343 cases. To do so went,

> . . . beyond interpretation and essentially constitute[d] judicial legislation. See *Honbo v. Hawaiian Ins. & Guar. Co., Ltd.*, 86 Hawai'i 373, 376, 949 P.2d 213, 216 (App. 1997) ("If there is any inequality or any situation that was overlooked in the law, it is up to the legislature to make the correction. For this court to do so under the guise of statutory construction is to indulge in judicial legislation which we are prohibited from doing under the doctrine of separation of powers.").

Doe v. Doe, 116 Haw. 323, 335, 172 P.3d 1067, 1080 (2007).

The Second Circuit's adoption and application of the private attorney general doctrine therefore derogated the proper constitutional roles of the legislature and the courts. By allowing Plaintiffs their attorney's fees against Hawaii Superferry pursuant to the private attorney general doctrine, the court significantly expanded upon the Legislature's determination that attorney's fees should only be allowed in Chapter 343 cases in the limited circumstances defined by Haw. Rev. Stat. § 607-25. As argued above, none of the enumerated circumstances in § 607-25 were applicable here.

2. The Second Circuit Erred in Awarding Fees Against a Private Party Pursuant To The Private Attorney General Doctrine

The trial court erred when it adopted and applied the private attorney general doctrine. This error was compounded when – in a significant and unprecedented expansion of that doctrine – the trial court awarded Plaintiffs their fees and costs against Hawaii Superferry, a private party. R12:4115-4117. Even Plaintiffs themselves realized that fees could not be recovered from Hawaii Superferry under the private attorney general doctrine. R11:3787-3840 at 3788. ("Plaintiffs seek the reimbursement of their reasonable attorney's fees and costs in this case from Defendant HDOT through an application of the Private Attorney General Doctrine ("PAG"). Plaintiffs are not seeking attorney's fees from the State pursuant to Haw. Rev. Stat. § 607-25.")

In the instances where the Hawai'i Supreme Court has acknowledged the existence of the private attorney general doctrine, it has nowhere intimated that such a recovery could be assessed against a private party. The private attorney general doctrine, if adopted, would apply to circumstances in which a party is "contesting [an] action or policy of the government," not an action or policy of a private party. See *Waiahole II*, 96 Haw. at 32, 25 P.3d at 807. Hawaii Superferry does not have a legal duty to protect and preserve harbor resources, manage state harbors, or protect the public trust. It does not follow that simply because Plaintiffs chose to name both the State and Hawaii Superferry as parties, Plaintiffs should be awarded fees from Hawaii Superferry pursuant to this doctrine. There is no precedent for awarding fees to any party pursuant to the private attorney general doctrine and especially no precedent for awarding fees against a private party.

In *Sierra Club,* the Hawai'i Supreme Court found that the *State* erroneously granted an exemption determination and that the *State* was required to perform an environmental assessment. *Sierra Club*, 115 Haw. at 342, 167 P.3d at 335. No court has ever found that Hawaii Superferry has violated Chapter 343, and the Supreme Court expressly stated the contrary. Given that there is no finding that Hawaii Superferry violated Chapter 343 and that attorney fees awarded pursuant to the private attorney general doctrine can only be assessed against governmental entities and not private parties, the Second Circuit erred when it assessed against fees and costs Hawaii Superferry pursuant to this doctrine.

3. The Trial Court Erred in Applying the Private Attorney General Doctrine

Even assuming that the private attorney general doctrine applies, which it does not, the doctrine includes a stringent three-part test in order to prevent "unbridled judicial authority to pick and choose which plaintiffs and causes of action merit an award of attorney fees." *Waiahole II*, 96 Haw. at 31, 25 P.3d at 805 quoting *New Mexico Right to Choose/NARAL v. Johnson*, 986 P.2d 450 (N.M. 1999). The bar set by this test is high. Without adopting it, the *Waiahole II* court noted that courts applying the private attorney general doctrine typically consider three prongs: "(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." *Waiahole II*, 96 Hawai'i at 29, 25 P.3d at 805 (citations omitted). The trial court's award of attorney's fees to

Plaintiffs erred in its implicit determination that Plaintiffs satisfied all three of these requirements.

a. Plaintiffs did not Vindicate Important Public Policy

Given that Plaintiffs were not the prevailing parties for the reasons discussed above, Plaintiffs did not "vindicate" any important public policy. No environmental review will be conducted pursuant to Chapter 343. The environmental review to be conducted by the State is wholly due to legislative action in Act 2.

The Hawai'i State Legislature has determined 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 be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted." Act 2, section 1(a) (App. B). Therefore, Act 2 resolved against Plaintiffs the public policy issue of whether a large capacity ferry should be allowed to operate while environmental review is conducted.

Even before Act 2 was passed, the Legislature recognized that there is a public interest in ferry service: "It being hereby declared that the establishment of a ferry service to provide the people of this state with an economic means of transportation is a public purpose." Haw. Rev. Stat. § 268-1. The declaration of policy in the Hawai`i Water Carrier Law, Chapter 271G, Haw. Rev. Stat., also recognized the public's interest in Hawaii Superferry's operations, "The legislature of this State recognizes and declares that the transportation of persons and of property, for commercial purposes, by water within the State or between points within the State, constitutes a business affected with the public interest." Haw. Rev. Stat. § 271G-2. The Hawai`i State Plan, Haw. Rev. Stat. § 226-17 agrees. Moreover, the 2004 Legislature recognized that Hawaii Superferry is in the public interest stating "the proposed interisland vehicle and passenger ferries will stimulate the Hawai`i economy through the creation of approximately 1,000 jobs, increase the annual state gross domestic product by up to $1 billion, lower the cost of living for residents, and reduce the reliance of residents on a single mode of transportation." Ex. HSF 101 at 1.

The determination by the Public Utilities Commission ("PUC") in issuing the Hawaii Superferry's Certificate of Public Convenience and Necessity ("CPCN") demonstrates the public

interest being served by the continued operation of Hawaii Superferry. When it approved HSF's CPCN in Decision and Order No. 21524, Docket No. 04-0180 (December 30, 2004), the PUC expressly found that Hawaii Superferry's proposed ferry service "is or will be required by the present or future public convenience and necessity" and "is consistent with the public interest and the transportation policy set forth in Haw. Rev. Stat. § 271G-2." Ex. HSF 2 at 22, 24. To the extent Plaintiffs were advocating against operation of a ferry service, they were therefore advocating their own personal opinions, not public policy. The trial court therefore erred in its implicit determination that Plaintiffs vindicated a public policy against Hawaii Superferry.

b. There was no Necessity for Private Enforcement

In *Waiahole II,* the Hawai'i Supreme Court held that "the necessity for private enforcement and the magnitude of the resultant burden on the plaintiff" prong was not satisfied. The Court noted that cases in which attorney fees pursuant to private attorney general doctrine were proper were when the "government either completely abandoned, or actively opposed, the plaintiff's cause." *Waiahole II*, 96 Haw. at 31, 25 P.3d at 806 citing *Stewart v. Utah Public Service Com'n,* 885 P.2d 759, 783 (Utah 1994)(observing that the agency charged with representing consumer interests made no appearance at all); *Serrano v. Priest*, 569 P.2d 1303, 1315 n.20 (Cal. 1977) (noting that no governmental agency could reasonably have been expected to represent the rights asserted by plaintiffs).

In *Maui Tomorrow*, the Hawai'i Supreme Court agreed with the State that it did not "abandon" or "actively oppose" the plaintiff's cause when BLNR recognized the State's duty but believed that another agency, the Commission on Water Resource Management, rather than itself, was the appropriate agency to fulfill the State's duty, and "thus, the State was not abandoning its duty; rather, the BLNR was under the impression, although erroneous, that the duty was to be carried out by another agency." *Maui Tomorrow v. State, Bd. of Land and Natural Resources of State of Hawai'i*, 110 Haw. 234, 245, 131 P.3d 517, 528 (2006). The facts here are similar. HDOT cannot be said to have abandoned or actively opposed Plaintiff's cause. HDOT, in good faith, "was under the impression, although erroneous," that an exemption determination was proper. Until the Supreme Court's order on August 23, 2007 both the OEQC and the Second Circuit concurred with HDOT's exemption determination.

Plaintiffs also failed to satisfy this prong given that the magnitude of the resultant burden on the Plaintiffs is relatively small. Counsel provided Plaintiffs with several fee discounts. R11:3780-84. First, counsel for Plaintiffs discounted his hourly rate from $200 per hour to $190 per hour. *Id.*, ¶ 14. Second, counsel for Plaintiffs provided additional discounts over the course of the litigation totaling 18% of the total amount billed at the discounted rate of $190.00 per hour. *Id.* Consequently, Plaintiffs were charged a rate of approximately $156 an hour. Moreover, Plaintiffs' agreement with its counsel contemplate that counsel would undertake "considerable amounts of work...without the reasonable expectation that the Plaintiff entities would be able to fully compensate counsel for the work and compensation for this work would most likely occur only if Plaintiffs prevailed in the case and the Court also granted Plaintiffs' Motion for Reimbursement of Reasonable Attorney Fees and Costs." *Id.*, ¶ 16. In short, counsel did not expect Plaintiffs to fully compensate him. To date, Plaintiffs have paid approximately 33% of the discounted amount billed. *Id.*, ¶ 15. Accordingly, the magnitude of the burden on the Plaintiffs is potentially the incurrence of $52 per hour of legal fees shared among three entities. These numbers provided by counsel simply do not add up to a burden of great magnitude *upon Plaintiffs*. Although Plaintiffs offered facts which perhaps evidenced a burden of great magnitude upon counsel, Plaintiffs failed to demonstrate a resultant burden of great magnitude on the Plaintiffs sufficient to meet this prong.

The trial court's award of attorney's fees to Plaintiffs erred in its implicit determination of the need for private enforcement and the magnitude of the burden, if any, on Plaintiffs.

c. No People Stand to Benefit from the Judgment

The Hawai'i State Legislature has determined 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 be allowed to be used, while any environmental studies, including any environmental assessments or environmental impact statements, are conducted." Act 2, section 1(a). Accordingly, the Legislature concluded that the citizens of the State of Hawai'i suffered a detriment, not a benefit, from judicial decisions which prevented the continuation of large capacity ferry vessel service. In fact, Plaintiffs have conceded that "subsequent legislation has mooted Plaintiffs' claims." R10:3518. Given that subsequent

legislation mooted Plaintiffs' claims, there are no people who stand to benefit from any order or judgment of the trial court.

4. The Trial Court Abused its Discretion by Awarding More Fees than Plaintiffs Paid Their Counsel

Based on the foregoing arguments, the trial court should not have awarded any attorney's fees at all. It was a further abuse of discretion for the court to award an hourly rate more than the hourly rate Plaintiffs agreed to pay their counsel. There is "a strong presumption that the lodestar represents the reasonable fee." *Schefke v. Reliable Collection Agency, Ltd.*, 96 Haw. 408, 443 fn. 70, 32 P.3d 52, 87 fn. 70 (2001) (citations omitted). Attorney fees awarded should represent the lodestar amount which "equals the number of hours plaintiff's counsel spent on this case *multiplied by his hourly rate*." 96 Haw. at 443, 32 P.3d 52 at 87 (citations omitted)(emphasis added). Plaintiffs paid counsel a rate of approximately $156 an hour because counsel billed Plaintiffs at a rate of $190 per hour and provided Plaintiffs with a additional discount of 18% of the total amount billed. R11:3780-84 at ¶ 15. "[W]hen awarding attorneys' fees in favor of prevailing parties, it is generally *an abuse of discretion to award more than the prevailing parties agree to pay their attorneys for the particular services involved.*" *Morrison-Knudsen Co., Inc. v. Makahuena Corp.*, 5 Haw. App. 315, 322, 690 P.2d 1310, 1315, *reconsideration denied,* 5 Haw. App. 683, 753 P.2d 253, *cert. denied,* 67 Haw. 686, 744 P.2d 781 (1984)(emphasis added).

Although the Hawai'i Supreme Court has held that Hawai'i courts should be given discretion to enhance the lodestar fee when an attorney has been retained on a contingency fee basis, Plaintiffs here did not retain counsel on a traditional contingency basis. *Schefke*, 96 Haw. at 452, 32 P.3d at 96 (holding contingency enhancements are allowed in fee-shifting cases, which this action is not properly classified and affirming that *Morrison-Knudsen* was correctly decided). Even Plaintiffs conceded, "The agreement for compensation was admittedly not the type of contingency fee agreement utilized in personal injury lawsuits by which the client does not pay the attorney and the attorney is compensated through an entitlement to a percentage of damages awarded to the client." R11:3781-84 at ¶ 3.

The trial court awarded Plaintiffs attorney's fees in the amount of $200 per hour, R12:4115-4117 (App. G), which was more than the $190 per hour at which Plaintiff's counsel billed his time, R11:3781-3784 ¶ 14, and more than the $156 per hour he was paid, *Id.* ¶ 14, and

894

a rate that did not reflect that Plaintiffs' counsel had received actual payment of only thirty-three percent of the fees billed. *Id.* ¶ 15. Accordingly, even if a fee award was authorized by precedent – which it was not – those fees should have been capped at $156 an hour, *i.e.* what the parties agreed to pay their attorney for the particular services involved. The trial court abused its discretion by awarding Plaintiffs more than they agreed to pay for the particular services involved.

Moreover, even if Plaintiffs were entitled to an award of fees, "fees are to be awarded only on those claims on which Plaintiff prevailed," *not* based on time "spent on the entire case." *Schefke*, 96 Haw. at 408, 444, 32 P.3d at 88. The trial court erred when it failed to associate the amounts requested with any claims upon which Plaintiffs prevailed even before the enactment of Act 2. It also erred when it failed to exclude the amount of fees associated with Count II of Plaintiffs' first amended complaint which they voluntarily dismissed. R8:2834-41.

D. The Trial Court Erred in Awarding Costs to Plaintiffs

Plaintiffs requested fees in the amount of $5,442.44. R10:3517-3643 at 3544 . The Second Circuit erred by awarding this entire amount based on Haw. Rev. Stat. § 607-25 and the private attorney general doctrine.[4] R12:4115-4117. As argued above, Plaintiffs were not the "prevailing parties" in this litigation and, for this reason alone, they were therefore not entitled to costs under either § 607-25 or the private attorney general doctrine. Furthermore, the trial court erred in awarding costs under § 607-25 for the same reasons, also argued above, that it erred in awarding fees under that statute. Finally, there is no precedent in Hawai`i or elsewhere for awarding costs under the private attorney general doctrine.

Although the trial court was careful to explain that it was awarding only certain fees from August 24, 2007 onward, R12:4115-4117 (App. G), and although Plaintiffs requested costs that

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[4] Although Plaintiffs asserted that they were entitled to reimbursements of all costs allowed by HRCP Rule 54(d) and Haw. Rev. Stat. § 607-9, R10:3517-3643 at pp. 12-13, the Second Circuit only awarded fees and costs based on Haw. Rev. Stat. § 607-25 and the private attorney general doctrine. R12:4115-17 at 4116 (App. G). In any event, given that Plaintiffs were not the prevailing parties for the reasons discussed above, no costs could be permitted by either Haw. R. Civil Procedure Rule 54(d) or Haw. Rev. Stat. § 607-9.

predated August 24, 2007, R10:3517-3643 at 3637-40, the trial court failed to exclude costs incurred before August 24, 2007. The trial court therefore abused its discretion in awarding fees predating August 24, 2007, which could only have been awarded by the Hawai'i Supreme Court by a motion timely filed pursuant to Haw. R. App. Proc. 39(d)(2)(requiring a motion for fees and costs to be filed "no later than 14 days after the time for filing a motion for reconsideration has expired . . .").

Although the trial court indicated it would "not award for any cost items that are deemed overhead items, 2/13/08 Tr. at 42:21-22, it awarded Plaintiffs the entire amount they requested. Plaintiffs' costs included $471.47 for "supplies" and $52.08 for a conference room rental. Hawaii Superferry objected to these requests on the basis that these costs related to the operation of a law practice and were not allowable. *Wong v. Takeuchi*, 88 Haw. 46, 54, 961 P.2d 611, 619 (1998) ("As a general rule, routine expenses related to operating a law practice are not taxable costs[,] [t]herefore, [the claimant] would have to demonstrate a compelling rationale for the court to grant this expense."). Plaintiffs failed to demonstrate, and the Second Circuit failed to articulate, any compelling rationale to justify allowing these costs. As routine expenses related to operating a law practice are not taxable costs, the trial court abused its discretion in awarding them.

Plaintiffs also requested $50 for filing fees, R10:3517-3643 at 3637, and the trial court erred in awarding this amount. Plaintiffs filed this case in the Second Circuit and Plaintiffs' counsel practices on Maui. There was no explanation of what filing fees were incurred or why ex officio fees were incurred, and the trial court erred in awarding them. *Kamalu v. Paren, Inc.*, 110 Haw. 269, 279, 132 P.3d 378, 388 (2006) (holding that State was not required to pay filing fees that were not documented by party); *see also Kikuchi v. Brown,* 110 Haw. 204, 212, 130 P.3d 1069, 1077 (App. 2006) (holding that messenger fees for the routine task of delivering documents to court, is categorically outside the concept of "costs.").

The trial court also erred in awarding fees that Plaintiffs failed to justify with an appropriate itemization supporting reasonableness. See *Kikuchi*, 110 Haw. at 211, 130 P.3d at 1076; *Bjornen v. State Farm Fire & Cas. Co.*, 81 Haw. 105, 109, 912 P.2d 602, 606 (App. 1996). Without further explanation from counsel as to when and/or why these costs were incurred, it could only have been concluded that these are expenses that are more properly reflected as a part

of the counsel's overhead. Several of the requested costs did not reference a specific date and appear to be mere estimations.[5] For this reason, all of the costs requested must be denied given the absence of appropriate itemization supporting its reasonableness. *Schefke*, 96 Haw. at 459, 32 P.3d at 103 (vacating and remanding the court's order as to costs because "the court did not explain its ruling, and its reasons for doing so are not readily discernible.")

VI. RELEVANT STATUTES AND RULES

Statutes and rules pertinent to the points presented are set forth in Appendix A.

VII. CONCLUSION

Based on the foregoing reasons and authorities, Hawaii Superferry respectfully requests that the Intermediate Court of Appeals reverse the award of fees and costs to Plaintiffs in its entirety.

DATED: Honolulu, Hawai'i, July 8, 2008.

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[5] Without reference to a date or reason for travel, Plaintiffs requested airfare from Maui and airport parking. R10:3517-3643 at 3637. The trial court never required Plaintiffs to explain why inter-island travel was necessary to this case and why they sought travel expenses for apparently multiple passengers. Plaintiffs have failed to submit receipts or other documentation to support the costs requested, nor did they provide any explanation for the reasonableness or necessity of these charges. Without a basis to determine their reasonableness or necessity, the trial court abused its discretion in awarding these costs.