No. 28822

IN THE SUPREME COURT OF THE STATE OF HAWAII

COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. C&J COUPE FAMILY LIMITED PARTNERSHIP, Defendant-Appellant, and ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; MILES HUGH WILSON, *et al.*, Defendants.	CIVIL NO. 05-1-015K (Kona) (Condemnation) APPEAL FROM FIRST AMENDED FINAL JUDGMENT (filed September 27, 2007) THIRD CIRCUIT COURT Honorable Ronald Ibarra, Judge
COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. ROBERT NIGEL RICHARDS, TRUSTEE UNDER THE MARILYN SUE WILSON TRUST; C&J COUPE FAMILY LIMITED PARTNERSHIP; MILES HUGH WILSON, *et al.*, Defendants-Appellants.	CIVIL NO. 00-1-181K (Kona) (Condemnation) APPEAL FROM THE DENIAL OF THE POST-JUDGMENT MOTION OF DEFENDANT C&J COUPE FAMILY LIMITED PARTNERSHIP FOR STATUTORY DAMAGES PURSUANT TO HAW. REV. STAT. § 101-27 (FILED OCT. 11, 2007) THIRD CIRCUIT COURT Honorable Ronald Ibarra, Judge

DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION

DECLARATION OF ROBERT H. THOMAS

CERTIFICATE OF SERVICE

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COUNTY OF HAWAII, a municipal corporation, Plaintiff-Appellee, vs. C&J COUPE FAMILY LIMITED PARTNERSHIP, Defendant-Appellant,	CIVIL NO. 05-1-015K (Kona) (Condemnation) CIVIL NO. 00-1-181K (Kona) (Condemnation)

DEFENDANT-APPELLANT'S MOTION FOR RECONSIDERATION

Pursuant to Haw. R. App. P. 40, Defendant-Appellant C&J Coupe Family Limited Partnership ("Appellant") respectfully moves the Court to withdraw and reconsider the following portions of its Opinion filed April 21, 2009 ("Opinion"), and to award Appellant an additional $13,045.40 as damages pursuant to Haw. Rev. Stat. § 101-27 (1993) :

1. Section 101-27 requires payment of "all" damages incurred traceable to a failed condemnation, whether or not County prevailed on an ancillary procedural motion. The Opinion states the Appellant is not entitled to damages associated with the County of Hawaii's ("County") motion to transfer the consolidated appeals from the Intermediate Court of Appeals to this Court because "the County prevailed" on that motion. *See* slip op. at 29-30 ("Furthermore, although Appellant protests that the 6/17/08 and 6/24/08 entries 'were incurred in the course of the Condemnation 1 appeal[,]' it appears that those entries had to do with the County's motion to transfer to this court, a motion upon which the County prevailed. Therefore, those entries will also be excluded from the final amount."). However, liability for a failed or discontinued condemnation is not reduced or excused under section 101-27 if the condemnor happens to prevail on issues other than whether the property can be finally be taken, or prevails on ancillary procedural motions. The plain language of the statute compels County's liability for "all such damage as may have been

sustained by the defendant by reason of the bringing of the proceedings," and liability is not reduced proportionally if it prevails on motions:

> [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 damage 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.

Haw. Rev. Stat. § 101-27 (1993) (emphasis added). Liability was triggered by County's failure to take the property in Condemnation 1, not by whether it prevailed or lost any intermediate motion in the case. Had County not instituted Condemnation 1, Appellant would never have had to oppose a motion to transfer; having failed to take the property, County is liable for *all* damages, including fees incurred by Appellant opposing a procedural motion on which County prevailed. The damages award should include an additional $292.50 plus $13.78 GET, for a subtotal of $306.28. This amount is based on the entries of 6/17/08 and 6/23/08. *See* Opinion 35 n.10.

2. Oral argument preparation in Condemnation 1 was allocated to Condemnation 1. The Opinion also notes that Appellant is not entitled to recover damages for time incurred in Condemnation 1 preparing for oral argument (30.6 hours). *See* slip op. at 30 ("Therefore, because Appellant has failed to argue that the specific entries regarding supplementing the Record on Appeal and those regarding oral argument are related in their entirety to Condemnation 1, the amounts claimed for those entries are excluded from the lodestar amount."). Counsel did not split the time entries for oral argument preparation because although the time entries were not expressly *labeled* as having been incurred in Condemnation 1 exclusively, the time was in fact incurred solely in that case, and the entries were in fact segregated. *See* Defendant-Appellant's Request for Statutory Damages at 5 n.5 (filed Jan. 20, 2009) ("Request"); Defendant-Appellant's Response to Objections re: Request for Statutory Damages at 4 n.4 (filed Feb. 19, 2009). In accounting for attorney time, counsel's accounting system assigns a "client number" to each client, with separate "matter numbers" assigned to each separate case. After County instituted Condemnation 2, Counsel established a new, separate "matter number" for that case, and began contemporaneously accounting

for time incurred in each condemnation case separately, although the cases were consolidated for trial. Appellants separately appealed the separate judgments in Condemnation 1 and Condemnation 2, but the ICA *sua sponte* consolidated the appeals. Counsel maintained separate "matter numbers" for each appeal, and recorded time separately. Consequently, individual time entries for Condemnation 1 were recorded only with the actual task performed (*i.e.*, "prepare for oral argument"), since they were recorded exclusively under the Condemnation 1 matter number, and further detail would have been redundant. Thus, the time entries for efforts in Condemnation 1 submitted with the Request were not labeled "prepare for oral argument in Condemnation 1" because counsel's time recordation and accounting system had *already* separated these time entries from those involving the same task in Condemnation 2. There was no need to segregate on the Request, and the damages award should include an additional $9,923.56 plus $446.56 GET for a subtotal of $10, 370.12. This amount is based on the entries from 08/26/08 through 10/16/08. *See* Opinion at 35 n.10.

3. "Defendant's costs of court" are not subject to reasonableness inquiry.

The Opinion also rejected the Appellant's request for $2,369.00 in copying costs because Appellant did not "make any argument as to why any additional photocopying costs requested [in addition to briefs and appendices] are reasonable." Slip op. at 25. The opinion concluded "recovery of damages under HRS § 101-27 is subject to reasonableness requirement." *See* slip op. at 25 ("Appellant's argument again fails to acknowledge that despite what 'actual' costs Appellant may have incurred, recovery of damages under HRS § 101-27 is subject to reasonableness requirement."). The plain language of section 101-27, however, reflects that recovery of costs of court as a separate element of damages is not subject to a reasonableness requirement. The statute provides that damages includes "the defendant's costs of court," and in the next phrase separately includes "a *reasonable* amount to cover attorney's fees paid by the defendant in connection therewith, and other *reasonable* expenses." Haw. Rev. Stat. § 101-27 (1993) (emphasis added). This language does not limit costs of court to "a reasonable amount" in the same fashion it limits "attorney's fees paid" and "other expenses." Inclusion of the term "reasonable" to modify two elements of damages, but its omission from the other reflects a legislative requirement that all costs of court actually incurred by the property owner are a recoverable. *See State v. Villeza*, 85 Haw. 258, 273, 942 P.2d 522, 537 (1997)

(where a statute with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed); *Levy v. Kimball*, 51 Haw. 540, 544, 465 P.2d 580, 583 (1970) (legislature's omission of language contained in a federal statute when it enacted the Hawaii version must be seen as intentional rather than as an oversight). Full recovery of "the defendant's costs of court" provided for in section 101-27 is not limited to copying costs for briefs and appendices under Haw. R. App. P. 39, and is not limited to non-extraordinary items. *See* slip op. at 9 (rules and statutes read *in pari materia* to avoid conflict, but if conflict arises, specific statute prevails). When it instituted Condemnation 1, County bore the risk of "all such damage" that resulted from that action, including "the defendant's costs of court." The damages award should include an additional $2,369.00.

DATED: Honolulu, Hawaii, May 1, 2009.

Respectfully submitted,

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