

NO. 22022

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

JACK T. KONNO; SAMUEL K. KALUA, III; GARY W. RODRIGUES;
UNITED PUBLIC WORKERS, AFSCME, LOCAL 646, AFL-CIO,
Plaintiffs-Appellants

vs.

COUNTY OF HAWAI'I; STEPHEN K. YAMASHIRO; DONNA FAY K.
KIYOSAKI; RICHARD WURDEMAN; MICHAEL BEN, as Director of
the Department of Personnel, County of Hawai'i; SPENCER
KALANI SCHUTTE; TAKASHI DOMINGO; JIMMY ARAKAKI; KEOLA CHILDS;
JIM RATH; JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS
1-10, DOE PARTNERSHIPS 1-10, ROE NON-PROFIT ORGANIZATIONS
1-10; and ROE GOVERNMENTAL ENTITIES 1-10,
Defendants-Appellees

and

WASTE MANAGEMENT OF HAWAII, INC., Intervenor/Appellee

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 93-281)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.,
and Circuit Judge Perkins, in place of Acoba, J., recused)

Plaintiffs-Appellants Jack T. Konno; Samuel K. Kalua,
III; Gary W. Rodrigues; United Public Workers, AFSCME, Local 646,
AFL-CIO [hereinafter collectively, the Plaintiffs], appeal the
following, filed by the third circuit court, the Honorable
Riki May Amano presiding: (1) Order (filed June 16, 1997)
Granting Motion (filed May 22, 1997) for Authorization to
Continue Private Operations at the Pu'uana'hulu Landfill and to

Receive Continued Payment for Private Operations; (2) Findings of Fact, Conclusions of Law and Order (filed September 5, 1997) and All Related Oral Rulings of the Court Leading to Said Determination; (3) Order (filed April 8, 1998) Regarding Transfer of Operations and Other Transitional Matters as Required by This Court's September 5, 1997 Order Regarding Plaintiffs' Written Request for Specific Additional Relief; (4) Order (filed May 13, 1998) Granting Plaintiffs' Second Written Request for Additional Relief Specific to Wage Losses Pursuant to September 5, 1997 Findings of Fact, Conclusions of Law and Order and November 10, 1997 Hearing; (5) Judgment Filed October 8, 1998; and (6) Notice of Entry of Judgment Filed October 8, 1998.

On appeal, the Plaintiffs contend that the circuit court: (1) erred by disobeying the instructions and mandate of this court by refusing to grant summary judgment to United Public Workers (UPW), approving further privatization by Waste Management of Hawaii, Inc. (WMI), and declining to order the transfer of all eight "landfill worker positions" at Pu'uana'hulu; (2) erred by failing to follow the law of the case established in Konno v. County of Hawai'i, 85 Hawai'i 61, 937 P.2d 397 (1997) (Konno I), on civil service coverage and exemptions at Pu'uana'hulu; (3) erred in its determination that illegal portions of the WMI-County contract were severable; and (4) erred in

denying legal, equitable, and statutory remedies to Plaintiffs consistent with "public interest concerns."

Upon carefully reviewing the record and the briefs submitted, we hold as follows:

(1) The circuit court fully complied with the mandate of Konno I. In Konno I, we vacated the circuit court's award of summary judgment in favor of the County in No. 18203 and instructed the circuit court to do the following: (a) grant the Plaintiffs a summary declaratory judgment; (b) fashion injunctive relief requiring the landfill to be transferred from private operation to County operation as rapidly as possible but consistent with practical and public interest concerns; (c) monitor the transition of the landfill's operation; and (d) determine whether the additional relief requested by the Plaintiffs was appropriate. Upon motion for reconsideration, we modified our decision to allow the circuit court to consider the practical concerns of the parties in the transition from private operation to County operation of the landfill. The circuit court complied with each of these instructions. When the parties could not agree on (1) which landfill positions could be privatized, and (2) a transition plan, the circuit court ordered the parties to brief these issues. Following briefing and evidentiary hearings, the circuit court determined that waste intake services

were customarily and traditionally performed by civil servants and thus could not be privatized under Konno I and set forth a transition plan. The circuit court held additional hearings to monitor the status of the transition and determine the Plaintiffs' request for additional relief. A declaratory judgment ordering transfer of the waste intake service positions from WMI to the County was subsequently entered. In sum, the circuit court fully complied with the mandate of Konno I.

(2) The circuit court did not relitigate the issue of civil service coverage and exemption at the Pu'uanahulu landfill. In Konno I, we drew the distinction between the (a) construction and (b) operation of the new landfill, and noted that the Plaintiffs did not oppose the private construction of the landfill but did strenuously object to the private operation of the landfill. We further noted that the County contracted with WMI for both construction and operation of the landfill and held that it was the operation of the landfill that conflicted with civil service laws and merit principles. We thus held that the contract between the County and WMI was void as a violation of public policy to the extent that it provides for the private operation at the Pu'uanahulu landfill. We did not specifically determine which landfill positions could be privatized but instead left it for the circuit court's determination on remand.

Contrary to the Plaintiffs' assertion in this case, we did not hold that the entire contract between the County and WMI was void. Thus, the circuit court's finding that the scope of the Konno I decision was limited to the operation of the landfill was not erroneous and did not relitigate the issue of civil service coverage and exemption.

(3) The circuit court correctly determined that the contract between WMI and the County was severable and was void only to the extent that it provided for privatization of waste intake services. The contract itself shows the parties intent that the contract be severable, inasmuch as it contained an express severability clause (§ 9.14), which provided that if "one or more of the provisions contained in this Agreement shall be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision in this Agreement" It is well settled that a partially legal contract may be upheld if the illegal portion is severable from the part which is legal. Ai v. Frank Huff Agency, Ltd., 61 Haw. 607, 607 P.2d 1304 (1980). The provision in the contract that privatized waste intake services was not essential to the agreement because WMI could perform the remainder of the contract without the inclusion of waste intake services. Any modifications to the contract were properly done

by agreement of the parties to make the contract consistent with the voided provisions and to comply with the mandate of Konno I.

(4) The circuit court did not abuse its discretion when it determined that neither WMI nor County officials were required to repay public funds paid to WMI for services it performed. First, Plaintiffs made no showing that WMI, the County, or County officials knew or should have known that the payments were improper, which is a condition precedent to liability under HRS § 76-53, see Hall v. Kim, 53 Haw. 215, 224, 491 P.2d 541, 547 (1971). Second, the issue presented in Konno I was one of first impression in the area of privatization, and there was no showing of bad faith by either the County or WMI in entering into the contract. Third, the circuit court followed the mandate issued by this court to (1) fashion injunctive relief transferring operation of the landfill from WMI to the County as rapidly as possible but consistent with practical and public interest concerns and (2) monitor the transition process. One of the practical issues faced by the circuit court was a fundamental dispute between the parties as to which landfill positions could be privatized, a dispute which necessitated evidentiary hearings and delayed the transition process. Payments to WMI for services rendered were not improper under these circumstances.

(5) The circuit court did not abuse its discretion when it denied Plaintiffs' claim for attorneys' fees. Ordinarily,

attorneys' fees cannot be awarded unless they are authorized by statute, stipulation, or agreement. S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 76 Hawai'i 396, 399 n.3, 879 P.2d 501, 504 n.3 (1994). In this case, Plaintiffs have not cited any statute, stipulation, or agreement in support of their claim for attorneys' fees. Plaintiffs' reliance on the common fund doctrine discussed in Montalvo v. Chang, 64 Haw. 345, 641 P.2d 1321 (1982), is misplaced, because no common fund was created, discovered, increased or preserved. Under these circumstances, the circuit court did not abuse its discretion in denying Plaintiffs' claim for attorneys' fees. Therefore,

IT IS HEREBY ORDERED that the circuit court's

(1) June 16, 1997 order granting Motion for Authorization to Continue Private Operations at the Pu'uana'hulu Landfill and to Receive Continued Payment for Private Operations,

(2) September 5, 1997 Findings of Fact, Conclusions of Law and Order and all related oral rulings, (3) Order Regarding Transfer of Operations and Other Transitional Matters as Required by the circuit court's September 5, 1997 Order and Regarding Plaintiffs' Written Request for Specific Additional Relief Pursuant to September 5, 1997 Findings of Fact, Conclusions of Law and Order,

(4) Order Granting Plaintiffs' Second Written Request for Additional Relief Specific to Wage Losses Pursuant to September 5, 1997 Findings of Fact, Conclusions of Law and Order

***** NOT FOR PUBLICATION *****

and November 19, 1997 Hearing, (5) Judgment filed October 8, 1998, and (6) Notice of Entry of Judgment filed October 8, 1998 are hereby affirmed.

DATED: Honolulu, Hawai'i, February 13, 2004.

On the briefs:

Herbert R. Takahashi,
Rebecca L. Covert
(Takahashi, Masui &
Vasconcellos) for
Plaintiffs-Appellants

Mark Bennett, Nadine Y.
Ando, and Carrie K.S.
Okinaga (McCorriston Miho
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Defendants-Appellees

Richard Rand (Torkildson,
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Appellee