

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 25872

IN THE SUPREME COURT OF THE STATE OF HAWAII

K. HANAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

TIMOTHY FOSTER JONES,
Plaintiff/Counterclaim Defendant/Appellant/Cross-Appellee

vs.

OWNERS AND OCCUPANTS OF ADJOINING LANDS; STATE OF HAWAII,
Defendant/Appellee/Cross-Appellant/Cross-Appellee,

HOWARD RUGGLES GREEN, WARREN JAY GUNDERSON and JAMES WALKER
AUSTIN, TRUSTEES OF THE JAMES WALKER AUSTIN TRUST DATED JUNE 7,
1985; RICHARD F. LERT and CARL E. YORK, JR., TRUSTEES OF THE
DANIEL J. FAIRBANKS III TRUST DATED OCTOBER 31, 1986; HOWARD
RUGGLES GREEN and WARREN JAY GUNDERSON, TRUSTEES OF THE SIANA
AUSTIN TRUST DATED JUNE 22, 1990 and TRUSTEES OF THE JAMES WALKER
AUSTIN III TRUST DATED JUNE 22, 1990,
Defendants/Counterclaimants/Appellees/Cross-Appellants,

BURK W. JONES AND JOAN DIANE JONES, TRUSTEES UNDER THE BURK W.
JONES AND JOANIE D. JONES REVOCABLE LIVING TRUST AGREEMENT DATED
JANUARY 15, 1993, Defendants/Appellants/Cross-Appellees,

HEIRS AND ASSIGNS OF KAINIKI (k); HEIRS AND ASSIGNS OF
KALAWAIANUI (w); OFFICE OF HAWAIIAN AFFAIRS; HEIRS AND ASSIGNS OF
ANNIE LEI WINCHESTER (including LOWELL THOMAS YOON, WESLEY KAIWI
NUI YOON and FERN MAHEALANI YOON); HEIRS AND ASSIGNS OF MABEL
K.P. CUMMINGS (also known as Mabel G. Cummings and as Mabel Gahan
Cummings); HEIRS AND ASSIGNS OF MAPUANA NAILIMA (also known as
Mapuana Kishi); HEIRS AND ASSIGNS OF HELEN FULLER (also known as
Helen S. Fuller and as Helen Scott Fuller); and Heirs of persons
named above who are deceased, or persons holding under said
Heirs; HERBERT A.K. CAMPOS; HAUNANI CAMPOS OLDS; MARIELENA R.
MEYER; CHARLES PILA; HARRY G. CUMMINGS, JR.; MARGARET T.
CUMMINGS; IRENE MILILANI BISHAW, RUSSEL GEORGE KALEOLANI PHIFER,
JOHN K. PERREIRA aka JOHN KAWAI PERREIRA; DOE DEFENDANTS 4
THROUGH 100; and all persons or corporations unknown claiming any
right, title estate, lien or interest in the real property
described in Plaintiffs' Complaint adverse to Plaintiffs'
ownership and TO ALL WHOM IT MAY CONCERN, Defendants.

BURK W. JONES AND JOAN DIANE JONES, TRUSTEES UNDER THE BURK W.
JONES AND JOANIE D. JONES REVOCABLE LIVING TRUST AGREEMENT DATED
JANUARY 15, 1993, Plaintiffs/Counterclaim
Defendants/Appellants/Cross-Appellees,

vs.

HOWARD RUGGLES GREEN, WARREN JAY GUNDERSON and JAMES WALKER AUSTIN, TRUSTEES OF THE JAMES WALKER AUSTIN TRUST DATED JUNE 7, 1985; RICHARD F. LERT and CARL E. YORK, JR., TRUSTEES OF THE DANIEL J. FAIRBANKS III TRUST DATED OCTOBER 31, 1986; HOWARD RUGGLES GREEN and WARREN JAY GUNDERSON, TRUSTEES OF THE SIANA AUSTIN TRUST DATED JUNE 22, 1990 and TRUSTEES OF THE JAMES WALKER AUSTIN III TRUST DATED JUNE 22, 1990, Defendants/Counterclaimants/Appellees/Cross-Appellants/Cross-Appellees,

OWNERS AND OCCUPANTS OF ADJOINING LANDS; STATE OF HAWAII, Defendant/Appellee/Cross-Appellant/Cross-Appellee,

TIMOTHY FOSTER JONES, Defendant/Counterclaim Defendant-Appellant/Cross-Appellee,

IRENE MILILANI BISHAW; RUSSEL GEORGE KALEOLANI PHIFER; JOHN K. PERREIRA (also known as John Kawai Perreira); HEIRS AND ASSIGNS OF NAKOKO (k); HEIRS AND ASSIGNS OF A. ROSA; OFFICE OF HAWAIIAN AFFAIRS; HEIRS AND ASSIGNS OF THEODORE DUDOIT (also known as Theodore Nawahine Dudoit); HEIRS AND ASSIGNS OF ANNE LEI WINCHESTER (including LOWELL THOMAS YOON, WESLEY KAIWI YOON and FERN MAHEALANI YOON); HEIRS AND ASSIGNS OF MABEL K.P. CUMMINGS (also known as Mabel G. Cummings and as Mabel Gahan Cummings); HEIRS AND ASSIGNS OF MAPUANA NAILIMA (also known as Mapuana Kishi); HEIRS AND ASSIGNS OF HELEN FULLER (also known as Helen S. Fuller and as Helen Scott Fuller); and Heirs of persons named above who are deceased, or persons holding under said Heirs; HERBERT A.K. CAMPOS, HAUNANI CAMPOS OLDS, PATRICK CAMPOS, MARIELENA R. MEYER, CHARMAINE D. ARMITAGE; DOE DEFENDANTS 6 through 100; and all other persons or corporations unknown claiming any right, title, estate, lien or interest in the real property described in Plaintiffs' Complaint adverse to Plaintiffs' ownership and TO ALL WHOM IT MAY CONCERN, Defendants.

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NOS. 98-0355 and 98-0358)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff/Counterclaim Defendant/Defendant/
Appellant/Cross-Appellee Timothy Foster Jones ("Tim") and
Plaintiffs/Counterclaim Defendants/Defendants/Appellants/Cross-
Appellees Burk W. Jones and Joan Diane Jones, in their capacities

as Trustees Under the Burk W. Jones and Joanie D. Jones Revocable Living Trust Agreement Dated January 15, 1993 (collectively "Burk")¹ jointly appeal from the June 6, 2003 order of the Circuit Court of the Second Circuit² ("circuit court") granting in part and denying in part Defendants/Counterclaimants/Appellees/Cross-Appellants' Trustees of the Daniel J. Fairbanks III Trust Dated October 31, 1986, Trustees of the Siana Austin Trust Dated June 22, 1990, and Trustees of the James Walker Austin Trusts Dated June 7, 1985 and June 22, 1990 (hereinafter collectively referred to as "the Austin and Fairbanks Trustees" or "the A&F Trustees")³ joint motion for costs and pre-judgment interest. The circuit court awarded a total of \$19,214.75 in costs, but no pre-judgment interest, pursuant to its June 6, 2003 order.

On appeal, Tim and Burk argue that: (1) the circuit court erroneously deemed the A&F Trustees the prevailing parties in this litigation because they prevailed on what the circuit court determined to be the "main issue" in the case. Tim and Burk claim that they would have been declared the prevailing parties had the circuit court "balanced all of the claims presented[;]" (2) alternatively, "the question of who is the

¹ Because (1) Burk Jones was named "individually" (without specific mention of Joan) as a captioned plaintiff/defendant at various points in the pleadings and in the record on appeal itself, and (2) Burk attended and participated in various proceedings (e.g. in depositions), while it appears that Joan did not, we will use the shorthand "Burk" to refer to both Burk and Joan as trustees of their revocable living trust for purposes of expediency and clarity, despite the technical inaccuracy.

² The Honorable Shackley F. Raffetto presided.

³ The parties as well as the circuit court referred to the A&F Trustees as the "Austin Defendants" throughout the course of litigation, omitting mention of the Fairbanks Trustees.

prevailing party is . . . too close to call [such that] the parties should bear their own costs[]" (boldface emphasis omitted) (capitalization omitted); and (3) even assuming that the A&F Trustees had been properly deemed the prevailing parties to this litigation, the A&F Trustees' motion for costs was improperly granted due to the movants' failure to remove certain submitted costs that had been waived due to a settlement agreement disposing of, inter alia, Tim and Burk's access and utility easement claim, where costs related to the settled claims were expressly to be borne by the parties.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we resolve Tim and Burk's arguments as follows:

(1) Tim and Burk challenge the circuit court's finding of fact "that the accretion claims were the main issue in dispute in the case and since [the A&F Trustees] prevailed on those claims, they are the prevailing parties even though they did not prevail on all claims[]" on the grounds that the circuit court should have instead balanced all of the disputed claims in the case. Tim and Burk allege that based upon their prevailing on all decided claims except for the accretion claim, they were, on balance, the prevailing parties in this case. Upon review, we observe that: (1) the circuit court set forth a reasonable, legitimate rationale for declaring the A&F Trustees the prevailing parties consonant with this court's caselaw (see Tradewinds Hotel v. Cochran, 8 Haw. App. 256, 269, 799 P.2d 60, 68 (1990) (citing Food Pantry v. Waikiki Business Plaza, Inc., 58

Haw. 606, 620, 575 P.2d 869, 879 (1978)); and (2) Tim and Burk have arguably demonstrated (as they did below) a second, equally reasonable and legitimate rationale by which the circuit court could have instead deemed Tim and Burk the prevailing parties for purposes of awarding costs. However, this does not constitute an abuse of discretion by the circuit court, because the circuit court's selection of one of these two equally reasonable theories advanced by the parties (in this case, the A&F Trustees') was, by definition, well within the bounds of reason. See, e.g., Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 297, 141 P.3d 459, 470 (2006) (quoting Wong v. Takeuchi, 88 Hawai'i 46, 52, 961 P.2d 611, 617 (1998) (citation omitted)), and 7's Enters., Inc. v. Del Rosario, 111 Hawai'i 484, 489, 143 P.3d 23, 28 (2006); see also Food Pantry, 58 Haw. at 620, 575 P.2d at 879 (1978). We therefore hold that the circuit court did not abuse its discretion when determining that the A&F Trustees were the prevailing parties in the litigation, nor did it abuse its discretion in awarding costs to the A&F Trustees. See Stanford Carr Dev. Corp., Wong, and 7 Enters., Inc., supra.

(2) Because we hold that the circuit court did not commit an abuse of discretion when awarding costs, we also hold that Tim and Burk's alternative argument that the case was "[t]oo [c]lose [t]o [c]all" (such that no costs should be awarded) is unavailing.

(3) We lastly address Tim and Burk's final argument that the circuit court abused its discretion by awarding costs despite the A&F Trustees' failure to exclude certain costs associated with the access and utility easement claim or claims

in the case, because the parties had entered into a settlement agreement expressly providing that all attorney's fees and costs as to the access and utility easement claim (among others) would be borne by the parties. Specifically, Tim and Burk contend that the circuit court abused its discretion in awarding costs inasmuch as: (a) the A&F Trustees' request for costs was inappropriately premised upon a "cut-off" date of costs incurred (November 13, 2002), rather than an actual apportionment of costs related to particular claims; and (b) certain deposition transcript cost items were clearly in relation to the access and utility easements claim, yet were nonetheless submitted by the A&F Trustees to the circuit court in derogation of the settlement agreement.

After careful review, we hold as follows. First, as to the general apportionment of claims, Tim and Burk have, at most, pointed out the existence of an ambiguity (as to whether the A&F Trustees either (1) apportioned costs using a "cut-off date," or (2) conducted a proper apportionment of costs on a certain date), which is insufficient to overcome the strong presumption that the A&F Trustees, as the prevailing parties in this case, are entitled to their costs. See Pulawa v. GTE Hawaiian Tel, 2006 WL 2632326 at *15, 112 Hawai'i 3, ---, 143 P.3d 1205, --- (Sept. 14, 2006); see also Hawai'i Rules of Civil Procedure Rule 54(d)(1) (2000). Finally, as to Tim and Burk's assertion that the A&F Trustees improperly included costs related to the settled access and utility easement claim, we find that Tim and Burk have not provided us any meaningful record citations to deposition transcripts, court reporter invoices, or other supporting

material on the record for their claim. Therefore, this argument is waived. See e.g., HRAP Rule 28(b)(7) (2004).

Therefore,

IT IS HEREBY ORDERED that the judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, December 13, 2006.

On the briefs:

Michael R. Marsh and
Seth R. Harris (of Case Bigelow &
Lombardi) for Plaintiffs/Counterclaim
Defendants/Defendants/Appellants/
Cross-Appellees Timothy Foster Jones
and Burk W. Jones and Joan Diane
Jones, Trustees Under the Burk W.
Jones and Joanie D. Jones Revocable
Living Trust Agreement Dated
January 15, 1993

Michael A. Lilly and Valerie M.
Kato (of Ning Lilly & Jones) for
Defendants/Counterclaimants/
Appellees/Cross-Appellants
Trustees of the Daniel J.
Fairbanks III Trust (Dated
October 31, 1986), Trustees
of the Siana Austin Trust
(Dated June 22, 1990), and
Trustees of the James Walker
Austin Trusts (Dated June 7,
1985 and June 22, 1990)

