

NO. 25178

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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DAVIANN NAEOLE, fka DAVIANN JANE TABION,  
Plaintiff-Appellant

vs.

MADELYN D'ENBEAU, STATE OF HAWAI'I, Defendants/Cross-  
Claimants/Cross-Claim Defendants-Appellees

RENATA FOSTER-AU, Defendant/Cross-Claim Defendant-Appellee

and

JOHN DOES 1-10, Defendants

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MADELYN D'ENBEAU,  
Third-Party Plaintiff/Counterclaim Defendant-Appellee

vs.

FRANCIS T. O'BRIEN, KEVIN H.S. YUEN, EUGENIA ROMERO,  
Third-Party Defendants/Cross-Claimants/  
Cross-Claim Defendants-Appellees

ERNESTO ROMERO, Third-Party Defendant/Counterclaimant/  
Cross-Claimant/Cross-Claim Defendant-Appellee

and

JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS 1-10,  
DOE CORPORATIONS 1-10, and DOE GOVERNMENTAL AGENCIES 1-10,  
Third-Party Defendants

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APPEAL FROM THE SECOND CIRCUIT COURT  
(CIV. NO. 97-0096)

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SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and  
Circuit Judge Ayabe, in Place of Duffy, J., Recused)

On June 19, 2002, Plaintiff-Appellant Daviann Naeole (Naeole) filed a notice of appeal from (1) the October 19, 2001 stipulation for dismissal with prejudice of all claims and all parties, (2) the February 13, 2002 order of the second circuit court<sup>1</sup> (the court) granting the motion of Third-Party Defendants-Appellees Francis T. O'Brien (O'Brien) and Kevin H.S. Yuen (Yuen) for a charging lien and denying Naeole's motion to resolve attorney's fees and to release settlement proceeds, and (3) the May 20, 2002 order denying Naeole's motion for reconsideration of the February 13, 2002 order.

This court does not have jurisdiction over Naeole's appeal from the October 19, 2001 stipulation for dismissal. "A properly executed settlement agreement generally precludes future litigation for its parties." State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc., 90 Hawai'i 315, 323, 978 P.2d 753, 761 (1999) (citation omitted). Furthermore, "[a]s a general rule, voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal therefrom." S. Utsunomiya Enters., Inc. v. Moomuku Country Club, 75 Haw. 480, 495, 866 P.2d 951, 960 (1994) (citations omitted); Gibbs v. McClain, 964

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<sup>1</sup> The Honorable Reinette W. Cooper presided.

S.W.2d 850, 851 (Mo. Ct. App. 1998) (agreeing with an appellee's assertion "that a voluntary stipulated dismissal by the parties is not appealable"); cf. Sharp v. Hui Wahine, Inc., 49 Haw. 241, 249, 413 P.2d 242, 248 (1966) ("Normally a consent judgment fixing attorney's fees is not reviewable."); Tudor Ranches, Inc. v. State Compensation Ins. Fund, 77 Cal. Rptr. 2d 574, 577 (Cal. Ct. App. 1998) ("Ordinarily, a judgment entered pursuant to a stipulation is not appealable."). Therefore, the October 19, 2001 stipulation for dismissal is not an appealable order under Hawai'i Revised Statutes (HRS) § 641-1(a) (1993).<sup>2</sup>

With respect to her appeal of the February 13, 2002 order, Naeole argues that (1) the court erred in awarding fees to O'Brien and Yuen under quantum meruit principles in light of their contingency fee agreement<sup>3</sup> and their voluntary withdrawal

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<sup>2</sup> HRS 641-1(a) states:

(a) Appeals shall be allowed in civil matters from all final judgments, orders, or decrees of circuit and district courts and the land court, to the supreme court or to the intermediate appellate court, except as otherwise provided by law and subject to the authority of the intermediate appellate court to certify reassignment of a matter directly to the supreme court and subject to the authority of the supreme court to reassign a matter to itself from the intermediate appellate court.

<sup>3</sup> Paragraph 6 of the contingency contract states:

Client understands that Attorneys will investigate Client's claim and, if after so investigating, said claim does not appear to them to have merit, then attorneys shall have the right to terminate this Agreement. If suit has been filed, Attorneys will not withdraw without leave of court and shall not seek such leave of court without giving notice to the Guardian of the Property. In this event, Client shall be liable for any costs incurred as set forth hereinabove.

(continued...)

from the case, (2) O'Brien and Yuen withdrew prior to the settlement of the case and, as such, are barred from recovering fees, (3) the fees awarded to O'Brien and Yuen are excessive in comparison to what they would have received under the contingency agreement, (4) O'Brien and Yuen waived their fees in the October 19, 2001 stipulation, (5) O'Brien and Yuen's claim for fees should be against attorney Steven Songstad (Songstad) rather than Naeole since the claim stems from a fee-splitting agreement among the attorneys, (6) there was insufficient documentation in support of O'Brien and Yuen's hours worked, (7) due to ethical conflicts, O'Brien and Yuen were not working in the best interests of Naeole and should not be awarded fees, and (8) Songstad should not be awarded fees because his work was substandard, he did not advance Naeole's case, and he never entered into a written fee agreement with her.

Questions of contract interpretation are freely reviewable by the appellate court. Cho Mark Oriental Food, Ltd. v. K & K Int'l., 73 Haw. 509, 520, 836 P.2d 1057, 1063 (1992). The award of attorney's fees by the court is subject to the abuse of discretion standard. Sharp v. Hui Wahine, Inc., 49 Haw. 241, 244, 413 P.2d 242, 245 (1966). As to argument (1), because the

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<sup>3</sup>(...continued)  
(Emphasis added.)

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instant case involves an involuntary withdrawal based on ethical conflicts, paragraph 6 of the contingency contract does not apply and in such a situation the court may in its discretion award fees on the basis of quantum meruit. Stall v. First Nat. Bank of Buhl, 375 N.W.2d 841, 845-46 (Minn. Ct. App. 1985) (holding that where an attorney voluntarily withdraws from a contingent fee agreement with good cause due to a conflict of interest, the attorney may still maintain an action in quantum meruit to recover compensation). As to argument (2), it was not an abuse of discretion to award fees to O'Brien and Yuen, even though they had withdrawn prior to the final settlement because the court has discretion to award reasonable fees, "even before the conclusion of the client's case." Booker v. Midpac Lumber Co., 65 Haw. 166, 170, 649 P.2d 376, 379 (1982). As to argument (3), the total amount recovered by Naeole from the settlements was \$125,000, not \$75,000, and, in any event, the structure of the contingency contract is but one factor that the court may consider in making its determination of reasonable fees. See id. at 173, 649 P.2d at 381. As to argument (4), the October 19, 2001 stipulation<sup>4</sup> could not reasonably be interpreted as dismissing any claims by an attorney as to fees due from a client. As to argument (5),

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<sup>4</sup> The stipulation states that "[a]ll remaining claims by all parties are hereby dismissed with prejudice pursuant to Rule 41(c) of the Hawai'i Rules of Civil Procedure, with the parties to bear their own attorney's fees and costs."

the court apparently determined the award of attorneys fees on the basis of quantum meruit and not on the basis of any contract among or between any of the attorneys. As to argument (6), there was sufficient evidence for the court to reach a decision on the amount of fees due. See Hoddick, O'Connor & Marrack v. Lotsof, 6 Haw. App. 296, 303, 719 P.2d 1107, 1113 (1986) [hereinafter Hoddick]. Based on the declarations submitted by O'Brien and Yuen, they were paid at an hourly rate of approximately \$141 based on the \$25,000 that they ultimately received. As to argument (7), the court did not abuse its discretion when it awarded fees to O'Brien and Yuen inasmuch as (a) O'Brien and Yuen served as Naeole's counsel for eleven months before third-party claims were filed against them, (b) the majority of their services for Naeole was performed during this time, (c) Yuen was present with Naeole at the February 16, 2001 and March 16, 2001 settlement meetings because Naeole had requested the assistance of O'Brien and Yuen, (d) at that point, O'Brien and Yuen's work could not have been compromised by conflict since all third-party claims against O'Brien and Yuen were dismissed with prejudice by January 29, 2001, and (e) the court noted the "twenty-three volumes of the case of documents and filings and pleadings and memoranda and motions" as evidence that O'Brien and Yuen's work did advance the case.

As to argument (8), the record reflects that Naeole failed to establish that the court abused its discretion. The record shows that Songstad did serve as Naeole's legal counsel for almost two years and did file motions and appear on Naeole's behalf at settlement meetings. The amount awarded to Songstad, \$10,000, amounted to 8% of Naeole's total settlement recovery of \$125,000.<sup>5</sup> Finally, because Naeole did not present any new evidence or new arguments that had not been presented at the previous motion, the court did not abuse its discretion when it denied Naeole's February 19, 2002 motion for reconsideration. Therefore,

In accordance with Hawai'i Rules of Appellate Procedure Rule 35, and after carefully reviewing the record and the briefs submitted by the parties, and duly considering and analyzing the law relevant to the arguments and issues raised by the parties,

IT IS HEREBY ORDERED that Naeole's appeal from the October 19, 2001 stipulation is dismissed for lack of jurisdiction.

IT IS HEREBY FURTHER ORDERED that the court's February 13, 2002 order granting O'Brien and Yuen's motion for a

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<sup>5</sup> It should be noted that the total fees paid to the attorneys, \$25,000 split between O'Brien and Yuen and \$10,000 to Songstad, still amounts to less than the amount that O'Brien and Yuen would have received if the original contingency contract had been enforced. While this is not dispositive in evaluating abuse of discretion, this court has previously held such analysis to be a relevant factor, noting that, "the contract and the reasonably estimated value of the case should be considered in fixing a reasonable attorney's fee." Booker, 65 Haw. at 173, 649 P.2d at 381.

charging lien and denying Naeole's motion to resolve attorney's fees and to release settlement proceeds, and its May 20, 2002 order denying Naeole's motion for reconsideration of the February 13, 2002 order, from which the appeal is taken, are affirmed.<sup>6</sup>

DATED: Honolulu, Hawai'i, September 1, 2004.

On the briefs:

Daviann Tabion, plaintiff-appellant, *pro se*.

Francis T. O'Brien, third-party defendant/cross-claimant/cross-claim defendant-appellee, *pro se*.

Kevin H.S. Yuen, third-party defendant/cross-claimant/cross-claim defendant-appellee, *pro se*.

Steven Booth Songstad, appellee, *pro se*.

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<sup>6</sup> This disposition is not intended to affect claims of alleged ethical violations, if any, brought by Naeole with the Office of Disciplinary Counsel.