NO. 26620

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

MARK J. MEYER, Petitioner-Appellee, v.
ROBERT KENNEDY, Respondent-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Civ. No. 1SS03-1-01619)

MEMORANDUM OPINION
(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Respondent-Appellant Robert Kennedy (Kennedy), appeals from a District Court of the First Circuit, Honolulu Division (district court) judgment in this injunction against harassment case. Based on a careful review of the issues raised, authority cited and arguments made by the parties, we decline Kennedy's invitation to review the challenged prejudgment orders but vacate the district court's denial of Kennedy's request for costs and attorney's fees and remand for further proceedings.

I.

On November 3, 2003, a Petition for Ex Parte Temporary Restraining Order and for Injunction Against Harassment (TRO) was filed against Kennedy by Petitioner-Appellee Mark J. Meyer (Meyer) pursuant to Hawaii Revised Statutes (HRS) § 604-10.5 (Supp. 2006).[1] Meyer, *pro se*, was an employee at Windward

[1] This provision, last amended in 1999, provides, in pertinent part:
(continued...)

[1](...continued)

§604-10.5 Power to enjoin and temporarily restrain harassment. (a) For the purposes of this section:

"Course of conduct" means a pattern of conduct composed of a series of acts over any period of time evidencing a continuity of purpose.

"Harassment" means:

(1) Physical harm, bodily injury, assault, or the threat of imminent physical harm, bodily injury, or assault; or

(2) An intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer emotional distress.

(b) The district courts shall have power to enjoin or prohibit or temporarily restrain harassment.

(c) Any person who has been subjected to harassment may petition the district court of the district in which the petitioner resides for a temporary restraining order and an injunction from further harassment.

(d) A petition for relief from harassment shall be in writing and shall allege that a past act or acts of harassment may have occurred, or that threats of harassment make it probable that acts of harassment may be imminent; and shall be accompanied by an affidavit made under oath or statement made under penalty of perjury stating the specific facts and circumstances from which relief is sought.

(e) Upon petition to a district court under this section, the court may temporarily restrain the person or persons named in the petition from harassing the petitioner upon a determination that there is probable cause to believe that a past act or acts of harassment have occurred or that a threat or threats of harassment may be imminent. The court may issue an ex parte temporary restraining order either in writing or orally; provided that oral orders shall be reduced to writing by the close of the next court day following oral issuance.

(f) A temporary restraining order that is granted under this section shall remain in effect at the discretion of the court for a period not to exceed ninety days from the date the order is granted. A hearing on the petition to enjoin harassment shall be held within fifteen days after the temporary restraining order is granted. In the event that service of the temporary restraining order has not been effected before the date of the hearing on the petition to enjoin, the court may set a new date for the hearing; provided that the new date shall not exceed ninety days from the date the temporary restraining order was granted.

(continued...)

Boats,Inc. (Windward Boats) and Kennedy was Meyer's supervisor at Windward Boats and terminated Meyer's employment. In his Petition, Meyer claimed,

> Robert Kennedy, has made many threats regarding employment since my work related injury at Windward Boats. His threats have included harassment of physical harm outside the work place. Last date was 10-31-03 was in front of office staff. Robert's atitude [sic] to anyone is very disturbbing [sic] due to his drinking. Robert should seek counceling [sic] in abuse center. The Petitioner did speak to police on 10-31-03.
>
> The Petitioner would like the Respondent to stay away 1,000 ft. The Petitioner will be making complaint's [sic] to the E.P.A. Building & safty, [sic] fire department, OSHA. Windward Boats is an unsafe working enviorment [sic].

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[1](...continued)

> The parties named in the petition may file or give oral responses explaining, excusing, justifying, or denying the alleged act or acts of harassment. The court shall receive all evidence that is relevant at the hearing, and may make independent inquiry.
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> If the court finds by clear and convincing evidence that harassment as defined in paragraph (1) of that definition exists, it may enjoin for no more than three years further harassment of the petitioner, or that harassment as defined in paragraph (2) of that definition exists, it shall enjoin for no more than three years further harassment of the petitioner; provided that this paragraph shall not prohibit the court from issuing other injunctions against the named parties even if the time to which the injunction applies exceeds a total of three years.
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> Any order issued under this section shall be served upon the respondent. For the purposes of this section, "served" shall mean actual personal service, service by certified mail, or proof that the respondent was present at the hearing in which the court orally issued the injunction.
>
> Where service of a restraining order or injunction has been made or where the respondent is deemed to have received notice of a restraining order or injunction order, any knowing or intentional violation of the restraining order or injunction order shall subject the respondent to the provisions in subsection (h).
>
> Any order issued shall be transmitted to the chief of police of the county in which the order is issued by way of regular mail, facsimile transmission, or other similar means of transmission.
>
> (g) The court may grant the prevailing party in an action brought under this section, costs and fees, including attorney's fees.

> Robert Kennedy is the manager at this facility. I believe the Respondent will retaliate against me.

The district court immediately issued an order that temporarily restrained Kennedy from contacting Meyer and required Kennedy to surrender his firearms and ammunition to the Honolulu Police Department for safekeeping. Pursuant to HRS §604-10.5(f), the district court also scheduled a hearing for November 18, 2003, to determine whether Meyer was entitled to a longer-term injunction against harassment.

At the hearing, the district court,[2] at Meyer's request, ordered Meyer and Kennedy to participate in mediation, noting that its "protocol is to send [the case] to mediation first." The protocol was not described in the record. However, it appears, based on the court's subsequent comments, that mediation would be ordered at the request of only one of the parties ("[if Meyer] still at that point wants a full blown mediation with the mediation panel, then, of course, I will have to follow the court's protocol and refer it out").

It appears that Meyer had not been served with Kennedy's responsive pleadings prior to the hearing. This was, according to Kennedy, because Meyer's address had been sealed. The court then passed the case to attempt a resolution in chambers. Upon their return to court, the district court reaffirmed its mediation order over Kennedy's objection that he had no notice that the case could be placed in mediation, had

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[2] The Honorable Faye M. Koyanagi presided.

come to court prepared to defend, including bringing three witnesses to testify, and that the delay had a "severe impact" on his Second Amendment right to bear arms. The district court noted Kennedy's objection, observed that the sooner the mediator was contacted the sooner mediation could occur and rescheduled the hearing date to December 18, 2003, in the event that Meyer and Kennedy could not resolve the matter through mediation.[3]

On December 8, 2003, The Mediation Center of the Pacific telefaxed a notice to the district court to the effect that the scheduled mediation was not held. The district court set aside its order requiring mediation and advanced the hearing date to December 12, 2003.

Following the hearing, the district court[4] denied Meyer's petition for an injunction against harassment and dismissed the petition with prejudice. Upon Kennedy's oral request for attorney's fees and costs, the court stated that it would be denied. An order releasing Kennedy's firearms was issued the same day.

On December 30, 2003, Kennedy's written motion to reconsider his request for attorney's fees and costs was summarily denied. Kennedy based his motion on HRS § 604-10.5(g)

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[3] On November 28, 2003, Kennedy filed a "Petition for Writ of Mandamus to Issue Forthwith with the Hawaii Supreme Court," requesting an order directing the District Court of the First Circuit, Honolulu Division (district court) to dissolve the temporary restraining order issued in this case because a hearing had not been held within the time proscribed in HRS § 604-10.5(f), or in the alternative, to conduct the hearing forthwith. On December 19, 2003, the Hawai'i Supreme Court denied the petition, holding that Kennedy had an adequate remedy by way of appeal if he was dissatisfied with the order or judgment filed in this case.

[4] The Honorable Barbara Richardson presided.

and prayed for attorney's fees in the amount of $5,295 and costs in the amount of $326.87 for a total of $5,621.87.

From the Judgment entered on May 13, 2004 in Kennedy's favor, he timely appealed. On appeal, Kennedy asserts that this court should (a) reverse the district court's order compelling mediation and (b) vacate the order denying Kennedy's motion for attorney's fees and costs, and remand this case to the district court with instructions to award reasonable attorney's fees and costs to Kennedy.

II.

DISCUSSION

Kennedy argues that the district court exceeded its authority under HRS § 604-10.5 when it (1) ordered Kennedy and Meyer to participate in mediation, (2) continued the hearing on the final disposition of Meyer's petition for the purpose of attempting the mediation, because HRS § 604-10.5(f) requires the hearing to take place within 15 days after the district court granted the temporary restraining order and (3) denied Kennedy's motion for attorney's fees and costs, because HRS § 604-10.5(g) authorizes such an award to Kennedy as the prevailing party. Meyer is a *pro se* litigant, and does not directly respond to Kennedy's arguments. Instead, Meyer continues to assert that Kennedy was harassing him and asks this court to affirm the order denying Kennedy's attorney's fees.

A. Whether the district court erred in postponing the hearing and referring this matter to mediation is moot.

Initially, we examine whether we have jurisdiction to consider Kennedy's appeal.

> [I]t is axiomatic that we are "under an obligation to ensure that [we have] jurisdiction to hear and determine each case and to dismiss an appeal on [our] own motion where [we] conclude [we] lack[] jurisdiction." *BDM, Inc. v. Sageco, Inc.*, 57 Haw. 73, 73, 549 P.2d 1147, 1148 (1976). "When we perceive a jurisdictional defect in an appeal, we must, *sua sponte*, dismiss that appeal." *Familian N[.W.], Inc. v. Cent[.] Pac. Boiler & Piping, Ltd.*, 68 Haw. 368, 369, 714 P.2d 936, 937 (1986).

Leslie v. Estate of Tavares, 109 Hawai'i 8, 11, 122 P.3d 803, 806, *reconsideration denied*, 109 Hawai'i 423, 127 P.3d 83 (2005) (ellipsis omitted) (quoting Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1129 (1986)). Generally, courts have no jurisdiction to decide moot cases. Territory v. Aldridge, 35 Haw. 565, 567-68 (1940). Rather, our duty "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." Wong v. Bd. of Regents, 62 Haw. 391, 395, 616 P.2d 201, 204 (1980) quoting Castle v. Irwin, 25 Haw. 786, 792 (1921).

Here, in his first two points on appeal, Kennedy asks that this court vacate the district court's orders compelling mediation and continuing the hearing. At this point in time, the former has been rescinded and the hearing has been held. As a result, the relief Kennedy seeks would serve no practical purpose

and these claims are moot. See Lathrop v. Sakatani, 111 Hawai'i 307, 313, 141 P.3d 480, 486 (2006) (case was moot where appellate court was not able to grant any effective relief).

However, "[t]here is a well-settled exception to the rule that appellate courts will not consider moot questions." Johnston v. Ing, 50 Haw. 379, 381, 441 P.2d 138, 140 (1968). As the United States Supreme Court and Hawai'i Supreme Court have subsequently made clear, this exception applies only in exceptional circumstances, Spencer v. Kemna, 523 U.S. 1, 17 (1998), where the issue is of public interest and is "capable of repetition, yet evading review." Lathrop, 111 Hawai'i at 314, 141 P.3d at 487 (2006) (internal quotation marks omitted) (quoting Carl Corp. v. State of Hawaii, Dep't of Educ., 93 Hawai'i 155, 165, 997 P.2d 567, 577 (2000)). The latter

> means that a court will not dismiss a case on the grounds of mootness where a challenged governmental action would evade full review because of the passage of time would present any single plaintiff from remaining subject to the restriction complained of for the period necessary to complete the lawsuit.

Life of the Land v. Burns, 59 Haw. 244, 251, 580 P.2d 405, 409-10 (1978) (quoting Valentino v. Howlett, 528 F.2d 975, 979-80 (7th Cir. 1976)). "[T]he capable-of-repetition doctrine applies only in exceptional situations, and generally only where the named plaintiff can make a reasonable showing that he will again be subjected to the alleged illegality." City of Los Angeles v. Lyons, 461 U.S. 95, 109 (1983) (citing DeFunis v. Odegaard, 416 U.S. 312, 319 (1974)).

While the district court's protocol[5] of postponing a hearing on the petition for injunction until the parties could attempt mediation may repeat, the possibility that it would be repeated by the court in litigation involving Kennedy is speculative at best and postponement of a hearing or referral to mediation is not the kind of question that is of the requisite public interest justifying application of this exception to the mootness bar here.

B. The Decision to Deny Attorney's Fees and Costs must Be Vacated and the Matter Remanded.

Notwithstanding the lack of jurisdiction over Kennedy's first two points on appeal, we retain jurisdiction to consider Kennedy's claim for attorney's fees and costs. See United States v. Ford, 650 F.2d 1141, 1144 (9th Cir. 1981), *cert. denied by* Midwest Growers Coop. v. United States, 455 U.S. 942 (1982) ("the question of attorney's fees is ancillary to the underlying action and survives independently under the Court's equitable jurisdiction" (citations omitted)).

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[5] The exact nature of this protocol is unclear on this record. Be that as it may, given our disposition on this issue, we express no opinion on the validity of the district court's practice of ordering the parties to mediate in a Chapter 604-10.5 action. However, we note that HRS § 607-10.5(f) states that the hearing shall be held within 15 days. We have also previously held, in Ling v. Yokoyama, 91 Hawai'i 131, 133-34, 980 P.2d 1005, 1007-08 (App. 1999) (interpreting the language of HRS § 604-10.5(f)(1998) and unchanged at the time of this petition), that the statute mandates a hearing on the petition be held within fifteen days and is not satisfied by merely setting the date for the hearing within that fifteen days.

Kennedy's claim for costs and attorney's fees[6] was based on HRS §604-10.5(g), which provides that, "[t]he court *may* grant the prevailing party in an action brought under this section, costs and fees, including attorney's fees." (Emphasis supplied.) Although it does not appear from the record[7] that Meyer opposed this motion below, he does appear to oppose this claim on appeal.

This jurisdiction follows the "American Rule" which dictates that each party bears the cost of their own litigation expenses. An exception to the rule is presented by a statute that allows for the payment of the prevailing party's fees by the losing party. Taomae v. Lingle, 110 Hawai'i 327, 331, 132 P.3d 1238, 1242 (2006). Nevertheless, even where a statute may authorize the assessment of fees and costs,

> [w]e review the trial court's denial of attorney's fees under the abuse of discretion standard. *Makani Dev. Co. v. Stahl*, 4 Haw. App. 542, 670 P.2d 1284 (1983). Discretion is abused whenever the court, in exercising it, "exceeds the bounds of reason, all of the circumstances before it being considered." *Ariyoshi v. Hawaii Pub. Employment Relations Bd.*, 5 Haw. App. 533, 542, 704 P.2d 917, 925 (1985) (citing *Berry v. Chaplin*, 74 Cal. App. 2d 669, 169 P.2d 453, 456 (1946)).

Coll v. McCarthy, 72 Haw. 20, 28-29, 804 P.2d 881, 887 (1991) (bold emphasis omitted). The exercise of discretion, however, is

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[6] Kennedy's first request for costs and fees was made, without documentation, at the December 12, 2003 hearing on the petition and was denied. He then proffered "Defendant['s] Non-Hearing Motion to Reconsider Request for Attorney's Fees and Costs" on December 22, 2003, which included a breakdown of his time and costs, which was denied on December 30, 2003.

[7] Although Kennedy served his written motion for fees on Meyer through the district court, there is nothing in the record indicating the document was actually sent by the district court to Meyer.

not without limits and there must be some support in the record for the exercise of that discretion.

With regard to costs, District Court Rules of Civil Procedure, Rule 54(d) provides, "[e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs[.]" In Schubert v. Saluni, 9 Haw. App. 591, 598, 855 P.2d 858, 862 (1993), *overruled on other grounds by* Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001), the district court's order denying costs was vacated because the record did not reveal the reason or reasons for the denial. With regard to attorney's fees, generally a trial court is not required to state its reasons for its decision. However, where the Hawai'i Supreme Court's review of the record led it to conclude that circuit court erred when it concluded the action did not meet the requirements of HRS § 607-14, it remanded the cause for further examination by the trial court. Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 33-34, 79 P.3d 119, 126-27 (2003).

In the instant case, the record does not reveal the reason or reasons for the denial of Kennedy's request for costs or attorney's fees. It appears that Meyer was not given the opportunity to respond to Kennedy's motion, so we do not know his position on the matter. As there was no order denying Kennedy's motion, but was only stamped "denied", we also do not have the benefit of the district court's analysis. Therefore, we must

vacate the denial of Kennedy's motion and remand the case for the district court to, at a minimum, state the reasons for its decision.

III.

CONCLUSION

The May 13, 2004 judgment of the District Court of the First Circuit, Honolulu Division is vacated with respect to the denial of Kennedy's request for costs and attorney's fees and remanded for further proceedings not inconsistent with this opinion.

DATED: Honolulu, Hawai'i, April 23, 2007.

On the briefs:

Joseph A. Gomes,
for Respondent-Appellant.

Mark J. Meyer,
Petitioner-Appellee, pro se.

Presiding Judge

Associate Judge

Associate Judge