NO. 29228

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STONERIDGE RECOVERIES, LLC, Plaintiff-Appellant,
v.
CITY & COUNTY OF HONOLULU, DEPARTMENT OF BUDGET & FISCAL SERVICES, Defendant-Appellee,
and
OFFICE OF ADMINISTRATIVE HEARINGS, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS, STATE OF HAWAII, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 07-1-0469)

MEMORANDUM OPINION
(By: Watanabe, Presiding J., Foley and Fujise, JJ.)

Plaintiff-Appellant Stoneridge Recoveries, LLC, (Stoneridge) appeals from the Amended Judgment filed on June 12, 2008 in the Circuit Court of the First Circuit[1] (circuit court). Stoneridge contends the circuit court abused its discretion when it (1) dismissed Stoneridge's third appeal for mootness in the June 12, 2008 Amended Order of Dismissal; (2) entered its June 12, 2008 Order Denying [Stoneridge's] Motion to Stay Judgment Pending Appeal and for Injunctive Relief; and (3) entered its June 12, 2008 "Order Granting in Part and Denying in Part [Stoneridge's] Non-hearing Motion to Amend or Alter Order and Judgment, and/or for Reconsideration Filed April 25, 2008."

On appeal, Stoneridge argues that the circuit court erred in (1) ruling that Stoneridge's emergency, short-term tow contracts with the City and County of Honolulu (CCH) mooted the issue of Stoneridge's entitlement to the original, solicited,

[1] The Honorable Eden Elizabeth Hifo presided.

five-year CCH towing contract and with respect to this ruling, failed to (a) remand the case to the hearings officer or (b) determine if Stoneridge's emergency, short-term, tow contracts were equivalent to the original solicited five-year tow contract; (2) failing to invoke the doctrine of judicial estoppel; and (3) dismissing Stoneridge's appeal without addressing Stoneridge's bad faith claim on the merits.

We disagree and affirm.

I. BACKGROUND

In May 2002, CCH solicited bids for motor vehicle towing services for zones I-II, III-IV-V, VI, VII, VIII, IX on the island of Oʻahu for a 60-month period from August 1, 2002 to July 31, 2007. Stoneridge submitted the highest bid for zone III-IV-V, but CCH inspected Stoneridge's Kapiʻolani lot and found the lot lacked proper governmental certification that the lot was zoned for vehicle storage, as contemplated under the bid solicitation. CCH rejected Stoneridge's bid. Stoneridge protested the rejection and alleged bad faith on the part of CCH administrators. CCH denied Stoneridge's protest. Stoneridge challenged this denial before the Office of Administrative Hearings of the State of Hawaiʻi Department of Commerce and Consumer Affairs (DCCA) and after DCCA dismissed Stoneridge's appeal, the circuit court. Stoneridge then brought a second similar challenge before the DCCA and after DCCA's dismissal, the circuit court. Stoneridge later withdrew the two circuit court appeals.

Because CCH could not find a qualified bidder for zones I-II and III-IV-V, it canceled the original solicitation, revised the bid requirements, and planned to re-solicit bids. Stoneridge sent three letters to CCH: (1) a demand for the award of the original five-year tow contract, (2) a protest to the proposed re-solicitation, and (3) a request that CCH award the

tow contract to Stoneridge on a temporary basis pending the resolution of Stoneridge's demand/protest.

After inspecting Stoneridge's Middle Street lot, CCH awarded Stoneridge an emergency tow contract on February 4, 2003. CCH re-awarded these contracts to Stoneridge through March 5, 2004, when CCH awarded the same contract to a third party for two months. Outside of this brief break, and since May 2004, Stoneridge has held this same contract on a continuous basis.

On March 20, 2003, CCH formally responded to Stoneridge's three letters by denying the demand for award of the original tow contract (letter 1) and the protest of re-solicitation (letter 2), and deeming the request for a temporary tow contract (letter 3) moot since Stoneridge had the requested contract with CCH. Stoneridge sought administrative review and then judicial review of CCH's denial.

At a January 2, 2008 hearing before the circuit court, Stoneridge and CCH stipulated that Stoneridge paid $7,000 less as a fee to CCH under the temporary tow contracts and that Stoneridge by April 1, 2008 would have provided tow services to CCH for five years. Based on these facts, the circuit court concluded that Stoneridge had received its requested relief and the issue of Stoneridge's entitlement to the original five-year-tow contract was moot.

Stoneridge timely appealed.

II. STANDARDS OF REVIEW

A. Mootness

"It is axiomatic that mootness is an issue of subject matter jurisdiction. Whether a court possesses subject matter jurisdiction is a question of law reviewable *de novo*." Hamilton v. Lethem, 119 Hawaiʻi 1, 4-5, 193 P.3d 839, 842-43 (2008) (internal quotation marks and citation omitted).

B. Administrative Agency Decisions-Secondary Appeals

> Review of a decision made by the circuit court upon its review of an agency's decision is a secondary appeal. The standard of review is one in which [the appellate] court must determine whether the circuit court was right or wrong in its decision, applying the standards set forth in HRS § 91-14(g) (1993) to the agency's decision.
>
> HRS § 91-14, entitled "Judicial review of contested cases," provides in relevant part:
>
> > (g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:
> >
> > (1) In violation of constitutional or statutory provisions; or
> >
> > (2) In excess of the statutory authority or jurisdiction of the agency; or
> >
> > (3) Made upon unlawful procedure; or
> >
> > (4) Affected by other error of law; or
> >
> > (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> >
> > (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
>
> Under HRS § 91-14(g), conclusions of law are reviewable under subsections (1), (2), and (4); questions regarding procedural defects under subsection (3); findings of fact under subsection (5); and an agency's exercise of discretion under subsection (6).

United Pub. Workers, AFSCME, Local 646, AFL-CIO, v. Hanneman, 106 Hawaiʻi 359, 363, 105 P.3d 236, 240 (2005) (brackets in original omitted) (quoting Paul's Elec. Serv., Inc. v. Befitel, 104 Hawaiʻi 412, 416, 91 P.3d 494, 498 (2004)). "Pursuant to HRS § 91-14(g), an agency's conclusions of law are reviewed de novo." United Pub. Workers, 106 Hawaiʻi at 363, 105 P.3d at 240 (internal quotation marks and citation omitted). "A circuit

court's conclusions of law are subject to *de novo* review." Paul's Elec. Serv., 104 Hawaiʻi at 420, 91 P.3d at 502.

III. DISCUSSION

A. THE CIRCUIT COURT CORRECTLY HELD THAT THE EMERGENCY TOW CONTRACTS MOOTED THE ISSUE OF STONERIDGE'S ENTITLEMENT TO THE FIVE-YEAR CCH TOW CONTRACT.

Stoneridge argues that the circuit court erred in dismissing Stoneridge's third appeal for mootness. The circuit court dismissed Stoneridge's appeal after concluding that CCH's continual awarding of temporary tow contracts to Stoneridge effectively served as the functional equivalent of the original five-year tow contract to which Stoneridge claimed entitlement. During oral argument on January 2, 2008, the circuit court explained this reasoning:

> I now also address the question of mootness and find that April 1, 2008, based upon the stipulation as to the length of time [Stoneridge] has had the temporary month to month at the approximately $13,000 rate that his clients had to pay the City instead of the $21,000 rate that they bid which they would had to pay had they been receiving the contract, that the five years will have expired on April 1, 2008. And therefore, even assuming the Court is correct that they should have gotten the award of the bid in the first place, the Court finds that they got temporary bid award on a month-to-month basis for the same length of time that the underlying disputed contract would have been, and therefore, the matter is moot and therefore the Court dismisses it as moot effective April 2, 2008.

The circuit court provided authority for its mootness ruling in its June 12, 2008 Amended Order of Dismissal:

> The Court finds this matter moot based on Okada Trucking v. Board of Water Supply, 99 Haw. 191, 195-6 (2002); CARL Corp. v. Department of Education, 93 Haw. 155 (2000); Wong v. Board of Regents, 62 Haw. 391 (1980) and the rationale in St. Paul Fire and Marine Insurance Co. v. Pepsico, 884 F.2d 688, 694 (2nd Cir. 1989), where the Second Circuit determined that a case was moot when the amount already recovered by the plaintiff exceeded the amount claimed inclusive of any reasonable attorney's fees and costs.
>
> In this case, the amount Appellant saved under five years of City and County "emergency" contracts during the

> pendency of its appeals for the same work, which is the subject of these appeals, compared with the $7,000 per month more it would have had to pay had the City and County awarded it the 5-year advertised contract, constitutes more than $400,000 in savings to Appellant.

Stoneridge argues that the above authorities do not support the extension of the mootness doctrine to the issue of its entitlement to the five-year tow contract. Stoneridge further argues that such an extension at least requires a remand for an evidentiary hearing to determine if the temporary tow contracts amounted to the functional equivalent of the five-year tow contract. We disagree.

The authorities cited in the circuit court's dismissal order are instructive. In Okada Trucking Co. v. Board of Water Supply, 99 Hawaiʻi 191, 53 P.3d 799 (2002), the Board of Water Supply (BWS) initially awarded a construction contract to Inter Island Environmental Services, Inc. (Inter Island). Id. at 192-93, 53 P.3d at 800-01. Okada Trucking Co. (Okada) filed for an administrative review, and the hearings officer terminated the contract with Inter Island. Id. at 193-94, 53 P.3d at 801-02. BWS then awarded the same contract to Okada. Id. at 194, 53 P.3d at 802. Inter Island appealed the award. Id. While the appeal ascended the rungs to the Hawaiʻi Supreme Court, Okada completed the construction contract. Id. at 195, 53 P.3d at 803. The supreme court ruled that Okada's completion mooted Inter Island's appeal because Inter Island's only relief available under the Procurement Code (contract termination) was no longer available. Id. at 196, 53 P.3d at 804. In reaching this holding, the court drew parallels with two cases: (1) Wong v. Bd. of Regents, Univ. of Hawaii, 62 Haw. 391, 396-97, 616 P.2d 201, 205 (1980) (the graduation of appellant mooted his suit to enjoin university disciplinary proceedings against him), and (2) CARL Corp. v. State of Hawaiʻi, Dep't of Educ., (CARL Corp. II) 93 Hawaiʻi 155,

164, 997 P.2d 567, 576 (2000) (termination of procurement contract mooted challenge of contract award to third party).

Okada Trucking holds that courts should apply the mootness doctrine where the aggrieved party has already received the equivalent of the requested relief. 99 Hawaiʻi at 196, 53 P.3d at 804. We conclude that a court cannot grant Stoneridge the relief it requests (the original five-year tow contract) because Stoneridge effectively received this relief through CCH's continual awarding of emergency tow contracts to Stoneridge for five years. This series of emergency tow contracts was the functional equivalent of the five-year tow contract Stoneridge sought. CCH essentially employed Stoneridge's tow services for Zones III-IV-V for a five-year period.

This court is not unmindful of Stoneridge's argument that had it been awarded the five-year tow contract, it would have invested in capital improvements and bettered its long-term position. Even if Stoneridge's inability to plan ahead and invest in the future may have resulted in a loss to Stoneridge, we agree with the circuit court that the reasoning in St. Paul Fire & Marine Insurance Co. v. PepsiCo, Inc., 884 F.2d 688 (2nd Cir. 1989), is applicable here. In St. Paul, PepsiCo paid St. Paul $1,600,000 pursuant to an interim arrangement, although St. Paul's complaint against PepsiCo pegged PepsiCo's potential liability at $1,020,000. Id. at 694. The United States Court of Appeals for the Second Circuit determined that St. Paul's case against PepsiCo was moot because St. Paul had already received what it demanded from PepsiCo. Id. Similarly, Stoneridge's savings of $7,000 per month under the emergency-tow contracts amounts to more than $400,000 in total savings over five years. We agree with the circuit court that this total savings moots any allegation of loss.

We do not think the application of St. Paul requires an evidentiary hearing to determine if the emergency tow contracts actually equate to the original five-year tow contract. It is undisputed that Stoneridge saved $7,000 a month on the emergency-tow contract and that Stoneridge continually provided tow services to CCH on this basis for five years. At a rate of $7,000 a month over five years, Stoneridge would have saved a total in fees to CCH of over $400,000. These facts strongly support the conclusion that the emergency tow contracts were the functional equivalent of the original five-year tow contract.

B. NO EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES TO STONERIDGE'S APPEAL.[2]

Courts recognize an exception to the mootness doctrine where the legal issues affect the public interest and are capable of repetition, yet evade review. See Okada Trucking, 99 Hawaiʻi at 196, 53 P.3d at 804. Although issues arising under the procurement code affect the public interest, courts refuse to apply an exception where these issues require "no additional authoritative determination." Id. at 197, 53 P.3d at 805 (quoting CARL Corp. II, 95 Hawaiʻi at 165, 997 P.2d at 577). Because we conclude that Stoneridge effectively received the relief it requested, there is "no additional authoritative determination" required on the issue of Stoneridge's entitlement to the original CCH five-year tow contract. We therefore decline to extend the mootness exception to this issue.

We affirm the circuit court's extension of the mootness doctrine to Stoneridge's agency appeal.

[2] No party argues for or against the application of an exception to the mootness doctrine. However, we address the issue *sua sponte*.

C. THERE IS NO MERIT TO STONERIDGE'S REMAINING POINTS OF ERROR.

Stoneridge argues that this court should judicially estop CCH from taking inconsistent positions. Stoneridge alleges that CCH in previous pleadings and arguments never argued that the emergency contracts were "the same as or the equivalent of the five-year Contract," yet CCH takes that position now. CCH denies this characterization of its position. We conclude that there is no basis for applying judicial estoppel on these facts. CCH previously argued that individual, temporary contracts differ from the five-year contract. CCH currently argues that the total benefit conferred on Stoneridge from CCH's continual awarding of these contracts moots any claim of entitlement to the five-year contract. We see no inconsistency between these positions.

Stoneridge also asserts a claim for bad faith pursuant to CARL Corp. v. State of Hawaiʻi, Department of Education, 85 Hawaiʻi 431, 946 P.2d 1 (1997), (CARL Corp. I) and argues that this authority requires us to remand this case for a determination of attorney's fees and costs to Stoneridge. CARL Corp. I provides the unsuccessful bidder a remedy where the bidder meets a three-prong test:

> [W]e hold that a protestor is entitled to recover its attorney's fees incurred in prosecuting its protest if: (1) the protestor has proven that the solicitation was in violation of the Code; (2) the contract was awarded in violation of HRS § 103D-701(f); and (3) the award of the contract was in bad faith.

Id. at 460, 946 P.2d at 30. Because CCH never awarded the five-year tow contract, Stoneridge cannot meet prong (2) of the test. Additionally, Stoneridge does not argue that CCH's awarding of the temporary contracts was done in bad faith.

We accordingly reject Stoneridge's remaining claims.

IV. CONCLUSION

The Amended Judgment filed on June 12, 2008 in the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawaiʻi, December 14, 2009.

On the briefs:

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Presiding Judge

Associate Judge

Associate Judge