*** FOR PUBLICATION ***

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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DFS GROUP L.P., a Delaware limited partnership, dba Hawaiian King Candies, Plaintff-Appellee

vs.

PAIEA PROPERTIES, a Hawai'i limited partnership, Defendant-Appellant

NO. 25662

REQUEST FOR ATTORNEYS' FEES ON APPEAL
(CIV. NO. 02-1-2012)

APRIL 3, 2006

MOON, C.J., LEVINSON, NAKAYAMA, AND ACOBA, JJ.
AND CIRCUIT JUDGE POLLACK, ASSIGNED BY REASON OF VACANCY,
MOON, C.J., CONCURRING SEPARATELY, WITH WHOM LEVINSON, J., JOINS

OPINION OF THE COURT BY NAKAYAMA, J.

Plaintiff-appellee DFS Group L.P., dba Hawaiian King Candies [hereinafter "DFS"], requests that this court award attorneys' fees in the amount of $133,555.88 and excise taxes in the amount of $5,565.28, for a total of $139,121.16, as reasonably and necessarily incurred on appeal.[1] For the following reasons, we grant in part and deny in part DFS' request for attorneys' fees. Furthermore, based upon the circumstances of this case, the matter is referred to the Office of

[1] Although DFS originally sought $141,761.79 in fees and $5,670.91 in excise taxes, DFS conceded a reduction of 7.8 hours in its reply memorandum. Accordingly, $2,535.00 should be deducted from the amount of fees requested and the requested taxes should be reduced by $105.63.

Disciplinary Counsel [hereinafter "ODC"] for an investigation as to whether the Hawai'i Rules of Professional Conduct [hereinafter "HRPC"] were violated.

I. BACKGROUND

The underlying appeal is the result of a dispute as to the terms of a November 18, 1996 commercial lease of warehouse space [hereinafter "the lease"] executed by Paiea Properties [hereinafter "Paiea"], as lessor, and DFS, as lessee.

Pursuant to Exhibit E, section 1(a) of the lease, DFS retained an option to renew the lease for one additional five-year term. In order to determine the "prevailing rent" for the five-year period, the lease incorporated an appraisal procedure authorizing the appointment of a certified appraiser to select either DFS' or Paiea's determination of the "prevailing rent," based upon whichever determination was closer to the appraiser's independent conclusion. The lease specifically provided that "[t]he appraiser's decision shall be final, conclusive and binding on Landlord and Tenant."

In a letter dated February 25, 2002, DFS purported to exercise its option under the lease and proposed the selection of Robert C. Hastings [hereinafter "Hastings"] as the appraiser responsible for determining the "prevailing rent." Paiea ultimately agreed to DFS' selection of Hastings. Thereafter, in a June 25, 2002 appraisal report, Hastings concluded that DFS' offer was closest to the market rent for the subject property.

In a June 30, 2002 letter addressed to DFS and Hastings, Paiea rejected the appraisal report stating that it was

not prepared in a manner consistent with the terms of the lease. Paiea specifically contended that Hastings' determination improperly included a reduction that accommodated DFS for the costs incurred in constructing permanent improvements. Paiea asserted that, pursuant to the terms of the lease, permanent improvements are owned by and for the benefit of Paiea, and therefore Hastings should not have deducted such costs from his calculation of the market rent. DFS and Hastings did not respond to Paiea's letter. Instead, on August 23, 2002, DFS filed a "Complaint for Declaratory Relief or in the Alternative for Confirmation of Arbitration Award and Entry of Final Judgment"[2] in the first circuit court. Paiea filed its answer on September 24, 2002.

On October 18, 2002, DFS filed a motion for summary judgment, requesting that the court confirm Hastings' appraisal report. DFS argued that there was no genuine issue of material fact inasmuch as: (1) Paiea unconditionally agreed to the selection of Hastings; (2) Paiea had a procedural mechanism available if it disputed the selection of the appraiser, and Paiea failed to make use of such mechanism; (3) Paiea unconditionally agreed, pursuant to the terms of the lease, that the appraiser's conclusion would be "final, conclusive, and binding" on the parties; and (4) Paiea only accused Hastings of being impartial, biased and corrupt after Hastings' appraisal report produced an adverse result. Paiea filed a memorandum in

[2] The circuit court construed the appraisal procedure as an arbitration.

opposition on November 6, 2002. Subsequently, on January 27, 2003, the circuit court, the Honorable Eden Elizabeth Hifo presiding, granted DFS' motion for summary judgment.

Paiea thereafter filed a timely notice of appeal on February 28, 2003. On appeal, Paiea argued that: (1) the circuit court erred by confirming the appraisal report inasmuch as it lacked the degree of certainty and definiteness required by law, such that the decision could lead to future litigation; (2) the circuit court erred by confirming the appraisal report because Hastings exceeded the authority conferred upon him by the terms of the lease; and (3) the circuit court erred in confirming the appraisal report in light of Hastings' evident bias and partiality. DFS filed its answering brief on August 12, 2003. On April 19, 2005, this court filed a summary disposition order stating that: (1) Paiea is not entitled to a vacation of the appraisal report inasmuch as Paiea neither moved the circuit court to vacate the report nor provided notice to DFS of its intent to vacate the report pursuant to Hawaii Revised Statutes [hereinafter "HRS"] § 658-11 (1993), repealed by 2001 Haw. Sess. L. Act 265, §§ 5, 8 at 811-813; (2) the appraisal report did not lack the degree of certainty and definiteness required by law inasmuch as the report clearly and definitely proposed a "prevailing rent" of $0.90 per square foot per month; and (3) the appraisal report required no clarification.

On May 16, 2005, DFS filed the present request for attorneys' fees incurred in connection with the underlying appeal.

II. DISCUSSION

A. The Lease Agreement Provides Authority for the Recovery of DFS' Attorneys' Fees Incurred on Appeal.

In TSA International, Ltd. v. Shimizu Corp., 92 Hawai'i 243, 263, 990 P.2d 713, 733 (1999) (citations omitted) (emphasis added), we set forth the following general principles related to the recovery of attorneys' fees:

> Generally, under the 'American Rule,' each party is responsible for paying his or her own litigation expenses. A notable exception to the 'American Rule,' however, is the rule that attorneys' fees may be awarded to the prevailing party where such an award is provided for by statute, stipulation, or agreement.

In the present case, the statutory exception to the "American Rule" is HRS § 607-14 (Supp. 1997) (emphasis added),[3] which provides that:

> [i]n all courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable.

Therefore, inasmuch as the lease constitutes a "contract in writing that provides for an attorney's fee," the determinative issue is whether the language of the lease authorizes the recovery of attorneys' fees in the present case. We conclude that it does.

The lease provides, in relevant part, that:

> [i]n the event of any action or proceeding brought by either party against the other based upon or arising out of any breach of the

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[3] HRS § 607-14 was subsequently amended in 2004, however the amendment does not have any substantive impact on the present analysis. See HRS § 607-14 (Supp. 2004).

> terms and conditions [thereof], the prevailing party shall be entitled to recover all reasonable costs, including reasonable attorneys' fees, from the other.

Invoking the foregoing provision, DFS asserts that it is entitled to recover attorneys' fees inasmuch as: (1) the lease provided specific procedures for an arbitration proceeding to resolve disputes over the determination of the "prevailing rent"; (2) Paiea refused to abide by the arbitrator's award; and (3) this court affirmed the circuit court's order granting summary judgment in favor of DFS on all claims, thereby establishing DFS as the prevailing party.

To the contrary, Paiea contends that the language of the lease authorizes the recovery of attorneys' fees only in actions brought for a breach of contract. Paiea thus appears to argue that because the complaint did not delineate a specific breach of contract cause of action, the clause authorizing the recovery of attorneys' fees was not triggered.

However, Paiea's interpretation construes the language of the lease too narrowly. The plain language of the lease authorizes the recovery of attorneys' fees by the prevailing party in "any action or proceeding" so long as the claim is "based upon or arising out of any breach of the terms and conditions [of the lease]." (Emphasis added.) In the present case, DFS alleged that the genesis of the dispute was Paiea's rejection of Hastings' determination of the "prevailing rent," despite Exhibit E, section (1)(f), in the lease, which states that "[t]he appraiser's decision shall be final, conclusive, and binding." Accordingly, the present action is clearly based upon

or arising out of a breach of the terms and conditions of the lease,[4] and DFS is authorized to recover reasonable attorneys' fees incurred in the underlying appeal, pursuant to section 19.06 of the lease.

B. DFS' Recovery of Attorneys' Fees is Not Limited to Twenty-Five Per Cent of the Judgment.

As previously mentioned, HRS § 607-14 authorizes an award of costs and fees "[i]n all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee." However, HRS § 607-14 also provides that an award of costs and fees "shall not exceed twenty-five per cent of the judgment."

DFS acknowledges the foregoing statutory limitation, but contends that the limitation is inapplicable where, as here, the party requesting fees did not seek a monetary judgment in the underlying appeal. DFS also contends, in the alternative, that even if the statutory limitation applies, such limitation does not preclude it from recovering the full $139,121.16 requested. DFS contends that the monetary sum attributable to the judgment is approximately $777,000.00 inasmuch as: (1) DFS offered an annual rent of $437,335.00; (2) Paiea demanded an annual rent of

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[4] We have previously referred to Black's Law Dictionary for a clarification of the term "breach of contract." In Aickin v. Ocean View Invs. Co., 84 Hawai'i 447, 457 n.16, 935 P.2d 992, 1002 n.16 (1997), we noted that Black's Law Dictionary 188, 417 (6th ed. 1990) defines the term "breach of contract" as a "[f]ailure, without legal excuse to perform any promise which forms the whole or part of a contract." Accordingly, inasmuch as we have already affirmed the circuit court's order granting summary judgment in favor of DFS, we have already determined that Paiea had no legal excuse for refusing to abide by Hasting's determination of the "prevailing rent," and therefore Paiea breached the terms and conditions of the lease.

$592,768.00; (3) the difference was $155,413.00 per year; and (4) the rental term was for five years. Thus, applying the twenty-five per cent cap to the sum of $777,000.00, DFS asserts that the applicable limit is $194,266.25, which exceeds the amount of fees requested.

Paiea, on the other hand, argues that the statutory limitation clearly applies, and subsequently disputes DFS' calculation of the twenty-five per cent cap. Paiea argues that DFS made representations to the circuit court that the rent due in years two through five were still subject to negotiation, and that the arbitration agreement addressed only the first year of the lease. Paiea asserts that the circuit court relied on DFS' representations when it granted DFS' motion for summary judgment, and that therefore DFS should be judicially estopped from arguing otherwise in its present request for fees. Therefore, using DFS' own calculations, Paiea asserts that the difference was $155,413.00, and that any award of attorneys' fees is limited to twenty-five per cent of that sum, or $38,853.25.

Based upon the following, we agree with DFS' initial contention that the statutory limitation set forth in HRS § 607-14 does not apply in the present case, and we therefore need not address DFS' and Paiea's contentions as to the appropriate method of calculating the twenty-five per cent cap.

Although the language of HRS § 607-14 appears to unequivocally limit an award of attorneys' fees to twenty-five per cent of the judgment, we have previously concluded that the twenty-five per cent limit does not apply in cases that involve

"only an adjudication of rights in which no monetary liability is in issue." Food Pantry, Ltd. v. Waikiki Bus. Plaza, Inc., 58 Haw. 606, 621, 575 P.2d 869, 880 (1978). Furthermore, in Piedvache v. Knabusch, 88 Hawai'i 115, 119, 962 P.2d 374, 378 (1998) (emphasis added), we recognized that "where it is impossible to determine what the judgment would or might have been . . . (e.g., in declaratory judgment actions), the [prevailing party] may be awarded all of his or her reasonable attorney's fees." See also Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 132-133, 839 P.2d 10, 34-35 (1992) ("[I]f no money damages are sought or awarded, as in a complaint for declaratory judgment, there is no monetary amount on the basis of which to calculate the twenty-five percent statutory ceiling for attorneys' fees") (emphasis added). In the present case, DFS sought either a declaratory judgment that Hastings' determination of the "prevailing rent" was binding on the parties, or a confirmation of Hasting's determination as an arbitration award. Consequently, the underlying appeal involved an adjudication of rights in which no monetary liability was in issue, and thus, in accordance with the foregoing precedent, we conclude that the twenty-five per cent limitation is inapplicable in the case at bar.[5]

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[5] We note that Paiea's argument can be construed so as to imply that monetary liability was in issue inasmuch as our affirmation of the circuit court's order granting summary judgment essentially reduces DFS' monthly rental obligation. Furthermore, both DFS and Paiea appear to agree that the difference between their two determinations of the "prevailing rent" serves as the basis from which the monetary value of the judgment may be calculated. However, the language of HRS § 607-14 plainly requires that the judgment serve (continued...)

C. DFS is Entitled to $23,515.70 in Attorneys' Fees.

Having established that DFS is entitled to its reasonable and necessary attorneys' fees and that such an award of attorneys' fees is not limited to twenty-five per cent of the judgment, we now consider which attorneys' fees were shown to have been reasonably and necessarily incurred.

As previously mentioned, DFS requests an award of attorneys' fees in the amount of $133,555.88, in addition to excise taxes in the amount of $5,565.28, for a total of $139,121.16. For support, DFS attached an invoice from Stubenberg & Durrett, Attorneys at Law [hereinafter "the Stubenberg firm"] describing each charge, as well as a declaration by Attorney Stubenberg stating, inter alia, that: (1) the attorneys' fees actually and reasonably incurred in connection with the Stubenberg firm's appellate representation of DFS amounted to $132,232.50; (2) DFS incurred computer-assisted research charges in the amount of $3,858.38; and (3) the hourly rates attributed to Attorney Stubenberg, Attorney Zahaby, and Attorney Lam were $325.00 per hour, $125.00 per hour, and $185.00 per hour respectively.

Paiea, on the other hand, contends that the fees charged by the Stubenberg firm were excessive and unreasonable, citing the following charges as examples: (1) $33,112.50 (135.3

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[5](...continued)
as the basis for calculating the twenty-five per cent cap. Both DFS' and Paiea's calculations as to the twenty-five per cent cap are inapposite inasmuch as it is not the judgment, but rather an economic incident of the judgment, that serves as the basis for their calculations. Such methodology is outside the scope of the language of HRS § 607-14.

billed hours) spent on a motion to dismiss the appeal; (2) 325.4 billed hours for a sixteen-page answering brief; (3) 3.8 billed hours to review supreme court schedules and oral argument scenarios; and (4) four billed hours to prepare an oral argument outline. In addition, Paiea contends that awarding DFS $3,858.38 for computer-assisted research is improper inasmuch as such expenses are a component of a law firm's overhead and are therefore already reflected in attorneys' fees. Accordingly, Paiea argues that any award of attorneys' fees should not exceed $38,853.25.

1. Applying the "lodestar" method

The United States Supreme Court has previously addressed the question of what constitutes a reasonable fee, in the context of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (West 1976), stating that:

> [t]he most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed.

Hensley v. Eckerhart, 461 U.S. 424, 433 (1983). In Montalvo v. Chang, 64 Haw. 345, 358-359, 641 P.2d 1321, 1331 (1982) (citations omitted), overruled on other grounds by Chun v. Bd. of Trustees of the Employees' Retirement Sys. of the State of Hawai'i, 92 Hawai'i 432, 992 P.2d 127 (2000),[6] we endorsed a

[6] Although Montalvo was overruled by Chun, 92 Hawai'i at 445, 992 P.2d at 140, to the extent that it mandated an application of the "lodestar" method when calculating attorneys' fees in common fund cases, we expressly (continued...)

virtually identical method of calculation in the context of a class action litigation where the recovery resulted in a common fund from which the attorneys' fees were to be drawn:

> In essence, the initial inquiry is "how many hours were spent in what manner by which attorneys." The determination of time spent in performing services "within appropriately specific categories," is followed by an estimate of its worth. "The value of an attorney's time generally is reflected in his normal billing rate." But it may be "necessary to use several different rates for the different attorneys" and the reasonable rate of compensation may differ "for different activities." And when the hourly rate reached through the foregoing analysis is applied to the actual hours worked, a "reasonably objective basis for valuing an attorney's services" is derived. The inquiry, however, does not end here, for other factors must be considered. The product of the first and second steps nevertheless serves as the "lodestar" of the ultimate fee award.
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> The first of the factors to be considered for possible adjustment of the "lodestar" determination is "the contingent nature of success," a factor which may be of special significance where "the attorney has no private agreement that guarantees payment even if no recovery is obtained." The second additional factor to be examined "is the extent, if any, to which the quality of an attorney's work mandates increasing or decreasing" the "lodestar" figure. If the court decides an adjustment is justified on this basis, it "should set forth as specifically as possible the facts that support ... (its) conclusion."

The foregoing algorithm is commonly referred to as the "lodestar" method. Id.; see also Chun, 92 Hawai'i at 434, 992 P.2d at 129 ("In Montalvo, we adopted the 'lodestar' method of awarding attorney's fees to plaintiffs' counsel in class action litigation where the recovery has resulted in the creation of a common fund from which the attorneys' fees are drawn") (emphasis added). Accordingly, we apply the "lodestar" method in the case at bar.

Our initial task is to determine how many hours were shown to have been reasonably expended. See Sharp v. Hui Wahine,

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[6](...continued)
stated that "we continue to adhere to Montalvo's explication of the mechanics of the lodestar method." Id.

49 Haw. 241, 246, 413 P.2d 242, 247 (1966) (the party requesting fees has the burden to prove that the requested fees were reasonably and necessarily incurred). To that end, after a thorough examination of the submissions of DFS and Paiea as well as a careful review of the record before us, we conclude that DFS has demonstrated that it expended 105 reasonable and necessary hours on the underlying appeal.[7]

Our subsequent task is to determine a reasonable hourly rate. We note that four different attorneys, with four different hourly rates, worked on varying aspects of the underlying appeal. Accordingly, we conclude that the average of the four different rates constitutes a reasonable rate in the case at bar. The hourly rates for Attorneys Stubenberg, Durrett, Lam, and Zahaby

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[7] The following hours were shown to have been reasonably expended: Twenty-four hours of work relating to the motion to dismiss the appeal, fifty-six hours of work in connection with the answering brief, and twenty-five hours for all remaining work. The concurring opinion, relying upon Price v. AIG Ins. Co., 107 Hawai'i 106, 111 P.3d 1 (2005) contends that this court is required to provide an explanation of the reasons underlying a substantial reduction of the requested fees. See concurring opinion, slip op. at 2-3. Price is inapposite authority for the following reasons. First, in Price, we "remind[ed] all judges to specify the grounds for awards of attorneys' fees and the amounts awarded with respect to each ground." Id. at 113, 111 P.3d at 8. The "grounds" for award of fees refers to the legal basis for the claims, such as assumpsit or tort. Id. It does not require a court to give an item-by-item explanation of the requested fees allowed where, as here, the record provides a readily apparent rationale -- to wit, the documentation accompanying the fee request does not support the amount requested. See Finley v. Home Ins. Co., 90 Hawai'i 25, 39, 975 P.2d 1145, 1159 (1998) (stating that "[a] detailed explanation of the rationale underlying the reduction in attorneys' fees awarded is not necessary"); Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 33, 79 P.3d 119, 126 (2003) ("The reasonableness of an expenditure of attorneys' fees is a matter within the discretion of the circuit court . . . [and, thus, a] detailed explanation of the rationale underlying the reduction in attorneys' fees awarded is not necessary. However, the denial or reduction of attorneys' fees must have support in the record."). Second, as we explained in Price, the purpose of requiring a lower court to explain the legal basis for the fee award and the amount awarded was to enable us to "effectively review" the fee award. Id. In the case at bar, we are not reviewing a lower court's fee award.

are $325/hour, $225/hour, $185/hour, and $125/hour, respectively. Thus, the average rate is $215/hour.

Finally, the lodestar method instructs us to multiply the reasonable rate by the sum of reasonable hours expended. See Montalvo, 64 Haw. at 358-359, 641 P.2d at 1331; Hensley, 461 U.S. at 433. Accordingly, applying a rate of $215/hour to a sum of 105 hours, we conclude that DFS has shown that it has incurred $22,575.00 in reasonable and necessary attorneys' fees, and $940.70 in taxes. We therefore award DFS $23,515.70 in attorneys' fees.

2. Computer-assisted research

DFS also requests $3,858.38 for computer-assisted research charges "as an element of its attorneys' fee recovery." Paiea, on the other hand, contends that the inclusion of computer-assisted research charges in any award of attorneys' fees is improper inasmuch as computer-assisted research charges are already incorporated into a law firm's overhead and are thus already reflected in the attorneys' fees charged.

Although we have not previously had occasion to pass upon the foregoing issue, the Intermediate Court of Appeals [hereinafter "ICA"], in Bjornen v. State Farm Fire and Casualty Co., 81 Hawai'i 105, 912 P.2d 602 (App. 1996), squarely addressed a request for an award of computer-assisted research costs.[8] The

[8] We have, however, impliedly endorsed the ICA's ruling in Bjornen, in our subsequent opinion in Bush v. Watson, 81 Haw. 474, 478 n.6, 918 P.2d 1130, 1134 n.6 (1996). In Bush, one of the appellees argued that "the circuit court did not abuse its discretion in awarding costs for computer assisted legal research (CALR) charges." Id. Although our holding in Bush rendered (continued...)

ICA initially noted that several treatises regarded the costs related to computer-assisted research as subsumed within an attorney's fee and therefore such costs may not be awarded in addition to attorneys' fees.[9] Id. at 107, 912 P.2d at 604. The ICA subsequently conducted a survey of the federal jurisdictions, stating that:

> [t]he majority of federal courts subscribe to the view that costs of computer legal research "are properly reflected as part of the law firm's overhead and, as such, are a factor to be included in the setting of attorneys fees as opposed to ordinary costs." In re San Juan Dupont Plaza Hotel Fire Litigation, 142 F.R.D. 41, 47 (D.Puerto Rico 1992). See Wolfe v. Wolfe, 570 F.Supp. 826, 828 (D.S.C.1983) (WESTLAW charges are incidental to attorneys' services and, therefore, are not considered to be valid costs); Friedlander v. Nims, 583 F.Supp. 1087, 1088-89 (N.D.Ga.1984) (expenses of computerized legal research are properly considered a component of attorney fees and are not recoverable as costs).

Id. at 108-109, 912 P.2d at 604-605. Accordingly, the ICA ruled that "disbursements for computerized legal research . . . are a component of attorney fees and are not taxable costs." Id. at

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[8](...continued)
any consideration of the appellee's argument unnecessary, we opted to provide guidance inasmuch as "the issue of costs may arise in subsequent proceedings." Id. Accordingly, we observed that "the [ICA] recently rejected CALR as a component of costs. [Bjornen, 81 Haw. at 107-109, 912 P.2d at 604-606.]" Id.

[9] Specifically, the ICA stated that:

> 6 J. Moore, Moore's Federal Practice, ¶54.77[8] (2d ed. 1986) states that "computer research is generally treated as a lawyer's cost and not taxable as ordinary costs[.]" (Footnote omitted). Similarly, 20 Am.Jur.2d Costs § 61 (1995) states that "[t]he expense of computer-aided research is also a component of attorney's fees, and like any other legal research such expense cannot be taxed as item of cost in addition to the attorney's fees award." (Footnote omitted). These conclusions are confirmed by the Annotation on the Recoverability of Cost of Computerized Legal Research Under 28 USCS § 1920 or Rule 54(d), Federal Rules of Civil Procedure, 80 A.L.R.Fed. 168 (1986).

Bjornen, 81 Haw. at 107, 912 P.2d at 604 (brackets in original).

109, 912 P.2d at 606.[10] Inasmuch as we agree with the ICA's ruling, we are also compelled to conclude that the computer-assisted research charges in the present case are not recoverable as separately billed attorneys' fees.

Although it appears that some federal jurisdictions might accept DFS' argument,[11] our endorsement of Bjornen

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[10] We note that there remains some degree of disagreement among the federal jurisdictions regarding the treatment of costs related to computer-assisted research. See Robinson v. Ariyoshi, 703 F.Supp. 1412, 1436-1437 (D. Haw. 1989), rev'd on other grounds, 933 F.2d 781 (9th Cir. 1991). Nevertheless, a significant amount of federal jurisdictions, not mentioned in the ICA's opinion, are in accord with the ICA's conclusion. See, e.g., United States v. Merritt Meridian Constr. Co., 95 F.3d 153, 172 (2nd Cir. 1996) ("We agree that computer research is merely a substitute for an attorney's time that is compensable under an application for attorneys' fees and is not a separately taxable cost"); Standley v. Chilhowee R-IV School Dist., 5 F.3d 319, 325 n.7 (8th Cir. 1993) (stating that "time spent doing the computer based research is compensable as part of counsels' billable hours. It is the actual cost to the attorneys for their on-line computer time that . . . is a component of attorney fees and cannot be recovered in addition to the fee award"); Montgomery v. Aetna Plywood, Inc., 231 F.3d 399, 409 (7th Cir. 2000) ("Computer research charges are considered a form of attorneys' fees. The idea is that computer-assisted legal research essentially raises an attorney's average hourly rate as it reduces (at least in theory) the number of hours that must be billed. As a form of attorneys' fees, the charges associated with such research are not separately recoverable expenses") (citations omitted).

[11] In Haroco, Inc. v. American Nat'l Bank and Trust Co. of Chicago, 38 F.3d 1429, 1440-1441 (7th Cir. 1994) (emphasis added), the United States Court of Appeals of the Seventh Circuit [hereinafter "seventh circuit"], stated that:

> [t]he added cost of computerized research is normally matched with a corresponding reduction in the amount of time an attorney must spend researching. Therefore, we see no difference between a situation where an attorney researches manually and bills only the time spent and a situation where the attorney does the research on a computer and bills for both the time and the computer fee. In both cases the total costs are attorney's fees and may not be recovered as 'costs.'

Also, in In re Cont'l Ill. Sec. Litig. v. Cont'l Ill. Corp., 962 F.2d 566, 570 (7th Cir. 1992) (some emphasis in original, some emphasis added) (citations omitted), the seventh circuit stated the following:

> The [trial] judge refused to allow the lawyers to bill any of their out-of-pocket expenses of using a computerized legal research service . . . . He thought those expenses should be part

(continued...)

precludes us from traversing a similar analytical path. Where a law firm passes its computer-assisted research charges to a client, allowing that client to recover those charges as an award of attorneys' fees debases the rule stated in Bjornen inasmuch as computer-assisted research charges would henceforth be recoverable so long as the party seeking recovery classifies the charges as separately billed "attorneys' fees" rather than "taxable costs." We thus decline to render Bjornen susceptible to such "form over substance" arguments and take the present opportunity to expressly state what the rule in Bjornen logically implies -- that computer-assisted research charges are subsumed within a law firm's overhead and therefore the client may not recover such costs by classifying them as separately billed attorneys' fees.

Accordingly, we deny DFS' request to recover $3,858.38 in computer-assisted research charges.

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[11](...continued)
of the lawyers' overhead. This was another clear error. If computerized research expense were customarily treated in this fashion, lawyers' hourly rates would be even higher than they are, requiring an adjustment in the lodestar. But the more important point is that the market--the paying, arms' length market--reimburses lawyers' LEXIS and WESTLAW expenses, just as it reimburses their paralegal expenses, rather than requiring that these items be folded into overhead. Markets know market values better than judges do. And as with paralegals, so with computerized research: if reimbursement at market rates is disallowed, the effect will be to induce lawyers to substitute their own, more expensive time for that of the paralegal or the computer.

Consequently, although the seventh circuit appears to agree with the ICA that computer-assisted research charges are not recoverable as taxable costs, there is some evidence to suggest that it might nevertheless award such computer-assisted research charges as a separately billed component of attorneys' fees.

D. Referral

Also, considering the particular circumstances of the present case, we refer this matter to ODC for investigation. In doing so, we do not express any opinion as to whether violations of the HRPC have occurred.

Although the concurring opinion takes issue with our decision to refer the matter to ODC without further explanation, see concurring opinion, slip op. at 9-15, our approach is no different than that taken in Lee v. Aiu, 85 Hawai'i 19, 35, 936 P.2d 655, 671 (1997). In Lee, we referred the record to ODC for its review without an explanation of specific misconduct, other than noting that counsel may have engaged in conduct that did not comport with the HRPC. Id.

Additionally, contrary to the concurring opinion's assertion, we have not "overlook[ed] the fact that this court, in Lee, provided a detailed description of the actions of the defendant-attorney in tortiously interfering with the contractual relations between the plaintiff and the co-defendant in that case[.]" Concurring opinion, slip op. at 13 (brackets added). We recognize that, in Lee, this court explicated in detail the actions of the defendant-attorneys which led to a referral to ODC. See Lee, 85 Hawai'i at 32, 936 P.2d at 668 ("Based upon our examination of the record, we believe that there is substantial evidence to support the jury's findings that the [defendant-attorneys] were cognizant of the settlement agreement between Lee and Aiu and that they intentionally proceeded to encourage Aiu to breach that agreement by convincing him to enter into a new

contract with them. The evidence further supports the finding that the [defendant-attorneys] were without justification, that is, that they were motivated only by their own personal gain. This is particularly so in light of: (1) [the defendant-attorney's] advice to Aiu that $25,000 for Aiu's putative interest in the Keha Place property was a ridiculous sum of money and that Aiu would be ill-advised to honor it; and (2) the [defendant-attorneys'] subsequent acquisition of Aiu's putative interest for that same 'ridiculous' sum.") (brackets added). However, it is obvious that our description of the specific actions of the defendant-attorneys was in the context of analyzing the tortious interference with contractual relations claim. Notably, in the section of the opinion entitled, "Referral to the ODC," we did not summarize those actions nor refer to them with any degree of specificity. See Lee, 85 Hawai'i at 35, 936 P.2d at 671. Rather, we merely stated that "it appears from the record in this case that [the defendant-attorney] engaged in conduct that may not comport with the HRPC." Id. (brackets added). Accordingly, Lee does not properly stand for the proposition that we may abrogate the general rule, set forth in State v. Mata, 71 Haw. 319, 324, 789 P.2d 1122, 1125 (1990), which plainly states that "[w]e cannot pass in these proceedings on whether or not the matters referred to [ODC] involved unprofessional conduct." Id. The distinction lies in the fact that in Lee, this court was required to set forth the actions of the attorneys in order to affirm the trial court's finding of liability with respect to the tortious interference

with contractual relations claim filed against the attorneys as party-defendants.[12] In the present case, we are simply faced with a request for attorneys fees, and, inasmuch as there was no independent claim filed against the attorneys as party-defendants, we perceive no reason to risk unduly influencing any forthcoming ODC investigation by extrapolating further.[13]

Given the circumstances of the present case, it is inappropriate for this court to express any opinion at this point in time as to whether the matters referred to ODC involve unprofessional conduct.[14] See Mata, 71 Haw. at 324, 789 P.2d at 1125. The explanation proffered by the concurring opinion contravenes this well settled principle by repeatedly expressing an opinion as to the unreasonableness of the fees that were incurred in this case. Such expressions manifestly articulate violations of the HRPC.[15] We therefore decline to selectively

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[12] We note further that as party-defendants, the attorneys in Lee were provided with a full and fair opportunity to justify their actions, a right not available to the attorneys in the present case.

[13] The concurring opinion also asserts that our failure to provide an explanation for the referral will prevent ODC from conducting a thorough investigation. See concurring opinion, slip op. at 9. However, in light of the fact that ODC will have access to all records before this court and other state courts, as well as any documents that it may request, ODC will clearly have the ability to conduct a full and complete investigation.

[14] Expository explanations may have the unavoidable effect of the court directly or indirectly expressing its views of the conduct in question prior to its investigation by ODC. Such problematic explanations are replete throughout the concurring opinion. See concurring opinion, slip op. at 4-8.

[15] HRPC Rule 1.5 requires that "[a] lawyer's fees shall be reasonable." HRPC Rule 8.4 provides that "[i]t is unprofessional misconduct for a lawyer to violate or attempt to violate the rules of professional conduct." Characterizing fees as unreasonable sets forth a violation of the HRPC.

discuss specific fee request items in our referral.

III. CONCLUSION

Based on the foregoing, we grant in part and deny in part DFS' request for attorneys' fees incurred in connection with the underlying appeal by awarding DFS $22,575.00 in fees, $940.70 in taxes, for a total of $23,515.70. Furthermore, we refer the record of this matter to ODC for investigation. Accordingly, we direct the Clerk of the Supreme Court to transmit a certified copy of this order to ODC. We additionally direct all clerks of the several courts of this state to make available any records and provide certified copies, at no additional cost, of any documents requested by ODC in connection with its investigation.

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on the request for fees

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