

CONCURRING OPINION BY ACOBA, J.,
IN WHICH DUFFY, J., JOINS

I concur that the test set forth by the Intermediate Court of Appeals (the ICA) in regard to calculating attorney's fees "when an employer . . . appeals on the ground that a [permanent partial disability (PPD)] award is excessive," Kapuwai v. City & County of Honolulu, 119 Hawai'i 304, 318, 196 P.3d 306, 320 (App. 2008), addressed an issue that was not ripe for decision, inasmuch as the application of the test could be entirely unnecessary. I write separately to address the points in the dissenting opinion that (1) neither Respondent/Claimant-Appellant Darrell N. Kapuwai (Respondent) nor Petitioner/Employer-Appellee City and County of Honolulu (Petitioner) raised the issue of ripeness, and, thus, it should not be addressed by this court, see dissent at 12-14, and (2) "this court has also issued advisory opinions in the past[,] "id. at 1, and therefore "the majority's opinion brings into question the enforceability of some of our past judgments," id. at 4. Although the dissent asserts the cases it cites are "quite relevant here, notwithstanding the concurring opinion's novel^[1]

¹ The dissent contends that the approach taken herein is "novel." Dissent at 11 n.2. But, examining each of the cited cases by contrasting it to the instant case is no more "novel" than the methodology applied by the dissent itself. In the approach taken by the dissent, no categories are established; rather, the dissent cites to a wide variety of cases, similar only in the respect that the appellate court decided more than one issue on appeal. The cases the dissent cites are patently distinguishable from the present case because ripeness principles were not violated in those cases and they involved real controversies with concrete facts. Where the rights of numerous future litigants will be affected by a new test, those litigants

(continued...)

approach at distinguishing each of them from the instant case[,]” id. at 11 n.2, it fails to show how the dissent’s cases soundly stand for the proposition that vacation of the ICA’s opinion “brings into question the enforceability of some of our past judgments,” id. at 4, in light of the marked differences between the instant case and the dissent’s cases. The dissent mistakes situations where multiple ripe issues are presented for decision, with the situation presented in this case, wherein resolution of one issue upon remand is preliminary to decision of the other, and thus, the ripeness of the separate issue is dependent on subsequent resolution of the preliminary issue. The former situation does not raise any jurisdictional objections, whereas the latter poses a ripeness problem.

I.

In this case, the Director of the Department of Labor and Industrial Relations (the Director) found that Respondent suffered 7 percent whole person PPD and converted that “to a 96 percent . . . right great toe [PPD], resulting in a PPD award of \$19,954.56.” Kapuwai, 119 Hawai‘i at 307, 196 P.3d at 309. Petitioner appealed the PPD award to the Labor and Industrial Relations Appeals Board (the LIRAB), which “conclud[ed] that [Respondent] is entitled to benefits for 4 [percent whole person PPD]. . . . The LIRAB’s decision did not separately determine

¹(...continued)
should have the benefit of having had the test first applied to an actual set of facts, rather than in the abstract.

what [Respondent's] PPD award would have been if based solely on the . . . right great toe [PPD]." Id. at 308, 196 P.3d at 310.

Respondent presented two issues on appeal to the ICA: (1) "the LIRAB erred as a matter of law when it failed to 'convert' its award of 4[percent whole person PPD] to an award of the right great toe [PPD] under the 'schedule' of injuries pursuant to [Hawai'i Revised Statutes (HRS) §] 386-32(a) [(Supp. 2008)]"; and (2) "the LIRAB erred as a matter of law and/or exceeded its limit of discretion in denying [Respondent's] request under [HRS §] 386-93(b) [(Supp. 2008)²] for assessment of 50% of [Respondent's] request for attorney's fees and costs against [Petitioner]." (Emphasis added.)

As to the first issue, the ICA "conclude[d] that [Respondent was] entitled to a PPD award based on . . . his [right] great toe [PPD] if that exceed[ed] an award based on . . . his whole person [PPD,]" and "therefore vacate[ed] the LIRAB's decision and remand[ed] the case for a determination of a PPD award based on the impairment of [Respondent's] great toe[.]" Id. at 306-07, 196 P.3d at 308-09. As to the second issue, the ICA itself recognized that because the case was remanded on the PPD issue, the issue of whether to award attorney's fees and costs to Respondent was not yet ripe for decision:

² HRS § 386-93(b) states in relevant part that "[i]f an employer appeals a decision of the director or appellate board, the costs of the proceedings of the appellate board or the appellate court, together with reasonable attorney's fees, shall be assessed against the employer if the employer loses[.]" (Emphases added.)

Because we are remanding the case for further proceedings, we do not decide [Respondent's] claim that the LIRAB erred in denying his request to assess one-half of his attorney's fees and costs against his employer pursuant to HRS § 386-93(b) []. That statute provides for the assessment of attorney's fees and costs against the employer, if the employer appeals to the LIRAB or the appellate court and "loses."

Id. at 307, 196 P.3d at 309 (emphasis added). Nevertheless, the ICA went on to craft a test to determine whether an employer has lost its appeal for purposes of awarding attorney's fees to the employee in the event that an employer remains liable for some portion of the employee's injury. Id. at 318, 196 P.3d at 320.

However, because the ICA vacated the decision of the LIRAB and "remand[ed] the case for a determination of a PPD award based on the impairment of [Respondent's] great toe[,] "id. at 311, 196 P.3d at 313, there was no longer a PPD award on which the ICA could base its analysis of attorney's fees. This court has stated that

[t]he duty of this court, as of every other judicial tribunal, 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.

Courts will not consume time deciding abstract propositions of law or moot cases, and have no jurisdiction to do so.

Wong v. Bd. of Regents, 62 Haw. 391, 394-95, 616 P.2d 201, 204 (1980) (internal citations omitted) (emphasis added).

At the point the ICA decided to remand, its discussion of HRS § 386-93(b) became merely an opinion on an abstract proposition. This is illustrated by the fact that there are two possible outcomes on remand to the LIRAB. The first is that

Respondent's PPD award based on the LIRAB's conversion of his whole person PPD to his great toe PPD either remains the same as the award provided by the Director, or is increased, in which case the test with respect to attorney's fees set forth by the ICA would not be applied at all,³ because Respondent would manifestly be the "winner" on appeal to the LIRAB. The second is that Respondent's award is reduced, in which case the test set forth by the ICA would be relevant to the determination of whether Respondent is entitled to attorney's fees. There is no way of predicting or knowing which one of the two possible alternatives would occur on remand. Therefore, any test formulated by the ICA at this point is premature. The matter then was unripe for decision, and in "the absence of ripeness[,]"" appellate courts "are without jurisdiction to consider [an unripe issue] on appeal." State v. Moniz, 69 Haw. 370, 373, 742 P.2d 373, 376 (1987). As such, the ICA lacked jurisdiction to decide the issue in this case.

II.

The dissent does not argue that the attorney's fees issue for which the ICA crafted its test was ripe for decision. Therefore, it apparently agrees that the issue was not ripe. Instead, as stated above, the dissent maintains that "the

³ The ICA noted that "a direct conversion of the LIRAB's 4 percent whole person PPD rating into a great toe PPD rating may not be appropriate." Kapuwai, 119 Hawai'i at 312, 196 P.3d at 314. Therefore, even though the LIRAB found a lower whole person PPD rating than the Director, it is possible that it could find a great toe PPD rating equal to or greater than that of the Director.

ripeness issue . . . is likewise unripe because none of the parties have argued [ripeness] before this court." Dissent at 14. With all due respect, this is plainly wrong. Respectfully, the dissent confuses the jurisdictional doctrine of ripeness with the requirements placed on litigants in Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b), which mandates that appellants raise points of error, standards of review, and arguments in individual sections of their briefs. Thus, an issue is not "unripe" if not raised, although failure to raise an error violates HRAP Rule 28(b).

Moreover, contrary to the dissent's position, whether ripeness was raised by the parties is irrelevant here because "[i]t is well-established . . . that lack of subject matter jurisdiction can never be waived by any party at any time." Chun v. Employees' Ret. Sys. of State of Hawaii, 73 Haw. 9, 13, 828 P.2d 260, 263 (1992) (emphasis added). As this court has stated, "[w]hen reviewing a case where the circuit court lacked subject matter jurisdiction, the appellate court retains jurisdiction, not on the merits, but for the purpose of correcting the error in jurisdiction." Amantiad v. Odum, 90 Hawai'i 152, 159, 977 P.2d 160, 167 (1999). This is because we have no option pursuant to HRAP Rule 28(b) to disregard the failure of any party to raise a lack of jurisdiction. See Chun, 73 Haw. at 13, 828 P.2d at 263 (stating that it is "absolute[ly] necess[ary] that a court possess subject matter jurisdiction"). Consequently, "[i]f the

parties do not raise the issue, 'a court sua sponte will, for unless jurisdiction of the court over the subject matter exists, any judgment rendered is invalid.'" Id. (quoting In re Application of Rice, 68 Haw. 334, 335, 713 P.2d 426, 427 (1986)). Because the issue is not ripe, as the ICA itself admitted and the dissent apparently concedes, the ICA lacked jurisdiction to decide the issue, making HRAP Rule 28 simply irrelevant. See id.

III.

Initially, it should be observed that the dissent uses the term "advisory opinion" but does not define it. In a sense, every opinion is "advisory," because to "advise" is "to give an opinion." Webster's Third New Int'l Dictionary 32 (1961). Thus, as used by the dissent, the term "advisory opinion" is inexact, and is devoid of any specific legal reference to a legal doctrine, such as ripeness or mootness. Therefore, the cases cited by the dissent lack any coherent connection to the dissent's claim that this court has "issued advisory opinions in the past[,]" dissent at 1, and that its decision in this case "brings into question the enforceability of some of our past judgments," id. at 4. Furthermore, it is apparent that none of the issues decided in the cases cited by the dissent depended on a new test that might never be applied on remand, as is the case here. Hence, the dissent incorrectly relies on these cases in

arguing that "the majority's opinion brings into question the enforceability of some of our past judgments[.]" Id.

IV.

In State v. Nichols, 111 Hawai'i 327, 329, 141 P.3d 974, 976 (2006), the defendant, who was convicted of terroristic threatening by a jury, alleged on appeal several errors related to the jury instructions. We vacated the judgment and remanded the case for a new trial because the circuit court had erred in failing to give an instruction regarding the "relevant attributes" of the plaintiff and the defendant. In doing so, we also addressed the defendant's other allegations of erroneous jury instructions.⁴ Id. at 340, 141 P.3d at 987.

In Nichols, it was certain that the circuit court would be providing the jury with instructions on remand. Therefore, it was vital for this court to address other allegedly erroneous jury instructions because they posed issues that the circuit court would have to face on remand. In this case, on the other hand, the ICA's test will only be relevant if the LIRAB reduces Respondent's award on remand. However, because the outcome of the LIRAB's decision on remand is uncertain, the ICA could not determine whether its test would be applicable to the LIRAB's decision.

⁴ The defendant also alleged that the circuit court had erred in not giving a "lesser included offense instruction[] and [a] nexus instruction (i.e., instruction that the jury must find that the threat by [the defendant] was related to, or the result of, the performance of [the plaintiff's] official duties [as a police officer]"). 111 Hawai'i at 338, 141 P.3d at 985.

Two other cases cited by the dissent involved jury instructions on remand, and are distinguishable from this case for the same reason as Nichols. In Courbat v. Dahana Ranch, Inc., 111 Hawai'i 254, 256, 141 P.3d 427, 429 (2006), the circuit court granted summary judgment in favor of the defendant in a negligence case involving a horse-related injury. In its grant of summary judgment, the circuit court had applied HRS chapter 663B, which sets forth a "statutory presumption of non-negligence for [horse]-related injuries." Id. at 264, 141 P.3d at 437. This court determined that a genuine issue of material fact existed as to whether a liability waiver signed by the plaintiffs was valid, and remanded the case for trial on that issue. Id. at 261, 141 P.3d at 434. It was also ruled that HRS chapter 663B was inapplicable to the plaintiffs' case. Id. at 264, 141 P.3d at 437.

In Courbat, it was possible that the jury could have found the liability waiver to be valid, meaning that the plaintiffs' negligence claim would fail, and that the applicability of HRS chapter 663B would not matter. However, because the case was remanded for trial, as in Nichols, it was necessary for this court to address the applicability of HRS chapter 663B inasmuch as that was an issue that the circuit court would have to face when giving jury instructions.

In State v. Mahoe, 89 Hawai'i 284, 287, 972 P.2d 287, 290 (1998), the defendant was convicted of burglary, an offense

requiring the prosecution to prove, among other things, that the defendant possessed an intent to commit "a crime against a person." During the prosecution's closing argument at trial, it argued that the defendant had "inten[ded] to commit a crime against a person either [by] assault or harassm[ent]." Id. at 286, 972 P.2d at 289. The trial court instructed the jury on the offense of harassm[ent], over the defendant's objection that the "offense of harassm[ent] [was] not an offense against a person[.]"⁵ Id. at 287, 972 P.2d at 290. The defendant raised multiple arguments on appeal, among them that the trial court had erred by giving the harassm[ent] instruction. Id. at 285, 972 P.2d at 288.

This court did not agree with the defendant's alleged errors,⁶ but remanded the case for a new trial "based on [its] independent review of the record" because the defendant's "constitutional rights to due process and unanimous jury verdict were violated." Id. (footnotes omitted). Mahoe also held that the trial court did not err in giving the harassm[ent] instruction because harassm[ent] did in fact constitute "a crime against a person." Id. at 291, 972 P.2d at 294.

Similar to Nichols and Courbat, it was obligatory for this court to address the defendant's allegation that the trial

⁵ The trial court also instructed the jury on the offense of assault. 89 Hawai'i at 287, 972 P.2d at 290.

⁶ In addition to his harassm[ent] argument, the defendant also argued that the circuit court "erred by: (1) refusing to excuse a juror for cause who stated in voir dire that he had been burglarized previously but would try to be impartial; [and] (2) allowing evidence of a temporary restraining order to be admitted to show the unlawfulness of [the defendant's] entry[.]" Id. at 285, 972 P.2d at 288.

court's jury instruction was erroneous, because on remand the trial court would again be providing jury instructions. In order to ensure that the trial court provided proper jury instructions, it was required that this court decide whether the trial court could instruct the jury on the offense of harassment, which depended upon whether harassment was a crime against a person for purposes of proving burglary.

V.

Several other cases cited by the dissent involve a fundamental distinction between those cases and the case at bar. In this case, on remand, the LIRAB has to first reach a decision as to Respondent's PPD award. Only after the LIRAB determines the amount of Respondent's PPD award will the issue of whether Respondent is entitled to attorney's fees even come up for decision, and only if it returns an award less than that of the Director's would the ICA's test become relevant. In the following cases that are cited by the dissent, however, the issues reached on appeal were immediately applicable to the disposition of the case on remand and applied independently of any decisions made by the trier of fact at the subsequent trial.

In State v. Wakisaka, 102 Hawai'i 504, 518, 78 P.3d 317, 331 (2003), the defendant sought a new trial on the basis of, among other things, prosecutorial misconduct, ineffective assistance of counsel, and the circuit court's "exclusion of much of [an expert witness's] proffered testimony" in regard to the

victim's anxiety disorder. This court agreed that there had been prosecutorial misconduct and ineffective assistance of counsel, and remanded the case for a new trial on that basis. Id. at 507, 78 P.3d at 320. It was also concluded that the circuit court erred in excluding "much of" the expert witness's testimony. Id. at 518, 78 P.3d at 331.

In addressing the exclusion of the expert witness's testimony, this court did not create a new test that might never be applied on remand, as the ICA did in this case. Instead, Wakisaka decided an issue that the circuit court would have to face on remand, namely, the extent to which the expert witness could testify on an issue raised at trial. Thus, Wakisaka is distinguishable from the case at bar.

In State v. Culkin, 97 Hawai'i 206, 211, 35 P.3d 233, 238 (2001), the defendant alleged that the circuit court had erred by providing prejudicial jury instructions. The defendant also alleged other errors, including errors regarding the circuit court's allowance of certain impeachment testimony and its exclusion of evidence related to his claim of self-defense. Id. This court held that the circuit court's jury instructions were prejudicial, and that the defendant was entitled to a new trial for that reason. Id. at 219, 35 P.3d at 246.

Culkin also addressed the defendant's other alleged errors, finding, for example, that the circuit court had not abused its discretion in allowing certain impeachment testimony

and that it had erred in excluding some of the evidence proffered by the defendant in support of the defendant's self-defense claim. Id. at 223-24, 35 P.3d at 250-51. As in Wakisaka, it was unavoidable that this court discuss the other errors alleged by the defendant on appeal because the circuit court would have to face those issues on remand.

In State v. Kauhi, 86 Hawai'i 195, 197, 948 P.2d 1036, 1038 (1997), the defendant, convicted by a jury of murder and burglary, claimed that the circuit court erred by (1) refusing to dismiss a juror for cause, (2) denying his motion to suppress certain statements he made, and (3) limiting his cross-examination of one of the prosecution's witnesses. This court held that the circuit court erred in not dismissing the juror for cause, and remanded the case for a new trial. Id. Kauhi went on to "address the remaining issues on appeal, inasmuch as they [would] undoubtedly resurface on remand." Id. at 200, 948 P.2d at 1041 (emphasis added). It was held that the circuit court did not err in denying the defendant's motion to suppress or in limiting his cross-examination of a witness. Id. at 204, 207, 948 P.2d at 1045, 1048.

Similar to the cases noted above, in Kauhi this court recognized that its disposition of the other issues raised by the defendant on appeal would be applicable to the trial of the case on remand. In this case, however, the LIRAB would not apply the

ICA's test unless there was a reduction in Respondent's PPD award.

In State v. Corella, 79 Hawai'i 255, 258, 900 P.2d 1322, 1325 (App. 1995), the defendant alleged that the circuit court had erred by (1) "limiting cross-examination about the complaining witness's [] relationship with her boyfriend[,] and (2) admitting into evidence an application (the application) filled out by the complaining witness for compensation as a victim of a violent crime. The defendant also contended that the complaining witness had given prejudicial testimony as to the defendant's character. Id. The ICA held that the circuit court's limitation on testimony was not harmless, and remanded the case for a new trial. Id. at 261, 900 P.2d at 1328. It also stated that "[b]ecause the case [would] be remanded, [it would] address the other two assignments of error." Id.

As with the other cases discussed above, it was incumbent upon the ICA to address the defendant's remaining points of error on appeal because the resolution of those issues was certain to be relevant on remand. Whether the application could be admitted into evidence, and what the complaining witness could say in regard to the defendant's character were both issues that the circuit court would have to address in a new trial. In this case, however, it is entirely uncertain whether the ICA's test regarding attorney's fees will apply at all. All of the foregoing cases involved multiple trial errors in the context of

a case that was being remanded for a new trial. In all of the cases, each of the issues was ripe for decision in and of itself on the facts as they were presented to the appellate court. None of the cases involved a situation where a decisive issue that must be decided on remand was preliminary to a separate issue in the case.

VI.

The dissent also cites to the following cases where appellate courts have offered "guidance" to the trial court on remand, maintaining that such "guidance" amounted to "advisory opinions." Dissent at 1-3. The dissent makes too much of the term "guidance." "Guidance" is defined as "the superintendence or assistance rendered by a guide." Webster's Third New Int'l Dictionary at 1009. As the court of last resort, one of our roles is to provide "guidance" for the proper administration of justice. The question in each case is not whether an appellate court has offered "guidance," which it does in many forms, but whether the appellate court thereby addresses matters that must be decided for the appropriate disposition of the issues remanded.

In E & J Lounge Operating Co., Inc. v. Liquor Commission of City & County of Honolulu, 118 Hawai'i 320, 322, 189 P.3d 432, 434 (2008), the Liquor Commission (the Commission), after a series of hearings on the applicant's application for a liquor license, denied the application. The central issue in E &

J Lounge was whether the hearings held by the Commission constituted "contested case hearings" under HRS § 91-11 (1993) such that the Commission was required to follow the requirements of that statute. Id. Related to this issue were two other questions: first, whether HRS § 91-11, which required "[Commission] officials [to] personally consider the record before voting on an issue[,] " conflicted with another statute, HRS § 281-59, which required the Commission to deny the application if a majority of neighbors voted against it, id. at 338, 189 P.3d at 450; and second, whether the application needed to be "deemed automatically granted for the alleged failure of the Commission to comply with HRS § 91-13.5(c)," which required the Commission to act on the application within a certain time period, id. at 347, 189 P.3d at 459.

We determined that HRS § 91-11 did apply to the Commission's hearings, and remanded the case for another hearing before the Commission because it had not complied with HRS § 91-11. Id. at 322-23, 189 P.3d at 434-35. This court also decided the related questions in E & J Lounge "[f]or purposes of guiding the Commission on remand," holding that there was no conflict between HRS § 91-11 and HRS § 281-59, and that the Commission had complied with HRS § 91-13.5. Id. at 350, 189 P.3d at 462. Obviously, discussions of those issues were rudimentary, because the issues were directly related to the outcome of the Commission's decision on remand. First, because the Commission

had to hold hearings in compliance with HRS § 91-11, any potential conflict between that statute and HRS § 281-59 would have to be resolved by this court before the Commission could conduct such hearings. Second, had the Commission failed to comply with HRS § 91-13.5, it would be legally compelled to grant the application on remand. Thus, this court's answers to the related questions were basic to the remand of the case.

In Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 340-41, 104 P.3d 912, 927-28 (2004), this court held that the trial court had properly found an attorney's conduct sanctionable under Hawai'i Rules of Civil Procedure Rule 11, but that it had abused its discretion in calculating the amount of the sanction imposed. In remanding the case for a redetermination of the sanction amount, this court "offer[ed] some guidance to the [trial] court" in regard to calculating sanction amounts, because that calculation was to be implemented by the trial court on remand. Id. at 341, 104 P.3d at 928. Thus, the discussion of the calculation in Gap was needed because it was obvious that the sanction would be applied on remand and the trial court had to know how to properly calculate it.

Likewise, in KNG Corp. v. Kim, 107 Hawai'i 73, 75, 110 P.3d 397, 399 (2005), the plaintiff filed a complaint against the defendant seeking payment of lease rent for certain property, and, on the return date of the summons on the complaint, "orally moved for the establishment of a rent trust fund pursuant to HRS

§ 666-21 (1993).” The circuit court granted the motion over the defendant’s objection that possession of the property had never been provided. On appeal, the defendant argued that the circuit court could not establish a rent trust fund without a hearing, and further argued that HRS § 666-21 was unconstitutional “on its face and as applied.” Id. at 76, 80, 110 P.3d at 400, 404.

We vacated and remanded the circuit court’s ruling, concluding that because the defendant had claimed that possession of the property was never provided, the circuit court was required to hold a hearing on that issue prior to establishing a rent trust fund. Id. at 79-80, 110 P.3d at 403-04. In order “[t]o provide guidance to the [circuit] court on remand,” this court ruled on the defendant’s constitutional claims, holding that HRS § 666-21 did not violate the constitution’s guarantee of rights to due process and equal protection. Id. at 80, 110 P.3d at 404.

Because we had ordered the circuit court to hold a hearing on remand to determine whether it could take action pursuant to HRS § 666-21, it was necessary for us to decide whether that statute was unconstitutional on its face. The circuit court could not hold a hearing to take action under a statute if the statute was unconstitutional. Therefore, unlike the situation faced by the ICA in the instant case, in KNG Corporation, the constitutional question this court discussed on appeal would have arisen before the circuit court on remand.

Similarly, in Moran v. Guerreiro, 97 Hawai'i 354, 356, 37 P.3d 603, 605 (App. 2001), the plaintiff appealed the dismissal of his suit brought in part "to enforce a contract for the sale of real property[.]" One of the questions in the underlying suit was whether a deed, known as the Sharpe deed, signed by one of the owners of the property, was valid. Id. at 374, 37 P.3d at 623. On appeal, the ICA vacated the dismissal of the plaintiff's suit on the basis that he had been prejudiced by ex parte communications and remanded the case to the circuit court. Id.

The ICA also addressed, "for the circuit court's guidance," the validity of the Sharpe deed, "a legal issue that [had] generated considerable confusion during the proceedings below[.]" Id. It set forth a test to be applied, but did not decide the issue because "[m]ore facts . . . [were] required to determine the validity of [the Sharpe deed]." Id. at 375, 37 P.3d at 624. Like the cases discussed above, it was appropriate for the ICA to do so because it was certain that the validity of the Sharpe deed was an issue that would have to be decided by the circuit court on remand. In the instant case, however, the ICA could not be certain that its test as to attorney's fees would ever be applied.

In Topliss v. Planning Commission, 9 Haw. App. 377, 381, 842 P.2d 648, 652 (1993), a developer appealed the Planning Commission's denial of his application for a permit to develop

buildings on his property, which was located within a Special Management Area and subject to the requirements of the Coastal Zone Management Act (CZMA). The ICA vacated the Planning Commission's decision and remanded the case, concluding that in denying the permit, the Planning Commission had failed to comply with the CZMA because it had not made a finding of fact regarding whether the development would impact the coastal zone before it denied the permit. Id. at 394, 842 P.2d at 658. Topliss also discussed the CZMA's requirement that the Planning Commission was required to determine whether any impact of the development could be mitigated if on remand it was found that the development would cause an impact on the coastal zone. Id. It was essential for the ICA to do so because the developer had indicated to the Planning Commission that he would be willing to minimize the impact of the project, but "[i]t d[id] not appear from the record that the [Planning] Commission considered [the developer's] offer as . . . it was required to do under the statute." Id.

In this case, however, the ICA's discussion of attorney's fees was not based on any error that it perceived the LIRAB had committed in refusing to grant Respondent's request for attorney's fees. Indeed, it could not be, because the LIRAB's PPD award had been vacated, and no decision on attorney's fees existed for the ICA to address. Instead, the ICA created a new test based on its interpretation of a statute, absent any

evidence that such a test would be relevant to the LIRAB's decision on attorney's fees on remand.

Similarly, in State v. Hoang, 94 Hawai'i 271, 272-73, 12 P.3d 371, 372-73 (App. 2000), the defendant argued on appeal that the trial court had failed to obtain a waiver of his right to testify, and that it did not afford him his right to allocution at sentencing because the court had addressed the defendant's counsel rather than the defendant. The ICA agreed that the defendant's right to testify had been violated, and "remand[ed] for a new trial." Id. at 281, 12 P.3d at 381.

The ICA addressed the defendant's allocution argument, holding that to satisfy a defendant's right to allocution, the trial court could not address the defendant through his counsel, but needed to "solicit allocution directly from the defendant at sentencing." Id. In so holding, the ICA noted that in State v. Chow, 77 Hawai'i 241, 247, 883 P.2d 663, 669 (App. 1994), it had previously held that the trial court was "'affirmatively require[d]'" to "'make direct inquiry of the defendant's wish to address the court before sentence is imposed.'" Hoang, 94 Hawai'i at 281, 12 P.3d at 381. Thus, the ICA merely reiterated precedent that had already been set forth in Chow, rather than crafting a new test of uncertain applicability, as the ICA has done in this case. Furthermore, as in Topliss, the ICA was addressing a specific error that the trial court had committed. In this case, on the other hand, the ICA's test regarding

attorney's fees had yet to be tied to any specific action on the part of the LIRAB, because the remand of the case to determine Respondent's PPD award meant that there was no longer a decision on an award of attorney's fees.

In In re Water Use Permit Applications, 105 Hawai'i 1, 5, 93 P.3d 643, 647 (2004), after several plaintiffs filed petitions to restore water that was being diverted from streams to a water diversion system, the Water Commission issued an order establishing Interim Instream Flow Standards (IIFS) that set the amount of water that could be diverted. In setting the IIFS, the Water Commission had concluded that stream levels at the time of the case were greater than stream levels in the 1960s. Id. at 12, 93 P.3d at 654. The Water Commission based this conclusion on testimony (the 1960s testimony) that the water level in the 1960s "was adequate to support the stream's ecosystem." Id.

On appeal, the plaintiffs argued that the Water Commission erred by relying on the 1960s testimony. Id. at 11-12, 93 P.3d at 653-54. This court vacated the Water Commission's IIFS, holding that the Water Commission's conclusion regarding relative water levels was unsupported by any finding because the Water Commission had not made a finding as to the actual amount of water in the streams in 1960, and remanded the case so that the Water Commission could make such a finding. Id. at 12, 93 P.3d at 654. In doing so, this court noted that if the Water Commission could support its conclusion with findings on remand,

it could utilize the 1960s testimony to establish IIFS. Id. Because the Water Commission's IIFS was being vacated and remanded, it was necessary that this court decide what facts on remand the Water Commission could use to establish an IIFS. In this case, however, the ICA's test was unnecessary because it is not evident that the situation to which it is applicable will arise at all.

Finally, in Ditto v. McCurdy, 102 Hawai'i 518, 520, 78 P.3d 331, 333 (2003), the plaintiff had obtained a jury award of over \$1 million against the defendant in 1992. Following appeals and delays caused by the defendant's bankruptcy, the circuit court issued a writ of execution on November 22, 1999, allowing the sheriff to levy the defendant's property. Id. On February 8, 2000, the sheriff levied the execution. Id. at 521, 78 P.3d at 334. The defendant appealed, arguing that the "levy was invalid insofar as it was made after the expiration of the return day of the execution" and that the writ of execution was "void for failing to specify whose property was to be levied upon." Id. at 520, 78 P.3d at 333.

Ditto held that under HRS § 651-34, which requires writs of execution to be returnable within sixty days of their issuance, the writ of execution in that case was "returnable prior to January 21, 2000[,]"" and therefore the sheriff's levy was invalid. Id. at 522, 78 P.3d at 335. This court also addressed the defendant's argument that the writ of execution

itself was void for lack of specificity. Id. at 523, 78 P.3d at 336. It was held that the writ of execution issued by the circuit court, which "command[ed] the authorized officer to levy upon 'any and all personal property found at [the defendant's address,]'" but failed to identify the defendant by name, was "overly broad." Id. at 524-25, 78 P.3d at 337-38.

In Ditto, the plaintiff's levy of the defendant's property was reversed on a procedural error, and thus this court could be certain that the plaintiff would seek a new or alias writ of execution, as authorized by HRS § 651-38.⁷ Because the circuit court would again be issuing a writ of execution, it was necessary to address the error of failing to specify the name of the person being levied. By contrast, in this case, the ICA's attorney's fees test will only be relevant if the LIRAB returns an award lower than that of the Director's, an outcome which is entirely uncertain on remand.

VII.

As the foregoing discussion of the cases cited by the dissent indicates, this court and the ICA addressed issues that were directly applicable to an existing underlying dispute on remand. For that reason, the issues presented "actual controversies" that were ripe for decision. Wong, 62 Haw. at

⁷ HRS § 651-38 states that "[a]ny circuit court, out of which an execution has been issued, if such execution has been returned unsatisfied wholly or in part, may issue an alias execution to the same circuit, or an execution leviable in some other circuit[.]" An "alias execution" is "[a] second execution issued to enforce a judgment not fully satisfied by the original writ." Black's Law Dictionary 609 (8th ed. 2004).

394, 616 P.2d at 204. Because the ICA's test regarding attorney's fees was unripe, I concur that that portion of the ICA opinion should be vacated.



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