NO. SCWC-17-0000806

IN THE SUPREME COURT OF HAWAI'I

PETER J. WINN, WESTMINSTER REALTY, INC. Respondents/Plaintiffs-Appellants, vs. WADE BRADY, et al., Defendants, JAMES E. SPENCE, BEVERLY C. SPENCE, Petitioners/Intervenors-Appellees STEPHEN R. SPENCE, AND VALORIE A. SPENCE, Intervenors -Appellees	CIVIL NO. 12-1-0087(1) (Contract) APPEAL FROM THE ORDER GRANTING INTERVENORS JAMES E. SPENCE, BEVERLY C. SPENCE, STEPHEN R. SPENCE, AND VALORIE A. SPENCE'S MOTION FOR RECONSIDERATION OF ORDER GRANTING JUDGMENT CREDITORS PETER J. WINN AND WESTMINSTER REALTY, INC.'S EX PARTE MOTION FOR FIRST ALIAS WRIT OF EXECUTION, filed OCTOBER 11, 2017 Circuit Court of the Second Circuit Hon. Rhonda I.L. Loo

PETITIONERS' REPLY TO RESPONDENTS-PLAINTIFFS-APPELLANTS' OBJECTIONS TO THE TAXATION OF COSTS, filed July 18, 2025 [Dkt. 32]

CERTIFICATE OF SERVICE

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DEFENDANTS-APPELLEES-INTERVENORS REPLY TO RESPONDENTS-PLAINTIFFS-APPELLANTS' OBJECTIONS TO THE TAXATION OF COSTS, FILED July 18, 2025 [Dkt. 32]

Petitioners/Intervenors-Appellees JAMES E. SPENCE and BEVERLY C. SPENCE ("***Spences***"), by and through their counsel Kobayashi Sugita & Goda, LLP, respectfully submit their Reply to Respondents/Plaintiffs-Appellants' Objections to the Taxation of Costs, filed on July 18, 2025 (Dkt. No. 32] ("***Objections***"). Respondents/Plaintiffs-Appellants PETER J. WINN and WESTMINSTER REALTY, INC.'s ("***Respondents***") Objections are without merit. Accordingly, Respondents' Objections should be disregarded and the Spences should be awarded their costs in full as set forth in their Request for Costs on Appeal, filed on July 14, 2025 [Dkt. No. 29]. This reply is submitted pursuant to Hawai'i Rules of Appellate Procedure ("***HRAP***") Rule 39(d)(4).

I. THE SPENCES ARE THE PREVAILING PARTY

In their Objections, Respondents argue that the Spences are not the prevailing party for the purpose of taxing costs, despite this Court's judgment rendered in favor of the Spences. *See* Objections at 3-4. In support of that contention, Respondents cite *Sierra Club v. Dep't of Transp. of State of Hawai'i*, 120 Hawai'i 181, 216, 202 P.3d 1226, 1261 (2009), *as amended* (May 13, 2009) ("***Superferry***") for the proposition that in order to determine the prevailing party, this Court should "identify the principle issues raised by the pleadings and proof in a particular case, and then determine, on balance, which party prevailed on the issues."

However, that test[1], as explained by this Court in *Superferry*, only applies "where final judgment did not make clear which party had prevailed." *Id*. Respondents' Objections fail to cite the more general rule, which is as follows:

> in general, a party in whose favor judgment is rendered by the district court is the prevailing party in that court, plaintiff or defendant, as the case may be. Although a plaintiff may not sustain his entire claim, if judgment is rendered for him, he is the prevailing party for purposes of costs and [attorney's] fees.

Id. (citing *Kamaka v. Goodsill Anderson Quinn & Stifel*, 117 Hawai'i 92, 126, 176 P.3d 91, 125 (2008).

Here, this Court's opinion in this case, entered on June 13, 2025 [Dkt. No. 23] ("***Opinion***"), clearly rendered a final judgment in favor of the Spences. As recognized in the Opinion, the Circuit Court of the Second Circuit ("***Circuit Court***") granted the Spences' motion for reconsideration of Respondent's writ of execution on the property located at 3031 Old Haleakalā Highway, Makawao, Hawai'i 96768 ("***Property***"), and denied Respondents' motion to amend their writ of execution on the Property. *See* Opinion at 5-6. Respondents appealed the Circuit Court's order to the Intermediate Court of Appeals ("***ICA***"), and the ICA vacated the Circuit Court's order, and reinstated Respondents' lien on the Property. *See id.* at 6, 15-16. Then, the Spences filed their application for writ of certiorari, which asked this Court to reverse the ICA's decision. *See* Petitioners' Application for Writ of Certiorari, filed on March 18, 2024 [Dkt. No. 1] at 12; *see also* Petitioner's Reply to Plaintiffs-Appellants-Respondents' Response to Petitioners' Application for Writ of Certiorari, filed on April 11, 2024 [Dkt. No. 8] at 4. This Court's Opinion granted the exact relief requested by the Spences: it reversed the ICA's decision vacating the Circuit

[1] As stated in *Superferry*, the test cited by Respondents was established in *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, 58 Haw. 606, 620, 575 P.2d 869, 879 (1978).

Court's order[2]. *See* Opinion at 20. Thus, judgment was clearly entered in the Spences' favor, making the Spences the prevailing party for the purpose of taxing costs. To be sure, the key issue that impacted the parties to this appeal was whether the Court's ruling would apply prospectively or retrospectively. This Court correctly held the application of its ruling should be applied prospectively only. That was the very relief requested by the Spences. Simply put, the only practical reason why Respondents would have appealed the Circuit Court's order in the first place was their hope that a newly announced rule would be retroactively applied in their favor. Respondents did not prevail on that critical issue.

II. THE SPENCES' COSTS ARE REASONABLE AND SHOULD BE TAXED AGAINST RESPONDENTS

A. The Spence's Airfare Cost Should Be Taxed Against Respondents.

The Spences' intrastate airfare cost of $217.69 is a reasonable cost incurred in connection with the Spences' mandatory participation in the Hawai'i Appellate Mediation Program. The actual receipt for the intrastate airfare is attached to the Spences' Request for Costs on Appeal as Exhibit 3.

Respondents' arguments opposing the taxation of the Spences' airfare cost conveniently ignore the fact that the parties' participation in the Appellate Mediation Program was mandatory. *See* Appellate Mediation Program [ICA Dkt. No. 8], filed on November 17, 2017 (requiring the parties participating in the Appellate Mediation Program, and explaining the participation is mandatory pursuant to Rule 3(b) of the Hawai'i Appellate Mediation Program Rules).

In the case cited by Respondents, *Arquette v. State*, 128 Hawai'i 423, 290 P.3d 493 (2012), this Court drew a clear distinction between costs incurred in connection with a court-

[2] Further, HRAP Rule 39(a) states that "if a judgment is reversed or a petition granted, costs shall be taxed against the appellee or the respondent against otherwise ordered."

ordered mediation, and costs incurred in connection with a voluntary mediation. *Id.* at 515-16, P.3d at 445-46. While costs incurred in connection with a voluntary mediation are generally not taxable, the costs of entering court-ordered mediation "are related to and cannot be severed from the underlying litigation," and thus may be taxed. *Id.* at 516, P.3d at 446 (cleaned up).

Respondents argue that because mediation is intended to reduce costs and should offer a cost-effective alternative to litigation, allowing the recovery of costs related to mediation contradicts the goals of mediation and may discourage parties from participating in good faith. *See* Objections at 4-5. This argument does not make sense. Awarding costs to the prevailing party at the conclusion of litigation, following a failure to reach a settlement at mediation, as is the case here, encourages settlement at mediation, not the other way around. If the parties had reached a settlement at mediation, costs would have been reduced, and each side would have borne its respective costs incurred in connection with the mediation. Moreover, as noted in Respondents' Objections, the mediation resulted in the narrowing of issues, which in turn reduced the scope of costs of the ensuing litigation.

Respondents also argue that "[t]axing costs based on the outcomes of a non-adjudicative process mischaracterizes mediation as a zero-sum contest and will have the effect of discouraging full participation." Objections at 5. Respondents seem to be under the impression that the Spences' Request for Costs on Appeal is directly based upon the parties' failure to settle at mediation. To be clear, the Spences' Request for Costs on Appeal is based upon the Spence's victory in this litigation following this Court's Opinion. It is obvious that when parties fail to settle a case, the case will be decided via litigation. Respondents' argument may apply to voluntary mediations, when it is clear that the parties are unlikely to reach a settlement

agreement. But, when mediation is mandatory, as was the case here, it is unclear how taxing costs at the conclusion of a litigation would discourage full participation in mediation.

B. **The Spence's Photocopy Costs Should Be Taxed Against Respondents.**

The photocopies listed in Spences' Request for Costs on Appeal did not exceed 20 cents per page, and were incurred as follows:

Bill #	Date	# of Units	Unit Cost	Incurred Amount	Billed Amount	Narrative
307559	11/02/2017	5.00	0.20	1.00	1.00	Photocopies
307559	11/02/2017	1.00	0.20	0.20	0.20	Photocopies

A. **The Spence's Transcript Cost Should Be Taxed Against Respondents.**

Respondents' argument that the costs of the August 22, 2017 transcript of proceedings is improper ignores the actual timeline of events. Respondents' filed their certificate of no transcript on November 1, 2017 [Dkt. No. 6]. Shortly thereafter, based on a reliance upon Respondent's certificate of no transcript, the Spences' ordered the transcript. *See* Exhibit 2 to the Spences' Request for Costs on Appeal (showing that the transcript was ordered on November 9, 2017). Respondents did not request the transcript until February 2, 2018 [Dkt. No. 22], nearly three months after the Spences had already purchased the transcript. Therefore, the cost of the transcript was incurred as a result of Respondents' filing of their certificate of no transcript.

III. CONCLUSION

The foregoing addresses the errors and misunderstanding contained in Respondents' Objections. As such, the Spences' assert that their taxable costs, as set forth in their Request for Costs on Appeal, were reasonably incurred in this matter. As the prevailing party, the Spences respectfully request that this Court order the taxation of costs against Respondents in the amount of $331.68.

Dated: Honolulu, Hawai‘i, July 23, 2025.

/s/ Aaron R. Mun
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The undersigned certifies that, on this date, a true and correct copy of the foregoing document was served upon the following parties by the method indicated below:

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Dated: Honolulu, Hawai‘i July 23, 2025.

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