

2010 WL 9047321 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Alden James ARQUETTE, Plaintiff-Appellant/Cross-Appellee,

v.

STATE OF HAWAII; Stephen H. Levins, Michael J.S. Moriyama, Defendants-Appellees/Cross-Appellants.

and

John DOES, 1-25, Defendants.

No. CAAP10-0000001.

December 30, 2010.

Civil No. 08-1-0118

Appeal and Cross Appeal from:

- 1) Order Granting Defendants' Motion for Summary Judgment, Filed March 29, 2010;
- 2) Order Granting Defendants' Second Motion for Summary Judgment, Filed June 30, 2010;
- 3) Order Granting Plaintiff's Motion for Review and/or Set Aside Taxation of Cost, Filed August 23, 2010, and
- 4) Judgment for Defendants State of Hawaii, Stephen H. Levins and Michael J.S. Moriyama, in the their individual and official capacities, Against Plaintiff Alden James Arquette Filed September 3, 2010

First Circuit Court

Honorable Karl K. Sakamoto Judge

Opening Brief of Cross-Appellants

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1 STATEMENT OF THE CASE*I. INTRODUCTION**

This cross-appeal seeks the reversal of the trial court's Order Granting Plaintiff's Motion For Review and/or To Set Aside Taxation of Costs filed August 23, 2010. *See* Order at Record on Appeal, Docket Entry No. # 21, pp. 496-497 (hereafter "RA" 21/496-497). The Defendants-Appellees/Cross-Appellants, Stephen H. Levins, Michael J.S. Moriyama and the State of Hawaii, (hereafter "Cross-Appellants") submit that the trial court **abused** its discretion and therefore committed reversible error when it granted Plaintiff-Appellant/Cross-Appellee Arquette's (hereafter "Appellant") Motion For Review And/Or To Set Aside Taxation Of Costs by denying some of the costs listed on the Clerk's Taxation of Costs filed on July 8, 2010. *See* Appellant's Motion at RA 21/478-485 and the Clerk's Taxation of Costs at RA 21/476-477.

The record establishes that the Cross-Appellants prevailed on the disputed main issue in the case. The Cross-Appellants prevailed on the two motions for summary judgment that they filed in the trial court. RA 19/543 and 21/466. The Appellant could not establish any genuine issues of material fact to support his malicious prosecution and negligence causes of action. The Cross-Appellants are therefore clearly the "prevailing party" for purposes of the award of costs by the trial court. *See, e.g., Food Pantry, Ltd. v. Waikiki Business Plaza, Inc., 58 Haw. 606, 619-620, 575 P.2d 869, 879 (1978)*. The law therefore entitles the Cross-Appellants to the award of all actual disbursements listed on the Clerk's Taxation of Costs. RA 21/476-477. [Haw. Rev. Stat. § 607-9](#)

***2** The following discussion provides a brief procedural history of this case with references to the evidence adduced on the merits in the trial court as necessary. ¹ The remainder of this Brief establishes that the trial court committed reversible error by denying some of the actual disbursements of the Cross-Appellants.

II. DISCUSSION**A. The Complaint.**

The Appellant filed suit on January 17, 2008, claiming that the State of Hawaii, Stephen H. Levins, the Executive Director of the State of Hawaii's Office of Consumer Protection, and Michael J.S. Moriyama, a trial attorney on the staff of the Office of Consumer Protection, are liable in damages for malicious prosecution. *See* Complaint, First Cause of Action, RA 19/18. That malicious prosecution claim is based on a civil action brought by the State of Hawaii's Office of Consumer Protection against Appellant Arquette and others in July 2004. *See* ¶ 9 of the Complaint at RA 19/13. The Appellant sued Mr. Levins and Mr. Moriyama in their official and individual capacities. Complaint at ¶¶ 3 and 4, RA 19/13.

The Appellant also alleged that Cross-Appellant Moriyama negligently failed to sufficiently investigate the claims made against Mr. Arquette in that prior civil action initiated by the Office of Consumer Protection. Complaint ¶¶ 11, 26, 36, 37, RA 19/13-19. Finally, the Appellant claimed that the Cross-Appellants State and Levins negligently failed to train and ***3** supervise staff attorney Michael Moriyama. *See* ¶ 39 of Third Cause of Action of Complaint, RA 19/19.

B. The Prior Proceeding Initiated By The Office of Consumer Protection v. Arquette, et al.

The lawsuit instituted by the Office of Consumer Protection (OCP) against Appellant Arquette and others filed in July 2004, which is the basis for the Appellant's claims of malicious prosecution and negligence in this case, sought to protect **elderly** members of the public against the unfair and deceptive business practices of Appellant Arquette and other insurance salespersons

selling long term deferred annuities while they portrayed themselves as paralegals acting on behalf of an estate planning attorney. That Office of Consumer Protection Complaint is attached as Exhibit "1" to Michael Moriyama's Declaration in support of Defendants' Motion for Summary Judgment. RA 19/195-248.

The investigations that formed the foundation for that OCP lawsuit revealed a pattern of conduct by the group of insurance persons of which Mr. Arquette was a part. They identified Mr. Arquette as one of the several persons who portrayed themselves as "paralegals" ostensibly employed by Rodwin Wong, the estate planning attorney who also participated in this scheme primarily with Dan Fox, the owner/operator of an insurance agency. *See* the Declaration of Michael J.S. Moriyama attached to Defendants' First Motion for Summary Judgment, ¶¶ 10, 17-18. RA 19/178-183 and the Declaration of Michael J.S. Moriyama attached to Defendants' Second Motion For Summary Judgment, ¶¶ 11-18, RA 21/45-48.

These "paralegals" and Rodwin Wong, however, were all being managed and paid by Dan Fox in his scheme to gain entry to the homes of **elderly** Hawaii residents, have these "paralegals" obtain knowledge of the financial wherewithal of these **elderly** *4 persons ostensibly for estate planning purposes, then transfer that information to a salesman who would follow up with attempts to sell long term deferred annuities.

These deferred annuities were inappropriate for these **elderly** persons because their deferral periods were so long. Many of the **elderly** purchasers of these annuities would likely die before becoming entitled to receive any payments from these annuities. These insurance/annuity products, however, provided large commissions for their sale. *See generally* Declaration of Michael J.S. Moriyama attached to Cross-Appellants' first motion for summary judgment, RA 19/175-194, specifically ¶¶ 9-24 at 19/177-185 and the Declaration of Michael J.S. Moriyama attached to the second motion for summary judgment presented by the Defendants-Cross-Appellants to the trial court, RA 21/42-65, specifically ¶¶ 11-18, RA 21/45-48.

C. The Defendants' First Motion For Summary Judgment.

The Cross-Appellants filed a Motion For Summary Judgment on December 24, 2009. RA 19/149-346. That motion contended that the Defendants-Cross-Appellants were entitled to judgment as a matter of law regarding the malicious prosecution claim because; 1) the prior Office of Consumer Protection lawsuit was initiated based on sufficient information to establish probable cause that Mr. Arquette was a participant in the scheme that constituted unfair and deceptive trade acts, among other violations of the law alleged in that OCP Complaint, and, 2) that prior action by the Office of Consumer Protection was not initiated with malice. RA 19/156-163.

The existence of malice and a lack of probable cause at the initiation of the prior proceeding are two of the three elements *5 of a cause of action for malicious prosecution in Hawaii.² *Young v. Allstate Insurance Co.*, 119 Hawaii 403, 417, 198 P.3d 666, 680 (2008); *Brodie v. Hawaii Automobile Retail Gasoline Dealers Association*, 2 Haw. App. 316, 631 P.2d 600 (1981).

That motion also presented legal argument, with supporting evidence, that showed there was no actionable negligence in the conduct of Mr. Moriyama's investigation and no actionable negligence in Mr. Levins' or the State's training or supervision of Mr. Moriyama. RA 19/165-174. The Cross-Appellants also argued and presented evidence in support of a finding of no liability against Mr. Levins and Mr. Moriyama, in their individual capacities, based on the qualified immunity that they enjoy by reason of their employment with the State of Hawaii. RA 19/163-165. *Towse v. State of Hawaii*, 64 Haw. 624, 632, 647 P.2d 696, 702 (1982). Finally the Cross-Appellants argued that the malicious prosecution cause of action, as it relates to the State and Mr. Levins and Mr. Moriyama in their official capacities, must be dismissed for lack of subject matter jurisdiction based on the explicit exception to the State's waiver of sovereign immunity for malicious prosecution contained in the State Tort Liability Act at [Haw. Rev. Stat. § 662-15\(4\)](#). RA 19/157-158.

The Plaintiff-Appellant filed his Memorandum In Opposition to Defendants-Cross-Appellants' Motion for Summary Judgment on February 22, 2010. RA 19/347. That Memorandum claimed there was substantial evidence that the OCP action was initiated

without probable cause and with malice.³ The Appellant also *6 claimed that the Legislature intended to create a legal duty in tort owed by the Defendants-Cross-Appellants to him by the enactment of [Haw. Rev. Stat. § 487-1](#).⁴ Finally the Appellant claimed that Cross-Appellant Levins is liable for the negligence of Defendant-Cross-Appellant Moriyama. RA 19/350.

The hearing on the Cross-Appellants' first Motion for Summary Judgment was held on March 2, 2010. *See* Court Appearance Summary, RA 19/6. The Court found that there were no genuine issues of material fact regarding the fact that the 2004 OCP litigation was supported by probable cause and that Mr. Moriyama was not motivated by malice at the initiation of the OCP lawsuit. *See* the transcript of that hearing, (hereafter "Tr") 3/2/10, p. 25, lines 5-8. The Court also found that summary judgment in favor of the Cross-Appellants was proper on the claims of negligent investigation by Moriyama and negligent supervision by Levins and the State. Tr 3/2/10, p. 29, lines 10- 25, p. 30, lines 1-3.⁵

The trial Court held, as a matter of law, that no legal duty in tort which would support the allegations of negligent investigation by Defendant Moriyama and negligent supervision against the State and Levins could be implied from [Section 487-1 of the Hawaii Revised Statutes](#). Tr 3/2/10, p. 16, lines 18-21, p. 30, lines 3-8.

*7 At that hearing, the Plaintiff also conceded on the record, and the Court so found, that the allegations of malicious prosecution could not, as a matter of law, apply to the State of Hawaii or Cross-Appellants Levins and Moriyama in their official capacities pursuant to [Haw. Rev. Stat. § 662-15\(4\)](#). Tr 3/2/10, p. 3, lines 22-25, p. 3, lines 1-5.⁶

After the Court granted the Cross-Appellants' motion at the hearing of March 2, 2010, *counsel for Plaintiff-Appellant argued that "we've alleged claims that this case was maintained without any evidence."* (Emphasis added.) Tr 3/2/10, p. 30, lines 18-19. The trial Court opined that the Defendants' motion did not sufficiently brief what may have occurred during the OCP lawsuit. The Court stated that "as far as the initiation of prosecution, that was what was brought, and that was what the court ruled on." Tr 3/2/10, p. 30, lines 18-19, p. 31, lines 1-10.⁷

The trial court signed the Order Granting Defendants' Motion For Summary Judgment which was prepared by Appellant's counsel which provides that "[t]his Order does not affect Plaintiff's claims of malicious prosecution, negligent investigation and negligent supervision arising from the maintenance of the action against *8 Plaintiff in Civil No. 04-1-1317-07(VSM) as those claims were not raised or briefed in the instant motion." (Emphasis added.) RA 19/543-544.

By the mere definition of malicious prosecution in Hawaii, that tort cannot exist unless malice and a lack of probable cause exist at the initiation of a lawsuit. Nevertheless, because the trial court's order left this caveat concerning claims arising out of the maintenance of the prior action, a second Motion for Summary Judgment was made necessary.

D. The Defendants' Second Motion For Summary Judgment.

Cross-Appellants filed their Second Motion For Summary Judgment on April 12, 2010. RA 21/8-218. The Cross-Appellants argued again that there can be no malicious prosecution in the *maintenance* of an action under Hawaii's definition of malicious prosecution. *See* Memorandum In Support of Defendants' Second Motion For Summary Judgment, p. 6, RA 21/20-21.

The Cross-Appellants argued for the first time in their second Motion For Summary Judgment that dismissal of the malicious prosecution cause of action was required because the third element of a cause of action for malicious prosecution, i.e., that the

prior litigation terminated in favor of the plaintiff, could never be proven. RA 21/22-23. This is so because it is undisputed that the prior litigation upon which Mr. Arquette based his claim of malicious prosecution, in fact, ended by the voluntary stipulation of the parties to dismiss that action without prejudice. *See* Declaration of Michael J.S. Moriyama, ¶ 59, RA 21/62. A copy of that Stipulation For Dismissal Without Prejudice As To The Balance of All Claims As Against Defendant Alden James Arquette is attached as Exhibit 13 to Defendants' Second Motion For Summary Judgment. RA 21/172-173. *See Wong v. Panis*, 7 Haw. App. 414, 772 P.2d 695 (1989); *9 *Jaress & Leong v. Burt*, 150 F. Supp. 2d 1058 (D. Haw., 2001) (Diversity action applying Hawaii law); *Haight v. Handweiler*, 199 Cal.App. 3d 85, 244 Cal. Rptr. 488, 489 (1988); *Villa v. Cole*, 4 Cal.App. 4th 1327, 6 Cal. Rptr. 2d 644, 649 (1992).⁸

The Appellant filed his Memorandum In Opposition To Defendants' Second Motion For Summary Judgment on June 4, 2010. RA 21/231. Cross-Appellants filed their Memorandum In Reply To Plaintiff's Memorandum In Opposition To Defendants' Second Motion for Summary Judgment on June 10, 2010. RA 21/430-462.

The hearing on Defendants' Second Motion For Summary Judgment was held on June 15, 2010. Court Appearance Summary, RA 19/7. At said hearing, the trial Court granted summary judgment in favor of all Defendants on all claims. Tr 6/15/10, pp. 16-21. The Order Granting Defendants' Second Motion For Summary Judgment was filed June 30, 2010. RA 21/466-468.

E. The Cross-Appellants Are The Prevailing Party.

The granting of summary judgment twice in favor of the Cross-Appellants caused the Cross-Appellant to be the “prevailing party” within the meaning of [Rule 54\(d\)\(1\) of the Hawaii Rules of Civil Procedure](#). *Food Pantry, Ltd. v. Waikiki Business Plaza, Inc.*, *supra*. Based on summary judgment being granted in favor of the Cross-Appellants on all claims, therefore, they are presumptively entitled to the award of all of their actual disbursements incurred as costs in defending this action. [Haw. Rev. Stat. § 607-9](#); [Haw. R. Civ. P., Rule 54\(d\)](#); *Shanghai Investment Co., Inc. v. Alteka Co., Ltd.*, 92 Hawaii 482, 502, 993 P.2d 516, 536 (2000); *Fought & Co., Inc., *10 v. Steel Engineering*, 87 Hawaii 37, 52-53, 951 P.2d 487, 502-503 (1998).

F. The Trial Court's Order Partially Denying Costs.

On July 2, 2010 the Cross-Appellants filed their Notice of Taxation of Costs with a supporting Declaration of Counsel establishing that the disbursements listed were necessarily incurred in the defense of this action. RA 21/469-475. On July 8, 2010, the Clerk's Taxation of Costs was filed. RA 21/476-477. That document listed all actual disbursements for which Cross-Appellants sought reimbursement in their Notice of Taxation of Costs.

The Appellant moved for review and/or to set aside the Clerk's taxation of costs on July 13, 2010. RA 21/478-485. The Appellant's motion contended that the costs incurred by the Cross-Appellants “were not reasonably necessary or relied upon in having Plaintiff's claims dismissed.” No evidence was provided by the Appellant with that motion to substantiate this argument.

The Appellant claimed that “...Plaintiff suffered substantial expenses in defending against the charges...,” i.e., the civil action filed by OCP. RA 21/480. The Appellant further contended that, because of Hawaii's limited definition of malicious prosecution, “...Plaintiff cannot pursue claims against Defendants for maintaining the prosecution after learning that there was no probable cause to do so.” RA 21/480.

The Appellant presented no evidence to substantiate any of these representations of fact. There was no evidence provided by the Appellant with that motion. There was no evidence in the trial court's record through previous filings that supported the representations that the Appellant “suffered substantial expenses” or that the Cross-Appellants ever learned there was no *11 probable cause during the pendency of the Office of Consumer Protection action.

Appellant made unsupported objections to each disbursement taxed as costs. The Appellant claimed that the mediation fee paid by Cross-Appellants should be disallowed because [Haw. Rev. Stat. § 607-9](#) does not specifically allow such costs and, “in the absence of any showing that Defendants made a good faith effort to settle Plaintiff’s claims in mediation the equities of the situation warrant the disallowance of these fees.” RA 21/480-481. Again, there was no evidence presented with the motion or anywhere else in the record before the trial court to substantiate the accusation that the Cross-Appellants did not participate in mediation in good faith.

The Appellant also specifically contended that the costs incurred by the Cross-Appellants for the records depositions of two physicians who had treated Mr. Arquette and the cost of the transcript of the deposition of the Plaintiff which had been taxed by the Clerk should not be allowed. This is so, it was argued without any evidentiary support, because the Cross-Appellants did not use those transcripts specifically to support their two motions for summary judgment. RA 21/481-482.

The Appellant submitted no sworn declarations or other competent evidence incident to his motion for review and/or to set aside costs to support any of the arguments made in that motion. There were also no previous filings in the record that contained competent evidence that would support Plaintiff’s arguments. In short, no evidence to support Plaintiff’s objections to the taxed costs was provided to the trial court. RA 21/478-485.

The Cross-Appellants filed their Memorandum In Opposition To Plaintiff’s Motion For Review And/Or To Set Aside Taxation of Costs on July 28, 2010. RA 21/486-495. By that memorandum, the *12 Defendants pointed out to the trial Court that the records of the case established; 1) the Plaintiff never produced any evidence to create any genuine issues of fact in response to the Defendants’ two motions for summary judgment, 2) based on the stipulation to dismiss filed in the prior proceeding alone, Mr. Arquette knew, or should have known, that he could never prove the allegations of his Complaint, and 3) the individual Defendants were sued in their individual capacity by the Plaintiff even though the Plaintiff never had any evidence of malice on their part or any evidence that the Defendants lacked probable cause. *Id.*

The Cross-Appellants argued, based on the evidence already submitted to the trial court through the sworn Declarations and exhibits attached to Defendants’ two motions for summary judgment, that if Mr. Arquette had followed the law, he never would have filed his malicious prosecution claim in the first place. Under these circumstances “the equities of the situation” favored the Cross-Appellants and more than justified the award of all the actual disbursements taxed as costs by the Clerk in accordance with [Haw. Rev. Stat. § 607-9](#). RA 21/488-492.

The hearing on Plaintiff’s Motion For Review and/or To Set Aside Taxation of Costs took place on August 10, 2010. See Court Appearance Summary, RA 19/7-8. Although no evidence was presented by the Appellant in support of that motion and no evidence to support counsel’s argument was in the trial court’s record, the trial court partially granted the Appellant’s motion by denying the award of the cost incurred by the Cross-Appellants for mediation (\$750.00), the cost of the records deposition of Dr. Claudine Kimura (\$214.26), the cost of the records deposition of Dr. L. Martin Johnson (\$223.19) and the *13 cost of the transcript of the deposition of the Plaintiff (\$626.23). Tr 8/10/10, pp. 1-4.

Those actual disbursements, the purpose for each, and the trial court’s decision regarding each cost are summarized as follows:

COSTS & PURPOSE	AMOUNT	TRIAL COURT ACTION
Mediation fee	\$750.00	Denied
Records deposition of Dr. Claudine Kimura (Arquette’s medical care provider)	\$214.24	Denied
Records deposition of Dr. L. Martin Johnson (Arquette’s medical care provider)	\$223.19	Denied

Deposition transcript of Plaintiff Arquette (discovery/prep for trial)	\$626.23	Denied
Deposition transcript (copy) of Defendant Moriyama	\$394.97	Granted
Transcript of 3/2/10 hearing on first motion for summary judgment (used for second motion for summary judgment)	\$134.03	Granted
TOTAL:	\$2,342.66	\$529.00 (Granted)

The trial court did not state any reasons for its decision to deny the award of these costs to the Cross-Appellants as the prevailing party. The trial court simply noted on the record that it had discretion in this regard. Tr. 8/10/10 p. 4.

The trial court's denial of these costs without having any evidence for doing so is reversible error. Furthermore, the trial court's failure to provide an adequate explanation for *14 denying costs to these prevailing parties is also reversible error. The trial court's denial of these costs based on no evidence and without providing any adequate reasons on the record are the subjects of this cross-appeal.

STATEMENT OF THE POINTS OF ERROR

1. The trial court committed reversible error by partially denying the costs taxed by the Clerk in favor of the Defendants-Appellees/Cross-Appellants as prevailing parties without providing an adequate explanation for doing so on the record.
2. The trial court committed reversible error by partially denying the costs taxed by the Clerk in favor of the Defendants-Appellees/Cross-Appellants as the prevailing parties without having any evidence for doing so since the Plaintiff-Appellant/Cross-Appellee presented no evidence in support of his Motion For Review And/Or To Set Aside Costs and the record in the trial court contained no evidence to support its ruling.

STANDARD OF REVIEW

An award of costs is reviewed under the **abuse** of discretion standard. *Kahala Royal Corp. v. Goodsill Anderson Quinn & Stifel*, 113 Hawaii 251, 266 151 P.3d 732, 747(2007); *Wong v. Takeuchi*, 88 Hawaii 46, 52, 961 P.2d 611, 617 (1998). An **abuse** of discretion occurs when the lower court “exceed[s] the bounds of reason or disregard[s] rules or principles of law or practice to the substantial detriment of” a party. *Amfac, Inc. v. Waikiki Beachcomber Inv. Co.*, 74 Haw. 85, 114, 839 P.2d 10, 26 (1992).

*15 ARGUMENT

A. THE TRIAL COURT **ABUSED** ITS DISCRETION BY DENYING COSTS WITHOUT AN ADEQUATE EXPLANATION FOR DOING SO.

The trial court **abused** its discretion by denying the costs taxed by the Clerk without stating its reasons for doing so on the record. Tr 8/10/10, p. 4. If the trial court denies any costs to a prevailing party, it must provide an adequate explanation unless the reasons are clear from the record. *Haw. Rev. Stat. § 607-9*; *Haw. R. Civ. P. Rule 54(d)*; *Ranger Insurance Co. v. Hinshaw*, 103 Hawaii 26, 32-33, 79 P.3d 119, 132-133 (2003).

[Hawaii Revised Statutes section 607-9](#) provides in relevant part;

All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, **expenses for deposition transcript originals and copies**, and other incidental expenses, including copying costs, intrastate long distance

telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation. *Id.* (Emphasis added.)

Rule 54(d)(1) of the Hawaii Rules of Civil Procedure provides in relevant part as follows;

Costs Other Than Attorneys' Fees. Except when express provision therefor is made either in a statute or in these rules, **costs shall be allowed as of course to the prevailing party** unless the court otherwise directs; *Id.* (Emphasis added.)

When costs are awardable to a prevailing party under [Haw. R. Civ. P. Rule 54\(d\)](#) and a particular taxable cost is allowed by statute or precedent, then actual disbursements for this *16 purpose are presumptively reasonable. This presumption in favor of awarding all actual disbursements as costs is so strong that Hawaii appellate courts have held that the trial court **abuses** its discretion if it does not explain on the record its reasons for denying the award of any cost contrary to that presumption. The reasons provided on the record must be adequate to overcome the presumption in favor of the award of costs. [Finley v. Home Insurance Co.](#), 90 Hawaii 25, 38, 975 P.2d 1145, 1158 (1998); [Wong v. Takeuchi](#), 88 Hawaii 46, 53, 961 P.2d 611, 618 (1998).

The award of the actual disbursements for all of the depositions transcripts is expressly authorized by [Haw. Rev. Stat. § 607-9](#). In the nonexclusive list of examples of actual disbursements that the Legislature determined are authorized for taxation and presumptively reasonable are “expenses for deposition transcript originals and copies.” *Id.*

The Appellant's argument in the trial court that those disbursements for deposition transcripts should not be awarded to Cross-Appellants because the Cross-Appellants did not show that they were necessary to prevail in the case misstates the test and incorrectly places the burden on the prevailing party.

As the Court stated in [Wong v. Takeuchi](#), 88 Hawaii 46 at 53, 961 P.2d 611 (1998), “The losing party bears the burden of showing that a denial of costs is justified because ‘the denial of costs is by nature a penalty.’” [quoting [National Information Services, Inc. v. TRW, Inc.](#), 51 F.3d 1470 at 1472 (9th Cir. 1995)]. In order then for any of these deposition transcript expenses to not be awardable, Appellant Arquette would have had to produce some evidence that the depositions expenses were not only not incurred to prevail in the case, but not incurred even for basic discovery purposes. Obviously, the Appellant did not meet his burden of rebutting the presumption that deposition transcript costs are awardable since he produced no evidence.

*17 The deposition transcript expense incurred to take the plaintiff's deposition can hardly be a completely unnecessary litigation expense. In view of the express inclusion of this expense, this is what the losing party would have to prove in order to rebut the presumption that it is an awardable cost.

Obtaining the records of the plaintiff's physician, Dr. Claudine Kimura, and psychologist, Dr. L. Martin Johnson, through depositions upon written interrogatories was necessary in order to conduct discovery on Appellant's damages and generally prepare the defense of the case. Contrary to Appellant's bald assertion, the Cross-Appellants did not have the burden of demonstrating to the trial court that these expenses were incurred in order to prevail on their motions.

True, those transcripts were not used to prevail in the case. But Appellant Arquette did not produce any authority to establish that as the test for a deposition transcript cost to be awardable. Nor did the Appellant produce any evidence that these records depositions of these damages witnesses was a waste of money in preparation of the case. This is what a nonprevailing party would logically have to show in view of the express inclusion of deposition expenses as awardable costs in [Haw. Rev. Stat. § 607-9](#) and the presumption of reasonableness that the nonprevailing party has the burden of rebutting. [Helms v. Wal-Mart Stores, Inc.](#), 808 F. Supp. 1568, 1571 (N.D. Ga. 1992).

The trial court's denial of the taxation of the mediation fee should also be reversed. Both voluntary and court ordered mediation is growing in significance as an integral part of the litigation process in Hawaii courts. Trial courts frequently order the parties to mediation before the trial court will hear the trial of a case. Denying the award of this actual disbursement, particularly without any evidentiary support being *18 provided by the Appellant, serves to penalize these Cross-Appellants for attempting to resolve this matter through alternative dispute resolution.

Other courts have allowed the award of mediators' fees and similar costs, even when they are not specifically authorized for reimbursement as costs by statute. For example, mediation fees have been awarded to prevailing parties because they are the kind of costs that are normally passed on to a client for payment. *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577 (9th Cir. 2010).

Mediation fees have also been likened to arbitration fees that are awardable by statute since they are “reasonably necessary to the conduct of the litigation” within the meaning of the applicable statutory scheme. “Like the related arbitration scheme, mediation is fundamental to the conduct of litigation as it encourages the parties to settle their disputes before trial and exposes parties who fail to agree to a reasonable settlement proposal to the risk of a discretionary court determination that they should pay their opponent's share of the failed mediation.” *Gibson v. Bobroff*, 49 Cal.App. 4th 1202, 1209, 57 Cal. Rptr. 2d 235 (1996).

Thus this expenditure for Cross-Appellants' own one-half share of the mediation fee is an actual disbursement found to be a legitimate expense of modern litigation by the courts, and therefore presumed to be taxable unless the losing party produces evidence justifying its denial. Appellant's counsel's unsworn representations that the Cross-Appellants did not participate in mediation in good faith is not supported by any evidence in Appellant's motion for review of the costs. Not only was there no evidentiary basis for the denial of this cost, the trial court gave no reasons whatsoever for denying the taxation of this cost.

*19 The trial court only stated that it had discretion in the award of costs based on the equities of the situation. It stated no reasons for the denial of these costs to Cross-Appellants as the prevailing party. Tr. 8/10/10, p. 4. This is reversible error normally warranting remand to the trial court so that it may provide its reasons for its denial of any costs. *Id.*

B. THE TRIAL COURT ABUSED ITS DISCRETION BY PARTIALLY GRANTING THE MOTION FOR REVIEW OF COSTS WITHOUT ANY EVIDENTIARY BASIS FOR DOING SO.

The presumption that the prevailing party is entitled to costs must be overcome by some evidence that an award would be inequitable under the circumstances. *Wong v. Takeuchi*, 88 Hawaii 46, 52, 961 P.2d 611, 617 (1998). The losing party bears the burden of making this showing by the production of evidence. 10 *Moore's Federal Practice* § 54.101(1) (a-b) (3d ed. 1998); *National Information Services, Inc. v. TRW Inc.*, 51 F.3d 1470 (9th Cir. 1995), *overruled in part on other grounds*, 231 F.3d 572 (9th Cir. 2000); *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994) (Non-prevailing party submitted no documentary evidence to support contention of inability to pay, relying instead on unsupported, self-serving statements.)⁹

Even if one surmises that the trial court based its denial of costs on the argument of counsel in Plaintiff-Appellant's motion for review and/or to set aside costs, or at the hearing of the motion, it was error to do since counsel's argument was not evidence. *State v. Valdivia*, 95 Hawaii 465, 484, 24 P.3d 661, 680 (2001). No evidence was presented incident to *20 Plaintiff's motion for review of costs to support the arguments made. No evidence from prior filings in the trial court's record supports the representations and arguments made in Plaintiff's Motion For Review And/Or To Set Aside Taxation of Costs or at the hearing on said motion. Tr. 8/10/10 pp. 2-4.

Essentially, the trial court granted the Plaintiff-Appellant's motion, contrary to statutory presumption, without having any evidence to support its decision. Whatever argument is made by any nonprevailing party in a motion for review of costs, it must be supported by evidence. *Corder v. Lucent Techs. Inc.*, 162 F.3d 924, 929 (7th Cir. 1998) (*Evidence of inability to pay required.*)

The Hawaii Supreme Court's decision in *Pulawa v. GTE Hawaiian Tel*, 112 Hawaii 3, 19-22, 143 P.3d 1205, 1221-1224 (2006) is instructive on the proper disposition of this appeal. In *Pulawa*, the plaintiff sustained significant injuries, including brain damage, in a construction accident. He had been out of work for eight years. While he litigated his personal injury claim, he and his family subsisted on workers compensation and disability benefits from his labor union and social security.¹⁰

When the plaintiff in *Pulawa* lost at trial, he opposed the taxation of costs against him which amounted to more than \$35,000. He argued that it would be inequitable for the Court to award those costs due to his financial situation.

The Hawaii Supreme Court, however, disagreed. It ruled that Mr. Pulawa made an insufficient evidentiary showing before the trial court to rebut the strong presumption that the *21 prevailing party is to be awarded its actual disbursements as costs. The Hawaii Supreme Court determined that there was no authority for the Court to remand to the trial court to provide the non-prevailing party any further opportunity to present additional evidence concerning his claimed financial inability to pay. *Id.* at 22, 143 P.3d at 1224. Therefore the trial court's award of costs was affirmed without remanding to the trial court.

In the present case, Mr. Arquette filed his motion to review and/or to set aside costs with nothing more to support his motion than his attorneys' arguments. RA 21/478-485. The Plaintiff-Appellant did not meet his evidentiary burden at his one opportunity to litigate the issue of costs.

This is not a situation requiring remand to the trial court so that it may explain on the record its adequate reasons for denying costs. There is no evidence in the record upon which the trial court could base any reasons for its denial of costs. Just as in *Pulawa supra*, there is no authority for this Court to remand this matter of costs to the trial court in order to give the Appellant another opportunity to present evidence. The non-prevailing party is entitled to only one hearing on his motion for review of costs.

This court should simply vacate the trial court's Order Granting Plaintiff's Motion for Review and/or To Set Aside Taxation of Costs filed August 23, 2010 and remand to the trial court with instructions to enter an Amended Judgment awarding the entire amount of costs taxed by the Clerk of Court.

CONCLUSION

The Defendants-Cross-Appellants are the prevailing parties and are therefore presumptively entitled to the award of all actual disbursements as costs. The Plaintiff failed to present *22 any evidence to support his Motion For Review And/Or To Set Aside Taxation of Costs. Accordingly, the trial court **abused** its discretion in partially granting that motion.

The trial court also **abused** its discretion by not stating on the record its reasons for denying some of the Defendants' actual disbursements that had been taxed as costs by the Clerk of Court. The remedy of remanding to the trial court so that it may place its reasons for its denial of costs is not appropriate in this case since there has been no evidence provided to the trial court by the party seeking review of those costs. There is no authority for giving the non-prevailing party a second opportunity to present evidence intended to rebut the presumption in favor of the award of all actual disbursements as costs to the prevailing party.

This matter should be remanded so that the trial court can file an Amended Judgment in Defendants-Cross-Appellants' favor for the entire amount of costs taxed by the Clerk of Court on July 8, 2010 (\$2,342.66).

Footnotes

- 1 H.R.S. § 607-9 governing the award of all actual disbursement as costs provides, in part, that "In determining whether and what costs should be taxed, the court may consider the equities of the situation." The evidence discussed herein is offered to show that "the equities of the situation" clearly favored the Cross-Appellants.

A much more extensive discussion of the evidence presented to the trial court will be presented in Defendants-Appellee/Cross-Appellants' Answering Brief.

2 The third element of a cause of action for malicious prosecution, i.e., that the prior proceeding must have terminated in favor of the plaintiff, was not addressed in the first motion for summary judgment filed by Defendants. *See* fn 3, p. 5 of Defendants Memorandum In Support of Motion For Summary Judgment, RA 19/159.

3 Although the Appellant claimed there was substantial evidence in regard to a lack of probable cause and the existence of malice, no relevant evidence of either was produced in either of the memoranda in opposition to the two motions for summary judgment filed.

4 **Haw. Rev. Stat. § 487-1 Legislative intent.** The public health, welfare and interest require a strong and effective consumer protection program to protect the interests of both the consumer public and the legitimate business person. Toward this end, a permanent office of consumer protection is created to coordinate the services offered to the consumer by various state and county agencies, together with private organizations, and to aid in the development of preventive and remedial programs affecting the interest of the consumer public.

5 The Plaintiff's counsel conceded on the record at the hearing on Defendants' first motion that, "[a]s to the negligent supervision claim, I think we would admit that Mr. Moriyama, at all times pertinent here, was acting within the scope of work." *See* Tr 3/2/10, p. 24, lines 2-4.

6 *See also* footnote 4 on page 6 of Plaintiff's Memorandum In Opposition to Defendants' first Motion for Summary Judgment in which Plaintiff's counsel states "**Defendants Moriyama and Levins are not sued in their official capacity for malicious prosecution, and accordingly the exclusions under the State Tort Liability Act, HRS S 662-15(4) are not applicable.**" RA 19/352.

7 The Plaintiff produced no evidence to create any genuine issues of fact regarding the Defendants' alleged lack of malice and the existence of probable cause **at any time before or during the prior litigation.** Since a party's cannot simply rely on the allegations of his Complaint or the representations of counsel at the hearing to respond to a motion for summary judgment, and the period of time to which those unsupported allegations refer, i.e., after the initiation of a lawsuit, is irrelevant by reason of the definition of the tort of malicious prosecution, counsel for the Defendants did not respond on the record. Tr 3/2/10, p. 30-31. *Costa v. Able Distributors, Inc.*, 3 Haw. App. 486, 653 P.2d 101 (1982).

8 The Defendants had not addressed this element of the malicious prosecution cause of action in their first Motion For Summary Judgment. *See* fn 3 on page 5 of Defendants' Memorandum In Support of their first Motion For Summary Judgment. RA 19/159.

9 **HRCF Rule 54(d) and Federal Rule of Civil Procedure Rule 54(d)** are functionally identical. "Where a Hawaii rule of civil procedure is identical to the federal rule, the interpretation of this rule by the federal courts is highly persuasive." *Collins v. South Seas Jeep Eagle*, 87 Hawaii 86, 88, 952 P.2d 374, 376 (1997).

10 The plaintiff in *Pulawa* presented sufficient evidence for the trial and appellate courts to make these findings of fact, yet the appellate court found the evidence presented was not sufficiently detailed or substantiated to support a denial of any costs awardable to the prevailing party. *Pulawa*, 112 Hawaii 3, 19, 143 P.3d at 1221 (2006).