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SCAP-18-0000578

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

OCEAN RESORT VILLAS VACATION OWNERS ASSOCIATION,
OCEAN RESORT VILLAS NORTH VACATION OWNERS ASSOCIATION,
VIC H. HENRY, and PETER A. BAGATELOS,
Plaintiffs-Appellees,

vs.

COUNTY OF MAUI and MAUI COUNTY COUNCIL,
Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CAAP-18-0000578; CIV. NO. 13-1-0848(2))

DISSENT TO ORDER DENYING MOTION FOR PARTIAL DISMISSAL OF APPEAL WITH PREJUDICE AND REMAND FOR VACATING OF FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDERS AND PRETRIAL FINAL JUDGMENT
(By Recktenwald, C.J., in which Nakayama, J., joins)

I respectfully dissent from the Order Denying Motion for Partial Dismissal of Appeal with Prejudice and Remand for Vacating of Findings of Fact Conclusions of Law, Orders and Partial Final Judgment. Goo v. Arakawa, 132 Hawaiʻi 304, 321 P.3d 655 (2014), dictates that in the circumstances presented by this case, we grant the motion in part, temporarily remand the case to the circuit court, and allow the circuit court to make

the equitable determination of whether and what portions of its orders should be vacated. I would deny the motion in part, declining to dismiss the appeal, without prejudice, pending the outcome on remand.

Goo and U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), on which Goo relies, concern the propriety of vacatur of a lower court's order by an appellate court when one party litigates in opposition to vacatur. Goo, 132 Hawai'i at 318, 321 P.3d at 669; Bancorp, 513 U.S. at 19. By contrast, the parties in the instant case have both agreed to seek vacatur, and they ask us to remand to the circuit court to consider whether vacatur would be appropriate. See Keahole Defense Coalition, Inc. v. Board of Land & Natural Resources, 110 Hawai'i 419, 437, 134 P.3d 585, 603 (2006) (concurring opinion) (explaining that Bancorp's "exceptional circumstance" test applies only to vacatur by an appellate court) (abrogated on other grounds by Tax Foundation of Hawai'i v. State, 144 Hawai'i 175 (2019)).

Indeed, both Goo and Bancorp explicitly contemplated and approved of the remedy requested here.[1] Bancorp, 513 U.S. at

[1] In Goo, we approvingly discussed a Ninth Circuit case which took the exact approach requested by the parties here. Id.at 315, 321 P.3d at 666 (citing American Games, Inc. v. Trade Products, Inc., 142 F.3d 1164 (9th Cir. 1998)). In American Games, "[r]ather than weighing the equities of vacatur, the Ninth Circuit dismissed the appeal and remanded the case to the district court 'for the purpose of considering the motion for vacatur.'" Goo at 315, 321 P.3d at 666 (citing American Games, 142 F.3d at 1165-66). We described American Games as demonstrative of the notion that "appellate courts can (continued...)

29 ("Of course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b)."). In Goo, we noted that "Bancorp explicitly states that, even before considering the existence or absence of 'extraordinary circumstances,' an appellate court presented with a request for vacatur may remand to the trial court pursuant to the federal rules." 132 Hawai'i at 315, 321 P.3d at 666 (citing Bancorp, 513 U.S. at 29) (emphasis added). Thus, we held that when faced with a motion for vacatur (requested because of mootness stemming from settlement or some other cause), "the appellate court should, absent exceptional circumstances, remand the case to the trial court for a consideration of the vacatur issue." Id. at 318, 321 P.3d at 669. We reasoned that the trial court is better positioned to evaluate the "equity-balancing, fact-intensive situation" presented by a motion for vacatur. Id. at 316, 321 P.3d at 667. Saliently, we also noted that the circuit court is best able to "modify a judgment to address the interests of both parties" and "perhaps reach a middle ground, or allow agreement of the

[1](...continued)
utilize remand to trial courts to develop a fuller record before deciding the issue of vacatur." Goo, 132 Hawai'i at 315, 321 P.3d at 666.

parties[.]" Id. at 317, 321 P.3d at 668.

Just as we held that an appellate court should remand to the trial court to consider a motion for vacatur in Goo (and the Bancorp court approved the same), I believe that ordering temporary remand is proper here. The parties in the instant case have participated in appellate mediation and settled some of the issues presented in the appeal. They mutually agreed that part of the order at issue on appeal should be vacated, which our precedent permits. While the circuit court need not grant the motion for vacatur and should independently consider whether that remedy is appropriate,[2] the parties should be given the opportunity to give effect to their agreement. Because this court has instructed appellate courts to order remand for consideration of the vacatur issue, and in service of promoting settlement on appeal, I respectfully dissent.

DATED: Honolulu, Hawai‘i, March 11, 2020.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

[2] The parties still need to meet the demands of the Hawai‘i Rules of Civil Procedure (HRCP) and any other relevant law. In particular, the parties must establish that the requirements of HRCP 60(b), which permits a court to "relieve a party . . . from a final judgment," are met. The policy considerations underpinning the Goo and Bancorp decisions may be relevant to the circuit court in determining whether vacatur is appropriate upon remand; that the parties have mutually agreed to the vacatur certainly would be as well.