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SCAP-18-0000578

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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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.

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

ORDER DISAPPROVING STIPULATION AND ORDER FOR PARTIAL DISMISSAL OF APPEAL WITH PREJUDICE AND FOR REMAND
(By: McKenna, Pollack, and Wilson, JJ.
with Recktenwald, C.J., dissenting separately,
with whom Nakayama, J., joins)

Upon consideration of the "Stipulation and Order for Partial Dismissal of Appeal with Prejudice and for Remand," filed January 3, 2020 ("Stipulation and Order"); and the record herein, it appears that the parties seek to vacate certain of the Circuit Court of the Second Circuit's ("circuit court") orders and judgments solely due to partial settlement on appeal. This court has adopted the United States Supreme Court's holding in U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 531 U.S. 18,

29 (1994), that "mootness by reason of settlement does not justify vacatur of a judgment under review." See Goo v. Arakawa, 132 Hawai'i 304, 314, 321 P.3d 655, 665 (2014) (favorably noting that "Bancorp established a presumption against vacatur in situations where the party requesting vacatur voluntarily caused the case to become moot," by, for example, settling on appeal).

As stated by the Court in Bancorp,

> We hold that mootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. **It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur --** which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed. 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 [sic] 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).

Bancorp, 513 U.S. at 25 (emphasis added).

Goo thus follows the United States Supreme Court in generally rejecting vacatur after settlement. The Dissent states, however, that in Goo 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." (Emphasis added.) The dissent misapprehends the meaning of this passage. An appellate court should not, absent exceptional circumstances, vacate a lower court decision because of mootness as a result of settlement, without first remanding the case to the trial court. However, an appellate court may elect to decline a request to vacate a trial court decision after weighing the equities of vacatur. Although Goo does contain this passage, this was not the "holding" of Goo. As we stated in Goo:

> Bancorp established a presumption against vacatur in situations where the party requesting vacatur voluntarily caused the case to become moot. The case also overruled what had become a federal practice under [United States v. ]Munsingwear[, Inc., 340 U.S. 36 (1950)], of automatically vacating judgments that had become moot on appeal so as to avoid issue preclusion attaching to a judgment that could not be reviewed on appeal. See also Valero Terrestrial Corp. v. Paige, 211 F.3d 112, 120 (4th Cir.2000) (in the forty-four years between the Court's decision in Munsingwear and its decision in Bancorp, the prevailing practice among district courts was to follow the appellate court practice of automatically vacating moot judgments, pursuant to Munsingwear).
>
> This practice had led to a situation where "repeat litigants," such as insurance companies, were settling cases after losing at the trial level against "one-time litigants," such as policy-holders, but only on the condition that judgments adverse to the interests of the repeat litigant were vacated. Thus, "[t]hrough vacatur, insurance companies [could] eradicate or reduce the number of pro-policy holder decisions and then argue that the weight of authority [was] in their favor."
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> Bancorp responded to this practice by holding that appellate courts could no longer vacate lower court judgments based solely on a settlement agreement, which represents a voluntary abandonment of the right to appellate review, absent "exceptional" or "extraordinary" circumstances. While Bancorp preserved Munsingwear's dictum that mootness resulting from "happenstance" provides sufficient reason to vacate, 513 U.S. at 25 n.3, 115 S.Ct. 386, the Court clearly emphasized the need to consider the public interest in preserving judicial precedents and "the

> orderly operation of the federal judicial system" when granting equitable relief such as vacatur. 513 U.S. at 26-27, 115 S.Ct. 386. Furthermore, as noted, 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. Id. at 29, 115 S.Ct. 386. Thus, Bancorp clearly allows an appellate court to weigh the equities of vacatur or to simply remand to the trial court to determine whether a judgment should be vacated based upon consideration of the equities in the case.

Goo, 132 Hawai'i at 314-15, 321 P.3d at 665-66.

Thus, Goo actually held that there is a presumption against vacatur based on settlement, although 'exceptional circumstances may conceivably counsel in favor of such a course.'" Goo, 132 Hawai'i at 314, 321 P.3d at 665 (citing Bancorp, 513 U.S. at 29). Rather than hold that "the appellate court should, absent exceptional circumstances, remand the case to the trial court for a consideration of the vacatur issue[,]" as asserted by the Dissent, Goo ordered a remand for consideration of vacatur based on the exceptional circumstances alleged in that case. Goo, 132 Hawai'i at 317, 321 P.3d at 668 (remanding case to trial court to consider motion for vacatur, where mootness resulted from enactment of county ordinance during the pendency of the parties' appeal, and it was not clear whether such enactment was the result of happenstance or the parties' voluntary action).

In contrast to Goo, the parties in this case did not even allege, and therefore made no showing, of any exceptional circumstances or equities favoring vacatur; rather, they

stipulated to a vacatur based solely on their settlement on appeal. As explained by Professor Jill E. Fisch in Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur, 76 Cornell L. Rev. 589, 641-42 (1991), allowing courts to consider vacaturs based solely on a settlement:

> imposes tangible but frequently undetectable social costs. These costs include the public cost of forgoing the collateral estoppel and res judicata effects of the prior judgment. This cost is borne directly by third party litigants but shared by the public interest in preventing duplicative and piecemeal litigation. The costs also include the erasure of collateral consequences of an adverse judgment, the loss of precedential value for judicial decisions, and a diminished respect for the judicial process.
>
> Moreover, rather than encouraging the settlement process, a judicial rule encouraging routine grants of vacatur disrupts the process. A procedure which allows parties to obtain vacatur as a matter of right by conditioning a postjudgment settlement on vacatur will encourage parties to delay settlement until after trial because the effects of an adverse judgment can be avoided at little or no cost by postjudgment settlement. The procedure will also permit the prevailing party to obtain as a private windfall the public costs of vacatur, and will place the defense of the integrity of judicial decisions in the hands of litigants who are not in a position to safeguard the public values inherent therein.
>
> Accordingly, the settlement of a case pending appeal should not entitle the litigants to vacatur as a matter of right. Rather, the courts should review motions to vacate with the presumption that vacatur is not an appropriate tool for erasing an unfavorable trial court decision. The standard motion to vacate after a postjudgment settlement, motivated solely by the losing party's desire to avoid the collateral consequences of that judgment, should be routinely denied. **Though the litigants should retain the opportunity to persuade the court that there is particular prejudice in an individual case, such as the unfairness presented by the Munsingwear doctrine, the litigants should bear the burden of convincing the court that this dilemma is not of their own making. Absent such a showing, the judgment in a case which has been resolved through settlement should enjoy the same vitality as that in any**

> **other case in which the losing litigant chooses not to appeal.**

(Emphasis added.) In this case, no circumstances have been alleged, or appear to exist, that would even merit consideration of vacatur based on the settlement reached by the parties.

An additional reason dictates against consideration of vacatur based on the settlement. It appears that the parties have stipulated to dismiss the following circuit court orders and judgment:

> 1) Order Certifying for Interlocutory Appeal Counts V, VI, VII, and VIII of the Second Amended Complaint, Filed August 12, 2016, Pursuant to Hawai‘i Rules of Civil Procedure Rule 54(b) and Staying Proceedings Under Hawai‘i Rules of Civil Procedure Rule 62(d) and (e), filed June 25, 2018 [ICA Dkt. 3];
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> 2) Findings of Fact, Conclusions of Law; Order Granting Plaintiffs' Motions for Partial Summary Judgment on Counts V, VI, VII and VIII of the Second Amended Complaint Filed August 12, 2016, Filed on December 1, 2016; and Denying Defendants County of Maui and the Maui County Council's Motions for Partial Summary Judgment as to Count V of the Plaintiffs' Second Amended Complaint Filed 2016-08-12, Filed on December 12, 2016, filed on August 9, 2017 [ICA Dkt. 10]
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> 3) Order Granting in Part and Deferring in Part Plaintiff's Motion re Damages Related to Count VIII (42 U.S.C. § 1983) of the Second Amended Complaint Filed August 12, 2016, Filed on September 22, 2017, filed on January 23, 2018 [ICA Dkt. 108:549-50]
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> 4) Order Granting (1) Plaintiffs' Motion for Further Hearing on Plaintiff's Request for Fees and Costs Relating to Count VIII of the Second Amended Complaint Filed August 12, 2016, Filed March 6, 2018; and (2) Plaintiffs' Motion re Damages Related to Count VIII (42 U.S.C. § 1983) of the Second Amended Complaint Filed August 12, 2016, Filed September 22, 2017, Regarding Attorney's Fees and Costs, filed on May 30, 2018 [ICA Dkt. 110:788-90]
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> 5) Final Judgment on Counts V, VI, VII, and VIII of the Second Amended Complaint Filed on August 12, 2016, filed July 2, 2018 [ICA Dkt. 4]

The Stipulation and Order goes on to state, however, that the parties do not stipulate to dismiss the second order listed above, "to the extent the Second Circuit Court made findings and rul[i]ngs regarding its subject matter jurisdiction over this case," as the issue of subject matter jurisdiction remains for this court's resolution. In other words, the Stipulation and Order asks this court to dismiss, and not dismiss, the same order. Therefore,

IT IS HEREBY ORDERED that the Stipulation and Order is disapproved.

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

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson