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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

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

SCAP-18-0000578

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CAAP-18-0000578; 2CC131000848)

JUNE 19, 2020

OPINION CONCURRING IN PART AND
DISSENTING IN PART BY RECKTENWALD, C.J.,
IN WHICH NAKAYAMA, J., JOINS

This appeal requires us to consider the circumstances under which courts can entertain a mutual request to vacate a judgment pursuant to the parties' settlement. Both the United States Supreme Court and this court have examined this issue, and have concluded that, when parties to a case on appeal seek

vacatur of the trial court's order pursuant to settlement, the appropriate course is to remand the case so that the trial court may consider the equities of the motion for vacatur. However, the majority now takes the position that remand to consider a motion for vacatur is permissible only in very narrow circumstances, and that in all other cases, appellate courts should deny parties' stipulated motions to vacate judgments on appeal. Because I believe our caselaw and sound public policy are opposed to this conclusion, I dissent as to Section IV(B) of the majority opinion.[1]

When an appellate court is faced with a stipulated motion to vacate the trial court's judgment, there are several options, including: granting vacatur, remanding the case so the trial court can consider the motion, or denying vacatur outright.[2] The majority here adopts the third approach and denies the motion outright. But Goo v. Arakawa, 132 Hawai'i 304, 321 P.3d 655 (2014), and U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994), plainly dictate that the proper course of action in response to the parties' motion for

[1] In all other aspects of the majority opinion, I concur.

[2] With regard to the first option, an appellate court may only grant vacatur in extraordinary circumstances. Goo v. Arakawa, 132 Hawai'i 304, 318, 321 P.3d 655, 669 (2014). In a prior order in this case, I agreed with the majority's decision not to remand the appeal with instructions to the circuit court to vacate its judgment, because that is the functional equivalent of the appellate court itself granting vacatur, and no extraordinary circumstances justified it.

partial dismissal is the second of those options: a temporary remand to the trial court to consider the equities of vacatur. Accordingly, the majority's refusal to remand for this purpose is contrary to our established precedent. Ultimately, the majority disregards Bancorp's statement that, "[o]f course," "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[.]" 513 U.S. at 29 (emphasis added). Goo likewise instructed appellate courts in no uncertain terms: "when a case is mooted while on appeal, the appellate court should, absent exceptional circumstances, remand the case to the trial court for a consideration of the vacatur issue." 132 Hawai'i at 318, 321 P.3d at 669 (emphasis added).

But rather than adhere to this principle, the majority narrows Goo by incorrectly reading it as limiting temporary remand only to cases in which it is not clear whether the appeal was rendered moot by a voluntary action of the parties, such as settlement, or by circumstances outside of the parties' control. This approach undermines the sound reasons for allowing the trial court, rather than the appellate court, to decide a motion for vacatur based on the facts of an individual case. As we reasoned in Goo, the trial court is best equipped to make the equitable determination as to whether vacatur is appropriate:

> Given the "fact-intensive" nature of the inquiry into whether the party seeking vacatur caused the case to become

> moot, a trial court is better equipped than an appellate court operating at a distance to fashion equitable relief. Remand to the lower court also better protects the "orderly operation of the judicial system" by leaving fact-finding powers with the trial courts and review of the trial courts' discretion to the appellate courts.
>
> Moreover, unlike an appellate court that is more likely to be in the position of rendering an "all or nothing" determination (vacating or not vacating), a lower court may modify a judgment to address the interests of both parties.

Id. at 317, 321 P.3d at 668 (citations omitted).[3]

In my view, the majority errs by concluding that vacatur was flatly inappropriate without any opportunity for the parties to present argument to the circuit court as to the equities. This holding contradicts our clear statement in Goo that appellate courts are ill-equipped to make this decision and that the appropriate course of action is remand.

The majority argues that, had we acted in accordance with Bancorp, "the circuit court would have vacated the very order containing its erroneous assertion of subject matter jurisdiction, before this court would have had a chance to review it." Majority at 37. In my view, if the circuit court's

[3] In Keahole Defense Coalition, Inc. v. Board of Land and Natural Resources, 110 Hawai'i 419, 134 P.3d 585 (2006), the concurring opinion stated that "a court may vacate its own judgment upon a balancing of the equities . . . as opposed to a finding of 'exceptional circumstances' which . . . is the standard for appellate courts" themselves vacating a trial court's judgment. Id. at 437, 134 P.3d at 603 (Del Rosario, circuit judge, concurring), abrogated on other grounds by Tax Found. of Hawai'i v. State, 144 Hawai'i 175, 439 P.3d 127 (2019). The concurrence also rejected the contention that the trial court's vacatur of its own judgment "impairs the integrity of judicial process and social value of judicial precedents," concluding instead that the trial court can properly weigh these concerns as part of the equities of the case. Id. at 438, 134 P.3d at 604 (footnote and internal quotation marks omitted).

evaluation of the equities resulted in it vacating a legally erroneous order, that would be a favorable collateral consequence of temporary remand.

Respectfully, I do not share the majority's reservations about allowing trial courts to consider settlements that include requests for vacatur, provided that the court that originally issued the judgment determines that the equities weigh in favor of that outcome. While vacatur pursuant to a settlement agreement may not be appropriate in all cases for the policy reasons explained by the majority, we should allow parties flexibility in the pursuit of amicable resolution of litigation. If vacatur pursuant to settlement results in inequity or undermines the finality of a decision in an individual case, our trial courts are well-suited to evaluate the circumstances and deny the request as appropriate. See Goo, 132 Hawai'i at 317, 321 P.3d at 668 ("Enabling the trial court to evaluate the issue first, and perhaps reach a middle ground, or allow agreement of the parties, would also be consistent with the policy of preserving judgments.").

For these reasons, and the other reasons stated in my dissent to the Order Denying Motion for Partial Dismissal of Appeal, Ocean Resort Villas Vacation Owners Association v. County of Maui, SCAP-18-0000578 (Mar. 11, 2020) (Recktenwald, C.J., dissenting), I disagree with the majority that remand for

the trial court to consider vacatur would have been inappropriate. Accordingly, I respectfully dissent on that basis.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama