IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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JANE DOE, Respondent/Plaintiff-Appellant,

vs.

JOHN DOE, Petitioner/Defendant-Appellee,

and

JOHN DOE II, Respondent/Defendant-Appellee.

NO. 22172

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(FC-P NO. 96-032K)

JULY 17, 2002

DISSENTING OPINION BY RAMIL, J.,
WITH WHOM ACOBA, J., JOINS

Recently, this court has had reason to consider the purpose of judicial publication. Publication is critical to the development of law. I am concerned that this court periodically abdicates its role in guiding the public on important legal issues by misusing its power to issue summary disposition orders. My concern first arose when this court surprisingly disposed of Baehr v. Miike, 92 Hawai'i 634, 994 P.2d 566 (1999), by a summary disposition order, and my concern has not dissipated with the increased frequency of such occurrences.[1] Ironically, my views

[1] A summary disposition order is generally understood to be a one-line affirmance, in effect adopting the reasoning of the trial court. It should also be generally understood that the decision must be a unanimous one. In cases where unanimity cannot be reached, it should not be disposed of via summary disposition order. In Baehr, the majority filed a four-page summary disposition order, with a five-page concurrence attached. It is problematical

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on when publication is necessary have thus far only appeared in opinion that is un-published. See id. I therefore take the opportunity in this published opinion to present my recommendation that this court adopt Rule 36(b)(2) of the United States Court of Appeals of the First Circuit.

I begin by explaining when summary disposition orders may properly be used. The guidelines for disposition of cases are set forth by the report of the Hawai‘i Chapter of the American Judicature Society's Special Committee on Unpublished Judicial Opinions:

> (1) Summary disposition orders are issued when the appellate courts are affirming a judgment and the issues raised are decided by application of well-known legal principles to unremarkable facts.
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> (2) Memorandum opinions are issued when the appellate courts are reversing a judgment or when they are affirming, affirming in part and vacating in part, or affirming in part and reversing in part, but are applying well-known legal principles to unremarkable facts.
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> (3) Published opinions are issued when explication of the law will provide some benefit to parties, courts, and practitioners. Published opinions are more likely when the case involves unique issues of law, cases of first impression, the application of known legal principles in circumstances different from previous cases, or when known legal principles need further explanation or limitation.

Furthermore, the ABA Standards for Appellate Courts § 3.36 instruct, "A full written opinion reciting the facts, the questions presented, and analysis of pertinent authorities and principles, should be rendered in cases involving new or

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that despite nine pages of discussion, the case was still disposed of via summary disposition order.

unsettled questions of general importance." See also Commentary to ABA Standards for Appellate Courts § 3.36 ("[Unpublished] opinions should not be used to avoid responsibility for reasoned, legally supported resolution of difficult cases.").

It logically follows, then, that the guidelines envisioned that the accompaniment of a dissenting or concurring opinion necessarily designates the disposition for publication, unless the court unanimously finds reason not to publish. The current practice of the court disregards the existence of dissenting or concurring opinions in deciding whether or not to publish, so long as the majority is satisfied that publication is not warranted. I ask whether there is a clearer indication of an "unsettled question" than the Supreme Court itself being divided on an issue. If the case involves, as the above criteria suggests, "the application of well-known legal principles" such that publication will not "provide some benefit," then the correct result and the correct basis for the result should be obvious to any individual well-trained in the law. Thus, in the absence of a unanimous agreement otherwise, the existence of disagreement among Supreme Court justices removes the case from summary disposition order eligibility.

I caution that improper use of a summary disposition order has the deleterious effect of stifling the development of law. At the present time, our rules of appellate procedure forbid citation to summary disposition orders in all but a few limited situations. See Hawai‘i Rules of Appellate Procedure

(HRAP), Rule 35(c).[2] Furthermore, summary disposition orders are not available in the Hawai‘i Reports, the Pacific Reporter, Westlaw, or Lexis; they are only available on the Judiciary website, and can be accessed only by date. See, e.g., AIG Hawai‘i Ins. Co., Inc. v. Yucoco, 91 Hawai‘i 123 (Dec. 14, 1998) (memorandum opinion).[3] Thus, when an opinion is not published, a justice is impeded in presenting his or her perspective of the law to interested parties.[4] Prudence then dictates that in situations where there is disagreement as to the precedential value of a case, publication must be allowed. In short, we must be careful to never silence a justice through the use of a

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[2] In its April 24, 2002 report, the Hawai‘i Chapter of the American Judicature Society's Special Committee on Unpublished Judicial Opinions recommended that HRAP Rule 35 should be amended to allow a party to cite a memorandum opinion or unpublished dispositional order in any action or proceeding, provided it has persuasive value. Until HRAP Rule 35 is amended, the inability to cite to unpublished judicial opinions remains a danger of tiered publication. As discussed infra, however, this danger may also be obviated by other measures.

[3] I attempted to retrieve the Yucoco decision from the Judiciary website by selecting the month and year of disposition, and then scrolling down the days until I found the decision. When I clicked on the memorandum opinion, however, I found that it was inexplicably unavailable. It appears that in order to obtain a copy of Yucoco, one would need to submit a request to the Supreme Court Clerk's Office. The Clerk's Office will then provide it at a charge of $1.00 for the first page, and $0.50 for each additional page.

[4] There should be no question that separate opinions are more than simply the losing side of a vote. Publication of dissenting and concurring opinions assures the public that its court of last resort is not acting as a Star-chamber, assists future courts in revisiting issues where error may have been made or the times require further consideration, provides the legal community with a more thorough understanding of the different viewpoints espoused by the justices of the court, and oftentimes provides a basis for legislative response. The majority's current practice demonstrates its belief that a minority of the court is incapable of correctly determining that an opinion has precedential value. The danger of such practice is that the majority that makes the substantive decision always has the power to decide if the dissent will be permitted to express its disagreement with the majority.

summary disposition order.[5]

Although this court has not before found reason to incorporate publication procedures into the Hawai‘i Rules of Appellate Procedure, I believe that recent events necessitate such action. Accordingly, I recommend that this court adopt Rule 36(b)(2) of the United States Court of Appeals for the First Circuit, which provides:

> (2) Manner of Implementation.
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> (A) As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in light of further research and reflection.
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> (B) With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in a cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.
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> (C) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.

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[5] In his dissenting opinion in Poe v. Hawai‘i Labor Relations Board, No. 24313, 2002 WL 1481051 (Hawai‘i July 10, 2002), Justice Acoba provides an example of how a rule that restricts publication can result in abusive practices:

> Judge Jefferson's experience in a California Court of Appeals case, People v. Para, No. CRA 15889 (Cal. Ct. App. Aug. 1979), is instructive:
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> > Initially, it appeared that the majority felt the same as I do regarding the fact that the majority opinion merited publication in the Official Reports. When circulated to me, the majority opinion was approved of by the two justices making up the majority and was marked for publication in the Official Reports. It was only after I had circulated my dissenting opinion to the two justices who make up the majority that they decided to reverse their original position regarding publication in the Official Reports. I do not think this reversal of position is justified.

Poe, 2002 WL 1481051, at *4 n.1 (citation omitted).

> (D) Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opnion.
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> (E) If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion.
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> (F) Unpublished opinions may be cited in filings with or arguments to this court only in related cases. Otherwise only published opinions may be cited. A published opinion is one that appears in the ordinary West Federal Reporter series (not including West's Federal Appendix) or as a recent opinion intended to be so published. All slip opinions released by the clerk's office are intended to be so published unless they bear the legend "Not For Publication" or some comparable phraseology.
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> (G) Periodically the court shall conduct a review in an effort to improve its publication policy and implementation.

(Emphasis added.)[6]

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[6] Several federal and state jurisdictions incorporate a rule similar to the First Circuit's Rule 36(b)(2)(C) into their appellate procedures. See, e.g., U.S. Ct. of App. 5th Cir., Rule 47.5.1 ("An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion . . . ." (emphasis added)); U.S. Ct. of App. 6th Cir., Rule 206 ("The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter: . . . (4) whether it is accompanied by a concurring or dissenting opinion . . . . An opinion or order shall be designated for publication upon the request of any member of the panel." (emphases added)); U.S. Ct. of App. 8th Cir., App. I ("The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication." (emphasis added)); U.S. Ct. of App. 9th Cir., Rule 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: . . . Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression." (capitalization in original; emphasis added)); Alabama Rules of Appellate Procedure, Rule 53 ("[I]f in a "No Opinion" case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to

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which the special opinion is addressed." (emphasis added)); Rules of the Supreme Court of Arizona, Rule 111(b)(4) ("Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine that it involves a legal or factual issue of unique interest or substantial public importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the decision shall be by opinion." (internal section numbering omitted; emphasis added)); Indiana Rules of Appellate Procedure, Rule 65 ("A judge who dissents from a not-for-publication memorandum decision may designate the dissent for publication if one (1) of the criteria above is met." (emphasis added)); Louisiana Revised Statutes, Uniform Rules, Courts of Appeal, Rule 2-16.2 ("An opinion may also be published if it is accompanied by a concurring or dissenting opinion . . . ." (emphasis added)); Rules of the Supreme Court of Kansas, Rule 7.04 ("A memorandum opinion shall not be published unless there is a separate concurring or dissenting opinion in the case, and the author of such separate opinion requests that it be reported; or unless it is ordered to be published by the Supreme Court. . . . Concurring and dissenting opinions shall be published only if the majority opinion is published." (emphasis added)); North Dakota Supreme Court Administrative Rules, Rule 27, Section 14(c) ("The opinion may be published only if one of the three judges participating in the decision determines that one of the standards set out in this rule is satisfied. The published opinion must include concurrences and dissents.") (emphasis added)); South Carolina Appellate Court Rules, Rule 220 ("The Supreme Court may file a memorandum opinion dismissing an appeal, affirming or reversing the judgment appealed from, or granting other appropriate relief when, in unanimous decision, the Supreme Court determines that a published opinion would have no precedential value and any one or more of the following circumstances exists and is dispositive of issues submitted to the Court for decision: (A) that a judgment of the trial court is based on findings of fact which are not clearly erroneous; (B) that the evidence to support a jury verdict is or is not insufficient; (C) that the order of an administrative agency is or is not supported by such quantum of evidence as prescribed the statute or law under which judicial review is permitted; or (D) that no error of law appears." (emphases added)); Texas Rules of Appellate Procedure, Rule 47.5 ("A concurring or dissenting opinion may be published if, in the judgment of its author, it meets one of the criteria established in 47.4. If a concurrence or dissent is to be published, the majority opinion must be published as well." (emphasis added)).