

NO. 26103

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LINDA HATTIE NAKAPALAU and SOLOMON HARRY NAKAPALAU,
Appellants-Appellees,

vs.

LILLIAN KOLLER, State of Hawai'i, Department of Human Services,
Appellee-Appellant,

and

CANDACE PARK, Appellant.

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STATE OF HAWAII

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 01-1-0114K)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Appellee-appellant Lillian Koller, State of Hawai'i, Department of Human Services [hereinafter, DHS] and appellant Candace Park [hereinafter collectively, Appellants] appeal from the Circuit Court of the First Circuit's September 9, 2003 final judgment¹ and order imposing sanctions against "the State's attorney" pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 11 (2000)² for filing a third-party complaint without leave

¹ The Honorable Ronald Ibarra presided over this matter.

² HRCP Rule 11(c), entitled "Sanctions," provides:

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(continued...)

of court and ordering payment of \$6,327.72 in attorney's fees and \$107.34 in costs to appellants-appellees Linda Hattie Nakapalau and Solomon Harry Nakapalau [hereinafter collectively, the Nakapalaus]. As points of error, Appellants contend that, in

²(...continued)

(1) HOW INITIATED.

(A) *By Motion.* A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) *On Court's Initiative.* On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) NATURE OF SANCTION; LIMITATIONS. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) ORDER. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

imposing HRCF Rule 11 sanctions against "the State's attorney for filing a Third-Party Complaint without leave of the court and without legal authority," the circuit court abused its discretion when it: (1) failed to follow the procedures set out in HRCF 11(c) requiring (a) that the sanctioned party be given notice and an opportunity to respond, (b) that the court issue a preliminary order to show cause, (c) that attorney's fees be awarded only pursuant to motion, (d) that the court enter an order explaining the basis for the sanction imposed; and (2) imposed penalties for a non-frivolous pleading that was filed in a good-faith attempt to comply with a previous oral contempt order of the circuit court. The Nakapalaus counter that: (1) the instant appeal should be dismissed because (a) "the State's attorney," Park, did not file a timely notice of appeal, (b) Appellants waived their arguments on appeal by failing to preserve them below, (c) Appellants failed to append and quote the allegedly erroneous order of the circuit court in their Opening Brief as required by Hawai'i Rules of Appellate Procedure (HRAP) Rule 28; and (2) the circuit court did not abuse its discretion when it imposed sanctions for the filing of the third-party complaint.

Upon carefully reviewing the record and briefs submitted, we resolve the parties' contentions and hold as follows:

(1) This court has appellate jurisdiction because the circuit court's statement at the October 20, 2003 post-judgment hearing that the September 9, 2003 sanctions order against the "State's attorney" was against Park constituted a clarification of the order extending the time for appeal. See TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 265, 990 P.2d 713, 735 (1999) (circuit court retains jurisdiction even after filing of notice of appeal "to determine matters collateral or incidental to the judgment, and . . . act in aid of the appeal"); see also HRCF Rule 60(a) (errors of oversight or omission may be corrected by the court at any time prior to docketing of the appeal in the supreme court). A HRCF Rule 11 sanctions order is a directly appealable collateral order. Fujimoto v. Au, 95 Hawai'i 116, 126 n.8, 19 P.3d 699, 709 n.8 (2001). Consequently, Appellants' November 3, 2003 motion to substitute party on appeal, or in the alternative, for leave to file an amended notice of appeal naming Park as a party preserved appellate jurisdiction because it was filed within thirty days of October 20, 2003. HRAP Rule 4(a)(1). Accordingly, this court in its February 6,

2004 order had good cause to, and did, add Park as a party to the appeal pursuant to HRAP Rule 43(b)³;

- (2) Appellants did not waive their arguments on appeal because they raised them in the trial court at the October 20, 2003 post-judgment hearing at which the sanctions order was clarified. See Association of Apartment Owners of the Wailea Elua v. Wailea Resort Co., Ltd., 100 Hawai'i 97, 107-08, 58 P.3d 608, 618-19 (2002) (legal issues raised in the trial court not waived on appeal) (citation omitted);
- (3) Procedural deficiencies in Appellants' opening brief are not such as to warrant dismissal of the appeal in the exercise of this court's discretion under HRAP 30 because it is clear from Appellants' brief that they are challenging the sanctions order, the relevant portion of the order is quoted in full, and thus neither this court nor the Nakapalaus were unduly burdened or prejudiced by any technical deficiencies in the brief. See Schefke v. Reliable Collection Agency,

³ HRAP Rule 43(b), entitled "Substitution for other causes," provides: "If substitution of a party in the Hawai'i appellate courts is necessary for any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subsection (a)." Under the HRAP, this court had the discretion to simply add Park as a party rather than require the formality of an amended notice. See HRAP Rule 2 ("In the interest of expediting a decision, or for other good cause shown, either Hawai'i appellate court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.").

Ltd., 96 Hawai'i 408, 420, 32 P.3d 52, 64 (2001) (This court has "consistently adhered to the policy of affording litigants the opportunity to have their cases heard on the merits, where possible[.]" (internal quotation marks and citation omitted); Housing Finance and Development Corp. v. Ferguson, 91 Hawai'i 81, 85, 979 P.2d 1107, 1111 (1999) (appeal should be dismissed only where noncompliance with HRAP Rule 28 burdens parties and appellate court);

- (4) The circuit court abused its discretion by entering the sua sponte HRCF Rule 11 sanctions order against Park because (a) it failed to enter a show cause order giving Park notice and an opportunity to respond; and (b) HRCF Rule 11 does not authorize an award of attorney's fees and costs pursuant to a sua sponte order. HRCF Rule 11(c); HRCF Rule 11(c)(1)(B); HRCF Rule 11(c)(2); see also Gap v. Puna Geothermal Venture, 106 Hawai'i 325, 341-43, 104 P.3d 912, 928-30 (2004) (even when awarded on motion, an award of attorney's fees under HRCF Rule 11 constitutes abuse of discretion where the lower court does not make a determination that it is necessary for deterrence of future

misconduct by the sanctioned attorney or similarly situated attorneys)⁴;

- (5) The sanctions order cannot be sustained as an exercise of the circuit court's inherent powers because (a) the order does not contain factual findings with a high degree of specificity demonstrating clear and convincing evidence of Park's bad faith in filing the third-party complaint; and (b) we find no exceptional circumstances such as to retroactively justify a sanctions order as an exercise of the court's inherent power when the order is defective under HRCP Rule 11 because to do so would be to effectively circumvent the requirements of HRCP Rule 11. See Bank of Hawai'i v. Kunimoto, 91 Hawai'i 372, 391, 984 P.2d 1198, 1217 (1999) ("On appeal this court has declined to uphold awards under the bad-faith exception absent both clear and convincing evidence that the challenged actions are entirely without color, and are taken for reasons of harassment or delay or for other improper purposes and a high degree of specificity in the factual findings of the lower courts.") (internal citations, indentation, and quotation signals omitted) (emphases added); State

⁴ This court in Gap also strongly suggested that the attorney's ability to pay be considered in order to ensure that the sanction is not unduly harsh or punitive. Id. at 342-43, 104 P.3d at 929-30.

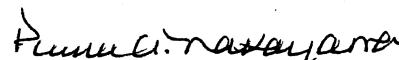
v. Pattioay, 78 Hawai'i 455, 468 n.28, 896 P.2d 911, 924-35 n.28 (1995) ("the court's inherent powers must be exercised with restraint and discretion and only in exceptional circumstances") (internal citation and quotation marks omitted). Therefore,

IT IS HEREBY ORDERED that the circuit court's sanctions order, entered on September 9, 2003 and clarified on October 20, 2003, is vacated and the matter is remanded for further proceedings consistent with this opinion on the sole issue of sanctions. The circuit court is instructed that if, after conducting a hearing and upon entry of factual findings, it chooses to impose a monetary sanction under HRCF Rule 11, the award "shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated" and may not be an award of attorney's fees or costs. In all other respects, the September 9, 2003 final judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, November 23, 2005.

On the briefs:

Benjamin T. Roberts,
Deputy Attorney General,
for appellee-appellant
Lillian Koller, State of
Hawai'i, Department of
Human Services, and
appellant Candace Park



Kamea E. Duggan, Jr.

***** NOT FOR PUBLICATION *****

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