

NO. 29425

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

DONALD M. MILLER, Plaintiff-Appellee, v.  
WALTER L. WAGNER, Defendant-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(CIV. NO. 05-1-0325)

ORDER DISMISSING APPEAL FOR  
LACK OF APPELLATE JURISDICTION

(By: Foley, Presiding Judge, Fujise and Leonard, JJ.)

Upon review of the record, it appears that we lack jurisdiction over Defendant-Appellant Walter L. Wagner's (Appellant Wagner) appeal from the Honorable Glenn S. Hara's April 30, 2008 judgment and related post-judgment orders, because Appellant Wagner's appeal is untimely under Rule 4(a)(3) of the Hawai'i Rules of Appellate Procedure (HRAP).

The April 30, 2008 judgment appears to resolve all claims against all parties, and, thus, the April 30, 2008 judgment is an appealable final judgment pursuant to Hawaii Revised Statutes (HRS) § 641-1(a) (1993 & Supp. 2007), Rule 58 of the Hawai'i Rules of Civil Procedure (HRCPP), and the holding in Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994). However, Appellant Wagner did not file his October 17, 2008 notice of appeal within thirty days after entry of the April 30, 2008 judgment, as HRAP Rule 4(a)(1) requires. Nevertheless, pursuant to HRAP Rule 4(a)(3), certain timely post-judgment motions extend the time period for filing a notice of appeal:

(3) Time to Appeal Affected by Post-Judgment Motions. If any party files a timely motion for judgment as a matter of law, to amend findings or make additional findings, for a new trial, to reconsider, alter or amend the judgment or

K.HAMAKADO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

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order, or for attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.

HRAP Rule 4(a)(3) (emphasis added). Appellant Wagner filed his May 8, 2008 HRCP Rule 59(e) motion for reconsideration within ten days after entry of the April 30, 2008 judgment, as HRCP Rule 59(e) required. Furthermore, Plaintiff-Appellee Donald M. Miller (Appellee Miller) filed his May 12, 2008 HRCP Rule 54(d) motion for attorney's fees and costs within fourteen days after entry of the April 30, 2008 judgment, as HRCP Rule 54(d)(2)(B) required. Therefore, pursuant to HRAP Rule 4(a)(3), Appellant Wagner's and Appellant Miller's respective post-judgment motions extended the time period for filing a notice of appeal until thirty days after entry of the orders disposing of these post-judgment motions.

On September 17, 2008, the circuit court entered written orders on the two post-judgment motions:

- (1) a September 17, 2008 order denying Appellant Wagner's May 8, 2008 HRCP Rule 59(e) motion for reconsideration, and
- (2) a September 17, 2008 order granting Appellee Miller's May 12, 2008 HRCP Rule 54(d) motion for attorney's fees and costs.

However, HRAP Rule 4(a)(3) further "provide[s] that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion." HRAP Rule 4(a)(3). The ninetieth day after the May 8, 2008 filing date of Appellant Wagner's May 8, 2008 HRCP Rule 59(e) motion for reconsideration was August 6, 2008. The ninetieth day after the May 12, 2008 filing date of Appellee Miller's May 12, 2008 HRCP Rule 54(d)

motion for attorney's fees and costs was August 11,<sup>1</sup> 2008. Appellant Wagner did not file his October 17, 2008 notice of appeal within thirty days after August 11, 2008, as HRAP Rule 4(a)(3) required. Therefore, Appellant Wagner's appeal is untimely.

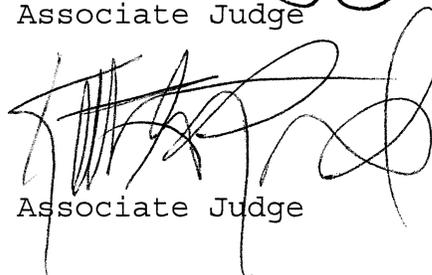
The failure to file a timely notice of appeal in a civil matter is a jurisdictional defect that the parties cannot waive and the appellate courts cannot disregard in the exercise of judicial discretion. Bacon v. Karlin, 68 Haw. 648, 650, 727 P.2d 1127, 1128 (1986); HRAP Rule 26(b) ("[N]o court or judge or justice thereof is authorized to change the jurisdictional requirements contained in Rule 4 of [the HRAP].").

Accordingly, IT IS HEREBY ORDERED that this appeal is dismissed for lack of appellate jurisdiction.

DATED: Honolulu, Hawai'i, February 6, 2009.

  
Daniel R. Foley  
Presiding Judge

  
Associate Judge

  
Associate Judge

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<sup>1</sup> The ninetieth calendar day after May 12, 2008, was actually Sunday, August 10, 2008, but, pursuant to Rule 26(a) of the Hawai'i Rules of Appellate Procedure, the ninety-day time period extended until Monday, August 11, 2008.