

NO. 29798

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

PASCAL C. BOLOMET and ROUTH T. BOLOMET,  
Plaintiffs-Appellants,

v.

RLI INSURANCE COMPANY, JAMES G. McLEAN, and ANNE L. McLEAN,  
Defendants-Appellees,

and

JOHN and JANE DOES 1-50 and DOE ENTITIES 1-50, Defendants  
APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 05-1-2222)

ORDER GRANTING THE SEPTEMBER 3, 2009 MOTION FOR  
RECONSIDERATION OF THE AUGUST 26, 2009 ORDER DISMISSING APPEAL  
(By: Watanabe, Acting C.J., Foley and Nakamura, JJ.)

Upon review of (1) the August 26, 2009 order dismissing appellate court case number 29798 for lack of jurisdiction, (2) a September 3, 2009 motion by Defendants-Appellants Pascal C. Bolomet and Routh T. Bolomet (the Bolomet Appellants) for reconsideration of the August 26, 2009 order dismissing appellate court case number 29798 pursuant to Rule 40 of the Hawai'i Rules of Appellate Procedure (HRAP), and (3) the record, it appears that an issue exists whether a Circuit Court of the First Circuit (circuit court) clerk (circuit court clerk) refused to allow the Bolomet Appellants to file their notice of appeal on April 30, 2009, the final day on which the Bolomet Appellants could file a timely notice of appeal pursuant to HRAP Rule 4(a)(3).

Therefore, we grant the Bolomet Appellants' September 3, 2009

*Jean Kikumoto*  
CLERK OF THE INTERMEDIATE COURT OF APPEALS

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HRAP Rule 40 motion for reconsideration of the August 26, 2009 dismissal order.

The Bolomet Appellants have asserted an appeal from the Honorable Bert I. Ayabe's January 23, 2009 judgment in Civil No. 05-1-2222 by filing a May 1, 2009 notice of appeal. Pursuant to HRAP Rule 4(a)(3), the Bolomet Appellants extended the thirty-day time period under HRAP Rule 4(a)(1) for filing a notice of appeal by timely filing their January 27, 2009 motion for reconsideration pursuant to Rule 59 of the Hawai'i Rules of Civil Procedure (HRCP) within ten days after entry of the January 23, 2009 judgment, as HRCP Rule 59 required. However, it appears that the Bolomet Appellants did not file their May 1, 2009 notice of appeal within thirty days after entry of the March 31, 2009 order denying the Bolomet Appellants' January 27, 2009 HRCP Rule 59 motion for reconsideration, as HRAP Rule 4(a)(3) required for a timely appeal. Therefore, the Bolomet Appellants' May 1, 2009 notice of appeal appears to be untimely under HRAP Rule 4(a)(3).

Nevertheless, in support of the Bolomet Appellants' September 3, 2009 HRAP Rule 40 motion for reconsideration, the Bolomet Appellants assert in declarations that on April 30, 2009, the Bolomet Appellants submitted their notice of appeal to the circuit court clerk for filing in Civil No. 05-1-2222, but the circuit court clerk would not accept the Bolomet Appellants' notice of appeal on April 30, 2009, because the Bolomet Appellants did not have the correct number of photocopies of

their notice of appeal. According to the Bolomet Appellants, the circuit court clerk told the Bolomet Appellants to file their notice of appeal the next day, May 1, 2009, with the correct number of photocopies. The Bolomet Appellants claim that they resubmitted their notice of appeal to the circuit court clerk on the next day, May 1, 2009, and the circuit court clerk file-stamped the Bolomet Appellants' notice of appeal with the date May 1, 2009. The Bolomet Appellants' also claim that they made a request to extend the time to file their notice of appeal on May 1, 2009.

More than thirteen years ago, the supreme court explained that,

because we seek to avoid the injustices associated with documents submitted by attorneys and pro se parties that, for whatever reason, are never filed, we now declare that, as long as documents in question are tendered within the time period prescribed by our rules, the clerks of the courts must file them.

Price v. Obayashi Hawaii Corporation, 81 Hawai'i 171, 179, 914 P.2d 1364, 1372 (1996) (footnote omitted) (emphasis in original). Shortly thereafter, the supreme court amended HRCF Rule 5(e) to provide that, "[a]ny other rule to the contrary notwithstanding, the clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules." HRCF Rule 5(e) (in part). If the circuit court clerk refused to file the Bolomet Appellants' notice of appeal on April 30, 2009, in violation of HRCF Rule 5(e), then the Bolomet Appellants' appeal is timely

under HRAP Rule 4(a)(3). However, if the circuit court clerk did not refuse to file the Bolomet Appellants' notice of appeal on April 30, 2009, then the Bolomet Appellants' May 1, 2009 notice of appeal is untimely under HRAP Rule 4(a)(3). Therefore,

IT IS HEREBY ORDERED as follows:

- (1) the Bolomet Appellants' September 3, 2009 HRAP Rule 40 motion for reconsideration of the August 26, 2009 dismissal order is granted;
- (2) the due date for the opening brief in appellate court case number 29798 is suspended indefinitely until further order by this court;
- (3) appellate court case number 29798 is temporarily remanded to the circuit court for hearing to determine whether a circuit court clerk refused to file Pascal C. Bolomet's and Routh T. Bolomet's notice of appeal in Civil NO. 05-1-2222-12 (BIA) on April 30, 2009;
- (4) if necessary, the circuit court shall also determine whether Pascal C. Bolomet and Routh T. Bolomet moved for an extension of time to file their notice of appeal on May 1, 2009, and if so, the circuit court shall rule on the merits of such motion;
- (5) within two (2) days after the entry of this order, the appellate court clerk shall transmit the circuit court record for Civil No. 05-1-2222-12 (BIA) to the circuit court;
- (6) within ten (10) days after the entry of this order, Defendants-Appellees James George McLean and Anne Louis McLean shall move the circuit court to schedule and hold a hearing on the issue of whether a circuit court clerk refused to file Pascal C. Bolomet's and Routh T. Bolomet's notice of appeal on April 30, 2009 and if necessary, the matters set forth in Paragraph (4);
- (7) the circuit court shall commence the hearing and take evidence, if necessary, no later than sixty (60) days after entry of this order;

- (8) in conducting the hearing, the circuit court shall allow the parties to file written arguments by specific dates prior to the hearing, subpoena relevant witnesses to appear at the hearing, and adduce relevant evidence at the hearing, all in accordance with the Hawai'i Rules of Civil Procedure;
- (9) within ten days after the final day of the hearing, the circuit court shall enter its written findings of fact (including assessments of the credibility of any witnesses) and its decision on the issue of whether a circuit court clerk refused to allow Pascal C. Bolomet and Routh T. Bolomet to file a notice of appeal in Civil No. 05-1-2222-12 (BIA) on April 30, 2009 and, if necessary, its findings of fact and its decision on whether Pascal C. Bolomet and Routh T. Bolomet moved for an extension of time to file their notice of appeal and, if so, whether the motion is granted;
- (10) within ten days after entry of the circuit court's findings and decision(s), the circuit court clerk shall retransmit the record for Civil No. 05-1-2222-12 (BIA), including a supplemental record containing all documents entered on remand, to the intermediate court of appeals, so that we may further consider the issue of appellate jurisdiction in appellate court case number 29798.

The failure by any person to comply with this order may result in sanctions.

DATED: Honolulu, Hawai'i, September 11, 2009.



Acting Chief Judge



Associate Judge



Associate Judge