

NO. 27182

IN THE SUPREME COURT OF THE STATE OF HAWAII

JASON THORNTON and ANNA THORNTON, Plaintiffs-Appellants,

vs.

NICHOLAS J. LOHR, Defendant-Appellee.

JOHN RAPP, Party In Interest-Appellant
(Former counsel for Plaintiffs-Appellants)

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STATE OF HAWAII
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APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-0342)

SUMMARY DISPOSITION ORDER

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

Plaintiffs-Appellants Jason and Anna Thornton ("the Thorntons"), appeal from the first circuit court's March 2, 2005 final judgment in favor of Defendant-Appellee, Nicholas J. Lohr ("Lohr").¹ Party In Interest-Appellant, John Rapp, Esq. ("Rapp"), former counsel for the Thorntons, appeals from the first circuit court's February 16, 2005 order and February 24, 2005 judgment in favor of Lohr. On appeal, Rapp presents the following points of error: (1) sanctions under Hawai'i Rules of Civil Procedure ("HRCP") Rule 11 should not have been ordered because the motion for sanctions was not properly served upon Rapp pursuant to HRCP Rule 11; (2) the circuit court erred in granting sanctions when another judge, who presided over a settlement conference, had previously denied Lohr's request for sanctions under HRCP Rule 11; (3) discovery motions are not a basis for HRCP Rule 11 sanctions; (4) sanctions were

¹ The Honorable Victoria S. Marks presided.

inappropriate for an alleged lack of candor; (5) sanctions were inappropriate under Hawai'i Revised Statutes ("HRS") § 603-21.9(1) and (6) (2003), because the circuit court did not make a finding of bad faith against him; (6) opposing counsel failed to meet his burden of proof; and (7) the circuit court's findings are inadequate to support the imposition of sanctions.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that the circuit court's March 2, 2005 "Final Judgment" is not an appealable final judgment, inasmuch as it: (1) fails to identify which counterclaims the award was made for, and which of the remaining counterclaims were dismissed pursuant to its findings of fact and conclusions of law; and (2) fails to address the circuit court's dismissal of the Thorntons's complaint other than stating "[t]here are no remaining claims in this matter" and incorporating by reference its findings of fact and conclusions of law.²

We also hold that the circuit court abused its discretion when it awarded sanctions against Rapp pursuant to HRCF Rule 11 (2003), and HRS § 603-21.9(1) and (6) (2003). The circuit court abused its discretion when it awarded sanctions pursuant to HRCF Rule 11 on the following grounds: (1) because Lohr filed a separate motion for sanctions, his assertion that

² Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994) (holding that a final judgment must, inter alia, (1) be "entered in favor of and against the appropriate parties"; (2) "identif[y] the claims for which it is entered; and (3) "dismiss any claims not specifically identified"); id. at 119 n.4, 869 P.2d at 1338 n.4 ("A statement that declares 'there are no other outstanding claims' is not a judgment. If the circuit court intends that claims other than those listed in the judgment language should be dismissed, it must say so[.]").

the court awarded sanctions pursuant to HRCP 11(c) (1) (B) is without merit; and (2) the motion for sanctions was not served upon Rapp twenty-one days ("or such other period as the court may prescribe") prior to it being filed in court.³ The circuit court abused its discretion when it also awarded sanctions pursuant to its inherent power under HRS § 603-21.9(1) and (6), on the following grounds: (1) the circuit court does not cite to any authority holding that it is bad faith, or sanctionable conduct, when an attorney fails to either withdraw or seek guidance from the ODC the moment he is notified by his clients that they are moving to another jurisdiction; (2) there would be a "material adverse effect on the interests" of the Thorntons if Rapp withdrew the moment he was notified by his clients that they were moving in November 2003, inasmuch as the Thorntons would only have three to four months to obtain another counsel and have that counsel prepare for trial;⁴ and (3) even though it appears that the circuit court was unpersuaded by Rapp's explanation for filing a motion to continue the trial in violation of the Rules of the Circuit Courts of the State of Hawai'i ("RCCSH") Rule 7(e) (2004),⁵ the findings and conclusions of the circuit court do not

³ HRCP Rule 11(c) (1) (A) ("A motion for sanctions under this rule . . . shall be served . . . 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.").

⁴ See Hawai'i Rules of Professional Conduct ("HRPC") Rule 1.16(b) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client.").

⁵ See Bank of Hawaii v. Kunimoto, 91 Hawai'i 372, 390-91, 984 P.2d 1198, 1216-17 ("Generally, the credibility of witnesses and the weight to be given their testimony are within the province of the trial court and, generally, will not be disturbed on appeal."). RCCSH Rule 7(e) states, in its
(continued...)

present the situation where there is a high degree of specificity clearly demonstrating that Rapp's continued representation of the Thorntons constituted "abusive litigation practices,"⁶ or was "entirely without color, and . . . taken for reasons of harassment or delay or for other improper purposes[.]"⁷

Therefore,

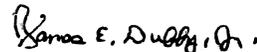
IT IS HEREBY ORDERED that the Thorntons' appeal is dismissed for lack of jurisdiction. It is further ordered that the circuit court's February 16, 2005 order, and February 24, 2005 judgment granting sanctions against John Rapp, Esq. is reversed.

DATED: Honolulu, Hawai'i, November 13, 2007.

On the briefs:

John Rapp, Party In
Interest-Appellant
Pro Se

David B. Rosen,
for Defendant-Appellee,
Nicholas J. Lohr



⁵(...continued)
entirety:

(e) Consent of party to continuance of trial. A motion for continuance of any assigned trial date, whether or not stipulated to by respective counsel, shall be granted only upon a showing of good cause, which shall include a showing that the client-party has consented to the continuance. Consent may be demonstrated by the client-party's signature on a motion for continuance or by the personal appearance in court of the client-party.

⁶ Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawai'i 452, 458, 903 P.2d 1273, 1279 (1995) (citations and quotation marks omitted).

⁷ Bank of Hawaii, 91 Hawai'i at 390, 984 P.2d at 1216 (block format and citation omitted).