SCWC-19-0000815

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

GABRIELLE LONGHI, CO-TRUSTEE OF THE ROBERT J. LONGHI REVOCABLE TRUST DATED MAY 30, 1995, AS AMENDED,
Petitioner/Plaintiff-Appellant,

vs.

MIMI HU and LEVIN & HU, LLP,
Respondents/Defendants-Appellees.

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-19-0000815; CIV. NO. 2CC171000196)

DISSENT OF McKENNA, J., IN WHICH WILSON, J., JOINS

I respectfully dissent from the majority's order rejecting the application for certiorari. The application was filed from the Intermediate Court of Appeals' ("ICA") June 30, 2020 order dismissing the November 19, 2019 appeal from circuit court orders granting sanctions against counsel for Petitioner/Plaintiff-Appellant ("Petitioner"). The ICA dismissed the appeal on the following grounds:

> We lack appellate jurisdiction to review the Sanctions Orders under the circumstances of this appeal, because the aggrieved party, BFR, is not a named party, i.e., the appellant, in the notice of appeal and the amended notice of appeal. See Gold v. Harrison, 88 Hawai'i 94, 104, 962 P.2d 353, 363 (1998) ("Accordingly, we hold that, on appeal, in a case where an attorney has been sanctioned pursuant to HRCP Rule 11, the attorney must be named as a party in the notice of appeal in order for this court to have the

> jurisdiction to address the circuit court's imposition of HRCP Rule 11 sanctions against the attorney."); State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc., 90 Hawai'i 315, 321 n.4, 978 P.2d 753, 759 n.4 (1999) ("[B]ecause the award took the form of attorney sanctions, it would have been improper to raise the issue here, unless the attorney were named as a party in the notice of appeal.")[.]

I believe certiorari should be accepted for the following reasons.

First, as noted above, Gold was based on an appeal of Rule 11 sanctions. As stated in Gold:

> . . . . Under HRCP Rule 11, when the attorney is sanctioned, the attorney must pay the HRCP Rule 11 sanctions. The sanctioning of the attorney is completely independent of the attorney's representation of the represented party, and the represented party's case is otherwise unaffected and unprejudiced. Therefore, as the only person affected by the HRCP Rule 11 sanctions, the attorney is the real party in interest and must challenge the imposition of HRCP Rule 11 sanctions as a named party on appeal.

88 Hawai'i at 104, 962 P.2d at 363. Gold was thus based on the special nature of Rule 11 sanctions, which required that the attorney being sanctioned, not the represented party, pay those sanctions.

This case does not involve Rule 11 sanctions. It is therefore unclear whether the law firm or the represented party is the real party in interest.

Second, in the reference to the State Farm footnote in the ICA's ruling quoted above, this court seemingly applied Gold's holding beyond the Rule 11 context. As noted in that footnote, however, there was no appeal of the circuit court order awarding attorneys' fees and costs, apparently under the inherent powers

doctrine. 90 Hawai‘i 315, 321 n.4, 978 P.2d 753, 759 n.4 (1999). Therefore, the statement in the footnote was not a holding. Gold has, however, since been extended by the ICA to apply to appeals from other sanctions imposed by the trial courts. See Collins v. Wassell, 144 Hawai‘i 66, 435 P.3d 1080 (App. 2019)(applying Gold rule to appeal from family court sanction); Alexander & Baldwin, Inc. v. Silva, 124 Hawai‘i 476, 479 n.2, 248 P.3d 1207, 1210 n.2 (App. 2011)(quoting Gold as applying generally to "imposition of sanctions"); State v. Grace, 107 Hawai‘i 295, 112 P.3d 781 (App. 2005) (citing Gold for ICA's lack of appellate jurisdiction over appeal from Hawai‘i Rules of Penal Procedure, Rule 16(e)(9)(ii) (2000) sanction).

Thus, I would accept certiorari to determine whether Gold was intended to extend beyond the Rule 11 context.

Third, our appellate court rules have changed since Gold. Gold adopted case law from other jurisdictions strictly interpreting the federal equivalent to then Hawai‘i Rules of Appellate Procedure ("HRAP") Rule 3(c). The cases relied on in Gold construed Federal Rules of Appellate Procedure ("FRAP") Rule 3(c). Those cases required that "when an attorney appeals from [FRCP] Rule 11 sanctions, the attorney must be named as a party in the notice of appeal. " Gold, 88 Hawai‘i at 104, 962 P.2d at 363.

At that time, similar to HRAP Rule 3(c), FRAP Rule 3(c) required a notice of appeal to "specify the party or parties taking the appeal." 88 Hawai'i at 104 n.8, 962 P.2d at 363 n.8 (quoting FRAP Rule 3(c) prior to its 1993 amendment). Gold thus held that an attorney appealing from HRCP Rule 11 sanctions must be a named party in the appeal for an appellate court to have jurisdiction over the appeal. 88 Hawai'i at 104, 962 P.2d at 363. But Hawai'i Rules of Appellate Procedure Rule 3(c)(1) now states: "The notice of appeal shall identify the party or parties taking the appeal either in the caption or the body of the notice of appeal."[1]

[1] Granted, the body of the December 13, 2019 amended notice of appeal suggests that the Petitioner, not the law firm, is the appellant:

> NOTICE IS HEREBY GIVEN that Plaintiff Gabrielle Longhi, Successor CoTrustee of the Robert J. Longhi Revocable Trust dated May 30, 1995, as amended, pursuant to Haw. Rev. Stat. § 641-1, the collateral order rule under Siangco v. Kasadate, 77 Hawai'i 157, 161, 883 P.2d 78, 82 (1994), and Rule 3 of the Haw. R. App. P., appeals to the Intermediate Court of Appeals of the State of Hawai`i from: (1) the Order Granting in Part and Denying in Part Defendants Mimi Hu and Levin & Hu, LLP's Motion for Sanctions and Disqualification of Plaintiff's Counsel Bronster Fujichaku Robbins Filed August 21, 2019, filed herein on October 21, 2019, and attached as Exhibit "A"; and (2) Order Awarding Attorneys' Fees and Costs to Defendants Re: Order Granting in Part and Denying in Part Defendants Mimi Hu and Levin & Hu, LLP's Motion for Sanctions and Disqualification of Plaintiff's Counsel Bronster Fujichaku Robbins Filed August 21, 2019, filed herein on December 13, 2019, and attached as Exhibit "B".

To reiterate, however, Gold only required that the attorney be the named appellant for Rule 11 sanctions. Therefore, if the party represented by the law firm was the actual appellant, the appeal still should not have been dismissed. In addition, see the discussion re HRCP Rule 17 that follows.

Fourth, HRAP Rule HRAP Rule 2.1(a) states that the HRCP "are hereby adopted as part of these rules whenever applicable." HRCP Rule 17(a) then states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

The Respondents raised Gold in their answering brief. If there was a question as to the identity of the actual real party in interest, the ICA should not have dismissed the appeal without allowing clarification of the issue instead of dismissing the appeal and disallowing any consideration of the merits of the sanction orders.

Finally, the majority's rejection of certiorari violates this court's policy of favoring adjudication on the merits of a case. See Rivera v. Dep't of Labor & Indus. Relations, 100 Haw. 348, 354, 60 P.3d 298, 304 (2002)(citing Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai‘i 103, 107, 899 P.2d 386, 390 (1995) (this court prefers “giving parties an opportunity to litigate claims or defenses on the merits”). For all of these reasons, I would accept certiorari.

DATED: Honolulu, Hawai‘i, September 25, 2020.

/s/ Sabrina S. McKenna

/s/ Michael D. Wilson