

NO. CAAP-23-0000106

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

HOWARD HOFELICH, Plaintiff-Appellant, and
SOUTH PACIFIC SCUBA TOURS, INC., Intervenor-Appellant, v.
STATE OF HAWAII, DCCA and DLNR; DENNIS KRUEGER, ESQ.;
ASHFORD AND WRISTON LAW CORPORATION; DAVID KAAPU, ESQ.;
STEPHEN D. WHITTAKER, ESQ.; CARL VINCENTI;
JUNG & VASSAR LAW CORPORATION; RONALD IBARRA;
UNITED STATES COAST GUARD VESSEL DOCUMENTATION CENTER (USCGVDC);
DAVID LAWTON, ESQ.; DOE CORPORATIONS 1-10; JOHN DOES 1-10;
JANE DOES 1-10; DOE GOVERNMENTAL AGENCIES 1-10;
DOE PARTNERSHIPS 1-10; DOE LLC CORPORATIONS 1-10,
Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CASE NO. 3CCV-21-0000297)

ORDER DENYING MOTION FOR RECONSIDERATION AND
ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS
(By: Ginoza, Chief Judge, Wadsworth and Nakasone, JJ.)

Upon consideration of: Defendants-Appellees David Lawton and Jung & Vassar P.C.'s (**Appellees**) June 15, 2023 Motion for Reconsideration of Order Granting Motion for Reconsideration (**Motion to Reconsider**); Defendants-Appellees State of Hawai'i and DCCA's (**State Parties**) June 16, 2023 Joinder to [the Motion to Reconsider]; Appellees' June 15, 2023 Second Motion to Dismiss Appeal (**Second Motion to Dismiss**); the State Parties' June 16, 2023 Joinder to [the Second Motion to Dismiss]; the papers in support, the record, and there being no opposition to either motion, it appears that:

(1) On March 6, 2023, self-represented Plaintiff-Appellant Howard Hofelich (**Hofelich**), filed the notice of appeal

without paying the fee required by Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 3(a);

(2) On April 25, 2023, Appellees filed a motion to dismiss the appeal (**First Motion to Dismiss**) on four grounds, one being that Hofelich failed to pay the appellate filing fee or obtain a fee waiver;

(3) On May 30, 2023, the court granted the First Motion to Dismiss under HRAP Rule 11(b)(2), (c)(2) (**Dismissal Order**), noting that the record on appeal had not been prepared due to Hofelich's failure to pay the required fees or obtain a fee waiver, the appellate clerk had entered a default of the record on appeal, and Hofelich failed to seek relief from the default;

(4) On June 2, 2023, Hofelich tendered payment of the filing fees and moved for relief from the default of the record on appeal and reconsideration of the Dismissal Order. On June 13, 2023, the court granted the request and reinstated the appeal (**Reinstatement Order**);

(5) Appellees now ask the court to set aside the Reinstatement Order or dismiss the appeal based on the other arguments raised in the First Motion to Dismiss, *i.e.*, that: (a) Intervenor-Appellant South Pacific Scuba Tours, Inc. (**South Pacific**) did not seek leave to intervene in the underlying case, and Hofelich cannot represent it in the appeal; (b) the appeal is barred by the doctrine of *res judicata*; and (c) Hofelich is a vexatious litigant bringing frivolous claims and has failed to obtain leave to proceed on appeal as required by Hawaii Revised Statutes (**HRS**) § 634J-7 (2016). Appellees additionally argue that the Reinstatement Order should be set aside because Hofelich falsely represented he was unable to pay the filing fee, and that the court should reverse, modify, or narrow its policy of affording deference to self-represented parties when they are vexatious litigants;¹

(6) South Pacific is not named as a party in the pleadings, and the record does not indicate that the circuit

¹ As the arguments in the Motion to Reconsider overlap with those in Second Motion to Dismiss, we address them together.

court granted South Pacific intervenor status. Though not a basis to set aside the Reinstatement Order or dismiss the appeal, South Pacific is not a proper party to the appeal. HRAP Rule 2.1(b);²

(7) Appellees' arguments based on *res judicata* address the merits of the appeal and fail to establish that the court lacks appellate jurisdiction;

(8) The court determines whether an appeal is frivolous after rendering a decision on the merits. HRAP Rule 38. Appellees cite no authority for the court to dismiss the appeal as frivolous. Even if Hofelich is barred "from filing any new litigation" as a vexatious litigant, Appellees fail to demonstrate that he is precluded from filing a notice of appeal from an existing civil action or proceeding under HRS §§ 634J-1 (2016) and 634J-7;

(9) The court reinstated the appeal in deference to Hofelich's self-represented status and in adherence to the policy of hearing cases on the merits where possible. Despite Hofelich's status as a vexatious litigant, it is possible to hear his arguments on the merits, and the Hawai'i Supreme Court has instructed that the filings of pro se litigants be liberally interpreted if possible. Erum v. Llego, 147 Hawai'i 368, 380-81, 465 P.3d 815, 827-28 (2020). We do not find Appellees' other arguments availing.

Therefore, IT IS HEREBY ORDERED that the Motion to Reconsider is denied.

IT IS FURTHER ORDERED that the Second Motion to Dismiss is granted-in-part and denied-in-part as follows:

1. The request to dismiss South Pacific Scuba Tours, Inc. from the appeal is granted;

2. The request to dismiss the appeal under the doctrine of *res judicata* is denied without prejudice to raising *res judicata* arguments in the briefs;

² HRAP Rule 2.1(b) defines "party" as a "named plaintiff, defendant, petitioner, respondent, claimant, or intervenor in the court or agency proceeding and anyone who has standing to seek review of the court or agency order or judgment."

3. The request to dismiss the appeal as frivolous and because Hofelich is a vexatious litigant is denied, without prejudice to raising such arguments in the briefs or by motion under HRAP Rule 38; and

4. All other relief requested is denied.

DATED: Honolulu, Hawai'i, July 14, 2023.

/s/ Lisa M. Ginoza
Chief Judge

/s/ Clyde J. Wadsworth
Associate Judge

/s/ Karen T. Nakasone
Associate Judge