

NO. CAAP-23-0000501

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

HOWARD HOFELICH, Plaintiff-Appellant, v.
ERWIN McMULLEN; LINDA McMULLEN;
ERVIN EDMUND McMULLEN and LINDA SUE McMULLEN,
Co-Trustees of the ERVIN EDMUND McMULLEN TRUST,
dated December 10, 2013;
LINDA SUE McMULLEN and ERVIN EDMUND McMULLEN,
Co-Trustees of the LINDA SUE McMULLEN TRUST,
dated December 10, 2013, Defendants-Appellees;
JOHN DOES 1-10; DOE GOVERNMENTAL AGENCIES 1-2, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIVIL NO. 3CCV-21-0000356)

ORDER GRANTING IN PART MOTION TO DISMISS APPEAL

(By: Leonard, Presiding Judge, Nakasone and McCullen, JJ.)

Upon consideration of Defendants-Appellees Erwin McMullen and Linda McMullen's (**McMullen Parties**) August 25, 2023 Motion to Dismiss Appeal for Lack of Jurisdiction, the papers in support, and the record, and there being no opposition, it appears that on August 24, 2023, self-represented Plaintiff-Appellant Howard Hofelich (**Hofelich**) filed a notice of appeal from, *inter alia*, the Circuit Court of the Third Circuit's (**Circuit Court**) April 13, 2023 "Order Granting Defendants [McMullen Parties'] Motion for Partial Summary Judgment" (**Partial Summary Judgment Order**). McMullen Parties seek dismissal of the appeal and a sanction against Hofelich for attorney's fees and costs. They contend: the Partial Summary Judgment Order is not an appealable order; the Circuit Court did not grant leave to file an interlocutory appeal from the Partial Summary Judgment

Order; even if the Partial Summary Judgment Order was appealable, the notice of appeal is untimely; and the appeal is frivolous.

We conclude that the court lacks appellate jurisdiction. The Circuit Court has not entered a final, appealable judgment under Hawaii Revised Statutes (**HRS**) § 641-1(a) (2016), Hawai'i Rules of Civil Procedure (**HRCPP**) Rules 58, and Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 119, 869 P.2d 1334, 1338 (1994), it has not certified the Partial Summary Judgment Order for appeal under HRCPP Rule 54(b), it has not granted leave to file an interlocutory appeal under HRS § 641-1(b) (2016) from any order entered in the underlying case, and no exception to the finality rule applies to any of the orders identified in Hofelich's notice of appeal.¹ See Greer v. Baker, 137 Hawai'i 249, 253, 369 P.3d 832, 836 (2016) (setting out the requirements for the collateral order and Forgay doctrines). Therefore, the court lacks appellate jurisdiction, and the appeal must be dismissed.

McCullen Parties seek attorney's fees and costs under Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 38, under which the court may award damages for a frivolous appeal after it decides the appeal. Upon review and consideration of the McCullen Parties arguments and the record, the court declines to award attorney's fees and costs pursuant to HRAP Rule 38.

Therefore, IT IS HEREBY ORDERED that the motion is granted in part and denied in part as follows:

1. The appeal is dismissed for lack of jurisdiction.
2. The request for attorney's fees and costs is denied without prejudice to a request for costs pursuant to HRAP Rule 39.

DATED: Honolulu, Hawai'i, September 11, 2023.

/s/ Katherine G. Leonard
Presiding Judge

/s/ Karen T. Nakasone
Associate Judge

/s/ Sonja M.P. McCullen
Associate Judge

¹ The notice of appeal appears to identify four different orders entered by the Circuit Court.