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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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THOMAS SCHMIDT,  
Petitioner/Plaintiff-Appellant,

vs.

GARY VICTOR DUBIN; DUBIN LAW OFFICES,  
Respondents/Defendants/Third-Party Plaintiffs/  
Third-Party Counterclaim Defendants-Appellees,

and

GARY VICTOR DUBIN; DUBIN LAW OFFICES,  
Respondents/Defendants/Third-Party Plaintiffs/  
Third-Party Counterclaim Defendants-Appellees,

vs.

JOHN S. CARROLL,  
Respondent/Third-Party Defendant/  
Third-Party Counterclaim Plaintiff-Appellee.

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SCWC-18-0000291

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS  
(CAAP-18-0000291; CASE NO. 1CC151000482)

SEPTEMBER 16, 2024

DISSENTING OPINION BY EDDINS, J., WITH WHOM  
CIRCUIT JUDGE KAWANO, IN PLACE OF DEVENS, J., JOINS

I.

I respectfully dissent.

In my view, the ICA's SDO and judgment on appeal do not stop the circuit court from revisiting attorney fees and costs on remand. A common-sense, contextual reading of the ICA's decision *requires* the circuit court to vacate its attorney fee award, because a non-prevailing party doesn't get attorney fees per Hawai'i Revised Statutes (HRS) § 607-14 (2016).

To reach its conclusion, the majority relies on Chun and Yoshikawa. It quotes Chun's statement that, on remand, circuit courts must "comply strictly with the mandate of the appellate court according to its true intent and meaning, as determined by the directions given by the reviewing court." Chun v. Bd. of Trs. of Emps.' Ret. Sys. State of Hawai'i, 106 Hawai'i 416, 439, 106 P.3d 339, 362 (2005). The majority's reasoning places much weight on strict compliance with a literal reading of the ICA's words - "[t]he Judgment is affirmed in all other respects." Yet the majority blows by the ICA decision's "true intent and meaning."

As this court has directed, "[o]n remand, a trial court must closely adhere to the true intent and meaning of the appellate court's mandate." Matter of Hawai'i Elec. Light Co., Inc., 149 Hawai'i 239, 241, 487 P.3d 708, 710 (2021) (HELCO II). "The 'true intent and meaning' of a reviewing court's mandate is

*not to be found in a solitary word or decontextualized phrase, but rather in the opinion, as a whole, read in conjunction with the judgment and interpreted in light of the case's procedural history and context."* Id. (emphasis added). HELCO II rejected an interpretation of a remand instruction that "only works if *everything else* in the HELCO I opinion and the language of the judgment is ignored." Id. Such a blinkered approach is unreasonable. Id. A remand's scope is determined "not by formula, but by inference from the opinion as a whole." Id.

For instance, HELCO II interpreted HELCO I's remand instruction in light of the whole opinion. It ruled that a phrase in the remand instruction vacating a Public Utilities Commission order should be understood as a "synecdoche" (a figure of speech using a broad phrase to represent a component part). Id. at 242, 487 P.3d at 711. In this context, the remand instruction's meaning was clear. Id.

Here, as in HELCO II, the ICA's "affirmed in all other respects" language referred to the other issues the ICA decided, not the attorney fee and cost issue (something undecided in its SDO).

Schmidt raised four issues to the ICA: (1) the circuit court should have denied MPSJ #1; (2) the court should have let Schmidt testify to when his claims accrued; (3) the court should have determined when Schmidt knew he had a claim against Dubin;

and (4) on remand, the court should determine when Schmidt's claims accrued. The ICA vacated the judgment "with respect to the Circuit Court's granting of summary judgment on Schmidt's breach of contract claim(s) against Dubin on the grounds that they were time-barred" (appellate issues 1, 3, and 4). It also ruled that Schmidt waived a legal malpractice claim against Dubin and appellate issue (2), his "I couldn't testify" point. So, when the SDO "affirmed in all other respects" it meant it affirmed on appellate issue 2 and the malpractice claim. The other issues it actually decided.

In this context, a circuit court judge would understand that the ICA's "affirmed in all other respects" phrase referred to these ancillary issues. Not to the attorney fees and costs.

But what about Yoshikawa? True, Yoshikawa said, "when a judgment upon which attorneys' fees and costs were based has been vacated, attorneys' fees and costs arising out of that judgment should also be vacated." Ass'n of Owners of Kalele Kai v. Yoshikawa, 149 Hawai'i 417, 418, 493 P.3d 939, 940 (2021).

But Yoshikawa also addressed what happens next when an appellate court does not vacate attorney fees and costs. It said, "[e]ven if the ICA had not vacated attorneys' fees and costs related to the vacated summary judgment, on remand, Yoshikawa could have filed a Hawai'i Rules of Civil Procedure ('HRCP') Rule 60(b)(5) (2006) motion to vacate fees and costs

awarded pursuant to the improper grant of summary judgment.” Id. at 421-22, 493 P.3d 943-44. Rule 60(b)(5) provides that a court may rescind a judgment when the judgment is based on an earlier ruling that has been reversed or vacated, or when maintaining the judgment is no longer equitable. Thus, the prevailing party can speak up for itself on remand, even if the appellate court didn't speak on the issue.

Yoshikawa's procedural history also differs from this case. That case's ICA opinion explicitly ruled that attorney fees were “not subject to litigation on remand.” Id. at 420, 493 P.3d at 942. Here, the ICA's SDO and judgment on appeal didn't mention attorney fees and costs. And, the ICA rejected Schmidt's reconsideration motion on attorney fees without giving a reason. In Yoshikawa, this court had to step in to correct the ICA's error. Here, I believe nothing prevents the circuit court from vacating the attorney fee and cost award on remand.

Because the ICA denied Schmidt's fee recon motion, the majority thinks that the ICA precluded the circuit court from re-examining fees. Not so. Schmidt's recon informed the ICA that its decision vacating Dubin's victory also impliedly vacates the fee award based on Dubin's prevailing party status. The majority seems to believe that the ICA overlooked this argument and affirmed an incorrect fee award. Rather, I trust the ICA understood Schmidt's simple argument, but rejected the

recon because it already understood "affirmed in all other respects" to mean the other issues it decided, not including the fee award.

A circuit court judge gets it. The ICA's judgment on appeal remanded "for further proceedings consistent with" the SDO. This instruction requires the circuit court to reconsider its attorney fee award. In a contract case (like this one), the prevailing party may win attorney fees. HRS § 607-14. A prevailing party may also recoup its costs, per HRCP Rule 54(d)(1).

If an appellate court rules that a formerly-prevailing party no longer prevails, then that party doesn't get attorney fees and costs under these provisions. If a lower court, on remand, lets a now non-prevailing party recover fees and costs, it defies the appellate court's "true intent and meaning." HELCO II, 149 Hawai'i at 241, 487 P.3d at 710. That court acts inconsistently with the appellate court's mandate.

Here, the only outcome "consistent with" the ICA's holding vacating summary judgment is to also vacate the award of attorney fees and costs predicated on that judgment. To do otherwise would ignore the opinion. See id. Further proceedings "consistent with" Dubin losing summary judgment mean that Schmidt doesn't have to pay attorney fees.

For sure, a lower court must "comply strictly" with an appellate court's mandate. Chun, 106 Hawai'i at 439, 106 P.3d at 362. It must comply with a mandate's meaning, not with an overly literal reading of its language. HELCO II, 149 Hawai'i at 241, 487 P.3d at 710.

Thus, there's no need to require every appellate decision to explicitly vacate attorney fees and costs for a no-longer-prevailing party. This court trusts lower courts to understand the meaning and logical operation of an opinion.

Because the circuit court will put on its thinking cap and figure out the remand instruction, I would simply affirm the ICA's summary disposition order.

/s/ Todd W. Eddins

/s/ Kelsey T. Kawano

