THE SENATE
THIRTY-FIRST LEGISLATURE, 2022
STATE OF HAWAII

S.B. NO. 2346

JAN 21 2022

A BILL FOR AN ACT

RELATING TO COURTS OF APPEAL.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. In one of her last published decisions, Justice Ruth Bader Ginsburg wrote that a court abuses its discretion when it departs from the principle of party presentation and decides a case on grounds not raised by the parties. *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020). Justice Ginsburg explained that the American legal system follows the principle of party presentation:

> [I]n both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

Id. at 1579. This is because the American legal system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* (alteration in original).

Justice Ginsburg elaborated that:

> [C]ourts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties.

Id. (alteration in original) (internal quotation marks and citation omitted).

Justice Ginsburg's decision comports with United States Supreme Court precedent stating that decisions reached without full briefing or argument have less precedential value and should be given less deference. For example, the Court has recognized that it has been "less constrained to follow precedent where, as here, the opinion was rendered without full briefing and argument." *Hohn v. United States*, 524 U.S. 236, 251 (1998).

The United States Supreme Court has also stated that "somewhat less deference [is owed] to a decision that was rendered without benefit of a full airing of all the relevant considerations. That is the premise of the canon of

interpretation that language in a decision not necessary to the holding may be accorded less weight in subsequent cases." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 709 n.6 (1978) (Powell, J., concurring).

Furthermore, "[s]ound judicial decisionmaking requires both a vigorous prosecution and a vigorous defense of the issues in dispute, and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring) (internal quotation marks and citation omitted). Additionally, the Court has stated that "a rule of law unnecessary to the outcome of the case, especially one not put into play by the parties, approaches without more the sort of dicta ... which may be followed if sufficiently persuasive but are not controlling." *Id.* at 572-573 (quotation marks omitted).

Sua sponte decisions that result from disregard of the principle of party presentation violate due process. In those situations, the court substituted itself as a party and denied the parties the opportunity to litigate their own cases. Due process is especially violated when an appellate court makes a

sua sponte decision that alters the remedy sought by the parties.

For example, in *Cox v. Cox*, 138 Haw. 476 (2016), a majority of the Hawaii supreme court *sua sponte* invalidated a family court rule to deny the prevailing party an award of attorneys' fees and costs. No one in the litigation requested that the rule be invalidated. Nor did the supreme court provide the parties with an opportunity to address the issue.

Again, in *State v. Chang*, 144 Haw. 535 (2019), a majority of the Hawaii supreme court vacated a conviction when the court unilaterally held that a motion to suppress may not be consolidated with a trial even when the parties consent to such an action. In making its decision, the majority overruled forty-year-old precedent. At no time did the majority afford the parties an opportunity to address the issue.

Denying a party the opportunity to present its own case is analogous to denying a party from engaging in a meaningful colloquy with a judge. On multiple occasions, the Hawaii Supreme Court has reiterated a party's right to discuss and explore its rights, claims, and defenses through a colloquy. *State v. Wilson*, 144 Haw. 454 (2019) (colloquy required before a

trial court accepts a stipulation to an element of a charged offense); *State v. Eduwensuyi*, 141 Haw. 328 (2018) (colloquy required to discuss right to testify); *State v. Ui*, 142 Haw. 287 (2018) (colloquy required to discuss party's waiver of right to have State prove all elements of a charge); *State v. Kaulia*, 128 Haw. 479 (2013) (colloquy required when defendant intends to leave courtroom during trial).

There are potential remedies that may prevent rash decisions. A party may be permitted to appeal the *sua sponte* decision to another court or an aggrieved party may be permitted to seek a recovery for any damages it may have incurred as a result of the decision.

The legislature finds that the better course of action is to simply prohibit an appellate court from rendering *sua sponte* decisions unless the parties have been heard. This alternative will ensure due process and permit the parties, rather than the appellate court, to litigate their own case.

The purpose of this Act is to prohibit the courts of appeal from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the

proceeding, unless the parties are provided the opportunity to brief the court.

SECTION 2. Chapter 602, Hawaii Revised Statutes, is amended as follows:

1. By adding a new section to part I to be appropriately designated and to read:

"**§602- Sua sponte decisions.** The supreme court, when acting on a matter on appeal, shall not affirm, modify, reverse, or vacate a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court. If the court fails to afford that opportunity for the parties to submit supplemental briefing, a rehearing shall be ordered upon timely petition of any party."

2. By adding a new section to part II to be appropriately designated and to read:

"**§602- Sua sponte decisions.** The intermediate appellate court shall not affirm, modify, reverse, or vacate a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court. If the court fails to afford that opportunity

for the parties to submit supplemental briefing, a rehearing shall be ordered upon timely petition of any party."

SECTION 3. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

INTRODUCED BY: _____

S.B. NO. 2346

Report Title:
Courts of Appeal; Sua Sponte Decisions

Description:
Prohibits courts of appeal from affirming, modifying, reversing, or vacating a matter on grounds other than those raised by the parties to the proceeding, unless the parties are provided the opportunity to brief the court. Requires a rehearing if the courts fail to afford the opportunity for parties to submit supplemental briefing.

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