



The Judiciary, State of Hawai'i

Testimony to the Thirty-Second Legislature, 2023 Regular Session

Senate Committee on Judiciary
Senator Karl Rhoads, Chair
Senator Mike Gabbard, Vice Chair

Thursday, February 16, 2023, 9:30 AM
State Capitol, Conference Room 016 & Via Videoconference

by:

Thomas J. Berger
Staff Attorney, Hawai'i Supreme Court

Bill No. and Title: Senate Bill No. 1072, Relating to Courts of Appeal.

Purpose: Prohibits the State's Supreme Court and Intermediate Appellate Court 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 upon timely petition of any party, if the courts fail to afford the opportunity for parties to submit supplemental briefing.

Judiciary's Position:

The Judiciary respectfully opposes SB 1072 which proposes to require the appellate courts to not enter a decision in a case on appeal "on grounds other than those raised by the parties . . . unless the parties are provided the opportunity to brief the court."

The Hawai'i Supreme Court has recently addressed the apparent intent of this bill through its ruling making authority. Specifically, on August 30, 2021 the court entered the Order Amending Rule 28(b)(4) of the Hawai'i Rules of Appellate Procedure ("**Subject Order**") as follows (new material is underscored):

Rule 28. BRIEFS.

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, . . .

....

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented. **If an appellate court, when acting on a case on appeal, contemplates basing the disposition of the case wholly or in part upon an issue of plain error not raised by the parties through briefing, it shall not affirm, reverse, or vacate the case without allowing the parties the opportunity to brief the potential plain error issue prior to disposition.** Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

A copy of the Subject Order is enclosed for your consideration. The Subject Order was effective January 1, 2022.

As additional background on the Subject Order please consider the following. The Hawai‘i Supreme Court has the constitutional authority to promulgate rules for all courts, and these rules have the force of law.¹ With respect to the Subject Order, it was proposed by the Standing Committee to Review the Hawai‘i Rules of Appellate Procedure. This standing committee includes attorney representatives from the civil and criminal bar, the Honolulu Prosecuting Attorney, the Office of the Public Defender and the Department of the Attorney General.

After the proposed rule was formulated by the standing committee the Hawai‘i Supreme Court released the proposed new rule for 90-days of public comment. Finally, after this process was completed, the Hawai‘i Supreme Court approved the new rule as set forth in the Subject Order.

In conclusion, it would appear the concerns motivating SB 1072 were resolved by the Subject Order.

Respectfully, the Judiciary opposes this bill. Thank you for the opportunity to testify.

¹ “The supreme court shall have power to promulgate rules and regulations in all civil and criminal cases for all courts relating to process, practice, procedure and appeals, which shall have the force and effect of law.” Haw. Const. art. VI, § 7.

Electronically Filed
Supreme Court
SCRU-10-0000012
30-AUG-2021
07:51 AM
Dkt. 60 ORD

SCRU-10-0000012

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the

HAWAI'I RULES OF APPELLATE PROCEDURE

ORDER AMENDING RULE 28(b)(4) OF THE
HAWAI'I RULES OF APPELLATE PROCEDURE

(By: Recktenwald, C.J., Nakayama, McKenna, Wilson, and Eddins, JJ.)

IT IS HEREBY ORDERED that Rule 28(b)(4) of the Hawai'i Rules of Appellate Procedure is amended, effective January 1, 2022, as follows (new material is underscored):

Rule 28. BRIEFS.

(b) Opening brief. Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:

(4) A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. Where applicable, each point shall also include the following:

(D) when the point involves a ruling upon the report of a master, a quotation of the objection to the report.

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not

presented. If an appellate court, when acting on a case on appeal, contemplates basing the disposition of the case wholly or in part upon an issue of plain error not raised by the parties through briefing, it shall not affirm, reverse, or vacate the case without allowing the parties the opportunity to brief the potential plain-error issue prior to disposition. Lengthy parts of the transcripts that are material to the points presented may be included in the appendix instead of being quoted in the point.

DATED: Honolulu, Hawai'i, August 30, 2021.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama

/s/ Sabrina S McKenna

/s/ Michael D. Wilson

/s/ Todd W. Eddins

