No. _____

In the

Supreme Court of the United States

MICHAEL J. SZYMANSKI,

Petitioner,

v.

WAILEA RESORT COMPANY, LTD.; a Hawaii corporation; ADOA-SHINWA DEVELOPMENT CORPORATION; and SHINWA GOLF HAWAII, CO. LTD., a Hawaii corporation,

Respondents.

On Petition for a Writ of Certiorari to the Hawaii Supreme Court, the Hawaii Intermediate Court of Appeals, and the Second Circuit Court of the State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are orders and judgments constitutionally void, in violation of due process, entered by a state court judge in an earlier case, who failed to disclose having a financial interest in the outcome, but who later is forced to admit in a subsequent lawsuit involving identical stock ownership in an identical real party in interest, as having had a more than de minimis, undisclosed conflict of interest in both cases, and who recuses herself from presiding in that subsequent lawsuit only when confronted by an aggrieved party in both cases first learning of and objecting to that more than half a decade long concealed appearance of partiality?

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A. JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this *Petition for a Writ of Certiorari*, timely filed by U.S. Mail, postmarked on June 12, 2017, in accordance with the extension of the filing deadline to June 11, 2017, the intervening Sunday not included in the calculation pursuant to Supreme Court Rule 30.1, granted by the Honorable Anthony M. Kennedy pursuant to Supreme Court Rules 22 and 30.3.

This Petition challenges the constitutionality of the January 12, 2017 Hawaii Supreme Court Order rejecting Petitioners' application for writ of certiorari to the Intermediate Court of Appeals which affirmed the orders and judgments of the Hawaii Intermediate Court of Appeals and the Second Circuit Court, all of which written decisions are set forth in the Appendix hereto.

This Court has jurisdiction to review this *Petition* and the aforesaid January 12, 2017 Hawaii Supreme Court Order and all challenged subsidiary orders and judgments above referenced pursuant to Section 1254(1) of Title 28 of the United States Code and Supreme Court Rules 10(b), (c) and 13(1).

B. AUTHORITATIVE PROVISIONS

The decisions being challenged concern the interpretation and application of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, the relevant portions of which are of course well known to this Court and fully referenced within the text herein.

C. STATEMENT OF THE CASE

1. The Maui Interpleader Action

The underlying litigation began on July 19, 2002, when Title Guaranty Escrow Services in Honolulu filed an Interpleader action against Petitioner Szymanski and Respondent Wailea Resort Company, Ltd., asking the Second Circuit Court on Maui to determine the respective rights of Szymanski and Wailea to certain funds deposited with it in escrow by Szymanski.

Szymanski had entered into an agreement to purchase from Wailea 23 acres of very valuable Maui vacant land expecting to make a profit of between $100 million and $300 million upon full development of the property and had deposited in escrow with Title Guaranty the entire purchase price of $4.55 million.

2. Competing Breach of Contract Claims

Szymanski claimed that Wailea immediately breached its agreement to provide marketable title to Szymanski upon closing, Wailea acknowledging its inability to remove certain liens on the property until after a year of extensions when it finally did, however nevertheless still failing to fulfill other "seller's closing obligations" that it had unconditionally promised to do upon closing.

In the Interpleader action Szymanski and Wailea filed breach of contract cross-claims against each other, and Szymanski, seeking specific performance, filed a third-party complaint against Third-Party Defendants ADOA-Shinwa Development Corp. and Shinwa Golf Hawaii Co., Ltd., parties related to Wailea and the intended purchase.

3. A&B Becomes a Real Party in Interest

Wailea on October 1, 2003, then sold the land to a wholly owned subsidiary of a prominent and influential Hawaii developer, Alexander and Baldwin, Inc., known as A&B, subject to the outcome of the ongoing Interpleader action.

That agreement between Wailea and A&B made A&B the real party in interest on the seller's side against Szymanski in the Interpleader action, which was known at the time to the Court and to all of the parties, fully set forth on the record of the case, with A&B's attorneys openly appearing in the case, noticing depositions, paying Wailea's attorneys' fees and court costs, and its representatives participating on the record in virtually all pretrial activities.

4. Judge Loo Grants Summary Judgment

In 2004, both Szymanski and Wailea filed motions for summary judgment. Judge Rhonda Loo, presiding, granted partial summary judgment in favor of Wailea. Szymanski timely appealed to the Hawaii Intermediate Court of Appeals in 2005, which affirmed Judge Loo's decision in 2009.

In 2010, upon remand, Judge Shackley Raffetto entered final judgment against Szymanski. Szymanski again appealed. The Intermediate Court of Appeal in 2013 this time reversed, ruling that Judge Raffetto had twice abused his discretion on procedural matters.

5. Szymanski's Co. Sues Its Engineering Co.

Meanwhile, Szymanski's development company, One Wailea Development LLC, had prepared to develop the land at issue, and obtained subdivision approvals that had significant value even without

owning the subject land.

However, the engineering company One Wailea had retained, Warren S. Unemori Engineering, Inc., without One Wailea's permission withdrew One Wailea's near final subdivision approval in 2006, and used One Wailea's subdivision plans paid for by One Wailea to secure subdivision approval for A&B in 2006 instead, misinforming Maui County that the ownership of the land was not in dispute, even though Szymanski's ownership appeal was still pending.

As a result, One Wailea sued Unemori Engineering in 2007, in Civil No. 07-1-0212, Judge Loo again presiding. A&B again was not a named party to the Unemori Engineering action, but a real party in interest nevertheless.

6. Judge Loo Owns Stock in A&B Discovered

It was only during the Unemori Engineering action around May 2011 that Szymanski accidently learned that Judge Loo owned stock in A&B when her financial disclosure statements posted on the Hawaii Judiciary Website came to his attention, alerted his attorney handling his appeal, who then filed a motion to disqualify Judge Loo from the Unemori Engineering case.

What Szymanski discovered and what was placed in the record of the Unemori Engineering action was Judge Loo's 2002 disclosure statement made under oath listing her ownership of "Alexander and Baldwin" stock before she granted summary judgment against Szymanski, later freely admitted by counsel for Wailea in his Answering Brief before the Intermediate Court of Appeals in CAAP-12-0000711, filed August 18, 2014, page 19 ("Judge Loo owned A&B stock"), which in 2012 was the only

stock she reported owning.

And Judge Loo's subsequently filed financial disclosure statements, updated only through the calendar year 2010, subject to judicial notice on the Hawaii Judiciary Website, continue to show ownership in A&B stock.

Of equal interest on every filed financial disclosure statement of hers is a listing of her as "Secretary 1992-present" of "Laniakea Investment Management, Inc.," which on the Official Hawaii Government Business Portal, also subject to judicial notice, lists Judge Loo also as corporate "Director," and contains this self-described company purpose: "provide investment advisory services with regard to stocks, bonds, options, securities, mutual funds, cash assets and evidences of property or business indebtedness."

Presumably, owning stock only in A&B when awarding summary judgment against Szymanski in 2004, her part-time for-profit stock advisory service may well have been advising others to purchase A&B stock, giving her if so additional incentive to see its stock price increase.

7. Judge Loo Recuses Herself Due to A&B Stock

Confronted in the Unemori Engineering action with a challenge for the first time to her heretofore undisclosed stock ownership of A&B, she immediately recused herself, submitting a "Certificate of Recusal" dated May 24, 2011, filed the same day, reassigning the case to Judge Shackley Raffetto "pursuant to HRS Sec. 601-7," which statute prohibits presiding in a case in "which the judge has . . . a more than de minimis pecuniary interest."

Judge Loo did not stop there, but on June 3, 2011

also filed an "Order Granting Motion To Recuse Judge Rhonda Loo," set forth in Appendix 1, at A-1 to A-2, "based upon Judge Rhonda Loo's ownership of shares in Alexander & Baldwin, Inc.," and there was no appeal.

8. Szymanski Files Rule 60(b) Motion

Recognizing that Judge Loo's undisclosed ownership interest during the Interpleader action was even more an appearance of partiality since A&B played an even more direct part in the Interpleader action as a real party in interest than in the Unemori Engineering action, Szymanski filed a Rule 60(b) motion to disqualify her in the Interpleader action and to set aside all of her adverse rulings while self admittedly in violation of Section 601-7, *supra*, there also.

Szymanski's Rule 60(b) motion was heard before Judge Shackley Raffetto at a hearing held on December 7, 2011, the official transcript of which is set forth in Appendix 2, at A-3 to A-7, wherein Szymanski's attorney requested disqualification and that the prior orders and judgments be set aside, basing his argument and supporting motion papers squarely on this Court's controlling federal due process precedent set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988).

9. Judge Raffetto Denies Rule 60(b) Motion

Judge Raffetto, however, rejected the *Liljeberg* constitutional precedent of this Court, concluding first that "the matter is moot" due to the prior appeal affirming Judge Loo's summary judgment since therefore he saw "no causation of any consequences to Mr. Szymanski from the failure to recuse," and concluding second that "there's no showing of any bias and no showing of any

appearance of impropriety or bias that no reasonable person could find that there was such," completely ignoring the opposite personal conclusion reached by Judge Loo in the Unemori Engineering action, who if anyone should best know the true facts relating to her disqualification based on ownership of stock in A&B, and, already recusing herself for, as she determined, a more than *de minimis* stock ownership interest in A&B.

10. Judge Raffetto's Decision Appealed

Judge Raffetto proceeded to enter a written Order on January 4, 2012, set forth in Appendix 3, at A-8 to A-10, repeating his same two justifications, *supra*, from which Rule 60(b) denial Szymanski appealed, his third appeal to the Intermediate Court of Appeals, arguing that the prior affirmance on appeal was irrelevant and did not make the Rule 60(b) motion moot, and once again building his constitutional case around this Court's decision in *Liljeberg* in his Opening Brief, at page 7 ("Mr. Szymanski's 2011 Rule 60(b) Motion argued that Judge Loo's 2004 orders now must be vacated, just as the U.S. Supreme Court ordered in *Liljeberg*").

11. Szymanski's Appeal Is Rejected.

The Intermediate Court of Appeals affirmed the denial of Szymanski's Rule 60(b) motion on August 31, 2016, its opinion set forth in Appendix 4, at A-11 to A-30, wherein it first corrected Judge Raffetto in that it held that Szymanski's Rule 60(b) motion was not moot, *id.*, at A-16 to A-17, A-18 to A-19, but concluded that "recusal was not required" under *Liljeberg* as Szymanski had argued

First, it ruled that Rule 60(b)(6) would apply only in exceptional circumstances and that Szymanski had waited too long – seven years – after the

summary judgment had been filed and that Judge Loo's financial disclosures had appeared on the State Judiciary Website during all that time, *id.*, at A-20, available to Szymanski supposedly.

That conclusion ignores the fact that Judge Loo was under an affirmative ethical duty as in *Liljeberg* to disclose her conflict of interest and did not do so until May 24, 2011, the same month that Szymanski inadvertently discovered her nondisclosure, and in any event parties to litigation do not usually investigate the stock holdings of their presiding judge, nor are they encouraged to do so, nor are they informed or otherwise aware that such information may be posted somewhere on the Internet, although usually out-of-date.

Second, it ruled that pursuant to Section 601-7 of the Hawaii Revised Statutes "Judge Loo's ownership of stock in A&B was *de minimis* because Judge Loo's stock ownership was too remote of a financial interest to require disqualification" as it was ownership in one of A&B's wholly owned subsidiaries instead, *id.*, at A-25, *see also* A-22 to A-26.

That conclusion ignores the fact that first of all the market value of a corporate parent's stock also reflects the value of its wholly owned subsidiaries.

Moreover, Judge Loo had already determined that she personally had a disqualifying interest in A&B stock and certified her recusal based on that fact, specifically applying and referencing that same Section 601-7, *supra*, yet the Intermediate Court of Appeals, although that specific issue was briefed on all sides (Opening Brief, at page 7; Answering Brief, at pages 24-26), chose inconsistently to not even mention let alone even address that controlling issue in its written opinion.

Furthermore, as the Intermediate Court of Appeals itself noted, *id.*, at A-23 n.6, at the time that the Interpleader action was filed in 2002, Hawaii instead had a different, applicable controlling *per se* stock ownership recusal rule identical to that governing federal judges today and not a *de minimis* standard ("[e]ffective April 15, 2004, the language of HRS § 601-7(a) changed from 'any pecuniary interest' to 'a more than de minimis pecuniary interest'").

12. Hawaii Supreme Court Rejects Certiorari

The Intermediate Court of Appeals entered its "Judgment on Appeal" on October 3, 2016, set forth in Appendix 5, at A-31 to A-32. Szymanski thereafter -- after a timely, approved extension -- sought review in the Hawaii Supreme Court on December 2, 2016, but was rejected by the Hawaii Supreme Court without comment on January 12, 2017, as set forth in Appendix 6, at A-33 to A-34.

D. LEGAL ARGUMENT SUPPORTING WRIT

1. The Federal Per Se Stock Ownership Rule

In the federal system, 28 U.S.C. § 455 governs disqualification of judges "where his impartiality might reasonably be questioned," enforced as a *per se* rule disqualifying federal judges owning even one share of stock in a party before him, as adopted in the "Code of Conduct for United States Judges"; *see Union Carbide Corp. v. U.S. Cutting Service, Inc.*, 782 F.2d 710, 714 (7th Cir. 1986):

> The purpose of (b) is to establish an absolute prohibition against a judge's knowingly presiding in a case in which he has a financial interest, either in his

> own or a spouse's (or minor child's) name. Before the statute was passed judges did not recuse themselves in such cases unless the interest was so large that a reasonable person might think it could influence the judge's decision. This standard was too nebulous -- not least from the judge's standpoint -- and Congress replaced it by a flat prohibition. Although the prohibition results in recusal in cases where the interest is too small to sway even the most mercenary judge, occasional silly results may be an acceptable price to pay for a rule that both is straightforward in application and spares the judge from having to make decisions under an uncertain standard apt to be misunderstood. See H.R. Rep. No. 1453, 93d Cong., 2d Sess. 2 (1974).

This Court has repeatedly elevated this concern to protected constitutional status *governing both federal and state judges*; *see, e.g.*:

Tumey v. Ohio, 273 U.S. 510, 522 (1927) (held Fourteenth Amendment violation for a judge to preside over action where court had direct interest in litigant or matter in controversy);

In re Murchison, 349 U.S. 133, 136 (1955) ("a fair trial in a fair tribunal is a basic requirement of due process . . . 'no man can be a judge . . . where he has an interest'");

Ward v. Village of Monroeville, 409 U.S. 57, 61-62 (1972) ("Petitioner is entitled to a neutral and detached judge");

Aetna Life Insurance Co. v. Lavole, 475 U.S. 813, 825 (1986) (disqualification based on mere appearance of partiality offering "a possible temptation to the average judge to lead him to not hold the balance nice, clear and true"); and

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 866 (1988) ("the judge's lack of knowledge of a disqualifying circumstance may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other parties," holding vacating past judgments is mandatory "when a reasonable person, knowing the relevant facts, would expect that a justice, judge, or magistrate knew of circumstances creating an appearance of partiality").

More recently, this Court in *Williams v. Pennsylvania*, 136 S.Ct. 1899, 1903 (2016) emphasized that the constitutional test for determining appearance of partiality does not require a showing of personal bias:

> Due process guarantees an absence of actual bias on the part of a judge. Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the U.S. Supreme Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present.

And only a few months ago in *Rippo v. Baker,* 137 S.Ct. 905 (2017), this Court unanimously criticized the Nevada state courts on Due Process grounds for appearing to insist on a showing of actual bias, while their placing an evidentiary burden upon Rippo, without his being allowed discovery or an

evidentiary hearing, to prove partiality, holding that the Nevada courts "did not ask the question our precedents require: whether, considering all of the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."

2. The State De Minimis Rule

Nevertheless, despite the impressive platitudes found in the above referenced cases, this Court has shown great reluctance to apply the federal courts' *per se* stock ownership test to the states where individual state courts claim to have adopted and implemented a *de minimis* standard instead for determining recusals, which in Szymanski's situation both Judge Raffetto and the Intermediate Court of Appeals used to deny any recusal duty on the part of Judge Loo, even a duty to disclose any potential conflict.

First, it is respectfully suggested that this Court's reluctance to apply a *per se* recusal stock ownership test to the states frankly continues to prove highly unwise, leading to not only unnecessary protracted litigation, but also disrespect for judiciaries nationwide.

Indeed, many state judiciaries have for themselves determined that due process imposes an ethical disclosure and recusal duty against appearances of partiality that trumps any application of a "de minimis" standard even if contained in their Codes of Judicial Conduct; *e.g.*:

Huffman v. Arkansas Judicial Discipline and Disability Commission, 344 Ark. 274, 281-282, 42 S.W.3d 386, 344 (2001), whose State adopted an identical Code as Hawaii:

> While there is little doubt that the action taken by Judge Huffman was unlikely to fundamentally affect the value of his and his wife's stock, which comprises but a minuscule percentage of the total stock existing in Wal-Mart, this analysis on the *de minimis* value of an economic interest mentioned in Canon 3E(1)(c) ["more than *de minimis* interest that could be substantially affected by the proceeding"] ignores the more basic issue of appearance of impropriety.

White v. Suntrust Bank, 245 Ga. App. 828, 538 S.E.2d 889 (2000), whose State adopted the *de minimis* standard in an identical Code as did Hawaii: ("a judge who holds stock in a corporation that is a party to a suit should recuse herself from the case").

And the remedy for such disqualification is universally considered setting aside prior judgments in such states as it is in federal courts; *e.g.*:

Liljeberg, 486 U.S. at 868 ("there is a greater risk in upholding the judgment in favor of Liljeberg than there is in allowing a new judge to take a fresh look at the issues");

Shell Oil Co. v. United States, 672 F.3d 1283, 1293 (Fed. Cir. 2012) ("we vacate Judge Smith's final judgment in favor of Shell Oil and Arco, as well as the summary judgment orders on which it was premised"); and

Blaisdell v. City of Rochester, 135 N.H. 589, 594, 609 A.2d 388 (1992) ("it would be inconsistent with the goals of our code to require certain standards of behavior for the judiciary in the interest of avoiding

the appearance of impropriety, but then to allow a judge's ruling to stand when those standards have been violated. * * * * [W]e vacate all existing orders").

3. Neither Rule Need Be Applied Here

But this Court need not consider constitutionally applying or mandating the *per se* disqualification rule to the states in the facts of this case, nor ignoring the *de minimis* test either, in order to grant review here and reverse.

For, despite all of the many such state disqualification challenges that continue to come before this Court, this is the first case of its kind seeking this Court's review pursuant to the Due Process Clauses of the Fifth and Fourteenth Amendments where the judge in question has already personally admitted to being disqualified based upon her previously undisclosed interest in the outcome of the case owning stock in a real party in interest, only to have her fellow judges refuse thereafter to disqualify her in her prior cases that suffer from the same identical lack of supervision.

E. CONCLUSION

Szymanski prays that this Court's will grant his *Petition for Writ of Certiorari* and reverse summarily or otherwise on due process grounds. There are no facts in dispute in this Petition.

Judge Loo has admitted in effect that she was ethically disqualified to preside over and to decide any aspect of the underlying dispute in both the Unemori Engineering action *and* the Interpleader action because of her ownership of A&B stock starting from at least 2002 when the Interpleader action was first filed.

Judge Loo cannot have it both ways. Having already admitted to being a disqualified jurist in one, her decisions adverse to Szymanski in the other should not be constitutionally tolerated.

Moreover, research continues to disclose, of which this Court may take judicial notice, that Szymanski is not the only victim of Judge Loo's failure to disclose her conflict of interest based upon her ownership of A&B stock.

For instance, research reveals Judge Loo to this day has also failed to disclose her stock ownership in A&B in at least one other Maui land development case contemporaneously ongoing with the Szymanski litigation, in which A&B has been a named party:

Dairy Road Partners v. The Maui Planning Commission and A&B Properties, Inc., Civil No. 11-1-0455(1) (Second Circuit, Hawaii), in which her summary judgment in favor of A&B was reversed in 2015 by the Intermediate Court of Appeals, 2015 Haw. App. LEXIS 26.

Such abuses will never cease until this Court someday accepts review in a case such like this and constitutionally abolishes the nebulous *de minimis* rule, relied upon below when not even applicable.

Respectfully submitted,

/s/ Gary Victor Dubin

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Honolulu, Hawaii
June 12, 2017

APPENDIX

1. SECOND CIRCUIT COURT ORDER GRANTING MOTION TO RECUSE JUDGE RHONDA LOO, FILED JUNE 3, 2011.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII

ONE WAILEA DEVELOPMENT LLC, Plaintiff, vs. WARREN S. UNEMORI ENGINEERING, INC., et al., Defendants.	CIVIL NO. 07-1-0212(1) CIVIL NO. 07-1-0212(3) ORDER GRANTING MOTION TO RECUSE JUDGE RHONDA LOO

ORDER GRANTING MOTION TO RECUSE JUDGE RHONDA LOO

The Motion To Recuse Judge Rhonda Loo ("Motion") by Plaintiff ONE WAILEA DEVELOPMENT LLC ("OWD") having come for hearing before the Honorable Rhonda I. L. Loo, Judge of the above-entitled court on Tuesday, May 24, 2011 at 8:15 a.m. Keith M. Kiuchi represented Plaintiff OWD at said hearing, and Bruce M. Ito represented Defendant WARREN S. UNEMORI ENGINEERING, INC. at said hearing.

The court having read the pleadings filed therein, and based upon Judge Rhonda Loo's

ownership of shares in Alexander & Baldwin, Inc., rules as follows:

> IT IS HEREBY ORDERED that based upon that fact, that Plaintiff OWD's Motion to Recuse Judge Rhonda Loo is GRANTED, and she hereby recuses herself as the judge in above-entitled matter.
>
> DATED: Wailuku, Hawaii, June 2, 2011.
>
> */s/ Rhonda I.L. Loo*
> Judge of the Above-Entitled Court

Approved as to form:
/s/ Bruce M. Ito
Attorney for Defendant Warren S. Unemori Engineering, Inc.

2. TRANSCRIPT OF PROCEEDINGS BEFORE THE HONORABLE SHACKLEY F. RAFFETTO, DECEMBER 7, 2011

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII

TITLE GUARANTY ESCROW SERVICES, INC, a Hawaii corporation, Plaintiff, vs. WAILEA RESORT COMPANY, LTD., a Hawaii corporation, MICHAEL J. SZYMANSKI, et al., Defendants.	CIVIL NO. 02-1-0352(2) TRANSCRIPT OF PROCEEDINGS

TRANSCRIPT OF PROCEEDINGS

before the HONORABLE SHACKLEY F. RAFFETTO, Circuit Court Judge presiding Wednesday, December 7, 2011. Defendant and third party plaintiff Michael J. Szymanski's Rule 60(b) motion based on Judge Rhonda Loo's failure to recuse herself, to vacate the final judgment filed on July 28th, 2010, final partial judgment filed on April 20, 2005, and all orders resulting from hearing before Judge Rhonda Loo including: (A) that October 20, 2004 order (1) granting defendant and

crossclaim defendant, Wailea Resort Company LTD's motion for summary judgment filed August 10, 2004, and (2) denying defendant and third party plaintiff Michael J. Szymanski's motion for partial summary judgment on Counts 1 and III of the crossclaim against defendant Wailea Resort Company, LTD. filed October 3rd, 2002 (filed September 17, 2004); and (B) that December 7, 2004 order denying defendant and third party plaintiff Michael J. Szymanski's motion for reconsideration filed on October 29th, 2004.

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TRANSCRIBED BY:
Beth Kelly, RPR, CSR #235
Official Court Reporter
State of Hawaii

Wednesday, December 7, 2011

THE CLERK: Calling Civil Number 02-1-0352, Title Guaranty Escrow Services, Inc. versus Wailea Resort Company LTD, defendant and third party plaintiff Michael J. Szymanski's Rule 60(b) motion based on Judge Rhonda Loo's failure to recuse herself, to vacate the final judgment filed on July 28th, 2010, final partial judgment filed on April 20, 2005, and all orders resulting from hearing before Judge Rhonda Loo including: (A) that October 20, 2004 order (1) granting defendant and crossclaim defendant, Wailea Resort Company LTD's motion for summary judgment filed August 10, 2004, and (2) denying defendant and third party plaintiff Michael J. Szymanski's motion for partial summary judgment on Counts 1 and III of the crossclaim against defendant Wailea Resort Company, LTD. filed October 3rd, 2002 (filed September 17, 2004); and (B) that December 7, 2004 order denying defendant and third party plaintiff Michael J. Szymanski's motion for reconsideration filed on October 29th, 2004.

MR KIUCHI: Good morning, your Honor, Keith Kiuchi for defendant and third party plaintiff, Michael J. Szymanski.

THE COURT: Good morning.

MR. WAKUZAWA: Good morning, your Honor, Bruce Wakuzawa for defendant, Wailea Resort and third party defendants, Shinwa entities.

THE COURT: Okay, good morning. I read over what's been filed. Do you want to add anything?

MR. KIUCHI: Your Honor, very rarely do you find a U.S. Supreme Court case that's on all fours with this situation here --

THE COURT: Maybe.

MR. KIUCHI: - - and that's exactly what we have. Ironically in Liljeberg, the Fifth Circuit affirmed on the underlying judgment. It was after that the Rule 60(b) motion was filed and subsequently granted. The facts are strikingly similar. I would ask that the Court grant Mr. Szymanski's motion.

THE COURT: All right. Thank you. Do you want to say anything?

MR. WAKUZAWA: No, your Honor. I think in our memo we showed why that case is irrelevant.

THE COURT: Okay, Well, I read through everything that was written very carefully and it's the Court's view that couple things.

One is I accept the argument that's made that because of the fact that the Intermediate Court of Appeals affirmed a motion -- the granting of the summary judgment, the matter is moot, and there's no causation of any consequences to Mr. Szymanski from the failure to recuse.

In addition to that, the Court finds that there's no showing of any bias and no showing of any appearance of impropriety or bias and that no reasonable person could find that there was such. So I'm going to deny the motion. Thank you.

MR. WAKUZAWA: Thank you, your Honor.

THE COURT: I'll ask you to prepare an order.

MR. WAKUZAWA: I will.

(At which time the above-entitled proceedings were concluded.)

3. SECOND CIRCUIT COURT ORDER DENYING RULE 60(B) MOTION BASED ON JUDGE RHONDA LOO'S FAILURE TO RECUSE HERSELF, FILED JANUARY 4, 2012.

IN THE CIRCUIT COURT OF THE SECOND CIRCUIT, STATE OF HAWAII

TITLE GUARANTY ESCROW SERVICES, INC, a Hawaii corporation, Plaintiff, vs. WAILEA RESORT COMPANY, LTD., a Hawaii corporation, MICHAEL J. SZYMANSKI, et al., Defendants.	CIVIL NO. 02-1-0352(2) (OTHER CIVIL ACTION – INTERPLEADER) ORDER DENYING DEFENDANT AND THIRD PARTY PLAINTIFF MICHAEL J. SZYMANSKI'S RULE 60(B) MOTION, BASED ON JUDGE RHONDA LOO'S FAILURE TO RECUSE HERSELF, TO VACATE THE FINAL JUDGMENT FILED ON JULY 28, 2010, FINAL PARTIAL JUDGMENT FILED ON APRIL 20, 2005, AND ALL ORDERS RESULTING FROM HEARINGS BEFORE JUDGE RHONDA LOO, FILED ON SEPTEMBER 19, 2011

ORDER DENYING DEFENDANT AND THIRD PARTY PLAINTIFF MICHAEL J. SZYMANSKI'S MOTION FOR RECONSIDERATION ON DENIAL OF HIS RULE 60(B) MOTION, BASED ON JUDGE RHONDA LOO'S FAILURE TO RECUSE HERSELF, TO VACATE THE FINAL JUDGMENT FILED ON JULY 28, 2010, FINAL PARTIAL JUDGMENT FILED ON APRIL 20, 2005, AND ALL ORDERS RESULTING FROM HEARINGS BEFORE JUDGE RHONDA LOO FILED ON SEPTEMBER 19, 2011

Defendant and Third-Party Plaintiff Michael J. Szymanski ("Szymanski")'s Motion for Reconsideration on Denial of his Rule 60(b) Motion, Based On Judge Rhonda Loo's Failure To Recuse Herself, To Vacate The Final Judgment Filed On July 28, 2010, Final Partial Judgment Filed On April 20, 2005, And All Orders Resulting From Hearings Before Judge Rhonda Loo ("Motion") filed on September 19, 2001 came on for hearing before the Honorable Shackley F. Raffetto on December 7, 2011 at 8:30 a.m. Keith M. Kiuchi appeared on behalf of Szymanski, and Bruce H. Wakuzawa appeared on behalf of Defendant Wailea Resort Company, Ltd. and Third-Party Defendants ADOA-Shinwa Development Corporation and Shinwa Golf Hawaii Co., Ltd.

The Court reviewed the Motion, memoranda, and records and files in this action and heard oral argument of counsel. Based on the foregoing, the Court denies the motion for the following reasons:

1. The matter is moot because the Intermediate Court of Appeals affirmed the motion for summary judgment ruling and there is no causation of any consequences to Mr. Szymanski from Judge Rhonda Loo's failure to recuse herself in this matter;

2. Mr. Szymanski failed to show any bias by the Court or Judge Loo;

3. Mr. Szymanski failed to show any appearance of impropriety by the Court or Judge Loo;

4. Mr. Szymanski failed to show any appearance of bias by the Court or Judge Loo; and

5. No reasonable person could find that there was any appearance of impropriety or appearance of bias by the Court or Judge Loo.

IT IS SO ORDERED.

DATED: Wailuku, Maui, Hawaii Jan – 4 2012

/s/ SHACKLEY F. RAFFETTO
(Seal)
JUDGE SHACKLEY F. RAFFETTO

Approved as to form:
/s/ Keith M. Kiuchi
KEITH M. KIUCHI
Attorney for Defendant
Michael J. Szymanski

4. MEMORANDUM OPINION BY THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII, FILED AUGUST 31, 2016

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MICHAEL J. SZYMANSKI, Appellant, vs. WAILEA RESORT COMPANY, LTD., a Hawaii corporation, et al., Appellees.	NO. CAAP-12-0000711 MEMORANDUM OPINION

MEMORANDUM OPINION

(By: Fujise, Presiding Judge, Reifurth and Ginoza, JJ.)

Defendant-Appellant Michael J. Szymanski (Szymanski) appeals from the: (1) order denying Szymanski's Hawaii Rules of Civil Procedure (HRCP) Rule 60(b) motion (Order Denying Rule 60(b) Motion), filed on January 4, 2012;[1] and (2) order denying Szymanski's HRCP Rule 59(e) motion

[1] The Honorable Shackley F. Raffetto presided except where otherwise indicated.

for reconsideration of the denial of his HRCP Rule 60(b) motion (Order Denying Rule 59(e) Motion), filed on July 11, 2012 in the Circuit Court for the Second Circuit (circuit court).[2]

Szymanski contends the circuit court abused its discretion by: (1) denying Szymanski's HRCP Rule 60(b) motion (Rule 60(b) Motion) despite an alleged conflict of interest for the judge who presided as to matters decided over six years previous; and (2) denying Szymanski's motion for reconsideration of the Order Denying Rule 60(b) Motion, filed pursuant to HRCP Rule 59(e) (Rule 59(e) Motion).

For the reasons discussed below, we affirm.

I. Background

This appeal stems from a complaint for interpleader, filed on July 19, 2002, by Plaintiff-Appellee Title Guaranty Escrow Services, Inc. (Title Guaranty) against Szymanski and Defendant-Appellee Wailea Resort Company, Ltd. (WRC) for the purpose of, *inter alia*, determining the rights to funds held by Title Guaranty in an escrow account.

WRC and Szymanski filed cross-claims against each other disputing whether there was performance under a land sales contract for a twenty-three-acre parcel of undeveloped land in Wailea, Maui, Hawai'i (the Property).

On August 10, 2004, WRC filed a motion for summary judgment regarding Szymanski's cross-claim against WRC. On September 17, 2004, Szymanski filed a motion for partial summary judgment on Counts I and III of his cross-claim against WRC.

On October 6, 2004, the circuit court held a hearing on WRC's motion for summary judgment and Szymanski's motion for partial summary judgment. The Honorable Rhonda I.L. Loo presided. The circuit court orally ruled in WRC's favor and denied Szymanski's motion for partial summary judgment. On October 20, 2004, the circuit court filed an order granting WRC's motion for summary judgment and denying Szymanski's motion for partial summary judgment (Order Granting Summary Judgment).

On October 29, 2004, Szymanski filed a motion for reconsideration of the Order Granting Summary Judgment. On December 2, 2004, the circuit court held a hearing on Szymanski's motion for reconsideration and orally denied the motion. Again, Judge Loo presided. On December 7, 2004, the circuit court filed an order denying Szymanski's motion for reconsideration.

On April 20, 2005, Judge Raffetto entered an HRCP Rule 54(b) Final Judgment (Rule 54(b) Judgment) as to the Order Granting Summary Judgment and the order denying Szymanski's motion for reconsideration.

On April 25, 2005, Szymanski filed a Notice of Appeal from the Rule 54(b) Judgment. On April 27, 2009, this court issued a Summary Disposition Order (SDO), which, upon a *de novo* review, concluded "that the circuit court did not err in granting summary judgment." Title Guar. Escrow Servs., Inc. v. Szymanski et al., No. 27254, 2009 WL 1112604, 120 Hawai'i 183, 205 P.3d 648, at *3 (Haw. App. Apr. 27, 2009) (SDO).

On July 28, 2010, the circuit court filed a "Final Judgment as to All Claims and Parties" (Final Judgment). The Final Judgment resolved the remaining claims of the case and also reasserted the prior Rule 54(b) Judgment. On August 27, 2010, Szymanski filed a Notice of Appeal from the Final Judgment, which became appellate case No. 30697.

On September 19, 2011, over six years after entry of the Rule 54(b) Judgment, Szymanski filed the Rule 60(b) Motion based on Judge Loo's alleged failure to recuse herself. In his Memorandum of Law in Support of Motion, Szymanski argued that because Judge Loo owned stock in Alexander & Baldwin, Inc. (A&B), Judge Loo had a direct financial interest in the outcome of this case and should have recused herself and not considered WRC and Szymanski's competing motions for summary judgment back in 2004. A&B was never a party to this case. Rather, on October 1, 2003, a Limited Warranty Deed was recorded with the State of Hawai'i Bureau of Conveyances, which transferred the Property from WRC to Wailea Estates, LLC (Wailea Estates). A&B Properties, Inc., a subsidiary

of A&B, is a member of Wailea Estates. Thus, Szymanski contended that the Order Granting Summary Judgment served to deny Szymanski any claims to the Property and benefitted A&B, which in turn allegedly financially benefitted Judge Loo.

On January 4, 2012, in addressing Szymanski's claims of conflict, the circuit court (Judge Raffetto) filed the Order Denying Rule 60(b) Motion. Judge Raffetto denied the motion on five grounds:

> 1. The matter is moot because the Intermediate Court of Appeals affirmed the motion for summary judgment ruling and there is no causation of any consequences to Mr. Szymanski from Judge Rhonda Loo's failure to recuse herself in this matter;
> 2. Mr. Szymanski failed to show any bias by the Court or Judge Loo;
> 3. Mr. Szymanski failed to show any appearance of impropriety by the Court or Judge Loo;
> 4. Mr. Szymanski failed to show any appearance of bias by the Court or Judge Loo; and
> 5. No reasonable person could find that there was any appearance of impropriety or appearance of bias by the Court or Judge Loo.

On January 13, 2012, Szymanski filed the Rule 59(e) Motion, requesting reconsideration of the denial of the Rule 60(b) Motion. On July 11, 2012,

the circuit court filed the Order Denying Rule 59(e) Motion.[3]

On August 10, 2012, Szymanski timely appealed from the Order Denying Rule 60(b) Motion and the Order Denying Rule 59(e) Motion.

On October 24, 2013, this court filed an SDO vacating the July 28, 2010 Final Judgment. Title Guar. Escrow Servs., Inc. v. Szymanski et al., No. 30697, 2013 WL 5761945 103 Hawai'i 435, 312 P.3d 311 (Haw. App. Oct. 24, 2013) (SDO).

II. Discussion

A. Mootness Based on Appellate Case No. 30697

On May 30, 2014, this court filed an order which, *inter alia*, instructed the parties in their appellate briefs to address whether any part of this appeal is moot in light of the fact that this court in No. 30697 vacated the Final Judgment entered on July 28, 2010. See Title Guar., 2013 WL 5761945.

It appears that the SDO in appeal No. 30697 vacated the Final Judgment and addressed three points of error separate and apart from the Rule 54(b) Judgment entered in 2005. Title Guar., 2013 WL 5761945 at *1. The points of error in appeal No.

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[3] The Honorable Blaine J. Kobayashi presided. The order shows that a hearing was held regarding the Rule 59(e) Motion on June 27, 2012, however, the transcripts of the hearing do not appear to be in the record.

30697 addressed Szymanski's representation during events that occurred after the Rule 54(b) Judgment and the distribution of funds from the escrow account. Id. at *1. Thus, the Final Judgment was vacated on issues not related to the Rule 54(b) Judgment addressed in this appeal. Therefore, the issues in this appeal are not moot.

B. Rule 60(b) Motion

Szymanski contends that the circuit court erred when it denied his Rule 60(b) Motion. "A circuit court's determination of an HRCP Rule 60 motion is reviewed for an abuse of discretion." Ditto v. McCurdy, 103 Hawai'i 153, 157, 80 P.3d 974, 978 (2003).

Szymanski contends that the circuit court abused its discretion because (1) Rule 60(b) relief can be granted even after an appeal affirmed the underlying decision, thus the issue is not moot; and (2) Judge Loo's financial interest was not *de minimis* and she was required to recuse herself due to an appearance of impropriety, thus Szymanski should be granted Rule 60(b) relief.[4] Szymanski contends

[4] Szymanski contends that the circuit court applied the wrong test to the Rule 60(b) Motion because the court required Szymanski to show "bias in fact," as opposed to the appearance of impropriety to the reasonable onlooker. See State v. Ross, 89 Hawai'i 371, 377, 974, P.2d 11, 17 (1998). However, the circuit court identified as two of its bases for denying the Rule 60(b) Motion that Szymanski failed to show "any appearance of impropriety by the Court or

that the United States Supreme Court decision in Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847 (1988), is binding on this court and mandates a conclusion that Judge Raffetto abused his discretion in concluding that Judge Loo did not need to recuse herself. As covered below, while we agree that the issue is not moot, we reject Szymanski's contention that Judge Raffetto abused his discretion in denying the Rule 60(b) Motion.

1. Mootness Regarding Judge Loo's Recusal

Szymanski contends that circuit court abused its discretion because relief based on a judge's conflict of interest can be granted even after the judgment has become final and affirmed on appeal. This is an implicit argument against the circuit court's determination that the issue of Judge Loo's recusal is moot. In fact, WRC contends in its answering brief that Szymanski's appeal is moot because the Rule 54(b) Judgment was already appealed, independently reviewed *de novo*, and affirmed in case No. 27254.

We agree with Szymanski that, notwithstanding that this court affirmed the Rule 54(b) Judgment in case No. 27254 upon a *de novo* review of the underlying motions for summary

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Judge Loo" and "[n]o reasonable person could find that there was any appearance of impropriety or appearance of bias by the Court or Judge Loo." Therefore, Szymanski's contention that the circuit court required him to show "bias in fact" is without merit.

judgment, it does not mean the issue of Judge Loo's potential conflict of interest is moot. While this court conducted a *de novo* review of the summary judgment motions, it does not appear that any party argued to this Court that Judge Loo had a conflict of interest or that Judge Loo's financial disclosure statements were presented to the Court in any way. This issue was not decided. "[A] fair trial in a fair tribunal is a basic requirement of due process." In re Estate of Damon, 119 Hawai'i 500, 508, 199 P.3d 89, 97 (2008) (citation and quotation marks omitted). Szymanski, like all parties, was entitled to an impartial first review of the issues. While Szymanski's Rule 60(b) Motion may be "untimely" (to be discussed below), it is not moot.

2. Recusal Was Not Required

Szymanski contends that this court is required to follow Liljeberg and conclude that the circuit court abused its discretion in denying the Rule 60(b) Motion because Judge Loo possessed more than a *de minimis* pecuniary interest in the outcome of the case which gives the appearance of impropriety and mandates recusal of the judge.

> HRCP Rule 60(b)(6) provides:
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason

> justifying relief from the operation of the judgment. The motion shall be made within a reasonable time [.]

(Emphasis added.) HRCP Rule 60(b)(6) "provides for extraordinary relief and is only invoked upon a showing of exceptional circumstances." Haw. Hous. Auth. v. Uyehara, 77 Hawai'i 144, 148, 883 P.2d 65, 69 (1994) (quoting Isemoto Contracting Co. v. Andrade, 1 Haw. App. 202, 205, 616 P.2d 1022, 1025 (1980)). Although HRCP Rule 60(b)(6) does not provide a statute of limitations, a motion must be filed within a "reasonable" time period. Id. at 149, 883, P.2d at 70. "What constitutes a 'reasonable time' is determined in the light of all attendant circumstances, intervening rights, loss of evidence, prejudice to the adverse party, the commanding equities of the case, and the general policy that judgments be final." Hayashi v. Hayashi, 4 Haw. App. 286, 290 666 P.2d 171, 175 (1983) (discussing Rule 60(b)(6) of the Hawai'i Family Court Rules, which is substantially similar to the HRCP Rule 60(b)(6)).

Szymanski filed his Rule 60(b) Motion nearly seven years after the Order Granting Summary Judgment was filed and more than six years after the Rule 54(b) Judgment. Szymanski had not previously asserted any conflict for Judge Loo. Szymanski however contends that Judge Loo should have disqualified herself from this case because she had a pecuniary interest in its outcome, which created the appearance of impropriety. Szymanski contends that he did not discover this fact until

2011, when he reviewed her financial disclosures. We note, however, that Judge Loo's financial disclosure statements where available to Szymanski in 2003 and 2004.[5] Moreover, Szymanski has not demonstrated that "exceptional circumstances" exist in this case such that the circuit court's decision to deny his Rule 60(b) Motion was an abuse of discretion. See Hayashi, 4 Haw. App. at 291 666 P.2d at 175 (stating a six year delay before filing a Rule 60(b)(6) motion "may or may not be unreasonable depending upon whether any exceptional circumstances are present which would mitigate the lengthy delay in bringing the motion").

Moreover, even assuming that "exceptional circumstances" under HRCP Rule 60(b) equates to whether Judge Loo was required to recuse herself years earlier, we conclude she was not so required in this case. In State v. Ross, 89 Hawai'i 371, 974 P.2d 11 (1998), the Supreme Court of Hawai'i provided a "two-part analysis for disqualification or recusal cases." Id. at 377, 974, P.2d at 17. "In the first part,

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[5] The Financial Disclosure Statements that Szymanski attached to his Rule 60(b) Motion, used to show Judge Loo's financial investments at the time she presided over the summary judgment proceedings, were filed on April 1, 2003, March 5, 2004, and January 31, 2005. The Order Granting Summary Judgment was filed on October 20, 2004. Thus, at least the Financial Disclosure Statements filed on March 5, 2004 and April 1, 2003, in which Judge Loo listed herself as a shareholder in A&B, were available to Szymanski at the time of the summary judgment order.

Hawaii Revised Statutes (HRS) § 601-7 is applied to determine whether the alleged bias is covered by any of the specific instances prohibited therein." Id.

> If the alleged bias falls outside of the provision of HRS § 601-7, the court may then turn, if appropriate, to the notions of due process described in [State v. Brown, 70 Haw. 459, 776 P.2d 1182 (1998)] in conducting the broader inquiry of whether "circumstances . . . fairly give rise to an appearance of impropriety and . . . reasonably cast suspicion on the judge's impartiality." Brown, 467 n.3, 776 P.2d at 158 n.3.

Id. (ellipses in original).

Based on Ross, we first look to HRS § 601-7 (1993 & 2015 Supp.), which provides in pertinent part:

> §601-7 Disqualification of judge; relationship, pecuniary interest, previous judgment, bias or prejudice. (a) No person shall sit as a judge in any case in which:
>
> (1) The judge's relative by affinity or consanguinity within the third degree is counsel, or interested either as a plaintiff or defendant, or in the issue of which the judge has, either directly

or through such relative, a more than de minimis pecuniary interest [.] [6]

(Emphasis added.) The applicability of HRS 601-7 is dependent on whether Judge Loo's financial interest was "more than de minimis pecuniary interest." The Hawai'i Revised Code of Judicial Conduct (HRCJC) (2008) has defined "'[d]e minimis' in the context of interests pertaining to disqualification of a judge, [as meaning] an insignificant interest that could not raise a reasonable question regarding the judge's impartiality."[7] In addition, 46 Am. Jur. 2d § 104 (2006) provides:

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[6] Effective April 15, 2004, the language in HRS § 601-7(a) changed from "any pecuniary interest" to "a more than de minimis pecuniary interest." 2004 Haw. Sess. Laws Act. 5 § 1 at 7. The House Committee on Judiciary and Hawaiian Affairs stated that the change was made so that the statute was reflective of the language in the Hawaii Revised Code of Judicial Conduct because "the code of conduct is more realistic for today's environment, and this measure will reconcile the current statute requirements for judge's disqualification which the code of conduct." S. Stand. Comm. Rep. No. 2921, in 2004 Senate Journal, at 1454.

[7] HRCJC Rule 2.11 offers additional guidance related to when a judge has an interest in the outcome of the litigation and provides in pertinent part:

Rule 2.11. DISQUALIFICATION OR RECUSAL

(a) Subject to the rule of necessity, a judge shall disqualify or recuse himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstance:

. . . .

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is:

. . . .

(C) a person who has more than a de minimis interest that could be substantially affected by the proceeding;

. . . .

(3) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, parent, or child, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding.

. . . .

(b) A judge shall keep informed about the judge's personal and fiduciary economic interests and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse or domestic

> The general rule is that stockholding by a judge constitutes disqualification where the interests of the corporation in which he or she is a stockholder are involved in the litigation instituted or pending before him or her. The most frequently applied limitation on the general rule of judicial disqualification through shareholding is that the "interest" of a stockholding judge in any pending matter may be too remote to be disqualifying, either because the stockholding is economically insignificant or because the involved corporation is merely indirectly or abstractly interested in the litigation.

(Emphasis added) (Footnotes omitted.)

We conclude that Judge Loo's ownership of stock in A&B was *de minimis* in the context of this case because Judge Loo's stock ownership was too remote of a financial interest to require disqualification. As stated above, A&B was not party to the case. WRC transferred a Limited Warranty Deed to Wailea Estates. A&B Properties, Inc. is a partner to Wailea Estates and A&B Properties is a subsidiary of A&B, in which Judge Loo owned stock. There is nothing to suggest the extent of how the purchase of the subject parcel of undeveloped land by a subsidiary of A&B would benefit a stock holder in A&B. If anything, any

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partner, minor children, or any other person residing in the judge's household.

benefit is speculative. Wailea Estates purchased land that is not developed and any profits from the purchase are unknown. To the extent Judge Loo had any pecuniary interest, there is nothing in the record to suggest it was more than *de minimis*.

As to the second part of the Ross analysis, given that Judge Loo's interest, if any, was *de minimis*, the circumstances do not fairly give rise to an appearance of impropriety. The test for disqualification based upon an appearance of impropriety "is an objective one, based not on the beliefs of the petitioner or the judge, but on the assessment of a reasonable impartial onlooker apprised of all facts." Ross, 89 Hawai'i at 380, 974 P.2d at 20. Applying this objective test, the record in this case does not reasonably raise a question regarding Judge Loo's impartiality or create the appearance of impartiality.

Szymanski contends that, contrary to the above analysis, we are required to follow Liljeberg and hold that Judge Loo should have recused herself. In Liljeberg, the United States Supreme Court addressed whether a judge should have disqualified himself pursuant to 28 U.S.C. § 455 (2012) due to a conflict of interest in the proceedings, such that his impartiality might reasonably be questioned. 486 U.S. at 858. The instant case, however, is distinguishable from Liljeberg.

Liljeberg involved a judge who was a member of the Board of Trustees of Loyola University. Id. at 850. The judge presided over a case involving an

individual with whom the university was negotiating a land deal, and the negotiations turned on Liljeberg prevailing in the litigation. Id. Further,

> [t]he proposed benefits to the University included not only the proceeds of the real estate sale itself, amounting to several million dollars, but also a substantial increase in the value to the University of the rezoned adjoining property. The progress of these negotiations was regularly reported to the University's Board of Trustees by its Real Estate Committee and discussed at Board meetings.

Id. at 853.

The Supreme Court held that "[t]hese facts create precisely the kind of appearance of impropriety that § 455(a) was intended to prevent." Id. at 867. The Supreme Court concentrated its analysis on the fact that the judge in Liljeberg had a direct and substantial link to the outcome of the case, stating "it is remarkable that the judge, who had regularly attended the meetings of the Board of Trustees since 1977, completely forgot about the University's interest in having a hospital constructed on its property. . . ." Id. at 865. Moreover, the Supreme Court noted "it is an unfortunate coincidence that although the judge regularly attended the meetings of the Board of Trustees, he was not present at the January 28, 1982, meeting, a week after the 2-day trial and while the case was still under advisement." Id. at 866.

Liljeberg is distinguishable from the instant case in that there was a direct and documented benefit to the judge as a member of the Board of Trustees, because the university would receive millions of dollars in proceeds from the land sale and the value of the university land would substantially increase. Id. at 853. In this case, to the contrary, any benefit to Judge Loo from her ownership of A&B stock is indirect and speculative. Given the facts of this case, there is not a similar risk of undermining the public's confidence in the judicial process as there was in Liljeberg. Unlike the judge in Liljeberg, Judge Loo did not have a direct financial link to the outcome of the case and any pecuniary interest is speculative and remote. Judge Loo only had a *de minimis* pecuniary interest, if any, in the outcome of the proceedings, and thus her impartiality cannot reasonably be questioned. The circuit court did not abuse its discretion when it denied Szymanski's Rule 60(b) Motion.[8]

C. Rule 59(e) Motion

Szymanski contends that the circuit court abused its discretion when it denied the Rule 59(e)

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[8] Szymanski contends that Judge Raffetto deprived Szymanski of his due process rights because Judge Raffetto denied the Rule 60(b) Motion and Szymanski was entitled to an impartial trial. However, Szymanski does not indicate any way in which Judge Raffetto's actions deprived him of due process in relation to consideration of his Rule 60(b) Motion.

Motion for reconsideration. Szymanski contends that the Rule 59(e) Motion should have been granted to correct a clear legal error and to prevent manifest injustice, and that Judge Loo should have heard the motion for reconsideration because she heard the underlying motions at issue.

"[T]he purpose of a motion for reconsideration is to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion." Omerod v. Heirs of Kaheananui, 116 Hawai'i 239, 270, 172 P.3d 983, 1014 (2007) (citation and quotation marks omitted). In addition, "[r]econsideration is not a device to relitigate old matters or to raise arguments or evidence that could and should have been brought during the earlier proceeding." Id. (citation and quotation marks omitted).

On appeal, Szymanski does not point to a new evidence or argument that could not have previously been presented to the circuit court. Rather, Szymanski argues that the motion should have been granted "for the same reasons" as the circuit court abused its discretion in denying the Rule 60(b) Motion. Szymanski simply contends that there was error that needs to be corrected. The circuit court did not abuse its discretion when it denied the Rule 59(e) Motion.

Further, Szymanski cites no case law that requires Judge Loo to have heard the Rule 60(b) and Rule 59(e) motions.

III. Conclusion

For the foregoing reasons, the (1) Order Denying Rule 60(b) Motion, filed on January 4, 2012, and (2) Order Denying Rule 59(e) Motion, filed on July 11, 2012, in the Circuit Court for the Second Circuit, are affirmed.

DATED: Honolulu, Hawai'i, August 31, 2016.

On the briefs:

Keith M. Kiuchi,
for Defendant/Cross-Claim
Plaintiff/Cross-Claim Defendant/
Third-Party Plaintiff/Third-Party
Counterclaim-Defendant/Appellant.

Bruce H. Wakuzawa,
for Defendant/Cross-Claim Defendant/
Cross-Claim Plaintiff/Appellee.

/s/ Alexa D. M. Fujise
Presiding Judge

/s/ Lawrence M. Reifurth
Associate Judge

/s/ Lisa M. Ginoza
Associate Judge

5. JUDGMENT ON APPEAL BY THE INTERMEDIATE COURT OF APPEALS OF THE STATE OF HAWAII, FILED OCTOBER 3, 2016

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MICHAEL J. SZYMANSKI, Appellant, vs. WAILEA RESORT COMPANY, LTD., a Hawaii corporation, et al., Appellees.	NO. CAAP-12-0000711 JUDGMENT ON APPEAL

JUDGMENT ON APPEAL
(By: Ginoza, J., for the court)
Fujise, Presiding Judge, Reifurth and Ginoza, JJ.

Pursuant to the Memorandum Opinion of this court entered on August 31, 2016, the following orders entered by the Circuit are affirmed:

(1) the January 4, 2012 "Order Denying Defendant and Third-Party Plaintiff Michael J. Szymanski's Rule 60(b) Motion, Based on Judge Rhonda Loo's Failure to Recuse Herself, to Vacate the Final Judgment Filed on July 28, 2010, Final Partial Judgment Filed on April 20, 2005, and All

Orders Resulting From Hearings Before Judge Rhonda Loo, Filed on September 19, 2011;" and

(2) the July 11, 2012 "Order Denying Defendant and Third Party Plaintiff Michael J. Szymanski's Motion for Reconsideration on Denial of His Rule 60(b) Motion, Based on Judge Rhonda Loo's Failure to Recuse Herself, to Vacate the Final Judgment Filed on July 28, 2010, Final Partial Judgment Filed on April 20, 2005, and All Orders Resulting From Hearings Before Judge Rhonda Loo Filed on January 13, 2012."

DATED: Honolulu, Hawai'i, October 3, 2016.

FOR THE COURT:
/s/ Lisa M. Ginoza
Associate Judge

6. ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI BY THE SUPREME COURT OF THE STATE OF HAWAII, FILED JANUARY 12, 2017

IN THE SUPREME COURT
OF THE STATE OF HAWAII

MICHAEL J. SZYMANSKI, Petitioner, vs. WAILEA RESORT COMPANY, LTD., a Hawaii corporation, et al., Respondents.	NO. SCWC-12-0000711 ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

ORDER REJECTING APPLICATION FOR WRIT OF CERTIORARI

(By: Nakayama, Acting C.J., McKenna, Pollack, and Wilson, JJ. and Circuit Judge Castagnetti, in place of Recktenwald, C.J., recused)

Petitioner/Defendant, Cross-Claimant, Third-Party Plaintiff, Third-Party Counterclaim Defendant-Appellant Michael J. Szymanski's Application for Writ of Certiorari, filed December 2, 2016, is hereby rejected.

DATED: Honolulu, Hawai'i, January 12, 2007.

/s/ Paula A. Nakayama
/s/ Sabrina S. McKenna
/s/ Richard W. Pollack
/s/ Michael D. Wilson
/s/ Jeannette H. Castagnetti