

CONCURRING OPINION OF ACOBA, J.,
WITH WHOM RAMIL, J., JOINS

I agree that the question of AIG Hawai'i Insurance Company's insured's liability for injuries suffered by Plaintiff-Appellant Seagram Flores that was germane to the court tort action was not actually litigated in the arbitration proceeding concerning payment of no fault benefits.¹ As indicated by the

¹ I agree with publication of this opinion because an opinion should be published if an existing rule of law is applied to a factual situation significantly different from those in previously published opinions. See, e.g., 5th Cir. R. 47.5.1 (stating that an opinion is published if it "applies an established rule of law to facts significantly different from those in previous published opinions applying the rule"). The need for publication of opinions to give guidance to the parties, counsel, trial courts, and the public cannot be understated.

On June 14, 2002, the Hawai'i Chapter of the American Judicature Society (AJS) submitted the "Report of the AJS Committee Reviewing Unpublished Opinions" (the Report) to the justices of the Hawai'i Supreme Court for our consideration, recommending that this court adopt an amendment to the Hawai'i Rules of Appellate Procedure (HRAP) Rule 35. The Report explained that "[t]here is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions." The Report at 4.

The AJS recommendation, inter alia, suggests an amendment to HRAP Rule 35 which would permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases. The Report at 18, 20. The recommendation would obviously affect the development of law for civil cases. The suggested amendment adds a new subsection c and re-alphabetizes and supplements the current subsection c as follows:

(c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.

[(c)] (d) Citation. A memorandum opinion or unpublished dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re [sic] judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.

In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the

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arbitrator's rendition of the issues decided, such liability was not decided by him. Consequently, his decision could not be given preclusive or collateral estoppel effect with respect to tort liability in the subsequent trial: "Issue preclusion, or collateral estoppel . . . applies to a subsequent suit between the parties or their privies on a different cause of action and prevents the parties or their privies from relitigating any issue [if] that [issue] was actually litigated and finally decided in the earlier action." Dorrance v. Lee, 90 Hawai'i 143, 149, 976 P.2d 904, 910 (1999) (emphasis and citation omitted) (emphasis added). The basis for requiring prior actual litigation is "the interest in providing an opportunity for a considered determination . . . [which] outweighs the interest in avoiding the burden of relitigation." Id. at 149, 976 P.2d at 910 (internal quotation marks and citation omitted).

¹(...continued)

opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

The Report at 22 (underscoring and brackets in original). This court has yet to decide on the suggested amendment.

Justice Ramil has also proposed a rule which would require publication of a case at the request of one justice. Thus, a decision would be published when the case is decided by unanimous decision, if, "[a]fter an exchange of views," any single justice votes for publication; or for publication of opinions "with a dissent or with more than one opinion . . . unless all participating judges decide against publication." Doe v. Doe, No. 22172, slip op. at 5 (July 17, 2002) (Ramil, J., dissenting) (quoting Rule 36(b)(2) of the United States Court of Appeals of the First Circuit) (emphasis added).

In my view, we have never abandoned the requirement that an issue in question must have been actually litigated in a prior proceeding before the affected party may be bound in a subsequent case. "Actual litigation is defined as '[w]hen an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined[.]'" Doe v. Doe, --- Hawai'i ---, ---, 52 P.3d 255, 271 (2002) (concurring opinion of Acoba, J., joined by Ramil, J.) (quoting Restatement (Second) of Judgments § 27 cmt. d (1980)). To hold otherwise would be fundamentally unfair. See Tradewind Ins. Co. v. Stout, 85 Hawai'i 177, 187, 938 P.2d 1196, 1206 (App.) (observing that "[i]ntertwined with the concepts of privity for collateral estoppel purposes' are 'the requirements of due process[,]" and that "[i]t would be a violation of due process for a judgment to be binding on a litigant who was not a party or privy and therefore has never had an opportunity to be heard" (quoting Safeco Ins. Co. v. Yon, 796 P.2d 1040, 1044 (Idaho Ct. App. 1990))), cert. denied, 85 Hawai'i 81, 937 P.2d 922 (1997).

For the foregoing reasons, I concur in the result.