

DISSENTING OPINION BY MOON, C.J.

In vacating the circuit court's decision in this case, the majority not only elevates form over substance, but does so utilizing "plain error," which, in my view, is inappropriate under the circumstances of this case. I, therefore, respectfully dissent.

I agree with the majority that the circuit court, in a confirmation hearing pursuant to HRS § 658-8, must confirm an arbitration award unless one party moves to vacate, modify, or correct the award pursuant to HRS §§ 658-9, 658-10, or one of the limited "judicially recognized exceptions" to these statutes. I disagree, however, with the majority's holding that, in order to obtain a ruling on the applicability of HRS § 431:10C-301.5 (Supp. 1997) [hereinafter, the covered loss deductible statute], the Gepayas were required to initiate a second, separate proceeding. In this regard, I believe the majority elevates form over substance. Neither party has challenged the alleged procedural defect in this case, and, in my view, there is none. Moreover, the arbitrators explicitly stated in the arbitration award that "[t]he possible application of HRS § 431:10C-301.5 covered loss deductible is specifically not being addressed in this award," and the parties implicitly agreed to submit the deductibility issue to the court hearing the motion to confirm the arbitration award.

The majority's conclusion requiring a separate proceeding is apparently motivated by its desire to protect the important public policy against judicial interference with arbitration awards. Although I agree with the importance of protecting the aforementioned public policy, I also believe that, under the specific circumstances of this case, the circuit court's determination of the applicability of the covered loss deductible statute does not constitute judicial interference with an arbitration award.

Technically, either the Gepayas or State Farm could have filed a declaratory judgment action (seeking a ruling on whether the covered loss deductible statute applied to the arbitration award) separate from the proceeding that sought confirmation of the award itself. However, there is nothing in our rules that would prevent the parties from seeking a ruling on the covered loss deductible issue in the same proceeding as the one seeking confirmation of the award.

As separate actions, one of two procedural courses would likely have occurred. On the one hand, both actions could have been consolidated, and the circuit court could have decided both issues of confirmation of the award as well as whether the deductible applied. On the other hand, the court, at the confirmation hearing, could have confirmed the amount awarded by the arbitrators and entered judgment in favor of the Gepayas, explicitly reserving payment of the judgment pending resolution

of the declaratory judgment action. Either way, the result would be the same: the Gepayas would be entitled to have the arbitration award confirmed, and, if the covered loss deductible statute was determined to apply, State Farm would be entitled to set off the deductible amount against the award. As a consolidated action or as separate actions, the circuit court had the authority to decide both issues regarding confirmation of the arbitration award and the applicability of the covered loss deductible statute.

In this case, however, the parties sought judicial determination of the legal question in a single proceeding. Admittedly, the papers filed by the Gepayas sought confirmation of the arbitration award and did not specifically include, for example, a "motion for declaratory judgment that the covered loss deductible statute did not apply." However, it is well-established that it is the substance of the pleading that controls, not the form. Island Holidays, Inc. v. Fitzgerald, 58 Haw. 552, 567, 574 P.2d 884, 893 (1978) (stating that "pleadings must be construed liberally and not technically"); Madden v. Madden, 43 Haw. 148, 149-50 (stating that "the substance of the pleading controls, not the nomenclature given to the pleading"). Substantively, the documents filed by both parties demonstrate that the parties desired a ruling from the circuit court regarding the covered loss deductibility issue. Attached to the Gepayas' motion to confirm the award were, inter alia: (1) the

arbitration award, which, as previously stated, explicitly excluded a determination on the applicability of the covered loss deductible statute to the award; (2) a signed contract between State Farm and the Gepayas in which the Gepayas accepted partial payment of the "undisputed portion" of the arbitration award in return for acknowledging that "the remaining disputed amount [is] a "'good faith' dispute as to which clarification or legal decision or agreement will be required, to be initiated by either or both parties"; and (3) the accompanying memorandum of law focusing exclusively on the very subject of the dispute referred to above -- whether the covered loss deductible statute applied to the award. State Farm's reply to the Gepayas' motion also dealt exclusively with whether the covered loss deductible statute applied. Read as a whole, these documents clearly indicate that both parties sought resolution of the covered loss deductibility issue, and the court approved the procedure by hearing and ruling on the matter. In my view, a separate proceeding should not be required to determine a reserved legal question by the circuit court in a confirmation hearing of an arbitration award where the merits of the award itself was not being attacked and especially where, as here, the parties and the court agreed that the issue be heard.

The primary cases cited by the majority support the proposition that the merits or "substance" of the award is what is immune from judicial review. See Majority Opinion (maj. op.)

at 8-9 (citing, inter alia, Mars Constructors, Inc. v. Tropical Enters., 51 Haw. 332, 334, 460 P.2d 317, 318 (1969) (affirming arbitration award even though the arbitrators “may have erred in the determination of fact and . . . the application of the law” in determining the award) (internal quotations omitted); Gadd v. Kelley, 66 Haw. 431, 443, 667 P.2d 251, 259 (1983) (rejecting a contention that arbitrators exceeded their authority in valuation of land, prevailing rate of return on the land and the effective valuation dates); Kalawaia v. AIG Hawai'i Ins. Co., 90 Hawai'i 167, 173, 977 P.2d 175, 181 (1999) (rejecting circuit court's award of prejudgement interest because the arbitration award itself encompassed any applicable prejudgement interest)). The majority apparently perceives the circuit court's actions in this case as attacking the merits of the award. The deductibility issue, however, does not implicate the merits of the award itself because the amount of the award was explicitly determined without consideration of extraneous factors such as the covered loss deductible statute. If, for example, the circuit court had increased or reduced the amount of the award because it felt that the arbitrators incorrectly determined the extent of injuries to the Gepayas, that action would be an attack on the merits of the arbitration award. However, where the application of the circuit court's ruling regarding the deductibility issue results in a reduction or set-off against the award, as was the case here, such action is not an attack immune from judicial review. The

policy of judicial noninterference with arbitration awards is not undermined by the circuit court's decision that the covered loss deductible applied -- an issue that the arbitrators acknowledged was not within the scope of their authority and that the circuit court had authority to decide upon request by the parties outside of arbitration.

Although neither of the parties have challenged the circuit court's authority in deciding the legal question, the majority, relying on Inlandboatmen's Union v. Sause Bros., Inc., 77 Hawai'i 187, 191, 881 P.2d 1255, 1259 (App. 1994), notes that "we may notice plain error not presented[.]" Maj. op. at 7-8 (internal quotations omitted). Inlandboatmen's Union, however, also states that "[t]he court shall take notice of a plain error when it is necessary to prevent a miscarriage of justice." Id. at 191, 881 P.2d at 1260 (internal citations omitted) (emphasis added). Here, no "miscarriage of justice" occurred where the parties received exactly the dispute resolution they sought from a court empowered to resolve their dispute. In fact, a far greater miscarriage of justice would occur by forcing the parties to go back and re-brief, re-argue, and possibly re-appeal an issue that has already been fully briefed, argued, decided in the circuit court, and is now ripe for review on appeal. The majority's holding today would not only result in a waste of judicial resources, but would increase the burden on the parties in terms of attorneys' fees and costs. In short, the majority's

use of plain error to vacate the circuit court's decision in this case is not only inappropriate but counterproductive.

Because the circuit court had the authority to confirm the arbitration award and decide the legal question not considered by the arbitrators, I would address the merits of the issues properly before us and determine the outcome of the case accordingly.