*** * * NOT FOR PUBLICATION * * ***

NO. 23266

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

ESSEX INSURANCE COMPANY, a Delaware corporation,
Plaintiff-Appellee

vs.

JOHN CUTTING and PEGGY CUTTING, Defendants-Appellants

and

GARY L. GATLIFF; JANE GATLIFF; GATLIFF KAUAI CORPORATION DBA GATLIFF HOMES, a Hawaiʻi corporation; CHARLES B. COWLEY; AMERICAN BONDING COMPANY, an Arizona corporation, in corporate capacity and as assignee of Theodore Teves, Jr. and David Yearian; PATTY BRIGGS; GLENN BRIGGS; MILLA DERBY; DAVID ROBICHAUX; BARNEY ROBINSON; DARRYL SOON; DONNA STRASBURG; and DOES 1-50, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-3955)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;
with Acoba, J., concurring separately)

Defendants-appellants John Cutting and Peggy Cutting (the Cuttings) appeal from the judgment of the First Circuit Court, the Honorable Virginia Lea Crandall presiding, in favor of plaintiff-appellee Essex Insurance Company (Essex). Specifically, the Cuttings appeals from (1) the July 21, 1999 judgment in favor of Essex; (2) the July 16, 1999 order granting Essex's second motion for summary judgment; and (3) the February 15, 2000 order denying the Cuttings' motion for reconsideration.

On appeal, the Cuttings argue that: (1) the circuit court should have declined to hear Essex's motion for summary judgment pursuant to the "law of the case" doctrine; (2) the circuit court erred in ruling that the Cuttings' claims are excluded from coverage under the Essex CGL policy; (3) the circuit court erred in finding that there were no genuine issues of material fact and in ruling that Essex was entitled to judgment as a matter of law; (4) the circuit court erred in ruling that the Cuttings' claims were solely for breach of contract; (5) this court's decision in Francis v. Lee Enters., 89 Hawai'i 234, 971 P.2d 707 (1999), should not be applied retroactively so as to bar the Cuttings' claim; and (6) the circuit court erred in denying the Cuttings' motion for reconsideration.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold that the circuit court correctly granted Essex's motion for summary judgment because all the Cuttings' claims are excluded from coverage based on the language of the policy or prior decisions of this court. Specifically, we hold that: **(1)** the Cuttings' breach of contract claim is excluded by the language of the policy and by this court's holding in Hawaiian Holiday Macadamia Nut Co., Inc. v. Industrial Indem. Co., 76 Hawai'i 166, 872 P.2d

230 (1994). In Hawaiian Holiday, we held that damages resulting from a breached contract do not constitute property damage giving rise to an "occurrence" under the breaching party's insurance policy. The definition of "occurrence" in the insurance policy in Hawaiian Holiday -- which was identical to the language in the instant case -- excluded claims for breach of contract:

> The complaint sought contractual relief in the form of benefit of the bargain damages and recovery for total expenditures under the contract. . . .
>
> The . . . plaintiffs' claim for relief . . . did not sound in negligence such that a claim for "property damage," within the meaning of the comprehensive general liability policy could be supported. On the contrary, the alleged property damage . . . was part and parcel of the alleged acts committed by Hawaiian Holiday that resulted in the claims for breach of contract and fraud.
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> Because the conduct alleged was not accidental, it does not constitute an "occurrence" within the meaning of the CGL policy.

Id. at 170-71, 872 P.2d at 234-35 (emphasis added). A claim for breach of contract is excluded by the policy's definition of "occurrence" and simply is not the type of fortuitous event covered by CGL insurance; **(2)** the Cuttings' tortious breach of contract claims is excluded by this court's holding in Francis, in which this court held that Hawai‘i law does not permit recovery for tortious breach of contract in the employment context "in the absence of conduct that (1) violates a duty that is independently recognized by principles of tort law and (2) transcends the breach of the contract." Francis, 89 Hawai‘i at 244, 971 P.2d at 717. The Cuttings argue that this court should not apply Francis to their suit because the

Francis decision was issued four years after the Cuttings obtained their default judgment against the Gatliffs; the bar on claims for tortious breach of contract, the Cuttings argue, should not be applied retroactively so as to bar the Cuttings' claim. As this court has stated: "Although judicial decisions are assumed to apply retroactively, such application is not automatic. . . . [W]here substantial prejudice results from the retrospective application of new legal principles to a given set of facts, the inequity may be avoided by giving the guiding principles prospective application only." Catron v. Tokio Marine Mgmt., Inc., 90 Hawai'i 407, 411, 978 P.2d 845, 849 (1999) (quoting State v. Ikezawa, 75 Haw. 210, 220-21, 857 P.2d 593, 597-98 (1993)) (alterations in original; block quote formatting omitted). However, retroactive application of the bar on claims for tortious breach of contract will not result in substantial prejudice to the Cuttings. First, the Cuttings do not allege that they relied to their detriment on Hawai'i law pre-Francis; the Cuttings brought a claim for tortious breach of contract as well as a variety of standard tort and contract claims, and it does not appear as though the Cuttings declined to bring other viable claims in order to bring the tortious breach of contract claim. Second, the Francis decision does not affect the Cuttings' default judgment against the Gatliffs. This case is not an appeal from the default judgment against the Gatliffs;

therefore, this court cannot invalidate the Cuttings' tortious breach of contract claim against the Gatliffs within the default judgment. Instead, this case involves Essex's responsibility for the Gatliffs' torts: it is as though the Cuttings are currently suing the Gatliffs for tortious breach of contract, and Essex is defending the Gatliffs against that suit. Since this case is still open and active, this court applies Francis -- just as this court would apply Francis in a case brought today by a dissatisfied home buyer. The Cuttings may collect the entire default judgment as against the Gatliffs, but may not collect damages for tortious breach of contract from Essex. Furthermore, this is not the type of "exceptional" situation in which "serious emotional disturbance is a particularly foreseeable result of a breach." Francis, 89 Hawai'i at 240, 971 P.2d at 713; **(3)** the Cuttings' remaining tort claims, while not barred by Francis, are barred by the language of the policy. The policy excludes "any claim arising out of or contributed to by the criminal, fraudulent, dishonest or malicious act or omission of the Insured, any employee of the Insured or anyone for whom the Insured may be held liable" (emphases added). Every tort alleged by the Cuttings (including conversion, negligent or intentional infliction of emotional distress, misrepresentation, concealment, and nondisclosure) arose from the Gatliffs' breach of the contract with the Cuttings; those torts, by definition,

necessarily stemmed from criminal, fraudulent, dishonest or malicious acts by the insured or an employee of the insured; **(4)** the circuit court correctly agreed to hear Essex's second motion for summary judgment. The "law of the case" doctrine refers to "the usual practice of courts to refuse to disturb all prior rulings in a particular case . . . . Unless cogent reasons support the second court's action, any modification of a prior ruling of another court of equal and concurrent jurisdiction will be deemed an abuse of discretion." Wong v. City and County of Honolulu, 66 Haw. 389, 396, 665 P.2d 157, 162 (1983) (citations omitted). In the instant case, however, Judge Crandall had "cogent reasons" for disturbing Judge Chang's initial denial of Essex's motion for summary judgment: namely, this court's decision in Francis; **(5)** the circuit court did not abuse its discretion in declining to grant the Cuttings' motion for reconsideration; and **(6)** the Cuttings' remaining arguments do not affect the above holdings. First, the Cuttings argue that Gatliff Homes, rather than Gary and Jane Gatliff, was the insured; therefore, from the perspective of Gatliff Homes, the intentional acts of Gary and Jane Gatliff were unforeseen, unexpected, and accidental. Even if this court ruled in the Cuttings' favor on this point, Gatliff Homes would still be ineligible for coverage pursuant to the criminal conduct exclusion. Second, Essex argues that it has no obligation to

provide defense or indemnification for the Gatliffs because the Gatliffs have not tendered their defense to Essex. However, even if the Gatliffs had requested coverage, this court would nevertheless conclude that the Gatliffs are not entitled to coverage under the undisputed facts of this case. Third, the Cuttings argue that the insurance policy should be liberally construed in favor of the insured. However, as discussed supra, the Cuttings' claims are excluded even under a liberal construction of the insurance contract. Therefore,

IT IS HEREBY ORDERED that the circuit court's orders granting Essex's second motion for summary judgment and denying the Cuttings' motion for reconsideration are affirmed.

DATED: Honolulu, Hawai'i, March 16, 2004.

On the briefs:

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