NO. 23028

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

JULIAN CHAPA, Plaintiff-Appellee, v. FEVE LYN BANASIHAN and CHRISTOPHER BANASIHAN, Defendants-Appellees, JOHN DOES 1-10, JANE DOES 1-10, DOE PARTNERSHIPS, CORPORATIONS, and/or OTHER ENTITIES 1-10, Defendants, and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Real Party in Interest-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(CIVIL NO. 97-0104)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Appellant State Farm Mutual Automobile Insurance Company (State Farm) appeals the November 12, 1999 order of the circuit court of the fifth circuit, the Honorable George M. Masuoka, judge presiding, that denied State Farm's September 14, 1999 motion to intervene by right in this case, brought pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 24(a) (1999).[1]

[1/] At the time State Farm Mutual Automobile Insurance Company's motion to intervene was decided, Hawaiʻi Rules of Civil Procedure (HRCP) Rule 24 (1999) provided:

> (a) *Intervention of right*. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's

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We conclude State Farm had a right to intervene under HRCP Rule 24(a)(2). We therefore vacate the order denying State Farm's motion.

I. BACKGROUND.

On March 28, 1996, Julian Chapa (Chapa) was injured when the motorcycle he was operating collided with an automobile driven by Feve Lyn Banasihan (Banasihan).[2] Chapa was

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[1/](...continued)

> interest is adequately represented by existing parties.
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> (b) *Permissive intervention*. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute, ordinance or executive order administered by an officer, agency or governmental organization of the State or a county, or upon any regulation, order, requirement or agreement issued or made pursuant to the statute, ordinance or executive order, the officer, agency or governmental organization upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.
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> (c) *Procedure*. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

[2/] The April 2, 1977 complaint filed by Julian Chapa in this case named Feve Lyn Banasihan and her husband, Christopher Banasihan, as defendants. However, the complaint did not contain allegations of liability against or a specific prayer for relief from Christopher Banasihan. On August 2, 1999, Christopher Banasihan filed a motion for judgment on the pleadings on the basis of those defects. It appears the motion was orally

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hospitalized for eleven days after the accident. After his release from the hospital, Chapa retained attorney Collin M. Fritz of the law firm Trecker & Fritz.

On May 13, 1996, James L. Morris (Morris), a legal assistant at Trecker & Fritz, sent an offer to Banasihan's insurance company, State Farm, to settle for the policy limit of $35,000.00. The express deadline for State Farm's acceptance of this original offer was May 28, 1996.

On May 24, 1996, State Farm senior claim representative Lon Malapit (Malapit) spoke to Morris on the telephone. He and Morris agreed that State Farm would be sent copies of Chapa's medical records and that the offer to settle would be held open beyond the original deadline while State Farm reviewed the medical records. In a confirming letter dated the same day, Malapit recounted, "We agreed that you would allow three weeks from the date we receive the medical records that you will be sending us, to evaluate your client's bodily injury claim." In a May 7, 1998 affidavit, Morris swore that the offer was to be held open for exactly three weeks after State Farm received the medical records. On the other hand, Malapit recalled, in a January 12, 1998 affidavit, that he agreed to try to respond within three weeks after receipt of the records, but that no

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granted without opposition at an August 26, 1999 hearing, but no written order granting the motion has been filed.

definite expiration date had been set. On June 6, 1996, Morris forwarded Chapa's medical records to Malapit.

On August 12, 1996, Malapit and Morris had a telephone conversation that Malapit recounted in an August 14, 1996 confirmation letter to Morris. Malapit confirmed that he had tendered State Farm's policy limit of $35,000.00 for settlement of Chapa's bodily injury claims. He also wrote, "Upon agreement to settle this claim, we will be sending you an appropriate Release for the bodily injury claim." He asked Morris to forward the offer to Chapa.

On August 28, 1996, Morris wrote a letter to Malapit. In it, he noted, "Your [August 14, 1996] letter also confirms that State Farm is tendering the $35,000 bodily injury limit." Morris added that he first needed to obtain the consent of the underinsured motorist carrier, and concluded, "I will forward a copy of your letter and the Certificates of Coverage to Transamerica and request their written consent to disburse the settlement proceeds from your company. We will notify you when we wish you to forward the settlement draft and Release."

In his January 12, 1998 affidavit, Malapit averred that, "[o]n or about September 19, 1996[,]" Morris telephoned him to say that he had received the consent of the underinsured motorist carrier, and that Malapit should forward the settlement check and release. On October 2, 1996, Jonathan L. Ortiz (Ortiz), an attorney retained by State Farm to prepare the

release, forwarded the release and the $35,000.00 settlement check to Morris.

However, on March 25, 1997, Samuel R. Blair (Blair), Chapa's new attorney, sent a letter to Ortiz rejecting what he called "[t]he offer to settle for $35,000 made August 12, 1996[.]" Blair also asserted that the three-week extension of the original May 13, 1996 settlement offer pending State Farms' review of the medical records had expired before acceptance. He returned the $35,000.00 settlement check. On April 2, 1997, Chapa initiated this action by filing a complaint against Banasihan and her husband, Christopher Banasihan (collectively, the Banasihans).

On January 21, 1998, the Banasihans, through insurance defense counsel, filed a motion to enforce the putative agreement to settle the case for the $35,000.00 policy limit. On May 4, 1998, the court heard the motion and apparently took the matter under advisement. At a September 9, 1999 settlement conference, the court apparently informed the parties that the motion to enforce settlement agreement would be denied. At the same conference, the parties (Chapa was represented by Blair; the Banasihans were represented by insurance defense counsel) informed the court that they had reached a settlement agreement in which Banasihan would admit liability and the parties would submit the amount of Chapa's damages to arbitration. Further, the Banasihans agreed to assign to Chapa any cause of action they

might have against State Farm for a bad-faith refusal to settle, and Chapa agreed not to execute on any judgment he might obtain against the Banasihans.

On September 14, 1999, State Farm, through its own counsel, filed a motion to intervene as of right pursuant to HRCP Rule 24(a). On the same day, State Farm filed a motion to continue trial and to set an evidentiary hearing on "issues of fact concerning the enforceability of the [$35,000.00] settlement[.]" On September 23, 1999, the court held a hearing on both motions. There, the court requested additional briefing on two specific issues: (1) whether the court could allow State Farm to intervene for the limited purpose of appealing the order denying its motion to enforce the settlement agreement, and (2) whether the court should take further evidence and/or hold further hearing on the motion to enforce settlement agreement. Both Chapa and State Farm filed additional briefs.

On October 22, 1999, the court filed an order denying the motion to enforce settlement agreement. On November 12, 1999, the court filed an order denying State Farm's motion to intervene. On December 7, 1999, State Farm filed a timely notice of this appeal of the order denying its motion to intervene. On January 5, 2000, the court filed an order denying State Farm's motion to continue trial and to set evidentiary hearing. On February 4, 2000, State Farm filed another notice of appeal, this

one on the order denying its motion to continue trial and to set evidentiary hearing.

II. ISSUES PRESENTED.

State Farm presents the following two issues on appeal: (1) whether the court erred in denying State Farm's motion to intervene, and (2) whether the court erred in denying State Farm's motion to continue trial and to set evidentiary hearing.

III. JURISDICTION AND STANDARD OF REVIEW.

"An order denying an application for intervention by right under Rule 24(a)(2), HRCP, is final and appealable, and is reviewable under the right/wrong standard of review." Baehr v. Miike, 80 Hawai'i 341, 343, 910 P.2d 112, 114 (1996) (citations and internal quotation marks omitted).

IV. DISCUSSION.

A. The Motion to Intervene.

At the time State Farm's motion to intervene was decided, HRCP Rule 24(a)(2), governing intervention of right, provided, in relevant part, that "[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest,

unless the applicant's interest is adequately represented by existing parties."[3]

Closely paralleling our case is Kim v. H.V. Corporation, 5 Haw App. 298, 688 P.2d 1158 (1984). In that case, the plaintiff, Su Duk Kim, was stabbed at the Yun Hee Lounge (the Lounge) by Nam Soo Kim, husband of a Lounge employee. The Lounge was owned by H.V. Corporation (the Corporation), which had, in turn, a sole shareholder, Yun Hee Im (Im). Im was also managing the Lounge the night of the incident. Su Duk Kim filed a complaint against Nam Soo Kim, the Corporation and Im. Great Southwest Fire Insurance Company (Great Southwest), the insurance company for Im and the Corporation, initially defended the suit. Great Southwest filed a separate action, however, in which it moved for and was granted summary declaratory judgment against coverage and the duty to defend. Great Southwest thereupon terminated its defense of Im and the Corporation in the Su Duk Kim lawsuit, whereupon Im and the Corporation appealed the summary declaratory judgment in the separate action. Later, Su Duk Kim reached a stipulation with Nam Soo Kim, the Corporation and Im in which, *inter alia*, Nam Soo Kim and the Corporation admitted liability for damages and Im was to be dismissed from the action. Su Duk Kim agreed not to record or execute any judgment against Im or the Corporation in return for their

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[3/] HRCP Rule 24(a)(2) (2001) is identical, except for changes that rectified inapposite gender generalizations.

assignment of all their rights against Great Southwest and certain related parties. About a month later, we held on the appeal in the separate action that summary declaratory judgment had been inappropriate, and remanded the case for trial. About twenty days after our remand in the separate action, Great Southwest filed a motion to intervene as of right in the Su Duk Kim lawsuit. Its motion was denied, and it appealed. In the meantime, a bench trial had determined the amount of damages. Id. at 299-300, 688 P.2d at 1159-60.

We held on Great Southwest's appeal that the trial court erred in denying the motion to intervene as of right. Id. at 303, 688 P.2d at 1162. In doing so, we applied the following analysis:

> Rule 24(a)(2), HRCP, requires us to consider four factors in assessing Great Southwest's right to intervene: a) whether the application was timely; b) whether Great Southwest claims an interest relating to the property or transaction which is the subject of the action; c) whether the disposition of the action would, as a practical matter, impair or impede Great Southwest's ability to protect that interest; and d) whether Great Southwest's interest was inadequately represented by the existing defendants.

Id. at 301, 688 P.2d at 1161. Answering yes to all four questions, we vacated the trial court's denial of Great Southwest's motion to intervene as of right, and remanded. The Kim analysis has since been adopted and reiterated by our supreme court. Baehr, 80 Hawai'i at 343, 910 P.2d at 114; Ing v. Acceptance Ins. Co., 76 Hawai'i 266, 271, 874 P.2d 1091, 1096 (1994).

Whether it be by way of near-parallel facts, supra, or by way of analysis, infra, Kim counsels that State Farm had a right to intervene in this case.

Under the Kim analysis, we first examine whether State Farm claims an interest relating to the transaction which is the subject of this action. HRCP Rule 24(a)(2); Kim, 5 Haw. App. at 301, 688 P.2d at 1161 (the second Kim factor). Surely it does. State Farm has an interest in the amount of damages awarded, regardless of whether it is above or below the policy limit. From the advent of the lawsuit, State Farm, by virtue of its duty to defend and through insurance defense counsel, had an interest in the threshold question of liability and in preventing any award, above or below the policy limit. Finley v. Home Ins. Co., 90 Hawai‘i 25, 36-37, 975 P.2d 1145, 1156-57 (1998) ("Both retained defense counsel and the insurer must understand that only the *insured* is the client. . . . [A]n insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." (Citation and internal block quote format omitted; emphasis in the original.). However, conceivably only Banasihan would have been liable for amounts exceeding the policy limit. Now, by virtue of the subsequent settlement between Chapa and the Banasihans, State Farm may be liable beyond the policy limit as well. See Delmonte v. State Farm Fire and

Cas. Co., 90 Hawai‘i 39, 52 n.9, 975 P.2d 1159, 1172 n.9 (1999) ("Even if the ultimate judgment was in excess of the policy limits, the insurer may still be liable for the entire amount if its refusal to settle was unreasonable." (Citation omitted.)). Now, *a fortiori*, it has an interest in the transaction which is the subject of this action.

It follows as well, from the subsequent settlement, that the disposition of this action would, as a practical matter, impair or impede State Farm's ability to protect its interest, HRCP Rule 24(a)(2); Kim, 5 Haw. App. at 301, 688 P.2d at 1161 (the third Kim factor), and that, State Farm's interest is inadequately represented by the Banasihans. HRCP Rule 24(a)(2); Kim, 5 Haw. App. at 301, 688 P.2d at 1161 (the fourth Kim factor). Without intervention, this action will terminate in an award of damages arbitrated without any participation by State Farm, a non-party. Cf. Kim, 5 Haw. App. at 303, 688 P.2d at 1162 ("since the [non-party] insurer is bound by the insureds' default, it is also bound by the insureds' stipulation"). Worse, by virtue of Chapa's forbearance from execution on their assets, the Banasihans now have absolutely no interest in limiting the amount of the damages ultimately awarded. As we have noted:

> The applicant [for intervention] has the burden to show the inadequacy [of representation]. However, this burden is minimal. Generally, inadequacy of representation may be shown if there is proof of collusion or if the representatives have, or represent, some interest adverse to that of the

> applicant or if there has been nonfeasance in the duty of representation.

Id. at 303, 688 P.2d at 1162 (citations omitted).

Finally, on the question of the timeliness of State Farm's motion to intervene, HRCP Rule 24(a)(2); Kim, 5 Haw. App. at 301, 688 P.2d at 1161 (the first Kim factor), we have held that

> all circumstances must be considered, but two are especially relevant: 1) the lapse of time between when the applicant should have sought intervention and when it actually did and 2) the prejudice caused to the existing parties by that lapse of time.

Id. at 301-02, 688 P.2d at 1161 (citation omitted). In this regard, timeliness "is generally regarded as a flexible concept, and is a matter within the sound discretion of the trial court." Id. at 301, 688 P.2d at 1161 (citations omitted).

Chapa's primary focus on appeal is this issue of the timeliness of State Farm's motion to intervene. Chapa suggests that State Farm should have known it had an interest in this case in conflict with the interest of the Banasihans as early as March 25, 1997, when Blair wrote to Ortiz to reject State Farm's $35,000.00 offer, and that State Farm should have intervened, accordingly, immediately after Chapa filed his complaint on April 2, 1997. Chapa also asserts that, even if State Farm did not know previously, it should have known that its interest could diverge from the interest of the Banasihans when it filed its motion to enforce settlement agreement on January 21, 1998. Chapa argues that State Farm should have known the motion could

be denied, and that divergent interests would result. He cites Kim for the proposition that "uncertainty of the interest is not a bar to intervention." Id. at 302, 688 P.2d at 1161 (citations omitted).

What these arguments overlook is that State Farm had no right to intervene until its interest was inadequately represented by the Banasihans. HRCP Rule 24(a)(2); Kim, 5 Haw. App. at 301, 688 P.2d at 1161 (the fourth Kim factor); Baehr, 80 Hawai'i at 345, 910 P.2d at 116 ("Failure to meet even one [of the Kim factors] prevents intervention 'by right' under HRCP Rule 24(a)(2).") The general rule is that "[i]f an applicant's interests in litigation are the same as one or more of the existing parties, adequate representation is assured. Indeed, there is a presumption of adequate representation if the applicant has the 'same ultimate objective' as an existing party." 6 James W. Moore, Moore's Federal Practice, § 24.03[4][a][ii] at 24-44 (3d ed. 2001) (footnotes omitted). As we have discussed, the respective interests first diverged during the September 9, 1999 settlement conference, when the court announced its denial of State Farm's motion to enforce the $35,000.00 settlement agreement and the parties disclosed their subsequent settlement.

State Farm moved to intervene on September 14, 1999, only five days after the court's oral denial of the motion to enforce settlement agreement and the disclosure of the subsequent

settlement. The record reveals no prejudice to the existing parties as a result of that lapse of time. Kim, 5 Haw. App. at 302, 688 P.2d at 1161. As we have stated, "[t]he timely replacement of an inadequate defender with one that is adequate is not prejudice." Id. Under these circumstances, we believe State Farm's motion to intervene was timely.

Because all four Kim factors weigh in favor of State Farm, State Farm should have been allowed to intervene as of right.

Chapa also implies on appeal that State Farm's intervention is nothing more than an attempt at a "second bite at the apple" of its motion to enforce the $35,000.00 settlement agreement. Chapa argues at length that the $35,000.00 settlement issue was fully litigated and correctly resolved, and that, hence, State Farm's intervention is an exercise in futility. But even assuming, *arguendo*, that upon intervention State Farm will not succeed in reopening or changing the court's decision not to enforce the $35,000.00 settlement, State Farm will still have a meaningful stake and say in the proceedings. See, e.g., H.B.H. v. State Farm Fire and Cas. Co., 823 P.2d 1332, 1339 (Ariz. Ct. App. 1991) (under similar circumstances, insurer had a right to intervene, if only to contest the reasonableness of the damages awarded at a default damages hearing held pursuant to a settlement between the plaintiff and the defendants); HRCP Rule

41(a)(2) (2001) (except for dismissals by stipulation or dismissals by the plaintiff before a responsive pleading is filed, "an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper").

B. The Motion to Continue Trial and to Set Evidentiary Hearing.

State Farm also presents in this appeal the propriety of the court's order denying State Farm's motion to continue trial and to set evidentiary hearing. As we detailed previously, however, State Farm took this appeal (No. 23028) on December 7, 1999, from the court's November 12, 1999 denial of State Farm's motion to intervene. Thereafter, on January 5, 2000, the court denied State Farm's motion to continue trial and to set evidentiary hearing, and State Farm noticed a separate appeal (No. 23143) of that order on February 4, 2000.

On May 23, 2000, our supreme court filed an order dismissing appeal No. 23143, reasoning, *inter alia*, that the January 5, 2000 order denying State Farm's motion to continue trial and to set evidentiary hearing is not an appealable final or collateral order, and specifically stating that "the January 5, 2000 order is not reviewable in the collateral order appeal of the order denying intervention in No. 23028[.]" Hence, we will not attempt to do so.

V. CONCLUSION.

The court's November 12, 1999 order denying State Farm's motion to intervene is vacated and the case is remanded. State Farm shall be allowed to intervene as a defendant.

DATED: Honolulu, Hawaii, February 7, 2002.

On the briefs:

Kevin P. H. Sumida,
Ward F. N. Fujimoto
(Matsui Chung Sumida & Tsuchiyama) for
real party in interest-appellant.

Acting Chief Judge

Associate Judge

Samuel R. Blair,
Waiyee Carmen Wong for
plaintiff-appellee.

Associate Judge