NOT FOR PUBLICATION

NO. 24450

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EMERSON M.F. JOU, M.D., Plaintiff-Appellant,
v. MEDICAL INSURANCE EXCHANGE
OF CALIFORNIA, Defendant-Appellee,
and JOHN DOE 1 TO 10, et al., Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-3924)

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

Emerson M.F. Jou, M.D. (Jou or Plaintiff), appeals the July 27, 2001 final judgment of the circuit court of the first circuit, the Honorable Eden Elizabeth Hifo, judge presiding, that dismissed all claims Jou asserted in his second amended complaint against Medical Insurance Exchange of California (MIEC or Defendant), his erstwhile insurer. We affirm.

I. Background.

On December 29, 2000, Jou filed a complaint against MIEC that purported to state numerous causes of action. In this complaint, Jou, "an Individual physician (and Solo Professional Corporation)[,]" alleged that MIEC had insured him under "an insurance policy bearing the number 0058540 . . . , by the terms of which Plaintiff [(sic)] agreed to defendant [(sic)] and to

indemnify Plaintiff." Jou made further, rather obscure allegations that, when he raised questions with MIEC about an alleged waiver of its right to select defense counsel and a "possible conflict of interest with respect to" defense counsel, MIEC "retaliated" by "canceling" his insurance coverage, thereby injuring him in his medical practice.

In response, MIEC filed a March 9, 2001 motion to dismiss the complaint. MIEC maintained that Jou's complaint was "blatantly conclusory and . . . largely incomprehensible" and hence, failed to state any cause of action. However, on March 23, 2001, Jou filed a memorandum in opposition to MIEC's motion, in which his counsel, Stephen M. Shaw (Shaw), declared that a first amended complaint would be filed and, indeed, a first amended complaint had been filed a minute before the memorandum was filed. Thereupon, on March 28, 2001, MIEC withdrew its motion to dismiss.

Although Jou's first amended complaint stated essentially the same causes of action, it made certain changes to the allegations of his original complaint -- such as correcting the insurance policy number ("DR 61-007031") -- and added more detailed allegations. The first amended complaint revealed that it was an unidentified complaint and summons filed against Jou that actuated his request to MIEC for a defense under the policy, and that it was MIEC's refusal to pay for Jou's choice of defense

counsel (Shaw) and MIEC's subsequent decision not to renew the insurance policy when it expired, that were, apparently, the gravamen of his grievances. Jou identified his "delisting as a preferred [Hawaii Medical Service Association (HMSA)] provider[,]" his loss of hospital staff privileges, and his inability to obtain other insurance coverage, as some of the items of his damages.

On March 28, 2001, MIEC filed a motion to dismiss the first amended complaint,

> on the ground that the defects which compel dismissal have not been cured by the First Amended Complaint which still fails to state a claim for which relief may be granted.
>
> . . . . The Amended Complaint remains deficient and still does not allege facts sufficient to sustain the claims stated therein. Furthermore, certain claims stated therein cannot be maintained as a matter of law. The Amended Complaint must therefore be dismissed.

In particular, MIEC argued that the implied covenant of good faith and fair dealing, the basis of the first cause of action in Jou's first amended complaint, was not implicated by its selection of defense counsel or by its decision not to renew the insurance policy.

On April 3, 2001, Jou filed a "cross-motion" for summary judgment: "Plaintiff Emerson M.F. Jou, M.D.[,] hereby moves for summary judgment on all counts of the complaint. [Hawai'i Rules of Civil Procedure (HRCP) Rule] 56. Alternatively, partial summary adjudication of issues is requested as to those matters set forth in Dr. Jou's

declaration." Jou's declaration stated:

> 1. Declarant is a medical doctor M.D., duly licensed in the State of Hawaii since June, 1977.
>
> 2. Declarant, until about January 29, 2001, was a participating Provider with Hawaii Medical Service Association (HMSA), 818 Keeaumoku Street, Honolulu, Hawaii, which entitled Declarant to the following professional and financial advantages: direct payment to the provider and more favorable medical fee schedules.
>
> 3. Declarant, until about February 1, 2000, held staff privileges at Rehabilitation Hospital of the Pacific, 226 North Kuakini Street, Honolulu, Hawaii 96817. These privileges entitled Declarant to the following professional and financial advantages: inpatient admission and direct patient care; professional association with all medical staff.
>
> 4. Since about May 15, 985 [(sic)], to February 1, 2000, has been [(sic)] insured for medical malpractice and other matters by Defendant Medical Insurance Exchange of California ("MIEC"), Defendant herein. The policy number is DR 61-007031, and a true and correct copy of a specimen thereof is marked as exhibit "A", made a part hereof and incorporated herein by this reference.
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> 5. On or about September 13, 1999, Declarant was served with a Complaint and Summons ("underlying Suit"), which he duly tendered to MIEC for defense, and requested that his present counsel be retained.
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> 6. On or about September 21 or 23, Defendant MIEC accepted the tender and so notified your Declarant by letter dated September 27, 1999. A true and correct copy of said letter is attached hereto as exhibit "B" made a part hereof and incorporated by reference. This letter ("B") informed Declarant that MIEC would not permit Declarant's present counsel in the matter to be retained; instead, MIEC had selected Keith Hiraoka, Esq. [(Hiraoka)] to represent Declarant.
>
> 7. On or about September 28, 1999, your Declarant informed MIEC that its decision regarding selection of counsel was not in good faith; and, that it had previously waived the selection process by its past conduct in allowing Declarant to select his own counsel. A true and correct copy of said letter is attached hereto, marked exhibit "C" and made a part hereof by incorporation.
>
> 8. On or about September 29, 1999, your Declarant wrote to MIEC regarding its refusal to allow Declarant to select counsel. A true and correct copy of said letter is attached hereto marked exhibit "D" and made a part hereof. Among other things, "D" inquired whether the attorney MIEC selected had ever represented the party (A.I.G.) suing your Declarant in the Underlying Action. See "D", page 2, par. No. 2.
>
> 9. MIEC did not respond to the foregoing letters, ("C", "D"), particularly the request for a conflict check.
>
> 10. Instead by letter, dated November 8, 1999, MIEC (corporate) notified Declarant of its decision not to renew his policy. A true and correct copy of the notification is attached hereto marked "E" and made a part hereof by incorporation.
>
> 11. Thereafter Defendant MIEC sent letters to various entities contracting with Plaintiff informing them of its non-renewal. As a result, two of the entities referred to in paragraphs 2 and 3, above, HMSA and Rehab. Hospital of the Pacific terminated their business and professional relationship with Dr. Jou. Further, Kuakini Hospital, Queens Hospital, and Castle Hospital, also terminated Declarant's

privileges.

Thereupon, Jou argued:

> Defendant does not dispute (1) that Dr. Jou was an insured by a policy of insurance issued by Defendant in 1999. Jou. Decl. par.4; (2) that in September of 1999, Defendant MIEC accepted a tender by Dr. Jou to defend him in AIG et al v. Jou, State of Hawaii, First Circuit No. Civ. 99-3416. Jou decl. par. 6; (3) that Dr. Jou objected to Defendant MIEC Selection of Counsel and asked for conflict of interest check. Jou decl. par.7, 8; (4) that within 45 days from Dr. Jou's objections and request for a conflicts check, MIEC notified him that it would not renew his coverage. Jou decl. par. 9, 10. Further, MIEC notified others in contractual relationships with Dr. Jou of the non-renewal. Jou decl. par. 11.
>
> These are the material facts; they entitle Dr. Jou to judgment on the intentional tort causes of action or alternative negligence discussed infra. A fact is material if proof of that fact would have the effect of establishing essential elements of a cause of action.
>
> In the alternative Dr. Jou requests that this Court find that the foregoing, 1-5, are not in dispute.

(Citation omitted; emphasis in the original.) Jou followed this argument with summary argument on each of his causes of action, arguments that were essentially conclusions that his declaration and the foregoing argument dictated summary adjudication in his favor on each cause of action of his first amended complaint.

On April 20, 2001, Jou filed his memorandum in opposition to MIEC's motion to dismiss his first amended complaint. Jou argued that the deficient factual allegations pointed out by MIEC could easily be remedied by a second amended complaint, which he "offered to the Court as exhibit 'A' attached hereto." Jou also argued that the implied covenant of good faith and fair dealing applies to an insurer's decision whether to renew an insurance policy, thus precluding dismissal of any of his causes of action. Almost as a *non sequitur* in this latter

discussion was the sentence: "MIEC violated public policy by disturbing the fiduciary duty of defense counsel to the insured. The insurer's duty to defend is not fulfilled merely by selecting counsel." (Citations omitted.)

On April 20, 2001, MIEC filed its memorandum in opposition to Jou's cross-motion for summary judgment. MIEC identified various evidentiary deficiencies in Jou's cross-motion. MIEC also argued that the implied covenant of good faith and fair dealing was not implicated by its choice of defense counsel or by its refusal to renew the insurance policy, and that Jou's causes of action must therefore fail. In his April 24, 2001 reply memorandum, Jou essentially gainsaid each of MIEC's points in opposition to his cross-motion, and reiterated that he was entitled to summary adjudication in his favor.

On April 30, 2001, the court held a hearing on Jou's cross-motion for summary judgment and on MIEC's motion to dismiss Jou's first amended complaint. After both parties presented extensive argument on both motions, the court denied Jou's cross-motion for summary judgment, because "there are genuine issues of material fact as to why the nonrenewal occured[.]" The court granted MIEC's motion to dismiss the first amended complaint:

> On the motion to dismiss, the court, having read the first amended complaint, appreciates the candor with which [counsel for Jou] concedes that it absolutely would have to be amended if for no other reason than to get the chronology straight to make sense out of any claim there may

> be cognizable in law that could have derived from the alleged triggering facts and, therefore, dismisses the first amended complaint.

However, the court dismissed the first amended complaint without prejudice, because

> I absolutely believe that Mr. Shaw has to be given the opportunity to draft a complaint that does have a set of facts that meets the good-faith requirement. I find that the proposed second amended complaint does not do that, therefore, [the court] denies the oral motion to file the specific second amended complaint attached to his memorandum in opposition to dismiss, and I dismiss without prejudice.
>
> Mr. Shaw, you're going to have to be very clear about what the facts are that you allege in whatever second amended complaint you choose to file so that they can come within the theory that the court agrees with you should exist, even if we don't know for certain that it does. And if you fail to do so, then no doubt you will invite another motion to dismiss, and at that point, it will be your third attempt to draft. And if it doesn't occur that you're able to meet that requirement, then the court at that time would probably be granting any such dismissal with prejudice. And that's just to give you a heads up that you really need to consider what your allegations will be.
>
> MR. SHAW: Thank you, Your Honor.

On May 23, 2001, the court filed its written order "finding that genuine issues of material fact do exist" and denying Jou's cross-motion for summary judgment. On June 26, 2001, the court filed its written order granting MIEC's motion to dismiss Jou's first amended complaint. The order stated that, "although the Court is unwilling to find that there is no set of facts upon which relief could be granted for the Plaintiff, finds [(sic)] the First Amended Complaint fails to do so." The order also denied, "without prejudice[,]" Jou's oral motion for leave to file the proposed second amended complaint that he had attached to his memorandum in opposition.

On May 18, 2001, Jou filed a second amended complaint against MIEC. Jou's basic allegations were as follows:

11. Defendant MIEC insures, at any given time, more than seventy-five percent (75%) of the physicians in the State of Hawaii.

12. Defendant MIEC issued and delivered a written policy of insurance to Plaintiff, MIEC Policy No. DR. 61-007031 ("The MIEC Policy" or "The Policy").

13. A document provided by Defendant to Plaintiff was represented by Defendant to be a true and correct copy of this declaration policy and is attached hereto, marked exhibit "A", and made a part hereof by incorporation. The same was intended by Defendant to represent a true and correct copy of the MIEC Policy.

14. In part IV.5, The Policy obligates Defendant MIEC to defend Plaintiff and his employees in claims arising out of a commercial fee dispute.

15. Plaintiff has complied with all of the terms and conditions precedent contained in The Policy under which he now seeks coverage herein, including the payment of premiums and notice, except as to that performance which has been excused, waived or prevented by the representations, acts or omissions of Defendant; and Plaintiff is entitled to the full benefit of the insurance provided by said policy.

16. On September 9, 1999, AIG Hawaii Insurance Company Inc. ("A.I.G.") sued Plaintiff and about thirteen (13) of his employees, claiming that Medical Doctors specializing in physical medicine (physiatrists) could not bill A.I.G. under payment codes for physical therapy. Even though massage therapists and physiatrists may bill for massage therapy under the treatment codes, A.I.G. refused to pay, and filed suit (herein, "Underlying Claim"), in this Court, in Case No. Civ. 99-1248-03.

17. In response to the Underlying Claim, and in order to investigate and defend against such Underlying Claim, the Plaintiff has been, and will be required to spend substantial sums of money.

18. The Underlying Claim currently pending involves substantial liability for defense costs, defense expenses and/or damages arising therefrom. Future actions may result in increased liability and additional legal expenses to the Plaintiff.

19. Plaintiff provided the Defendant with timely notice of the Underlying Claim and demanded that the Defendant honor all of its policy obligations with respect to the Underlying Claim, including the Defendant's duty to defend the Plaintiff in the Underlying Claim. Although the allegations stated in the [(sic)] against the Plaintiff in the Underlying Claim state a claim requiring coverage by the MIEC policy, to date, the Defendant has failed and refused to acknowledge its obligations to the Plaintiff regarding responding to the insured about defense of Underlying Claim; and specifically, has failed and refused to defend the Plaintiff and his employees in the Underlying Claim.

The attached Exhibit A,[1] the insurance policy, effective February 1, 1999 to February 1, 2000, covered Jou and his office nurses and medical assistants. One of the coverages afforded was "defense coverage for miscellaneous business liability" in the amount of $100,000.00 per claim. This coverage was contained in Part IV.5. of the policy:

> Subject to the terms and conditions set forth in this policy, MIEC agrees with insured to pay ninety percent (90%) of the reasonable legal expenses and costs incurred to defend only against each civil lawsuit, arbitration, or administrative proceeding brought against **Insured** by any person, entity, or federal, state or local agency, which is first reported to MIEC within the **policy period or reporting endorsement** applicable to **Insured** after the applicable **retroactive date** as a result of:
> . . . .
> 5. Breach of contract or agreement or other alleged misconduct in the nature of a commercial or fee dispute arising from and involving **Insured's** professional practice[.]

(Underlining and bold typesetting in the original.)

Part IV.a) provided, however:

> Defense coverage described under Part IV shall apply only under the following additional terms and conditions:
> a) **Insured** agrees to be represented in the civil lawsuit, arbitration, or administrative proceeding by legal counsel appointed or approved by MIEC within its sole discretion[.]

(Bold typesetting in the original.) The general conditions applicable to all coverages under the insurance policy contained

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[1] Hawai'i Rules of Civil Procedure (HRCP) Rule 10(c) (West 2001) provides, in pertinent part, that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." See also Marsland v. Pang, 5 Haw. App. 463, 467 n.1, 701 P.2d 175, 182 n.1 (1985) ("Attached to the complaint are numerous affidavits which we have considered as part of the pleadings. Rule 10(c), HRCP.").

the following provisions:

> **5. CONTROL OF DEFENSE AND SETTLEMENT**
> With respect to any claim, lawsuit, arbitration, or legal or other administrative proceeding which falls, or is claimed to fall, in whole or in part within the insurance coverage of this **policy**, MIEC shall have the sole and exclusive right to investigate, negotiate, evaluate, control and direct the defense of such matter, including the right to appoint legal counsel on behalf of **Insured**, as may be permitted or limited by law. With respect to any **covered claim**, **Insured** shall not utilize nor permit legal counsel selected by **Insured** to intervene or substitute into the defense of the matter without the prior consent and written approval of MIEC. . . .
> . . . .
> **13. WAIVER**
> Notice to any representative of MIEC, or knowledge possessed by any representative or person employed by or related to MIEC, shall not constitute a waiver or a change of any part of this **policy**, or preclude MIEC from asserting any right under the terms of this **policy**, nor shall the terms of this **policy** be deemed to be waived or changed by virtue of any representation or written or oral statement by MIEC, its employees or representatives, except as such waiver or change may be described by MIEC in an **endorsement or policy declaration** issued to **Insured**.

(Bold typesetting in the original.)

Jou's second amended complaint stated numerous causes of action. Jou called his first cause of action, "breach of the implied covenant of good faith and fair dealing: failure and refusal to investigate, evaluate, and respond to insured's request for conflict-of-interest information regarding defense attorney selected by insurer" (emphatic typesetting omitted):

> 21. The insurance policy referenced in the foregoing allegations contains an implied covenant of good faith and fair dealing, whereby Defendant insurer was required to investigate, evaluate, and respond to claims and other issues raised by its insured without unreasonable delay. Additionally, Defendant was required to give the Plaintiff's interests at least as much consideration as its own, and to do nothing to deny the insured the benefits of the insurance relationship.
> 22. The MIEC Policy herein is a contract of adhesion and involves considerations of public interest. Plaintiff, as Defendant's insured, sought more than profit or commercial advantage from Defendant's insurance policy; in particular, hospital privileges, peace of mind,

asset protection, preferred insurance provider status, and insurability.

23. Defendant MIEC has breached the implied covenant of good faith and fair dealing contained in the aforesaid MIEC Policy, by the following acts or omissions:

24. On or about September 14, 1999, Plaintiff reported to Defendant MIEC that a complaint and summons (Underlying Claim) was served upon him on September 13, 1999, and requested that defense coverage be provided pursuant to the Policy.

25. At the time the request for defense coverage was made, Plaintiff also requested that his attorney, who had already spent a considerable amount of time on the matter leading to the service of the Underlying Claim on Plaintiff, be retained by Defendant MIEC as Plaintiff's counsel to defend against the Underlying Claim.

26. On or about September 21, 1999, Defendant MIEC notified Plaintiff that defense coverage would be afforded under the Policy, providing defense coverage up to one hundred thousand dollars ($100,000.00), for both Plaintiff and about thirteen of his employees, who were sued in the Underlying Claim. A copy of Defendant MIEC's acceptance of defense coverage is attached hereto, marked exhibit "B" and made a part hereof by incorporation.

27. Since the Underlying Claim was filed by A.I.G., an insurer, against Dr. Jou, Plaintiff physician was concerned primarily that the attorney proposed by MIEC to represent him and his employees had previously represented A.I.G., and had a conflict of interest. On or about September 29, 1999, Plaintiff sent a letter and a fax to MIEC's president notifying the insurer that it should immediately provide a conflict-of-interest check on MIEC's proposed attorney. A true and correct copy of the request for a conflict-of-interest check on MIEC's proposed defense counsel is attached as exhibit "C", made a part hereof and incorporated herein by reference.

28. Defendant MIEC, while conceding its duty to defend Plaintiff and his employees (Exhibit "B") afterward failed and refused, and continues to refuse to provide a conflict check on its recommended defense counsel. At this time, MIEC is actively concealing this information.

29. Defendant's refusal to provide a routine conflict check as aforesaid began at a time that said insurance policy was in full force and effect.

30. Defendant, maliciously, oppressively, fraudulently and with a conscious indifference to consequences has, among other things, breached its duty of good faith and fair dealing owed to the Plaintiff as an insured under MIEC's Policy by doing those acts hereinabove alleged.

31. Defendant's conduct involves a pervasive business practice and indicates Defendant breached its duty of good faith and fair dealing owed to the Plaintiff by other acts or omissions of which the Plaintiff is presently unaware. Plaintiff will seek leave of court to amend this complaint at such time as it discovers the other acts or omissions of Defendant constituting such breach and other torts.

32. As a proximate result of the aforementioned wrongful conduct, Plaintiff suffered actual and consequential damages and out-of-pocket expenses, including economic damages, business interruption damages, attorneys fees and costs in attempting to obtain coverage under the policy; and loss of privileges, loss of insurability, and delisting as a preferred HMSA provider. In addition, as a result of MIEC's nonrenewal, Plaintiff is unable to obtain other comparable coverage. Further,

> Plaintiff has suffered damages in the amounts of attorney fees, costs in the Underlying Suit.
>
> 33. In committing these acts, defendants and their agents or employees, acted wantonly or oppressively with such malice as implied a spirit of mischief or criminal indifference to civil obligations; or defendants are guilty of willful misconduct, or that entire want of care which would raise the presumption of a conscious indifference to consequences. Defendants' conduct was willful, deliberate, malicious and oppressive, justifying an award of punitive damages, in addition to special and general damages, to be added by amendment according to proof.

Exhibit B was a September 27, 1999 letter from Roger C. Caron (Caron), a claims supervisor for MIEC, to Jou. It read:

> This letter will confirm that on September 14, 1999 you reported to this office that you and several of your Licensed Massage Therapist employees had been served with Complaint and Summons . . . the preceding day, September 13, 1999. You inquired whether you had coverage under your policy of insurance with MIEC (DR61-00703I). Specifically you thought there might be coverage under Part IV. You also requested that MIEC agree that Stephen Shaw, Esq., whom you had already retained to represent you in an administrative hearing, brought against you by AIG but not previously reported to MIEC, could continue to represent you and that MIEC agree to pay his fees and expenses.
>
> We retained coverage counsel to provide us with a coverage opinion and I informed you by telephone thereafter, on September 21 or 22 that coverage would be afforded under Part IV.5., which provides <u>defense coverage only</u> for both you and your employees in claims arising out of a commercial fee dispute, and that a letter would confirm this. A copy of that letter, which is just back from dictation, is enclosed.
> I also informed you in several phone calls you made to me that under the terms and conditions of Part IV.5. of the policy that "insured agrees to be represented in the civil lawsuit, arbitration, or administrative proceeding by legal counsel appointed or approved by MIEC within its sole discretion," and that we had referred the case to Keith K. Hiraoka, Esq. to represent you. You continued to request that Mr. Shaw be allowed to represent you.
>
> On September 27, Mr. Hiraoka informed me that he had spoken to you on Thursday September 23, 1999, and that you had informed him that you declined to agree to have him represent you in this matter and that you intended to have Mr. Shaw's representation, at your own expense if necessary. I then called you and you confirmed to me that you were refusing Mr. Hiraoka's representation. You asked whether MIEC would agree to pay for Mr. Shaw's legal expense and I advised you that MIEC would not.
>
> It is my understanding that the Complaint must be answered 20 days from service, in this case by October 4, 1999. If your have not already done so please inform Mr. Shaw of the date you were served. As you have declined to accept the attorney selected by MIEC to represent you,

> "within its sole discretion," and retained counsel of your own choosing to represent you, coverage is withdrawn and payment of legal expenses will be your responsibility.

(Underlining in the original.)

Exhibit C was apparently not what Jou's second amended complaint (paragraph 27) alleged it was -- a September 29, 1999 letter from Jou to MIEC's president demanding a conflict-of-interest check on Hiraoka. It was, instead, a copy of an undated and unsigned letter Jou allegedly sent to Caron:

> This letter will confirm that on September 27, 1999 you have denied coverage in bad faith. I believe that your decision is based solely on considerations of your local interest, with no regard for the circumstances surrounding MIEC, this action, or the interests of your insured.
>
> It would appear that your decision is based upon a reluctance to counterclaim or raise required affirmative defenses against AIG. Further, you have waived the selection process by allowing me to pick my own attorney twice before.
>
> I am prepared to prove that MEIC [(sic)] has waived its policy position and is discriminating against attorneys willing to countersue insurance companies when necessary. You are well aware that an attorney has a duty to his client, the insured, to raise claims of bad faith, fraud and RICO as affirmative defenses, yet no one on your list is sufficiently well-versed to raise these defenses. For instance, unlike Mr. Shaw, none of your "approved" attorneys has a published appellate decision against an insurance company.
>
> Please reconsider your decision. If you choose not to provide coverage as requested you leave me no other alternative but to take legal action for coverage I am due for the many years of paying MEIC [(sic)] premiums.

Jou dubbed his second cause of action, "breach of the implied covenant of good faith and fair dealing: failure and refusal to investigate, evaluate, and respond to inquiry

regarding insurer's waiver of a policy provision" (emphatic typesetting omitted):

> 35. After the Underlying Claim was filed by A.I.G., and before Defendant refused to renew the aforesaid policy, Plaintiff physician notified the insurer that it had probably waived conditions of Part IV.5 of the policy relating to the insurer's selection of defense counsel. See Exhibit "C".
>
> 36. Rather than investigate the suggestion by its insured of a waiver of a policy provision, or provide a reasonable explanation of its position, MIEC failed and refused to respond or provide an opinion regarding the coverage question raised by its insured.

Jou termed his third cause of action, "breach of the implied covenant of good faith and fair dealing: failure and refusal to investigate, evaluate, and bad faith refusal to renew policy" (emphatic typesetting omitted):

> 38. In Hawaii, the insurer's duty of good faith and fair dealing to insureds, extends to such decisions as the signing of settlement agreements, or; as here, to MIEC's decision whether or not to renew a physician's malpractice insurance policy.
>
> 39. MIEC's duty to Plaintiff physician of good faith and fair dealing is broad and wide-ranging and extends beyond the duty-to-defend or claims context, to the policy renewal context.
>
> 40. Instead of researching, investigating, evaluating and responding to Dr. Jou's questions regarding MIEC's possible waiver, and conflicts-of-interest with respect to MIEC counsel, in the context of the insurance policy, MIEC, on November 8, 1999 notified the physician that it was not renewing his malpractice coverage under MIEC Policy No. DR 61-007031 effective February 1, 2000. This conduct was malicious, retaliatory and in breach of the implied covenant of good faith and fair dealing.

Jou's fourth and fifth causes of action, for declaratory and injunctive relief, respectively, sought class action status, alleging that "[t]he class consists of approximately 5000 individuals[,]" being "physicians who purchased renewable medical malpractice insurance policies from Defendant MIEC, for coverage in the State of Hawaii." Jou

charged that a "massive violation of the implied covenant of good faith and fair dealing" in MIEC's policy renewal decisions "endangers public health in Hawaii by fraudulently and maliciously oppressing physicians."

For his sixth cause of action, Jou alleged "interference with economic advantage" (emphatic typesetting omitted):

> 57. At all times herein, there was a reasonable likelihood of prospective economic advantage or damage to Plaintiff in that there was, and is, a likelihood of his requiring staff privileges, malpractice insurance, and provider agreements to practice his profession at the time of, and after, Defendant's unlawful interference.
>
> 58. Defendants were aware of the likelihood of said requirements and/or Defendants were aware that requirements (i.e. hospital privileges) were in place.
>
> 59. The conduct of Defendants interfered with the prospective economic advantage and caused a business and personal loss to plaintiff. In particular, as a result of MIEC's communications directly to third parties, said parties failed to consummate or continue contracts with Plaintiff including; Preferred Provider Agreements (HMSA), Staff Privilege Agreements and Malpractice Insurance Contracts. A copy of HMSA's declination is attached hereto as "D" and made a part hereof.
>
> . . . .
>
> 61. Defendants had a duty to avoid interfering with economic advantages of Plaintiff and in breach thereof, interfered, all to his damage as aforesaid.
>
> . . . .
>
> 63. The interference by Defendants was willful, intentional, and done with malice to prevent Plaintiff from obtaining economic advantages at a time when Defendants were aware that Plaintiff would require privileges, insurance agreements, and participating provider agreements. See Exhibit "D".

Exhibit D, the last exhibit to Jou's second amended complaint, was a November 27, 2000 letter from HMSA to Jou informing him that his HMSA Participating Physician Agreement would be terminated for lack of professional malpractice insurance coverage.

Jou's seventh cause of action, in its entirety, averred that, "[i]n doing the acts herein above alleged, Defendant recklessly breached its duty to hire or to contract with competent employees and agents."

Jou's eighth cause of action charged a "civil conspiracy," in which MIEC allegedly conspired with Doe defendants to retaliate against him, "as aforesaid."

Jou's ninth cause of action sought an injunction to enjoin MIEC from continuing its "retaliatory withholding of insurance" and its "misinforming other prospective insurers regarding its alleged cancellation."

Jou's tenth cause of action claimed: "In doing these acts Defendants breached their duty of care owed to Plaintiff. Defendant had a duty to avoid the aforementioned injuries to Plaintiff. By Defendant's failure to conform to the standard of conduct for insurers, Defendant breached its duty to Plaintiff."

In his eleventh cause of action, Jou sought an accounting from MIEC, which was alleged to be "a constructive trustee over the premiums received from Plaintiff." Jou maintained that "Defendant MIEC took money belonging to Plaintiff, a portion of which is now due to Plaintiff as a result of a claim." The subject claim was not identified. Moreover, "[t]he exact amounts of money involved are unknown to Plaintiff

and cannot be established without an accounting of the amounts taken by MIEC from Plaintiff."

For his "tewlveth [(sic)] cause of action[,]" Jou claimed "violations of common law right to fair procedure" (emphatic typesetting omitted):

> 81. The foregoing conduct as hereinabove alleged deprived Plaintiff of rights to fair procedure, including, without limit, notice and an opportunity to be heard prior to policy cancellation, and the right to be treated equally with other insureds.
> 82. Defendant MIEC wielded power so substantial as to significantly impair Plaintiff's ability to practice medicine or a medical specialty in a particular geographical area, thereby affecting an important substantial economic interest.

On his class action allegations, Jou prayed that MIEC "be enjoined from violating the duty of good faith and fair dealing in the renewal context[.]" On all of his other causes of action, Jou prayed for general damages, special damages and punitive damages, all "according to proof;" for an "injunction including preliminary injunction, including reinstatement of the policy;" and for an accounting. On all of his causes of action, Jou prayed for attorneys's fees and costs.

On June 13, 2001, MIEC filed a motion to deny class certification for Jou's class action allegations. On the same day, MIEC filed a motion to dismiss Jou's second amended complaint. In its motion to dismiss, MIEC first averred that Jou's second amended complaint failed to remedy the deficient factual allegations that had previously prompted the court to dismiss his first amended complaint. MIEC also reiterated its

previous arguments that the implied covenant of good faith and fair dealing was not implicated by its selection of defense counsel or by its decision not to renew the insurance policy. MIEC attached a number of exhibits to its motion to dismiss. All but one of these were letter communications among the parties and Hiraoka, attached primarily to rebut the implication in the second amended complaint (paragraph 27) that Jou had requested a conflict-of-interest check before he declined to be represented by Hiraoka.

On June 21, 2001, Jou filed his memorandum in opposition to MIEC's motion to dismiss the second amended complaint. Jou did not attach or otherwise include any exhibits or other evidence in this memorandum. MIEC filed its reply memorandum on June 22, 2001, and therein pointed out that Jou's June 21, 2001 memorandum was a mere rehashing of his previous reply memorandum in support of his cross-motion for summary judgment and his earlier memorandum in opposition to MIEC's motion to dismiss the first amended complaint. On June 22, 2001, Jou filed his memorandum in opposition to MIEC's motion to deny class certification.

On June 26, 2001, the court held a hearing on MIEC's motion to dismiss Jou's second amended complaint and on MIEC's motion to deny class certification. In the course of argument by counsel, the court noted that exhibits had been attached to the

motion to dismiss and asked MIEC's counsel, "Did that convert it to a motion for summary judgment?" MIEC's counsel replied in the affirmative and explained that the exhibits had been attached in order to elucidate the exact chronology of events in relation to Jou's request for a conflict-of-interest check.[2] Further on in the hearing, the court indicated that "only as to the first and second causes would the record before the Court be converted to a motion for summary judgment on this motion to dismiss." A little while later, however, the court implied that it was treating the motion as a motion to dismiss: "Okay. Well let's take out the letters for now. Just take those out. Let's give every inference to the facts in favor of your client." In the final analysis, it remains unclear what the court ultimately granted, a motion to dismiss or a motion for summary judgment:

> THE COURT: Well, indeed, there's no claim. So the motion to deny the class certification is granted, and the motion to dismiss is also granted on the first and second cause on two alternative bases.
>
> Having read the memo in opposition and heard the argument, the Court finds that there is failure to state a cognizable claim under any

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[2] HRCP Rule 12(b) (West 2001) provides, in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

See also Stevens v. Kirkpatrick, 82 Hawai'i 91, 93, 919 P.2d 1003, 1005 (App. 1996) ("because the circuit court considered [matters outside the pleading] in rendering its ruling, we review the court's Order of Dismissal as one granting summary judgment pursuant to HRCP Rule 56 and not a motion to dismiss pursuant to HRCP Rule 12(b)(6)" (citation omitted)).

> legal -- legally cognizable theory and alternatively on a motion for summary judgment.
>
> Taking the evidence in the light most favorable to the plaintiff, it fails to state a claim since on the basis of that evidence it's clear that the inquiry regarding "conflict of interest" occurred after the decision to decline representation by the attorney that the contract expressly allowed the insurance company to choose. So either way, it's granted as to those. You may prepare the order.
>
> MR. HESTER [(MIEC's counsel)]: The remaining counts remain?
>
> THE COURT: I'll grant it on all, granted on the motion to dismiss.
>
> MR. HESTER: Thank you.
>
> MR. SHAW: Excuse me, which counts are we talking about?
>
> THE COURT: All counts, motion regarding class action was brought separately, that's granted.
>
> MR. SHAW: All right.
>
> THE COURT: The basis that there's a failure to meet the requirements of the rule, and the motion to dismiss is brought on the remaining counts for failure to state cognizable legal claims when applied to the facts that are alleged.
>
> And alternatively, it's converted to a motion for summary judgment only as to the first and second and granted on that basis as well, when you take into account the letters, the exhibits that are admissible evidence, and that were argued.
>
> MR. HESTER: Thank you, Your Honor. I'll prepare the order.

On July 3, 2001, the court filed its written order granting MIEC's motion to deny class certification. That same day, the court filed its written order granting MIEC's motion to dismiss Jou's second amended complaint. Final judgment was rendered on July 27, 2001, "dismissing all claims asserted in the Complaint in this action." Jou filed his timely notice of this appeal on July 31, 2001.

II. Standards of Review.

A. Motion to Dismiss.

Review of a motion to dismiss "is based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to the plaintiff. Dismissal

is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Norris v. Hawaiian Airlines, Inc., 74 Haw. 235, 240, 842 P.2d 634, 637 (1992) (citation and internal quotation marks and block quote format omitted). Such a review is a matter of law:

> We review the trial court's [conclusions of law] *de novo* under the right/wrong standard. Raines v. State, 79 Hawai'i 219, 222, 900 P.2d 1286, 1289 (1995). "Under this . . . standard, we examine the facts and answer the question without being required to give any weight to the trial court's answer to it." State v. Miller, 4 Haw. App. 603, 606, 671 P.2d 1037, 1040 (1983). See also Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 119, 839 P.2d 10, 28, reconsideration denied, 74 Haw. 650, 843 P.2d 144 (1992). Thus, a [conclusion of law] "is not binding upon the appellate court and is freely reviewable for its correctness." State v. Bowe, 51, 53, [(sic)] 77 Hawai'i 51, [53,] 881 P.2d 538, 540 (1994) (citation omitted).

Brown v. Thompson, 91 Hawai'i 1, 8, 979 P.2d 586, 593 (1999) (citations and internal block quote format omitted, ellipsis and some brackets in the original). In addition:

> "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." Giuliani v. Chuck, 1 Haw. App. 379, 385, 620 P.2d 733, 737 (1980). 5 Wright and Miller, Federal Practice and Procedure: Civil § 1357 (1969).
>
> However, in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged. 5 Wright and Miller, supra, § 1357.

Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985).

B. Motion for Summary Judgment.

We review *de novo* a circuit court's grant or denial of a motion for summary judgment. Hawaii Community Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000).

Accordingly,

> [o]n appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Pancakes of Hawaii, Inc. v. Pomare Properties Corp., 85 Hawai'i 286, 291, 944 P.2d 83, 88 (App. 1997) (citation and internal block quote format omitted). See also HRCP Rule 56(c) (West 2001).[3]

On a motion for summary judgment, a fact is material "if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Crichfield v. Grand Wailea Co., 93 Hawai'i 477, 482-83, 6 P.3d 349, 354-55 (2000) (citations and internal quotation marks and block quote format omitted). "To create a genuine issue as to any material fact a question of fact presented under a conflict in the affidavits as to a particular matter must be of such a nature that it would affect the result." Richards v. Midkiff, 48 Haw. 32, 39, 396 P.2d 49,

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[3] HRCP Rule 56(c) (West 2001) provides, in pertinent part:

> The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

54 (1964) (citation and internal quotation marks omitted).

In reviewing a circuit court's grant or denial of a motion for summary judgment, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion[,]" Crichfield, 93 Hawai'i at 483, 6 P.3d at 355 (original brackets, citations and internal quotation marks and block quote format omitted), and "any doubt concerning the propriety of granting the motion should be resolved in favor of the non-moving party." GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 521, 904 P.2d 530, 535 (App. 1995) (citations omitted), aff'd and modified, 80 Hawai'i 118, 905 P.2d 624 (1995).

Similarly,

> [c]ourts will treat the documents submitted in support of a motion for summary judgment differently from those in opposition. Although they carefully scrutinize the materials submitted by the moving party to ensure compliance with the requirements of Rule 56(e), HRCP (1990), the courts are more indulgent towards the materials submitted by the non-moving party. 10A C. Wright, A. Miller and M. Kane, Federal Practice and Procedure: Civil § 2738 (1983) (Wright and Miller). This is because of the drastic nature of summary judgment proceedings, which should not become a substitute for existing methods of determining factual issues. Snider v. Snider, 200 Cal. App.2d 741, 19 Cal. Rptr. 709 (1962).
>
> Affidavits in support of a summary judgment motion are scrutinized to determine whether the facts they aver are admissible at trial and are made on the personal knowledge of the affiant. Also, ultimate or conclusory facts or conclusions of law are not to be utilized in a summary judgment affidavit. Wright and Miller, supra.

Miller v. Manuel, 9 Haw. App. 56, 66, 828 P.2d 286, 292 (1991).

"Once the movant has satisfied the initial burden of showing that there is no genuine issue of material fact, the

opposing party must come forward, through affidavit or other evidence, with specific facts showing that there is a genuine issue of material fact." Id. at 65, 828 P.2d at 292 (citation omitted). If the non-moving party fails to meet this burden, the moving party is entitled to summary judgment as a matter of law. Hawaii Broadcasting Co., Inc. v. Hawaii Radio, Inc., 82 Hawai'i 106, 112, 919 P.2d 1018, 1024 (App. 1996); Hall v. State, 7 Haw. App. 274, 284, 756 P.2d 1048, 1055 (1988). See also HRCP Rule 56(e) (West 2001).[4]

In deciding a motion for summary judgment, a circuit court must keep in mind an important distinction:

> A judge ruling on a motion for summary judgment cannot summarily try the facts; his [or her] role is limited to applying the law to the facts that have been established by the litigants' papers. Therefore, a party moving for summary judgment is not entitled to a judgment merely because the facts he offers appear more plausible than those tendered in opposition or because it appears that the adversary is unlikely to prevail at trial. This is true even though both parties move for summary judgment. Therefore, if the evidence presented on the motion is subject to conflicting interpretations, or reasonable men [and women] might differ as to its significance, summary judgment is improper. [Citations omitted.]

Kajiya v. Department of Water Supply, 2 Haw. App. 221, 224, 629 P.2d 635, 638-39 (1981) (some brackets in the original; internal block quote format omitted) (quoting 10 Wright and Miller,

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[4] HRCP Rule 56(e) (West 2001) provides, in relevant part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Federal Practice and Procedure: Civil § 2725 (1973)).

In general, "summary judgment must be used with due regard for its purpose and should be cautiously invoked so that no person will be improperly deprived of a trial of disputed factual issues." Miller, 9 Haw. App. at 65-66, 828 P.2d at 292 (brackets, citation and internal quotation marks omitted).

III. Discussion.

A. The First Three Causes of Action of the Second Amended Complaint.

Because it remains unclear whether the court considered MIEC's motion to dismiss Jou's second amended complaint as such or as a motion for summary judgment, for purposes of disposition we review the court's dismissal of the first three causes of action of Jou's second amended complaint under the standard of review more favorable to Jou and hence, as an order granting a motion to dismiss. Even under the more favorable standard of review -- "based on the contents of the complaint, the allegations of which we accept as true and construe in the light most favorable to [Jou]" -- we believe the court's dismissal of the three causes of action was proper because "it appears beyond doubt that [Jou] can prove no set of facts in support of his claim[s] which would entitle him to relief." Norris, 74 Haw. at 240, 842 P.2d at 637 (citation and internal quotation marks and block quote format omitted). As will be revealed, infra, all of

the remaining causes of action of Jou's second amended complaint were merely derivative of the first three.

From what we can apprehend of Jou's arguments on appeal, and from our scrutiny of his second amended complaint, we believe that Jou's first three causes of action asserted, and were wholly dependent upon, two basic charges of bad faith and unfair dealing on the part of MIEC. See Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120, 132, 920 P.2d 334, 346 (1996) ("we hold that there is a legal duty, implied in a first- and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action"). First, that the implied covenant of good faith and fair dealing was breached by MIEC's refusal to respond to Jou's inquiries regarding a possible waiver of its right to select defense counsel and a possible conflict of interest on the part of the defense counsel it selected. Second, that the implied covenant of good faith and fair dealing was breached when MIEC decided not to renew Jou's insurance coverage, in retaliation for his inquiries regarding waiver and conflict of interest.

As to the first, we observe that MIEC had a contractual right to select defense counsel in its sole discretion. As the insurance policy stated, "Insured agrees to be represented in the civil lawsuit . . . by legal counsel appointed or approved by

MIEC within its sole discretion[.]" (Bold typesetting omitted.) The supreme court has confirmed that "the best result is to refrain from interfering with the insurer's contractual right to select counsel[.]" Finley v. Home Ins. Co., 90 Hawai'i 25, 31, 975 P.2d 1145, 1151 (1998) (footnote omitted). The supreme court explained:

> This comports with the general rule. Because of their financial stake in effective claims resolution, insurers have a contractual right to control their insureds' defenses. Insurers can best ensure adequate representation at a reasonable cost by controlling their insureds' defense, and the best way for insurers to control defense is to select their insureds' attorneys.

Id. at 32 n.9, 975 P.2d at 1152 n.9 (ellipsis, citation and internal quotation marks omitted). See also Delmonte v. State Farm Fire and Casualty Co., 90 Hawai'i 39, 53, 975 P.2d 1159, 1173 (1999). Accordingly, although the insured has the right to reject the insurer's choice of defense counsel and to select his or her own defense counsel, the insured has no right in that event to require the insurer to pay. Finley, 90 Hawai'i at 35, 975 P.2d at 1155 ("If the insured chooses to conduct its own defense, the insured is responsible for all attorneys' fees related thereto."); Delmonte, 90 Hawai'i at 53, 975 P.2d at 1173.

Having thus, the unfettered discretion to select defense counsel, MIEC was under no contractual obligation to

respond to Jou's inquiries regarding waiver of that right.[5] While MIEC's refusal to respond may have been, at worst, unaccommodating, it was not contractually actionable. Nor was it tortious bad faith or unfair dealing. MIEC afforded Jou the very protection and security he sought to gain by purchasing his insurance policy -- the free services of defense counsel selected by MIEC, or the services of defense counsel of his own choice to be paid for by himself, at his option -- and Jou made no cognizable allegation that MIEC's failure to respond to his inquiries regarding waiver in any wise derogated that protection

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[5] We also note that the general conditions of the insurance policy indicated that waiver of any provision of the policy could only be accomplished via formal endorsement or policy declaration:

> **13. WAIVER**
> Notice to any representative of MIEC, or knowledge possessed by any representative or person employed by or related to MIEC, shall not constitute a waiver or a change of any part of this **policy**, or preclude MIEC from asserting any right under the terms of this **policy**, nor shall the terms of this **policy** be deemed to be waived or changed by virtue of any representation or written or oral statement by MIEC, its employees or representatives, except as such waiver or change may be described by MIEC in an **endorsement or policy declaration** issued to **Insured**.

(Bold typesetting in the original.) See also Hawaii Revised Statutes § 431:10-220 (1993):

> (a) No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.
> (b) No insurer or its representatives shall make any insurance contract or agreement relative thereto that is not plainly expressed in the policy.
> (c) The requirements of this section shall not apply to the granting of additional benefits to all policyholders of the insurer, or a class or classes of them, which do not require increases in premium rates or reduction or restrictions of coverage.

or security. Best Place, 82 Hawai‘i at 132, 920 P.2d at 346 ("The implied covenant [of good faith and fair dealing] is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance." (Citation and internal quotation marks omitted.)). Under the circumstances of this case, MIEC's failure to respond to Jou's inquiries regarding waiver of its right to select defense counsel was, as a matter of law, simply not actionable under any theory of liability.

As for MIEC's failure to respond to Jou's inquiries about a possible conflict of interest on the part of its defense counsel, we believe Jou's inquiries were misdirected. For it was the responsibility of defense counsel, and not MIEC, to ensure compliance with the dictates of professional responsibility:

> We note that insurers may foreseeably assert a contractual right to "control" the litigation. However, while the insurer may have a contractual right to select defense counsel, the insurer's desire to limit expenses must yield to the attorney's professional judgment and his or her responsibility to provide competent, ethical representation to the insured. Whatever the rights and duties of the insurer and the insured under the insurance contract, that contract does not define the ethical responsibilities of the lawyer to his client.

Finley, 90 Hawai‘i at 34, 975 P.2d at 1154 (footnote, citation and some internal quotation marks omitted). See also Hawai‘i Rules of Professional Conduct (HRPC), passim (West 2002). For the same reason, Jou's allegations of actionable wrongdoing were premature:

> If the duties prescribed by the HRPC are not followed by retained

> counsel, various remedies exist to protect the insured. These remedies include: (1) an action against the attorney for professional malpractice; (2) an action against the insurer for bad faith conduct; and (3) estoppel of the insurer to deny indemnification. [Insurer] argues that these remedies are adequate to deter unethical conduct on the behalf of the insurer and retained counsel. We agree with [Insurer] on this point.

Finley, 90 Hawai‘i at 35, 975 P.2d at 1155. Accordingly, under the circumstances of this case, and regardless of whether Jou made his inquiries about a possible conflict of interest before or after he rejected MIEC's choice of defense counsel, MIEC's failure to respond was, as a matter of law, not actionable under contract, under tortious bad faith and unfair dealing, or under any other theory of liability.

With respect to Jou's second basic allegation, it is clear that, in the absence of an express policy provision to the contrary, MIEC had no legal duty to renew Jou's insurance coverage. Kapahua v. Hawaiian Ins. & Guar. Co., Ltd., 50 Haw. 644, 645, 447 P.2d 669, 670 (1968) (relying in part upon the predecessor statute to Hawaii Revised Statutes § 431:10-220 (1993), to the effect that all terms of an insurance contract must be in writing, and holding that, because "the insured is charged with knowledge of the stated expiration date, neither the insurer nor its agent has a legal duty to give notice of expiration or to renew the policy automatically"). To be sure, MIEC had no duty in good faith and fair dealing to renew Jou's insurance coverage, for under the circumstances of this case, Jou

lost all protection and security interests such a duty is meant to preserve when his coverage expired. Best Place, 82 Hawai‘i at 132, 920 P.2d at 346 ("The implied covenant [of good faith and fair dealing] is breached, whether the carrier pays the claim or not, when its conduct damages the very protection or security which the insured sought to gain by buying insurance." (Citation and internal quotation marks omitted.)). Because the insurer's duty of good faith and fair dealing is, at least at this point in the development of the law, circumscribed by the contractual relationship with the insured created by the insurance policy, id. at 125 n.7, 920 P.2d at 339 n.7, at the point at which that relationship no longer obtains, as at the expiration of the policy period in this case, the insurer's duty likewise ceases to exist. Under the circumstances of this case, MIEC was no longer duty-bound to Jou, and was legally estranged from him, when the insurance policy expired, Jou's continuing attempts to conjure a bad faith claim notwithstanding. There being thus no duty to renew in good faith, MIEC's refusal to renew, even if retaliatory, was at worst spiteful and ill-mannered, but not actionable under any cognizable legal theory.

We conclude, based upon the contents of the second amended complaint, the allegations of which we accept as true and construe in the light most favorable Jou, that it appears beyond doubt that Jou can prove no set of facts in support of the first

three causes of action of his second amended complaint which would entitle him to relief, and that the court's dismissal of those claims was therefore proper. Norris, 74 Haw. at 240, 842 P.2d at 637.

B. The Remaining Causes of Action of the Second Amended Complaint.

As MIEC points out in its answering brief, Jou's opening brief fails to present specific arguments on the remaining causes of action of the second amended complaint. MIEC argues that the court's dismissal of them should therefore be affirmed.

Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) (West 2001) provides:

> (b) *Opening Brief.* Within 40 days after the filing of the record on appeal, the appellant shall file an opening brief, containing the following sections in the order here indicated:
> . . . .
> (7) The argument, containing the contentions of the appellant on the points presented and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on. The argument may be preceded by a concise summary. Points not argued may be deemed waived.

The supreme court has reiterated the well-established policy behind the rule:

> Furthermore, the appellant, not having properly briefed the motley array of questions stated and advanced, cannot with reason expect the appellate court to make a painstaking survey of them in order to cull unimportant questions and determine the crucial ones, nor has he the right to cast upon it his burden of studying the record and authorities to essay the essential to the maintenance of the appeal and its efficient prosecution.

Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 159, 434 P.2d

516, 518 (1967) (internal quotation marks, block quote format and citation omitted) (elucidating supreme court Rule 3(b)(5), a predecessor to HRAP Rule 28(b)(7)). Furthermore, the rule

> requires specific arguments which demonstrate to this court, why a particular viewpoint should be adopted. Anything less can only be an imposition upon the court. Throughout its entire argument, the appellant has cast the burden on this court to ascertain the grounds of its objection to the trial court's findings of facts and conclusions of law. Counsel have no right to cast the burden on the court of searching through a voluminous record to find the ground of his objection and where the errors complained of are not squarely presented by the bill of exceptions, as in this exception, we shall follow the practice of this court and refuse to consider them.
>
> . . . .
>
> Close scrutiny of the appellant's opening brief reveals only generalities and assertions amounting to mere conclusions of law. Where arguments in a brief are unsupported by citations of authorities, this court will not ordinarily search out authorities, and will assume that counsel, after diligent search, had been unable to find any supporting authority.
>
> Appellant has the burden of sustaining his allegations of error against the presumption of correctness and regularity that attend the decision of the lower court. [T]he burden of showing error is on the plaintiffs in error. We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance.
>
> Appellant has not answered appellee's contentions as to the deficiencies of its opening brief, and has failed to file a reply brief.
>
> We are of the opinion that appellant's failure to observe the requirements of the rules of this court in its opening brief merits dismissal of the appeal.

Id. at 158-59, 434 P.2d at 518 (original ellipsis, internal quotation marks and citations omitted).

Here, Jou did file a reply brief. Jou's response to MIEC's HRAP Rule 28(b)(7) argument follows, in its entirety:

> D. **Appellant's Remaining Claims Hinged On A Preliminary Finding By The Trial Court**
>
> 1. Class Action Was Derivative
>
> The court ruled below "well, indeed there's no claim. So the motion ignore scribble [(sic) to] deny the class certification is granted." If the Circuit Court's decision on the claim is reversed, the

> class action count will be revived. Appellee's argument re numerosity is not supported by this record. The Circuit Court nonetheless understood that the class includes those physicians whose policies are being renewed.
>
> 2. Claims For Interference, Reckless Supervision, Civil Conspiracy Injunction [(sic)], Negligence, Accounting And For Fair Procedure Were Derivative
>
> [Answering Brief] pages 21-26 all relate to or derive from Appellee's conduct leading up to and including its decision not to renew the policy. Appellant Dr. Jou contends that MIEC policy is to make the policy renewal decision in all of its medical malpractice policies unfettered by the duty of good faith and fair dealing.
>
> The Interference, Reckless Supervision and Civil Conspiracy counts are based on MIEC's agents or employees contacting third parties to inform them that the Appellant's malpractice policy would not be renewed.
>
> The Injunction claim was directed to the non-renewal decision, as were the claims for Negligence, Accounting and Fair Procedure.
>
> Given the common factual theme to all of these claims, the Circuit Court did not address them.

Reply Brief at 5-6 (underlining and bold typesetting in the original; citations to the record omitted).

Clearly, Jou's arguments on the remaining causes of action of his second amended complaint remain "only generalities and assertions amounting to mere conclusions of law[,]" Ala Moana Boat Owners' Ass'n, 50 Haw. at 158, 434 P.2d at 518, and we have no reasonable choice but to affirm the court's dismissal of the remaining causes of action. What is more, Jou's reply brief confirms that his remaining causes of action were wholly parasitic on his first three causes of action. When the host dies, its parasites generally follow. Because we have concluded that the first three causes of action were indeed moribund, the remaining ones must also expire.

C. The Order Denying Jou's Cross-Motion for Summary Judgment.

The bulk of Jou's arguments on appeal regarding the implied covenant of good faith and fair dealing are made, not in connection with his second amended complaint, but in protest of the court's denial of his cross-motion for summary judgment, which he brought upon his first amended complaint. This is curious, because the final judgment Jou appeals was predicated upon the court's dismissal of his second amended complaint, which, in turn, was ostensibly filed to cure the deficient factual allegations that led the court to dismiss the first amended complaint. Indeed, as the court stated at hearing, Jou's counsel conceded at hearing that the factual allegations of the first amended complaint were insufficient to state a cause of action. Hence, how the first amended complaint could nonetheless support summary judgment is a perfect ponder. Our independent review and comparison of Jou's first and second amended complaints confirm that the former was merely an inchoate form of the latter, and we have here concluded that the latter still could not state a cognizable claim. Besides, the essential argument in Jou's cross-motion for summary judgment was nothing more than a chronological catalogue of the pertinent events, which culminated in MIEC's refusal to renew Jou's insurance coverage and its alleged dissemination of that decision. The

merely temporal was here, not substantively conclusive. As we have stated, "in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Marsland, 5 Haw. App. at 474, 701 P.2d at 186 (citation omitted). If Jou's allegations, exhibits and merely conclusory arguments were insufficient to state a cause of action, they were *a fortiori* insufficient to support a summary judgment. We believe that Jou's arguments on appeal with respect to the court's denial of his cross-motion for summary judgment are without merit.

IV. Conclusion.

The court's July 27, 2001 final judgment is affirmed.

DATED: Honolulu, Hawaii, May 30, 2003.

On the briefs:

Stephen M. Shaw,
for plaintiff-appellant.

Acting Chief Judge

George W. Playdon, Jr.,
Jeffrey K. Hester,
(Reinwald O'Connor
& Playdon LLP)
for defendant-appellee.

Associate Judge

Associate Judge