

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27091

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

HILDA COOPER, as next friend of Natasha Cooper, a minor, George Cromack, D.C.; Joel Grimwood, D.C.; Scott McCaffrey, M.D., Plaintiffs-Appellees, v. LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts Corporation, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE FIRST CIRCUIT
HONOLULU DIVISION
(Civ. No. 1RC04-1-2950)

NOEMA T. YARA
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

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FILED

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Fujise, J.)

Defendant-Appellant Liberty Mutual Insurance Company (Liberty Mutual) appeals from the January 7, 2005 judgment of the District Court of the First Circuit (district court)¹ awarding attorney's fees and costs to Hilda Cooper, as next friend of Natasha Cooper (Natasha); a minor; George Cromack, D.C. (Dr. Cromack); Joel Grimwood, D.C. (Dr. Grimwood); and Scott McCaffrey, M.D. (Dr. McCaffrey) (collectively, Plaintiffs).

On appeal, Liberty Mutual argues that the award of attorney's fees and costs should be set aside because: (1) the district court erred by refusing to give full effect to matters deemed admitted pursuant to District Court Rules of Civil Procedure (DCRCP) Rule 36; (2) the award of attorney's fees included fees for time accrued after the denials of personal injury protection (PIP) benefits were rescinded; (3) Plaintiffs did not meet the requirements for an award of attorney's fees because they failed to prove that any benefits were actually due under the contract; (4) the court should not have awarded the costs of the reports prepared by named parties; and (5) the fees charged for the reports are in excess of the statutory cap.

¹ The Honorable Christopher P. McKenzie presided.

Upon careful consideration of the issues raised, arguments advanced, the authority cited and the record in this case, we resolve Liberty Mutual's appeal as follows:

1. Liberty Mutual's challenge to the judgment based on the district court's refusal to deem admitted the matters in the Request for Admissions under DCRCP Rule 36,² or, in the alternative, to allow Liberty Mutual opportunity to prove Plaintiffs' claim was excessive, fraudulent, or frivolous fails because the matters in its request for admissions called for legal conclusions and were therefore outside the scope of the rule authorizing the requests. See Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth., 234 F.R.D. 1, 3 (D.D.C. 2006).

Moreover, Liberty Mutual failed to preserve the claim of prejudice. Liberty Mutual did not ask the district court for an opportunity to reopen its case nor did it seek reconsideration on this basis. See In re Tax Appeal of Trade Wind Tours of Hawaii, Inc., 6 Haw. App. 260, 266, 718 P.2d 1122, 1127 (1986) (fact that party did not seek continuance to obtain evidence mitigates against finding of prejudice due to reliance on binding effect of a request for admissions). Having failed to preserve this argument below, Liberty Mutual has waived the argument on appeal. County of Kaua'i v. Baptiste, 115 Hawai'i 15, ___ n.23, 165 P.3d 916, 943 n.23 (2007).

2. Plaintiffs could be awarded attorney's fees because plaintiffs may be awarded attorney's fees and costs in suits brought to secure PIP benefits even if they fail to prove

² District Court Rules of Civil Procedure Rule 36(a) states in relevant part:

A party may serve upon any other party a written request for the admission of the truth of any matters within the scope of Rule 26(b) set forth in the request that relates to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

benefits were due under the contract. Hawaii Revised Statutes (HRS) §§ 431:10C-211(a)³ and 431:10C-304(5)⁴ (2005); Iaea v. TIG Ins. Co., 104 Hawai'i 375, 380, 90 P.3d 267, 272 (App. 2004). Here, the district court specifically determined that Plaintiffs were the prevailing parties.

3. The award of attorney's fees for attorney time expended after the denials of PIP benefits were rescinded was not an abuse of discretion. Plaintiffs' attorney was obliged to continue working on the case even after Liberty Mutual rescinded its denial of Natasha's PIP benefits as Liberty Mutual continued its defense in the case, including its request for admissions delivered to Plaintiffs' counsel, after the denials of coverage were rescinded. Indeed, Liberty Mutual continues to contest Plaintiffs' underlying claim on appeal with its arguments that the district court should have deemed Plaintiffs' claim frivolous and that the Plaintiffs failed to prove that the PIP benefits were "due under the contract."

³ Hawaii Revised Statutes (HRS) § 431:10C-211(a) (2005) states:

Attorney's Fees. (a) A person making a claim for personal injury protection benefits may be allowed an award of a reasonable sum for attorney's fees, and reasonable costs of suit in an action brought by or against an insurer who denies all or part of a claim for benefits under the policy, unless the court upon judicial proceeding or the commissioner upon administrative proceeding determines that the claim was unreasonable, fraudulent, excessive, or frivolous. Reasonable attorney's fees, based upon actual time expended, shall be treated separately from the claim and be paid directly by the insurer to the attorney.

⁴ HRS § 431:10C-304(5) (2005) states:

(5) No part of personal injury protection benefits paid shall be applied in any manner as attorney's fees in the case of injury or death for which the benefits are paid. The insurer shall pay, subject to section 431:10C-211, in addition to the personal injury protection benefits due, all attorney's fees and costs of settlement or suit necessary to effect the payment of any or all personal injury protection benefits found due under the contract. Any contract in violation of this provision shall be illegal and unenforceable. It shall constitute an unlawful and unethical act for any attorney to solicit, enter into, or knowingly accept benefits under any contract;

4. Liberty Mutual has failed to show the district court abused its discretion by awarding amounts for the doctors' reports as "costs." Reasonable costs are authorized by HRS § 431:10C-211 and the district court found the reports "reasonable and necessary" to the pursuit of Natasha's claim with Liberty Mutual. To the extent the doctors were named as parties to this suit, they were parties also entitled to attorneys' fees and costs for challenging the denial of PIP benefits. Gov't Employees Ins. Co. v. Hyman, 90 Hawai'i 1,7-8, 975 P.2d 211, 217-18 (1999) ("Because . . . [health care provider] Dr. Hyman has standing under HRS § 431:10C-212(a) (1993) to contest GEICO's denial of benefits, he is entitled to attorneys fees and costs under HRS §431:10C-211(a)").

5. Finally, the award of costs for the doctors' reports was not limited by HRS § 431:10C-308.5(g) (2005)⁵, which applies to reports prepared to document the need for treatment that exceeds the worker's compensation fee schedule. Liberty Mutual's argument that this limitation applies to any report prepared to rebut an Independent Medical Examination (IME) because the IME sets the limit of the fee schedule is unsupported by any authority.

Having sustained the district court on the points raised by Liberty Mutual, we are nevertheless compelled to note that there was no substantiation offered for Plaintiffs' claim for photocopies and facsimiles and thus, the award of these costs was plain error of which we must take notice. See Tortorello v. Tortorello, 113 Hawai'i 432, 444-45, 153 P.3d 1117, 1129-30 (2007) (grave error to award \$9.71 in unsubstantiated postage

⁵ HRS § 431:10C-308.5(g) (2005) states:

(g) A health care provider shall be compensated by the insurer for preparing reports documenting the need for treatments which exceed the workers' compensation supplemental medical fee schedule in accordance with the fee schedule for special reports. The health care provider may assess the cost of preparing a report to the insurer at no more than \$20 per page up to a maximum of \$75 for each report.

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costs). Finally, although the court awarded \$50.00 for service of documents, HRS § 607-4(d)(2) (Supp. 2006) provides only \$25.00 for the service of a civil summons.⁶

Therefore,

IT IS HEREBY ORDERED that the District Court of the First Circuit's January 7, 2005 judgment is amended to provide for \$865.00 in costs. In all other respects, the judgment is affirmed.

DATED: Honolulu, Hawai'i, October 11, 2007.

On the briefs:

Kevin P.H. Sumida and
Anthony L. Wong,
(Sumida & Tsuchiyama),
for Defendant-Appellant.

William Copulos and
Michael P. Healy,
for Plaintiffs-Appellees.

Arumie Ka Watanabe
Presiding Judge

James R. Foley
Associate Judge

Aunani H. Frijoles
Associate Judge

⁶ The District Court of the First Circuit's award of \$120.00 for filing fees is also unsubstantiated. These awards are proper, because filing fees are considered self evident. See Kamalu v. Paren, Inc., 110 Hawai'i 269, 279, 132 P.3d 378, 388 (2006).