NO. 26929

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

THE HAWAIIAN INSURANCE & GUARANTY COMPANY, LIMITED,
a Hawaii Corporation, as Subrogee of MARY LAURA KIMM,
Plaintiff-Appellant,
v.
DORIS ANN McDONALD-WEBSTER,
JOHN DOES 1-10, DOE CORPORATIONS 1-10,
DOE ENTITIES 1-10, AND DOE GOVERNMENTAL ENTITIES 1-10,
Defendant-Appellee

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT
PUNA DIVISION
(CIVIL NO. 02-0467PN)

MEMORANDUM OPINION
(By: Foley, Presiding Judge, Nakamura, and Fujise, JJ.)

This case arises out of an automobile accident in which a car driven by Tane Kimm collided with a car driven by Defendant-Appellee Doris Ann McDonald-Webster (McDonald-Webster). Dusty Boyer (Boyer) was a passenger in McDonald-Webster's car and was injured in the accident. The car driven by Tane Kimm was owned by his mother, Mary Kimm, and insured by Plaintiff-Appellant Hawaiian Insurance & Guaranty Company, Limited (HIG).

On behalf of the Kimms, HIG entered into a settlement agreement with Boyer. HIG paid Boyer $25,000 to settle his personal injury claims and obtained Boyer's release of any and all claims he had against Tane Kimm, Mary Kimm, *and McDonald-Webster* arising out of the accident. HIG did not seek a judicial determination that the settlement was in good faith, and McDonald-Webster did not consent to her inclusion in Boyer's release.

HIG subsequently filed a complaint against McDonald-Webster alleging that her negligence had caused or contributed to the accident. HIG further alleged that it was "entitled to

contribution, subrogation, and/or indemnity from [McDonald-Webster] for the amounts it paid to [Boyer] on behalf of [McDonald-Webster]," and for amounts it paid to Mary Kimm for damage to her vehicle.[1]

McDonald-Webster filed a motion for summary judgment with respect to HIG's claim for recovery of amounts it paid to Boyer. The District Court of the Third Circuit (district court)[2] granted McDonald-Webster's motion for summary judgment. The district court concluded that Hawaii Revised Statutes (HRS) § 663-15.5 (Supp. 2001) barred HIG's claim for contribution and indemnity against McDonald-Webster because: 1) McDonald-Webster had been included in the release signed by Boyer; and 2) HIG had not obtained a judicial determination that HIG's settlement with Boyer had been in good faith. The district court further concluded that HIG was not entitled to make a claim for equitable subrogation.

HIG appeals from the Final Judgment (Judgment) filed on October 15, 2004, in favor of McDonald-Webster. The Judgment incorporated the district court's order granting McDonald-Webster's motion for summary judgment and also awarded McDonald-Webster $489.55 in attorney's fees and $1,084.46 in costs.

On appeal, HIG asserts that the district court erred by: 1) granting McDonald-Webster's motion for summary judgment; and 2) awarding McDonald-Webster $1,084.46 in costs. For the reasons discussed below, we vacate the district court's Judgment and remand for further proceedings consistent with this opinion.

I.

The district court's grant of summary judgment was mainly based on its conclusion that HRS § 663-15.5 barred HIG's claim for contribution and indemnity against McDonald-Webster.

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[1] HIG agreed to submit its claim for recovery of amounts it paid to Mary Kimm to arbitration after McDonald-Webster moved to compel arbitration on that claim. HIG's claim related to Mary Kimm was dismissed without prejudice, and neither that claim nor its dismissal is implicated in this appeal.

[2] The Honorable Matthew S.K. Pyun presided.

HIG argues that the district court erred in relying on HRS § 663-15.5 in granting summary judgment against HIG. We agree that the district court's reliance on HRS § 663-15.5 was in error, but for different reasons than proffered by HIG.[3] We conclude that HRS § 663-15.5 applies to protect a settling joint tortfeasor against a claim for contribution or indemnity brought by a nonsettling tortfeasor, provided that the settling joint tortfeasor obtains a judicial determination that his or her settlement with the injured party was made in good faith. HRS § 663-15.5, however, does not apply to bar a settling joint tortfeasor (i.e. HIG) who has obtained the release of claims against the nonsettling tortfeasor (i.e. McDonald-Webster) from seeking contribution or indemnity from the nonsettling tortfeasor. Thus, the district court erred in relying on HRS § 663-15.5 in granting summary judgment against HIG.

At the time of HIG's settlement with Boyer, HRS § 663-15.5 (Supp. 2001) provided, in relevant part:

> **§ 663-15.5 Release; joint tortfeasors; co-obligors; good faith settlement.**
>
> (a) A release, dismissal with or without prejudice, or a covenant not to sue or not to enforce a judgment that is given in good faith under subsection (b) to one or more joint tortfeasors, or to one or more co-obligors who are mutually subject to contribution rights, shall:
>
> (1) Not discharge any other party not released from liability unless its terms so provide;
>
> (2) Reduce the claims against the other party not released in the amount stipulated by the release, dismissal, or covenant, or in the amount of the consideration paid for it, whichever is greater; and

[3] HIG contends that when it obtained a complete release from Boyer of his claims against all parties to the accident, HIG's insureds were no longer joint tortfeasors with McDonald-Webster but that HIG became subrogated to the rights of Boyer. HIG thus argues that its claim for recovery against McDonald-Webster is based on subrogation, not contribution, and thus HRS § 663-15.5 does not apply. In particular, HIG asserts that HRS § 663-15.5 does not apply to bar its right of subrogation, and that under a subrogation theory, it is entitled to recover from McDonald-Webster all amounts Boyer would have been able to recover from McDonald-Webster for her negligence in the accident. We disagree with HIG that Boyer's release of all his claims meant that HIG's insureds were no longer joint tortfeasors with McDonald-Webster. We discuss HIG's claim for equitable subrogation infra.

> (3) Discharge the party to whom it is given from all liability for any contribution to any other party.
>
> This subsection shall not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves.
>
> (b) For purposes of subsection (a), a party shall petition the court for a hearing on the issue of good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors or co-obligors, serving notice to all other known joint tortfeasors or co-obligors. Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced.
>
> The petition shall indicate the settling parties and the basis, terms, and settlement amount.
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> Except for a settlement that includes a confidentiality agreement regarding the case or the terms of the settlement, the notice, petition, and proposed order shall be served by certified mail, return receipt requested. Proof of service shall be filed with the court. Within twenty-five days of the mailing of the notice, petition, and proposed order, a nonsettling party may file an objection to contest the good faith of the settlement. If none of the nonsettling parties files an objection within the twenty-five days, the court may approve the settlement without a hearing. An objection by a nonsettling party shall be served upon all other parties. The party asserting a lack of good faith shall have the burden of proof on that issue.
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> . . . .
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> (c) The court may determine the issue of good faith for purposes of subsection (a) on the basis of affidavits or declarations served with the petition under subsection (a), and any affidavits or declarations filed in response. In the alternative, the court, in its discretion, may receive other evidence at a hearing.
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> (d) A determination by the court that a settlement was made in good faith shall bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
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> (e) A party aggrieved by a court determination on the issue of good faith may appeal the determination. . . .
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> . . . .

(Emphases added.)[4]

[4] In 2003, the Hawai'i Legislature made "clarifying and housekeeping" amendments to HRS § 663-15.5 (Supp. 2001). Conf. Com. Rep. No. 9, in 2003 Senate Journal at 949. Among the changes made by the 2003 amendments were:

(continued...)

The purpose of HRS § 663-15.5 is to encourage settlement by protecting the *settling tortfeasor* against claims for contribution brought by the *nonsettling tortfeasor*. See Troyer v. Adams, 102 Hawai'i 399, 414, 77 P.3d 83, 98 (2003). To avail himself or herself of the protection afforded by the statute, the settling tortfeasor is required to obtain a judicial determination that the settlement was made in good faith. If the settling tortfeasor fails to obtain the court's "good faith" determination, the settling tortfeasor remains subject to claims of contribution from the nonsettling tortfeasor under HRS § 663-12 (1993).[5] In this case, HIG obtained Boyer's release of claims against all tortfeasors, including McDonald-Webster, and thus did not need the protection afforded by HRS § 663-15.5 against claims for contribution by a nonsettling tortfeasor.

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[4](...continued)
1) the substitution of the term "other joint tortfeasor or co-obligor" for "other party" in HRS § 663-15.5(a); 2) the substitution of the term "nonsettling alleged joint tortfeasor or co-obligor" for "nonsettling party" in HRS § 663-15.5(b); and 3) the revision of HRS § 663-15.5(d) to clarify that the court's determination that a settlement was made in good faith shall bar further claims against the settling tortfeasor by any other joint tortfeasor or co-obligor, except those based on a written indemnity agreement. See 2003 Haw. Sess. L. Act 146, § 1 at 343-44. The 2003 amendments to HRS § 663-15.5 did not change the statute in ways that would affect our analysis in this case.

[5] HRS § 663-12 (1993) provides:

> **§ 663-12 Right of contribution; accrual; pro rata share.**
>
> The right of contribution exists among joint tortfeasors.
>
> A joint tortfeasor is not entitled to a money judgment for contribution until the joint tortfeasor has by payment discharged the common liability or has paid more than the joint tortfeasor's pro rata share thereof.
>
> A joint tortfeasor who enters into a settlement with the injured person is not entitled to recover contribution from another joint tortfeasor whose liability to the injured person is not extinguished by the settlement.
>
> When there is such a disproportion of fault among joint tortfeasors as to render inequitable an equal distribution among them of the common liability by contribution, the relative degrees of fault of the joint tortfeasors shall be considered in determining their pro rata shares, subject to section 663-17.

HRS § 663-15.5 does not prevent a settling joint tortfeasor from seeking contribution or indemnity from the non-settling tortfeasor where the settling joint tortfeasor has paid the injured party and obtained a release of claims against the nonsettling tortfeasor. HIG's failure to obtain a judicial determination that its settlement with Boyer was in good faith simply meant that HRS § 663-15.5 did not apply to HIG's settlement with Boyer. It did not mean, as the district court erroneously concluded, that HIG (the settling joint tortfeasor) was barred from pursing its claim for contribution or indemnity against McDonald-Webster (the nonsettling tortfeasor).

The district court not only erred in applying HRS § 663-15.5 to HIG's settlement with Boyer, but the court also misconstrued HRS § 663-15.5(a)(3). The district court concluded that HRS § 663-15.5(a)(3) discharged McDonald-Webster from liability for contribution because she was included in the release that HIG has secured from Boyer. However, when read in the context of the entire statute, the reference in HRS § 663-15.5(a)(3) to "the party to whom [the release] is given" clearly means the settling joint tortfeasor. Thus under HRS § 663-15.5(a)(3), the release given to the settling joint tortfeasor who has obtained a judicial determination that the settlement was in good faith "discharge[s] [the settling joint tortfeasor] from all liability for any contribution to any other party." HRS § 663-15.5(a)(3) does not work to discharge the nonsettling tortfeasor from liability for contribution. See Robarts v. Diaco, 581 So.2d 911, 916-18 (Fla. Dist. Ct. App. 1991) (reaching same conclusion under similar statutory scheme); City of Tuscon v. Superior Court In and For County of Pima, 798 P.2d 374, 379 (Ariz. 1990) (same).

HRS § 663-15.5 did not apply to HIG's settlement with Boyer and thus the district court erred in relying on that statute to bar HIG's claims for contribution and indemnity against McDonald-Webster. Because HRS § 663-15.5 was inapplicable, HIG was entitled to seek contribution against

McDonald-Webster upon establishing that McDonald-Webster's negligence contributed to Boyer's injuries. See HRS § 663-12; Alamida v. Wilson, 53 Haw. 398, 402-404, 495 P.2d 585, 589-90 (1972) (indicating, under circumstances similar to this case, that a settling party who is a joint tortfeasor can ordinarily recover from a nonsettling tortfeasor on the theory of contribution, but applying the equitable principle of subrogation to permit recovery where the settling parties were not joint tortfeasors because they were found to be not negligent); Robarts, 581 So.2d at 916-18; City of Tuscon, 798 P.2d at 377-79.

II.

HIG argues that in granting summary judgment, the district court erred in concluding that HIG was not entitled to recovery on the theory of equitable subrogation. The district court construed Alamida v. Wilson, 53 Haw. 398, 495 P.2d 585, as holding that only a non-negligent settling party can recover on the theory of equitable subrogation. HIG disputes this interpretation of Alamida, but argues that even if equitable subrogation is limited to non-negligent settling parties, the district court should not have granted summary judgment. We conclude that the district court erred in granting summary judgment because there are genuine issues of material fact concerning HIG's equitable subrogation claim.

In Alamida, five settling defendants obtained a release from the plaintiff which ran to all defendants, including a nonsettling defendant. Id. at 399, 495 P.2d at 587. The case then became an action for contribution by the settling defendants against the nonsettling defendant. Id. After a jury trial, two of the settling defendants were found to be not negligent and the nonsettling defendant was found to be 30 percent negligent. Id. at 399, 403, 495 P.2d at 587, 589.

The Hawai'i Supreme Court held that the two non-negligent settling defendants were not entitled to recover from the nonsettling defendant on the theory of contribution. Id. at 403, 495 P.2d at 589. This was because the absence of fault on

the part of the two non-negligent settling defendants meant that they were not "joint tortfeasors" as defined by HRS § 663-11.[6] Id. Thus, they did not have the right of contribution under HRS § 663-12,[7] which gives that right to joint tortfeasors. Id. The court, however, held that the non-negligent settling defendants were entitled to recover on the equitable principle of subrogation. The court described this principle as:

> . . . broad enough to include every instance in which one party pays a debt for which another is primarily answerable, and which in equity and good conscience should have been discharged by the latter; but it is not to be applied in favor of one who has officiously, and as a mere volunteer, paid the debt of another, for which neither he nor his property was under any obligation to pay; and it is not allowed where it works any injustice to the rights of others.

Id. (quoting Kapena v. Kaleleonalani, 6 Haw. 579, 583 (1885)) (ellipses in original).[8]

As noted, the district court read Alamida as only permitting an equitable subrogation claim where the settling party was not negligent, and it concluded that "the admitted fault" of HIG's insureds barred HIG's claim for equitable subrogation. The district court's conclusion that HIG's insureds had admitted fault was based on its finding that HIG's agent had acknowledged liability on the part of Tane Kimm in a letter written to Boyer's counsel that contained a settlement offer. In

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[6] The version of HRS § 663-11 in effect when Alamida was decided is the same as the current version of the statute, HRS § 663-11 (1993), which provides as follows:

> **§ 663-11 Joint tortfeasors defined.** For the purpose of this part the term "joint tortfeasors" means two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them.

[7] The version of HRS § 663-12 in effect when Alamida was decided is almost the same as the current version of the statute, which is quoted in note 5 supra, except that the phrase "subject to section 663-17," which is at the end of the last paragraph of the current statute, was added after Alamida was decided. See 1972 Haw. Sess. L. Act 144, § 2 at 491.

[8] A result similar to Alamida was reached in West American Ins. Co. v. Yellow Cab Co. of Orlando, 495 So.2d 204 (Fla. Dist. Ct. App. 1986).

the portion of the letter relevant to the district court's finding, HIG's agent wrote:

> As you are aware, substantial liability rests with the driver of Mr. Boyer's vehicle. A settlement based on a 25% reduction in the value of the property damage was accepted. However it is our view that the potential liability exposure of the driver of Mr. Boyer's vehicle is significant and could be in excess of 50 percent.

We conclude that the above-quoted statement in the letter from HIG's agent was insufficient to establish as a matter of law that HIG's insureds were negligent in causing the accident. Thus, the district court erred in granting summary judgment on HIG's equitable subrogation claim, even under the district court's interpretation of Alamida, because there remain genuine issues of material fact as to whether HIG's insureds were negligent in causing the accident.[9]

The district court also ruled that HIG was estopped from recovering from McDonald-Webster because HIG did not act with clean hands. This ruling, however, was founded on the district court's erroneous view that HRS § 663-15.5 required HIG to seek a judicial determination that its settlement with Boyer was in good faith. We conclude that there are material factual disputes regarding whether HIG acted with unclean hands in this case. Moreover, because we conclude that HIG is entitled to raise a claim for contribution, there are genuine issues of material fact as to the apportionment of liability between McDonald-Webster and HIG's insureds.

III.

HIG disputes deposition costs awarded to McDonald-Webster. These costs were awarded to McDonald-Webster as the prevailing party in obtaining summary judgment against HIG. Because we are vacating the district court's order granting

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[9] If HIG's insureds and McDonald-Webster are both determined to be negligent in causing the accident, then HIG may recover from McDonald-Webster on the theory of contribution. See HRS § 663-12 (1993). Therefore, we need not decide whether the right to equitable subrogation set forth in Alamida extends beyond non-negligent settling parties to settling parties that are jointly negligent with the nonsettling tortfeasor.

summary judgment, we must also vacate the court's award of costs relating to its grant of summary judgment. We do not address HIG's arguments regarding the award of costs as the district court's decision to award costs may change depending upon what happens on remand.

IV.

In sum, we hold that the district court erred in granting McDonald-Webster's motion for summary judgment with respect to HIG's claim for recovery of amounts HIG paid to Boyer, and that the court's award of costs to McDonald-Webster, which was based on its grant of summary judgment, must be vacated. We vacate the district court's Judgment and remand the case for further proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, March 20, 2008.

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Presiding Judge

Associate Judge

Associate Judge