

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 28106

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Provider-Appellant, v.
 J.P. SCHMIDT, Insurance Commissioner, Department of Commerce
 and Consumer Affairs, State of Hawaii, Appellee-Appellee, and
 DAI-TOKYO ROYAL INSURANCE COMPANY, Respondent-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
 (CIVIL NO. 05-1-1053)

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Fujise and Leonard,

NORMA T. YARA
 CLERK APPELLATE COURTS
 STATE OF HAWAII

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FILED

In this secondary appeal, Plaintiff-Appellant Emerson M.F. Jou, M.D. (**Jou**) appeals from the Judgment filed in the Circuit Court of the First Circuit (**Circuit Court**) on July 18, 2006.¹ The Circuit Court ruled in favor of Insurance Commissioner J.P. Schmidt (**Commissioner Schmidt**), for the Department of Commerce and Consumer Affairs of the State of Hawaii (**DCCA**), and Dai-Tokyo Royal Insurance Company (**DTRIC**), affirming Commissioner Schmidt's Final Order filed May 12, 2005, that adopted the April 13, 2005 Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order. Jou filed a timely notice of appeal on August 16, 2006.

On appeal, Jou maintains that the Circuit Court:

- (1) erred in finding DTRIC was not required to issue a Notice of Denial after it made reduced and partial payments on his claims;
- (2) erred in finding his claim against DTRIC was moot on the grounds that claimant's no-fault benefits had already been exhausted;
- (3) erred in failing to order DTRIC to pay interest, attorney's fees and costs;

¹ The Honorable Eden Elizabeth Hifo presided.

- (4) erred in affirming erroneous Findings of Fact and Conclusions of Law; and
- (5) violated his due process and equal protection rights, and made a "regulatory taking" of his interest in balances, in violation of the Hawai'i and U.S. constitutions.

After a careful review of the record and the arguments and supporting authorities presented by the parties, we resolve Jou's points of error as follows:

Jou argues that the DCCA and the Circuit Court erred in finding that DTRIC was not required to issue a formal notice of denial of benefits pursuant to HRS § 431:10C-304(3)(B) after it made both reduced and partial payments on Jou's claims. We agree. See Jou v. Schmidt, 117 Hawai'i 477, 486, 184 P.3d 792, 801 (App. 2008) (Jou I).

We nevertheless reject Jou's argument that he was entitled to payment from DTRIC after the applicable policy limits were exhausted.^{2/} An insurer's obligation to pay no-fault personal injury protection benefits is outlined under HRS § 431:10C-304(1) (Supp. 1998), which provides in part:

For purposes of this section, the term "personal injury protection insurer" includes personal injury protection self-insurers. Every personal injury protection insurer shall provide personal injury protection benefits for accidental harm as follows:

- (1) Except as otherwise provided in section 431:10C-305(d),^{3/} in the case of injury arising out of

² As we noted in Jou v. Schmidt, 117 Hawai'i 502, 506 n.6, 184 P.3d 817, 820 n.6 (App. 2008) (Jou II), an insurer's failure to issue a formal notice may subject the insurer to potential civil penalties pursuant to HRS § 431:10C-117(b) and (c) (1993).

³ HRS § 431:10C-305(d) (Supp. 1998) provides:

- (d) The following persons are not eligible to receive payment of personal injury protection benefits:
 - (1) Occupants of a motor vehicle other than the insured motor vehicle;
 - (2) Operator or user of a motor vehicle engaging in criminal conduct which causes any loss; or
 - (3) Operator of a motorcycle or motor scooter as defined in section 286-2.

(continued...)

a motor vehicle accident, the insurer shall pay, without regard to fault, to the provider of services on behalf of the following persons who sustain accidental harm as a result of the operation, maintenance, or use of the vehicle, an amount equal to the personal injury protection benefits as defined in section 431:10C-103.5(a) payable for expenses to that person as a result of the injury:

- (A) Any person, including the owner, operator, occupant, or user of the insured motor vehicle;
- (B) Any pedestrian (including a bicyclist); or
- (C) Any user or operator of a moped as defined in section 249-1; provided that this paragraph shall not apply in the case of injury to or death of any operator or passenger of a motorcycle or motor scooter as defined in section 286-2 arising out of a motor vehicle accident, unless expressly provided for in the motor vehicle policy[.]

(Emphasis added.)

It is well-recognized that an insurer retains the right to limit its liability by the terms of its policy. In Salviejo v. State Farm Fire and Casualty Co., 87 Hawai'i 430, 434-35, 958 P.2d 552, 556-57 (App. 1998), this court held:

Our jurisdiction follows the principle that liability insurers have the same rights as individuals to limit their liability, and to impose whatever conditions they please on their obligation, provided they are not in contravention of statutory inhibitions or public policy.

Id. at 434-35, 958 P.2d at 556-57 (citation and internal quotation marks omitted); see also Crawley v. State Farm Mut. Auto. Ins. Co., 90 Hawai'i 478, 484, 979 P.2d 74, 80 (App. 1999) ("the terms of the [insurance] policy should be interpreted according to their plain, ordinary, and accepted sense in common speech unless it appears from the policy that a different meaning is intended") (citations omitted); Foote v. Royal Ins. Co. of Am., 88 Hawai'i 122, 125, 962 P.2d 1004, 1007 (App. 1998) ("so long as the policy is clear and unambiguous, and not in contravention of statutory inhibitions or public policy, the insurance policy should be enforced on its terms") (citation

³(...continued)

This subsection shall not preclude recovery in other capacities under a motor vehicle insurance policy covering a vehicle which the person did not occupy at the time of the accident.

omitted). Thus, as New York courts have also held, where "an insurer has paid the full monetary limits set forth in the policy, its duties under the contract of insurance cease." Hosp. for Joint Diseases v. State Farm Mut. Auto. Ins. Co., 8 A.D.3d 533, 534, 779 N.Y.S.2d 534, 535 (2004).

For these reasons, on the facts presented in this case, we hold that an insurer is not required, under HRS § 431:10C-304(1), to pay benefits once the full amount of the policy limits have been reached. Based on the plain language of HRS § 341:10C-304(1), DTRIC's obligation to pay no-fault/PIP benefits to its insureds is clearly limited to the amount equal to the no-fault benefits, that is, to the amount of benefits that remains available to make any payment that might be due. Once DTRIC paid the full amount of the policy limits, its obligation to pay any additional outstanding bills due to the providers was extinguished.

Jou does not dispute that the aggregate limit under DTRIC's no-fault policy in this case is \$20,000. On appeal, Jou challenges Commissioner Schmidt's conclusion of law that DTRIC therefore had no further responsibility for the bills incurred by the insured. However, Jou does not appeal the finding that the policy limits were, indeed, exhausted in this case.⁴ Therefore, we conclude that the Circuit Court did not err in rejecting Jou's claim that he was entitled to additional payment from DTRIC.

Jou also claims Commissioner Schmidt and the Circuit Court erred "by refusing to order attorney's fees, interest, and costs in [his] favor under HRS § 431:10C-304(4) and (5)."⁵

⁴ Although the agency labeled this finding as a conclusion, the accuracy of that label is freely reviewable and this factual determination will be treated as a mixed question of fact and law for the purposes of our review. See Kilauea Neighborhood Ass'n v. Land Use Comm'n, 7 Haw. App. 227, 229, 751 P.2d 1031, 1034 (1988).

⁵ HRS § 431:10C-304 (1993) provides in relevant part:

(4) Amounts of benefits which are unpaid thirty days after the insurer has received reasonable proof of the fact and the
(continued...)

Jou's reliance on HRS § 431:10C-304(4) is misplaced. Jou has failed to present any discernible argument that DTRIC failed to pay interest on any amounts that were determined to be due to him, but had remained unpaid after the expiration of the thirty-day period specified in the statute.

Similarly, although HRS § 431:10C-304(5) provides for attorney's fees and costs, such fees and costs are only available if they were incurred "to effect the payment of any or all personal injury protection benefits found due under the contract." Thus, under HRS § 431:10C-304(5), an award of attorney's fees and costs is mandatory only if a claimant prevails in a settlement or suit for no-fault benefits. See Iaea v. TIG Ins. Co., 104 Hawai'i 375, 380, 90 P.3d 267, 272 (App. 2004). Here, Jou did not prevail on his claim for no-fault benefits, and HRS § 431:10C-304(5) therefore does not support his claim for attorney's fees and costs.

Although not cited by Jou, we note that HRS § 431:10C-211(a) provides discretion to a court to award attorney's fees and costs even if the claimant is unsuccessful. See also Iaea, 104 Hawai'i at 379-83, 90 P.3d at 271-74.^{5/} Even assuming Jou had

⁵(...continued)

amount of benefits accrued, and demand for payment thereof, after the expiration of the thirty days, shall bear interest at the rate of one and one-half per cent per month;

- (5) No part of no-fault 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 no-fault benefits due, all attorney's fees and costs of settlement or suit necessary to effect the payment of any or all no-fault 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[.]

(Emphasis added.)

⁶ HRS § 431:10C-211(a) (1993) provides:

- (a) A person making a claim for no-fault benefits may be allowed
(continued...)

raised HRS § 431:10C-211(a) as the appropriate statutory authority for his claim, Jou has failed to present any cogent argument that the Circuit Court abused its discretion in declining to award him fees and costs in this case.

Jou's alternative arguments and remaining points of error are without merit. Accordingly, we affirm the Circuit Court's July 18, 2006 Judgment.

DATED: Honolulu, Hawai'i, August 27, 2008.

On the briefs:

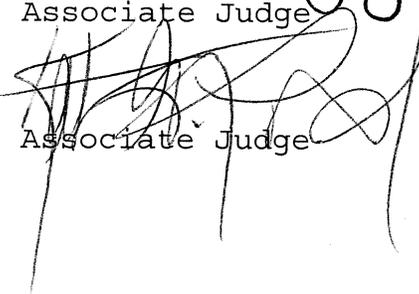
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Deborah Day Emerson
Deputy Attorneys General
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J. Patrick Gallagher
(Henderson, Gallagher & Kane)
for Respondent-Appellee.


Charles R. Foley
Presiding Judge


Awa'olu J. Iijima
Associate Judge


Associate Judge

⁶(...continued)

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.

(Emphasis added.)