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NO. 26180

IN THE SUPREME COURT OF THE STATE OF HAWAII

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EMERSON M.F. JOU, M.D., Plaintiff-Appellant

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.  
Defendant-Appellee,

and

JOHN DOE 1-50; DOE ATTORNEYS 1-50;  
DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10, and  
DOE DIRECTORS OF GOVERNMENTAL ENTITIES 1-10,  
Defendants.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 03-1-1286)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;  
and Acoba, J., Dissenting)

Plaintiff-Appellant Emerson M.F. Jou, M.D. (Dr. Jou), appeals from the October 1, 2003 final judgment (amended October 22, 2003) of the Circuit Court of the First Circuit<sup>1</sup> in favor of Defendant-Appellee First Insurance Company of Hawaii, Ltd. (First Insurance) dismissing his complaint against First Insurance for publication of, or failure to remove, harmful and false credit information about him that resulted in a denial of credit to him. On appeal, Dr. Jou argues two points of error:<sup>2</sup>

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<sup>1</sup> The Honorable Sabrina S. McKenna presided over this matter.

<sup>2</sup> Dr. Jou also contends that the circuit court's failure to recognize a cause of action constitutes an error of constitutional proportions (*i.e.*, a violation of due process and equal protection). However, Dr. Jou fails to  
(continued...)

(1) the circuit court erred by dismissing his complaint under the doctrines of res judicata and collateral estoppel<sup>3</sup> because a subsequent denial of credit constitutes a new wrong and new injury; and (2) the circuit court erred by signing a defective judgment without giving notice and allowing for objections as to form by Dr. Jou as required by Hawai'i Rules of Circuit Courts (HRCC) Rule 23.<sup>4</sup> First Insurance responds: (1) dismissal of the complaint was proper; and (2) any violation of HRCC Rule 23 was harmless.

Upon carefully reviewing the record and briefs submitted, we hold as follows:

- (1) The circuit court did not err in dismissing Dr. Jou's complaint because the complaint fails to state a claim upon which relief can be granted even when construed in

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<sup>2</sup>(...continued)

argue or cite any authority in support of the proposition that refusal to recognize a new common-law claim is a violation of his constitutional rights. As a result, this argument is deemed waived. Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(7) ("Points not argued may be deemed waived.").

<sup>3</sup> Dr. Jou's previous suit arising out of the same facts was resolved by Summary Disposition Order of this court in Jou v. First Insurance Company of Hawaii, Ltd., No. 25093 (Nov. 12, 2004).

<sup>4</sup> HRCC Rule 23 provides in relevant part:

Within 10 days after decision of the court awarding any judgment, decree or order that requires settlement and approval by a judge, including any interlocutory order, the prevailing party, unless otherwise ordered by the court, shall prepare a judgment, decree or order in accordance with the decision, attempt to secure the approval as to form of opposing parties thereon, and following such approval deliver the original and one copy to the court.

the light most favorable to Dr. Jou.<sup>5</sup> See Hawai'i Rules of Civil Procedure (HRCP) Rule 12(b)(6) (judgment may be granted on the pleadings for failure to state a claim upon which relief may be granted); Dunlea v. Dappen, 83 Hawai'i 28, 32, 924 P.2d 196, 200 (1996), overruled on other grounds by, Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 105-06, 73 P.3d 46, 59-60 (2003) (dismissal is proper only if it appears beyond doubt that the plaintiff "can prove no set of facts in support of his or her claim which would entitle him or her to relief"). First, Dr. Jou's allegations with respect to claims arising out of the failure by First Insurance to release a 1995 judgment lien that were or might have been litigated in No. 25093 are barred by the doctrine of collateral estoppel. See Bremer v. Weeks, 104 Hawai'i 43, 53, 85 P.3d 150, 160 (2004) ("the judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the

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<sup>5</sup> In his opposition to First Insurance's motion to dismiss, Dr. Jou attached a proposed amended complaint, but it was never filed. Dr. Jou does not assign any error with respect to the proposed amended complaint, and so it is not considered directly. Nevertheless, some weight is given to the additional allegations in considering whether Dr. Jou might be able to prove any set of facts in support of his claim and thus whether the complaint should have been dismissed with prejudice or with leave to replead.

issues which were actually litigated in the first action, but also of all grounds of claim and defense which might have been properly litigated in the first action, but were not litigated or decided") (emphasis in original). Second, Dr. Jou's allegation that First Insurance's continued failure to release the 1995 judgment lien even after judgment in the prior action resulted in a new denial of credit to Dr. Jou, does not state a new and distinct claim against First Insurance because omitting to release a lien that was originally filed properly does not constitute affirmative republication of a false statement to a reporting agency or transmission of a false credit report. See Hoke v. Paul, 65 Haw. 478, 483, 653 P.2d 1155, 1160 (1982) (republication is required in order to state a claim for a new and separate tort), overruled on other grounds by Bauernfiend v. AOA Kihe Beach Condos, 99 Hawai'i 281, 54 P.3d 452 (2002); see also Young v. Equifax Credit Information Services, Inc., 294 F.3d 631, 638 (5th Cir. 2002) (to establish a separate, new tort, plaintiff must allege that defendant retransmitted the harmful credit information to the reporting agency); Hyde v. Hibernia Nat'l Bank, 861 F.2d 446, 450 (5th Cir. 1988) ("each transmission of

the same credit report is a separate and distinct tort");

- (2) Any failure of the circuit court to provide Dr. Jou notice and opportunity under HRCC Rule 23 to object as to the form of the October 1, 2003 judgment was harmless because Dr. Jou was granted permission to prepare and file an amended judgment on October 22, 2003. HRCP Rule 61 ("no error or defect in any ruling or order" is ground for disturbing the judgment unless failure to amend or modify the judgment is "inconsistent with substantial justice"). See also Hawai'i Revised Statutes (HRS) § 641-2 (1993) (no judgment shall be modified on appeal for error unless the substantial rights of the appellant have been injured). Therefore,

IT IS HEREBY ORDERED that the circuit court's October 1, 2003 final judgment is affirmed.

DATED: Honolulu, Hawai'i, November 21, 2005.

On the briefs:

Stephen M. Shaw  
for plaintiff-appellant  
Emerson M.F. Jou, M.D.

Dennis E.W. O'Connor,  
Kelvin H. Kaneshiro, and  
Dennis E.W. O'Connor, Jr.  
(of Reinwald, O'Connor  
& Playdon LLP) for defendant-  
appellee First Insurance  
Company of Hawaii, Ltd.

