*** NOT FOR PUBLICATION ***

NO. 25292

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HOUSE OF FINANCE, INC., a Hawai'i corporation,
Plaintiff-Appellant,

vs.

FINANCIAL SOLUTIONS INSURANCE SERVICES, INC., dba BANKERS INSURANCE SERVICE, an Underwriter at Lloyd's, London on Behalf of Itself and All Those Other Lloyd's Underwriters Subscribing to Mortgage Bankers Bond No. MBB-97-00355; GULF UNDERWRITERS INSURANCE COMPANY; on Behalf of Itself and All Those Other Lloyd's Underwriters Subscribing to Mortgage Bankers Bond No. MBB-97-00355, Defendants-Appellees,

and

JOHN DOES 1-10; JANE DOES 1-10; PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 01-1-0723)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Plaintiff-Appellant House of Finance, Inc. ("House of Finance") appeals from the Findings of Fact, Conclusions of Law and Order, and Judgment of the Circuit Court of the First Circuit ("circuit court") filed August 1, 2002, following the granting of summary judgment in favor of the above-named defendants ("Underwriters").[1] Following cross-motions for summary judgment, the circuit court found that the plain language of the insurance policy between insurer Underwriters and insured House of Finance "must be construed according to its terms," such that House of

[1] The Honorable Sabrina S. McKenna presided.

Finance was precluded from indemnification thereunder as a matter of law, where (1) the liability policy had a $15,000 deductible, (2) House of Finance had settled the underlying action from which indemnity was sought for only $3,500, (3) "defense fees and costs cannot be included as part of [the "loss"] based on the applicable law as well as the contract," and (4) "there can be no claim for '[insurer] bad faith' based on legitimate interpretations of an insurance contract." In the same ruling, the circuit court also denied House of Finance's motion to compel answers to interrogatories and production of documents from Underwriters, finding that the motion "does not request any information that would in any way alter the court's legal conclusions."

On appeal, House of Finance argues, in substance, that the circuit court erred inasmuch as: (1) given (a) the applicable "rule" of Hawai'i law that House of Finance need only show potential liability for the underlying claim under the particular circumstances of the instant case, (b) the complaint from underlying claim allegedly giving rise to indemnity coverage, (c) the $82,826.85 in attorney's fees and court costs House of Finance expended in its own defense and ultimate settlement of the underlying claim, and (d) a $2,500 payment from House of Finance to a different third party in connection with the underlying claim (in addition to the $3,500 settlement), there was a compensable loss in excess of $15,000 as per the plain language of the liability policy such that coverage was due (subject to the deductible); (2) alternatively, the relevant policy terms were ambiguous and must be construed in favor of

coverage; (3) Underwriters' plain language interpretation of the policy violates public policy; and (4) there were numerous genuine issues of material fact as to whether Underwriters committed insurer bad faith.

At issue is Insuring Clause A1 of the policy, which is subject to a $15,000 deductible and provides coverage for

> dlirect financial loss sustained by the **Assured** at any time and discovered by the **Assured** during the **Bond Period** by reason of and directly caused by
>
> . . . .
>
> [b] any other dishonest acts by any **Employee** of the **Assured**, whether committed alone or in collusion with others, committed by said **Employee** with the manifest intent to obtain **Improper Personal Financial Gain** for said **Employee**, or for any other person or entity intended by the **Employee** to receive such **Improper Personal Financial Gain**
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> . . . .

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold as follows:

(1) The language of insurance policy at issue is unambiguous, and its plain terms must be given effect. See Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai'i 398, 411-12, 992 P.2d 93, 106-07 (2000), and Barabin v. AIG Hawai'i Ins. Co., Inc., 82 Hawai'i 258, 263, 921 P.2d 732, 737 (1996). Although the policy may be somewhat detailed and might require a more-than-cursory reading, the mere fact that a policy is complex does not create ambiguity. See Barabin, 82 Hawai'i at 263, 921 P.2d at 737. As per the policy's plain language, court costs and attorney's fees are clearly separate from "direct financial loss" under Insuring Clause A1, and holding otherwise would effectively result in re-writing the insurance policy, which this court

cannot do. See Fortune v. Wong, 68 Haw. 1, 11, 702 P.2d 299, 306 (1985). Thus, in order for House of Finance to be entitled to any indemnification, it must show a "direct financial loss" in excess of $15,000 separate and apart from court costs and attorney's fees. However, assuming arguendo that House of Finance has suffered a qualifying "direct financial loss" under Insuring Clause A1, this loss is no more than $6,000 as per House of Finance's own Opening Brief.

Even assuming that this court were to follow the "rule of potential, not actual liability" when determining whether Underwriters has a duty to indemnify, as purportedly set forth in Hawaiian Ins. & Guar. Co., Ltd. v. Higashi, 4 Haw. App. 608, 610, 672 P.2d 556, 558 (1983), rev'd, 67 Haw. 12, 675 P.2d 767 (1984), the "rule" states in pertinent part: "In cases involving a written indemnity agreement, the ultimate decision turns upon the language of the contractual undertaking." (Emphasis added.) Thus, assuming that the "rule" advanced by House of Finance survived our reversal of the ICA's opinion in Higashi, it appears to be in accord with Hawaii's insurance law, in that "[a] court must respect the plain terms of the policy and not create ambiguity where none exists." Barabin, 82 Hawai'i at 263, 921 P.2d at 737. Thus, the circuit court did not err in ruling that House of Finance could not recover under the policy.

(2) No public policy concerns exist in the present case. First, contrary to House of Finance's suggestion, the circuit court's ruling and the plain language of the insurance policy do not operate to impose a "double application" of the $15,000 deductible. Second, while House of Finance correctly

points out that Hawai'i has a public policy favoring settlement,[2] it is inapposite to the instant case. Any duty to mitigate damages under an insurance policy exists separate and apart from the insured's balancing of a lower insurance premium against a higher deductible (or vice versa) at the time the policy is obtained. Taking on a deductible necessarily means that certain otherwise insurable losses may sometimes go uncovered. Benjamin Moore v. Aetna Cas. & Sur. Co., 843 A.2d 1094, 1108 (N.J. 2004). Since House of Finance does not contend that the $15,000 deductible was forced upon them by Underwriters, or that its premiums were unreasonably high, we see no reason to disturb the plain language of the insurance policy and perceive no dilemma arising from the deductible's existence. Because there are no public policy violations arising from the instant appeal, House of Finance's argument in this regard is without merit.

(3) There are no genuine issues of material fact precluding summary judgment in favor of Underwriters as to House of Finance's bad faith claim. With respect to insurer bad faith, this court has explicitly held 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. The breach of the express covenant to pay claims, however, is not the sine qua non for an action for breach of the implied covenant of good faith and fair dealing. The implied covenant 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.

The Best Place, Inc. v. Penn America Ins. Co., 82 Hawai'i 120,

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[2] See e.g. Keahole Defense Coalition v. Board of Land and Natural Resources, 110 Hawai'i 419, 439, 134 P.3d 585, 605 (2006) ("this court has acknowledged the strong public policy in favor of settlement of claims" (citing cases)).

132, 920 P.2d 334, 346 (1996). This court has further explained that in the context of a first-party bad faith claim,

> the insured need not show a conscious awareness of wrongdoing or unjustifiable conduct, nor an evil motive or intent to harm the insured. An unreasonable delay in payment of benefits will warrant recovery for compensatory damages [.] However, conduct based on an interpretation of the insurance contract that is reasonable does not constitute bad faith. In addition, an erroneous decision not to pay a claim for benefits due under a policy does not by itself justify an award of compensatory damages. Rather, the decision not to pay a claim must be in "bad faith."

Id. at 133, 920 P.2d at 347 (emphasis added). As Underwriters demonstrated in their motion for summary judgment, a "plain language" reading of the policy at issue is reasonable because the relevant policy terms are unambiguous. The burden of production therefore shifted from Underwriters to House of Finance. However, House of Finance merely advanced unsupported allegations, almost exactly as it now does on appeal, that

> the record in this case embraces numerous questions of fact on whether the Underwriters (a) unreasonably interpreted the provisions of the Policy; (b) made "unreasonably low settlement offers"; (c) engaged in unreasonable conduct after the filing of this complaint in this bad faith action" [sic]; (d) negligently investigated the House of Finance's claim; (e) failed to promptly determine its position on coverage; (f) failed "to effectuate prompt settlement"; (g) compelled the House of Finance to initiate litigation in order to recover benefits under the Policy; and (h) violated any of the provisions of HRS § 431:13-103(a). The existence of such genuine issues of material fact preclude the granting of summary judgment in favor of Defendants on the House of Finance's claim of bad faith.

(Footnote omitted.) (Emphasis added.) House of Finance had the burden of producing specific facts in order to defeat summary judgment. Hawai'i Rules of Civil Procedure ("HRCP") Rule 56(e) (2000); see also Lee v. Puamana Community Ass'n, 109 Hawai'i 561, 567, 128 P.3d 874, 880 (2006) (quoting French v. Hawai'i Pizza Hut, Inc., 105 Hawai'i 462, 99 P.3d 1046 (2004)). However, House of Finance's memorandum in opposition to Underwriters' motion for

summary judgment as to the bad faith issue is comprised entirely of conclusory statements and legal argument and is devoid of a single factual assertion or record reference to any matter within the 558-page volume of "Stipulated Facts" prepared by the parties. The same can be said of House of Finance's Opening Brief on this issue. As such, House of Finance's argument on appeal as to bad faith is in violation of HRAP 28(b)(7) (2004) (operative text unchanged from 2000 version),[3] and we decline to review this point on appeal. See Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (App. 2000) ("[a]n appellate court does not have to address matters for which the appellant has failed to present discernible argument" (citations omitted)); see also Int'l Brotherhood of Elec. Workers, Local 1357 v. Hawaiian Telephone Co., 68 Haw. 316, 322 n.7, 713 P.2d 943, 950 n.7 (1986) ("Counsel has no right to cast upon the court the burden of searching through a voluminous record to find the ground of an objection" (citation omitted)).

In any event, upon careful review of the record, there is no evidence that Underwriters acted in bad faith. In its correspondence with House of Finance, Underwriters reasonably interpreted their insurance contract and correctly determined that there was no indemnification coverage because House of Finance's claimed "direct financial loss" of $6,000 did not exceed the $15,000 deductible. Consequently, the circuit court

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[3] HRAP 28(b)(7) provides in pertinent part: "[T]he appellant shall file an opening brief, containing . . . . [t]he 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. . . . . Points not argued may be deemed waived." (Emphasis added.)

properly granted summary judgment for Underwriters on the issue of bad faith.

(4) As to House of Finance's breach of contract claim, insofar as (a) Underwriters' policy was unambiguous and (b) Underwriters properly interpreted its own policy, Underwriters did not breach its contract with House of Finance, such that summary judgment thereon was properly granted for Underwriters.

(5) Similarly, with respect to House of Finance's motion to compel answers to interrogatories and production of documents, because there already was an adequate record upon which to decide Underwriters' motion for summary judgment below, we hold that any additional discovery sought by House of Finance would not affect the outcome of this case, as the circuit court ruled, such that the motion was properly denied.

Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, July 13, 2006.

On the briefs:

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