

*** NOT FOR PUBLICATION ***

NO. 26877

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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

vs.

J.P. SCHMIDT, Insurance Commissioner, Department
of Commerce and Consumer Affairs, State of Hawai'i,
Appellee-Appellee,

and

AIG HAWAII INSURANCE CO., Respondent-Appellee-Appellee

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APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2106)SUMMARY DISPOSITION ORDER(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;
with Acoba, J., Concurring Separately and Dissenting)

Provider-appellant-appellant Emerson M.F. Jou, M.D. (Dr. Jou), appeals from the September 9, 2004 final judgment of the Circuit Court of the First Circuit in favor of appellee-appellee J.P. Schmidt, Insurance Commissioner (Commissioner), Department of Commerce and Consumer Affairs (DCCA), State of Hawai'i and respondent-appellee-appellee AIG Hawaii Insurance Co. (AIG).¹ On appeal, Dr. Jou argues that the circuit court erred by: (1) violating his right "to work in a common occupation in his community" guaranteed by the due process clause of the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution; (2) affirming

¹ The Honorable Sabrina S. McKenna presided over this matter.

the Commissioner's violation of the separation of powers doctrine as set forth in article V, section 6 of the Hawai'i Constitution and in the United States Constitution by engaging in illegal legislative conduct when he rewrote Hawai'i Revised Statutes (HRS) § 452-1 (1993) (defining "massage" and "massage therapy") to eliminate clauses supporting Dr. Jou's right to work as a physiatrist employing licensed massage therapists; (3) violating the equal protection clauses of the fourteenth amendment to the United States Constitution and article I, section 5 of the Hawai'i Constitution; (4) violating the rules of statutory construction requiring the court to give force to and preserve all the words of HRS § 452-1; and (5) affirming the Commissioner's reliance on AIG's witness, Darcy Tavares, as an expert on bill coding when (a) her testimony was superfluous, and (b) she had "no license qualifying her to testify about the application of law or medicine to the physicians' billing codes." The Commissioner responds that: (1) the circuit court did not err in affirming the October 13, 2003 Commissioner's Final Order (CFO); and (2) Dr. Jou has failed to present any discernible argument in support of his assignments of error and thus his claims should be disregarded. AIG joins in the Commissioner's brief and also answers in its own right, arguing that: (1) Dr. Jou's claims are barred by res judicata because they were already raised and ruled upon by this court's Summary Disposition Order

(SDO) in AIG Hawaii Insurance Co. v. Jou, No. 24566 (Aug. 24, 2004); and (2) the circuit court did not err in affirming the CFO.

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

- (1) Dr. Jou's constitutional claims are deemed waived for failure to raise them below.² Generally, "[i]ssues not properly raised on appeal will be deemed to be waived." Bitney v. Honolulu Police Dep't, 96 Hawai'i 243, 251, 30 P.3d 257, 265 (2001) (alteration in original) (quoting Hill v. Inouye, 90 Hawai'i 76, 82, 976 P.2d 390, 396 (1998)). Assuming arguendo that the arguments were not waived, this court nevertheless disregards the constitutional claims for failure to present a discernible argument. See State v.

² Although Dr. Jou may have attempted to raise constitutional claims at oral argument in the circuit court, his failure to timely request the transcript precludes this court's consideration of errors allegedly made or raised therein. See Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(b)(1)(A) ("[A]n appellant [who] desires to raise any point on appeal that requires consideration of the oral proceedings before the court . . . appealed from . . . shall file, within 10 days after filing the notice of appeal, a request to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary[.]"). Here, Dr. Jou first filed a transcript request on October 26, 2004, more than 10 days after he filed his notice of appeal on October 8, 2004.

Moreover, Dr. Jou's attempt to reserve his claims of constitutional error in his circuit court brief fails because there was no bar precluding him from raising those claims below. See HRS § 91-14(g)(1) (indicating that the circuit court has jurisdiction to consider claims of constitutional error in an agency appeal).

Moore, 82 Hawai'i 202, 206 n.1, 921 P.2d 122, 126 n.1 (1996) (holding that this court may disregard a claim where a proponent fails to make any discernible argument in support thereof). Here, Dr. Jou has failed to apply any constitutional standard to an identified statute or ruling and explain how the allegedly offending statute or ruling violates his constitutional rights either facially or on the facts presented;

- (2) Dr. Jou is precluded from relitigating the issue of whether an insurer is obligated to reimburse a licensed physician/medical provider for physical therapy services provided by third parties not licensed as physical therapists or physicians but acting under the physician/provider's supervision because the same issue was already decided against him on the merits in the summary disposition order of this court in AIG Hawaii Ins. Co. v. Jou, No. 24566, 2004 WL 1879846 (Haw. Aug. 24, 2004). See Exotics Hawaii-Kona, Inc. v. E.I. Dupont De Nemours & Co., 104 Hawai'i 358, 365, 90 P.3d 250, 257 (2004) ("Issue preclusion applies to a subsequent suit between the parties or their privies on a different cause of action and

prevents the parties or their privies from relitigating any issue that was actually litigated and finally decided in the earlier action."

(Internal quotation marks, citation, and emphases omitted.); HRAP Rule 35(c) (providing that unpublished dispositional orders may be cited for collateral estoppel purposes);

- (3) Dr. Jou's contention that the Commissioner erred by admitting expert testimony from an unqualified witness, Darcy Tavares, is deemed waived because Dr. Jou fails to argue it in his brief. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."); and
- (4) We determine that this secondary appeal is frivolous because it was filed -- despite the lack of any material change in the facts, law, or arguments advanced -- only six weeks after this court rejected the same arguments made by Dr. Jou in No. 24566, a decision binding against him, see Point (2), supra. It thus demonstrates a bad faith refusal to acknowledge controlling authority. See HRAP Rule 38 (providing that the appellate court may on its own initiative find an appeal frivolous, and, after notice and an

opportunity to respond, award damages, including fees and costs, to the appellees); Rhoads v. Okamura, 98 Hawai'i 407, 414, 49 P.3d 373, 380 (2002) (defining a frivolous appeal as one so manifestly and palpably without merit as to indicate bad faith on the pleader's part) (citation omitted); Gold v. Harrison, 88 Hawai'i 94, 107, 962 P.2d 353, 366 (1998) (imposing HRAP Rule 38 sanctions where the appellant knowingly "refus[ed] to acknowledge controlling authority"); see also Hawai'i Rules of Professional Conduct (HRPC) Rule 3.1 ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law."). Accordingly, a sua sponte sanctions order is appropriate to "protect the courts -- and derivatively parties in other cases -- from impositions on their time [because t]he court has an interest in the orderly conduct of business[.]" Abastillas v. Kekona, 87 Hawai'i 446, 449, 958

P.2d 1136, 1139 (1998) (internal quotation marks and citation omitted). Therefore,

IT IS HEREBY ORDERED that the circuit court's September 9, 2004 final judgment is affirmed. We also hereby give notice to the parties that the instant secondary appeal was frivolous and request briefing with regard to damages and costs to be awarded to AIG and the Commissioner as authorized by HRAP Rule 38. Briefs by AIG and the Commissioner shall be submitted within 15 days of the date of this order and Dr. Jou's response thereto shall be submitted within 15 days thereafter.

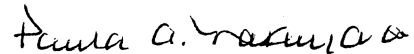
DATED: Honolulu, Hawai'i, May 18, 2006.

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