NO. 26311

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

EMERSON M.F. JOU, M.D., and as to Some Claims, on Behalf of the Class of Others Similarly Situated, Plaintiff-Appellant,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY, LARRY M. REIFURTH,[1] ESQ., DIRECTOR, Department of Commerce and Consumer Affairs, Defendants-Appellees,

and

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

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 02-1-1603-07)

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

Plaintiff-Appellant Emerson M.F. Jou, M.D. ("Jou") appeals from the amended judgment of the Circuit Court of the First Circuit[2] ("circuit court") filed on December 10, 2003. On appeal, Jou raises five points of error: (1) the circuit court erred in granting Defendant-Appellee Government Employees Ins. Co.'s (hereinafter "GEICO") motion to dismiss, or, in the alternative, for summary judgment;[3] (2) the presiding judge, the Honorable Gary W. B. Chang (hereinafter "Judge Chang"), erred by refusing to disqualify himself upon Jou's motion; (3) the circuit court erroneously denied Jou's motion to amend his second amended

[1] Pursuant to Hawai'i Rules of Appellate Procedure ("HRAP") Rule 43(c) (2000), Lawrence M. Reifurth has been substituted as a party to the instant appeal in place of Mark E. Recktenwald, in his official capacity.

[2] The Honorable Gary W. B. Chang presided.

[3] The circuit court did not specify whether it was treating or ruling upon the motion as one for summary judgment or for dismissal.

complaint; (4) the circuit court erred in granting the Defendant-Appellee Lawrence M. Reifurth's (in his official capacity as Director of the Dep't of Commerce and Consumer Affairs, State of Hawai'i) (hereinafter "the DCCA Director") motion for summary judgment or dismissal, which the circuit court construed as a motion for summary judgment; and (5) the final judgment appealed from does not comport with the requirements of Jenkins v. Cades Schutte Fleming & Wright, 76 Hawai'i 115, 869 P.2d 1334 (1994).

Additionally, the DCCA Director, within its Answering Brief, moves for damages and costs under Hawai'i Rules of Appellate Procedure ("HRAP") Rule 38 (2000)[4] on the ground that Jou's appeal is frivolous.

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) With respect to Jou's fifth point of error, regarding the existence of this court's appellate jurisdiction, we hold that the December 10, 2003 amended final judgment complied with Jenkins. 76 Hawai'i at 119, 869 P.2d at 1338. Thus, we have jurisdiction over the instant appeal.

(2) With respect to Jou's first point of error, the circuit court did not err in granting GEICO's motion, which was denominated as being for dismissal or summary judgment. Because the record reveals that matters outside the pleading were introduced on summary judgment which were expressly considered by the circuit court in making its ruling, we note that GEICO's

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[4] HRAP Rule 38 provides: "If a Hawai'i appellate court determines that an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee."

motion was converted into a motion for summary judgment. See e.g., HRCP Rule 12(b) (2000); Gamino v. Greenwell, 2 Haw. App. 59, 62, 625 P.2d 1055, 1058 (1981); and Au v. Au, 63 Haw. 210, 213-14, 626 P.2d 173, 176-77 (1981). Upon careful review, we discern two cognizable contentions by Jou: that (a) Jou should have prevailed on his abuse of process claim, and (b) this court's decision in Moss v. Am. Int'l Adjustment Co., Inc., 86 Hawai'i 59, 947 P.2d 371 (1997) did not serve to preclude him from filing a lawsuit in circuit court.

We first hold that summary judgment in favor of GEICO was proper as to the abuse of process claim. See e.g., Orthopedic Assocs. of Hawai'i, Inc. v. Hawaiian Ins. & Guar. Co., Ltd., 109 Hawai'i 185, 194, 124 P.3d 930, 939 (2005). We discern neither any ulterior motive nor any wilful act for the purpose of misusing or otherwise manipulating the State Department of Commerce and Consumer Affairs' ("DCCA") Insurance Division's administrative hearing process via GEICO seeking (in 2000) a declaratory ruling as to whether formal written denial of claim notices are required to be sent to a provider of services (e.g., a physician) where a submitted no-fault insurance claim is approved and paid, but where a dispute between the insurer and provider of services with respect to the proper amount payable remains. See Wong v. Panis, 7 Haw. App. 414, 420-21, 772 P.2d 695, 699-700 (1989), abrogated on other grounds by Hac v. Univ. of Hawai'i, 102 Hawai'i 92, 105-07, 73 P.3d 46, 59-61 (2003).[5] In that 2000 administrative declaratory proceeding, involving GEICO as petitioner and the DCCA as respondent, the hearing officer

[5] See also, e.g., Hawai'i Revised Statutes ("HRS") §§ 431:10C-304 (Supp. 2000) and 431:10C-308.5 (Supp. 2000 & Supp. 2006) (with respect to the no-fault payment issue presented).

answered in the negative, and in doing so expressly reaffirmed a preexisting advisory opinion by the Insurance Commissioner which took the same position on the same subject matter in 1999.[6] Thus, not only was there no abuse of process as a matter of law, there was also nothing GEICO could have obtained by initiating the declaratory proceeding, inasmuch as (1) the Insurance Commissioner had already issued his advisory memorandum opinion to all insurers on that issue months before GEICO initiated the declaratory proceeding, and (2) for all intents and purposes, it was the Insurance Commissioner, the original proponent of the position, and not GEICO who ultimately "benefitted" from the formal ruling on the matter. Accordingly, Jou's contention that he should have been granted summary judgment on his abuse of process claim is without merit.

As to Jou's other contention, that Moss was inapplicable to the instant case, we hold to the contrary. The key Moss-related issue in this case, as pointed out by both the circuit court and GEICO, was Jou's having concurrent proceedings before both the Insurance Commissioner and this court (in the instant case), where both proceedings concerned medical claims submitted as to the same ten patients. Jou did not and does not discernibly contest or otherwise challenge the circuit court's or GEICO's understanding that Jou's initiated proceeding before circuit court in the instant case was concurrent with the administrative proceeding and also arose from the same dispute.

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[6] Solely in passing, we observe, but do not hold or otherwise find or decide, that in any event, Jou's 1999 administrative proceeding in the Insurance Division adjudicated partially in his favor was not affected by the declaratory ruling "obtained" by GEICO, because it appears from the record that no payment determination or request for information was ever issued by GEICO as to a specific subset of claims submitted by Jou.

And in the absence of any such challenge, this court declines to sua sponte second-guess the circuit court's understanding that Jou's circuit court lawsuit was concurrent and based upon the same subject matter. Further, after careful review, we hold that Jou has not presented any cognizable argument with respect to either (1) whether the instant case and Moss involved fundamentally different types of claims such that Moss was distinguishable, or (2) Jou's contention that Hawai'i agencies have no jurisdiction to hear claims sounding in tort. See e.g., HRAP Rule 28(b)(7) (2004); Hawai'i Ventures, LLC v. Otaka, Inc., --- P.3d ----, 2007 WL 1346603 at *29 (May 9, 2007); and Kienker v. Bauer, 110 Hawai'i 97, 104 n.12, 129 P.3d 1125, 1132 n.12 (2006). Thus, we affirm the circuit court's grant of summary judgment in favor of GEICO.

(3) Regarding Jou's second point of error, Judge Chang did not abuse his discretion in declining to disqualify or recuse himself from the instant case. See Found. Int'l, Inc. v. E.T. Ige Constr., Inc., 102 Hawai'i 487, 503, 78 P.3d 23, 39 (2003) (quoting State v. Ross, 89 Hawai'i 371, 375-76, 974 P.2d 11, 15-16 (1998)); Office of Hawaiian Affairs v. State, 110 Hawai'i 338, 351, 133 P.3d 767, 780 (2006). We find no colorable argument or record support from Jou establishing such an abuse of discretion, and therefore Judge Chang's denial of Jou's motion to disqualify him is affirmed.

(4) Regarding Jou's third point of error, the circuit court did not abuse its discretion in denying Jou's motion for leave to amend his second amended complaint. Office of Hawaiian Affairs, 110 Hawai'i at 351, 133 P.3d at 780. On appeal, Jou does not challenge the circuit court's express oral finding of

"unreasonable delay" in Jou's bringing the motion for leave to amend. Such a finding of delay is a specific exception to the general rule that leave to amend a complaint should be freely given. Tri-S Corp. v. W. World Ins. Co., 110 Hawai'i 473, 490, 135 P.3d 82, 99 (2006). Accordingly, the circuit court's motion denying Jou's motion for leave to amended his second amended complaint is affirmed.

(5) Regarding Jou's fourth point of error, the circuit court did not err in granting summary judgment in favor of the DCCA Director. In his second amended complaint, Jou challenges the DCCA's jurisdiction to hear "controversies involving issues relating to automobile insurance" by seeking a declaration that certain agency rules are invalid. However, the DCCA, as a creature of statute, derives its jurisdiction from legislative enactment, not agency rule.[7] As such, Jou's thirteenth claim is without a valid legal basis. Thus, the circuit court's grant of summary judgment in favor of the DCCA Director is affirmed.

(6) Jou's remaining arguments (those not addressed above) are waived for (a) lack of legally cognizable argument and/or (b) lack of demonstrated or apparent nexus to Jou's five points of error. See HRAP Rule 28(b)(7), Hawai'i Ventures and Kienker, supra.

(7) The DCCA Director's motion for damages and costs for frivolous appeal under HRAP Rule 38 is denied.

Therefore,

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[7] See, e.g., HRS § 26-9 (Supp. 2006) (establishing the DCCA); HRS § 431:2-101 (1993) (establishing the Insurance Division within the DCCA); HRS § 431:2-102 (Supp. 2000) (establishing the office of the Insurance Commissioner); and HRS § 431:2-201 (Supp. 2003) (setting forth the general powers and duties of the Insurance Commissioner).

IT IS HEREBY ORDERED that (1) the December 10, 2003 amended judgment of the circuit court is affirmed, and (2) the DCCA Director's HRAP Rule 38 motion for damages and costs is denied.

DATED: Honolulu, Hawai'i, July 26, 2007.

On the briefs:

Stephen Shaw, for
Plaintiff-Appellant
Emerson M. F. Jou, M.D.

Kathy K. Higham, (of Kessner Duca Umebayashi Bain & Matsunaga, A Law Corporation) for Defendant-Appellee Government Employees Ins. Co., Inc.

David A. Webber, Deborah Day Emerson, Esq., Deputy Attorneys General, for Defendant-Appellee Lawrence M. Reifurth, in his official capacity as Director, Dep't of Commerce and Consumer Affairs, State of Hawai'i