

*** NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER ***

NO. 26541

IN THE SUPREME COURT OF THE STATE OF HAWAII

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

vs.

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

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Respondent-Appellee-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 03-1-2157)

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant-Appellant Emerson M.F. Jou, M.D. ("Jou") appeals from the judgment of the Circuit Court of the First Circuit¹ ("circuit court") filed on March 30, 2004. In the underlying agency appeal giving rise to the instant appeal, the circuit court granted Respondent-Appellee-Appellee State Farm Mutual Automobile Insurance Co.'s ("State Farm") motion to dismiss Jou's agency appeal under Hawai'i Rules of Civil Procedure ("HRCP") Rule 41(b) (2000).²

On appeal, Jou raises the following points of error:

¹ The Honorable Elizabeth Eden Hifo presided.

² HRCP Rule 41(b) (2000) (involuntary dismissal), in effect at the time of Jou's agency appeal (henceforth, all rule and statute versions cited in this order refer to the version then in effect unless otherwise noted) provided in pertinent part: "For failure of the plaintiff to prosecute or to comply with [the Hawai'i Rules of Civil Procedure] or any order of court, a defendant may move for dismissal of an action or of any claim against it."

K. HAMAKA'DU
CLERK, APPELLATE COURTS
STATE OF HAWAII

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(1) "[t]he circuit court committed reversible error in granting [State Farm's] motion to dismiss this appeal grounded on alleged non-compliance with HRCP [Rule] 72(d)(1)";³ (2) the circuit court "deprived [Jou] of his right to a fair hearing in a fair tribunal guaranteed by" the state and federal constitutions; (3) the circuit court "is depriving [Jou] of his right to work for a living in a common occupation in the community guaranteed by" the state and federal constitutions; (4) the circuit court's dismissal of Jou's agency appeal imposed "extra-statutory service requirements" in violation of the equal protection guarantees of the federal and state constitutions; (5) the circuit court engaged in prohibited "state action" and "regulatory taking" in violation of his state and federal constitutional rights; and (6) the circuit court's dismissal of his agency appeal "violated [Jou's] constitutional rights and was therefore more egregious

³ HRCP Rule 72(d)(1) (1996) (designation of the record on appeal) provided:

The appellant shall, within the time provided for filing the notice of appeal or within such further time, not to exceed 30 days, as may be allowed by the court for good cause shown, prepare and present to the clerk of the circuit court a designation, which shall specify the papers, transcripts, minutes and exhibits which the appellate desires filed in the circuit court in connection with the appeal. The clerk, in the name and under the seal of the circuit court, shall endorse on the designation an order, directed to the official or body whose decision, order or action is appealed from, commanding the latter to certify and transmit such papers, transcripts, minutes and exhibits to the circuit court within 20 days of the date of the order or within such further time as may be allowed by the court. The clerk shall issue certified copies of such designation and order to the appellant for service upon the official or body whose decision, order or action is appealed from and for service upon any other appellee. The appellant shall serve certified copies of the designation and order and shall make due return of service thereof to the clerk of the circuit court. The circuit court may compel obedience to the order by any appropriate process.

than an abuse of discretion."

Upon carefully reviewing of 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) Regarding Jou's first point of error, the circuit court did not abuse its discretion in dismissing Jou's agency appeal. See Shasteen, Inc. v. Hilton Hawaiian Village Joint Venture, 79 Hawai'i 103, 107, 899 P.2d 386, 390 (1995). The record reflects that the agency record was never prepared and transmitted for the circuit court's consideration for the following reasons: (a) there is no proof that Jou effected service of his notice of appeal, designation of the record, or order for certification and transmission of the record as required by HRCF Rule 72(d)(1) (1996) and HRCF Rule 4(g) (2003);⁴ and (b) Jou failed to serve his notice of appeal, designation of the record, and order for certification and transmission of the record upon the state attorney general (legal counsel for the Insurance Commissioner),⁵ as required by HRCF Rules 4(d)(4) and

⁴ HRCF Rule 72(d)(1) (1996) required that an appellant "shall serve certified copies of the designation [of record on appeal to the circuit court] and order [to certify and transmit the record] and shall make due return of service thereof to the clerk of the circuit court." (Emphases added.) Return of service, as per HRCF Rule 4(g) (2003), states that "[t]he person serving the process shall make proof of service thereof to the court promptly . . ." (Emphasis added.) See also Munoz v. Chandler, 98 Hawai'i 80, 89, 42 P.3d 657, 666 (App. 2002). However, each and every certificate of service by Jou (appended to his notice of appeal, designation of the record, and order for certification and transmission of the record) only states in pertinent part that those papers "will be served" upon the Insurance Commissioner himself and counsel for State Farm. (Emphasis added.) We hold that this does not constitute proof of service under HRCF Rule 4(g) (2003).

⁵ See HRS § 431:2-102 (Supp. 2000) (establishing the office of the Insurance Commissioner), and HRS § 26-7 (1993) ("The department [of the
(continued...)

(4) (d) (5) (2003)⁶ and HRCP Rule 5(a) (2000),⁷ because the appended certificates of service only listed the Insurance Commissioner himself and counsel for State Farm as addressees. Thus, the circuit court was within its discretion to dismiss Jou's agency appeal. See e.g., Independence Mortgage Trust v. Glenn Constr. Corp., 57 Haw. 554, 556, 560 P.2d 488, 490 (1977); In re Estate of Holi, 42 Haw. 74, 74-75 (Hawai'i Terr, 1957).

(2) Jou's remaining points of error are raised for the first time on appeal, and are therefore waived. Hawai'i Rules of Appellate Procedure Rule 28(b)(4) (2004); Kemp v. State of Hawai'i Child Support Enforcement Agency, 111 Hawai'i 367, 391, 141 P.3d 1014, 1038 (2006).

Therefore,

⁵(...continued)
attorney general] shall . . . represent the State in all civil actions in which the State is a party[.]").

⁶ Per Munoz, the notice of appeal from an agency decision must be served upon the state attorney general in accordance with HRCP Rules 4(d)(4) and 4(d)(5) (2003). 98 Hawai'i at 89, 42 P.3d at 666. Service upon a government official may only be effected "by serving the State." HRCP Rule 4(d)(5) (2003). The State is served "by delivering a copy of the summons and of the complaint to the attorney general of the State or to the assistant attorney general or to any deputy attorney general who has been appointed by the attorney general."

⁷ HRCP Rule 5(a) (2000) expressly requires that "every written . . . designation of record on appeal[] and similar paper shall be served upon each of the parties." (Emphasis added.) As to how service is made, HRCP Rule 5(b) provides that as a default rule, "service shall be made upon the [representing] attorney unless service upon the party is ordered by the court." (Emphasis added.) As previously noted, the attorney for the Insurance Commissioner is the state attorney general.

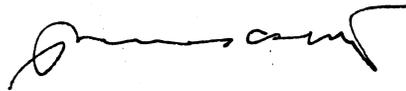
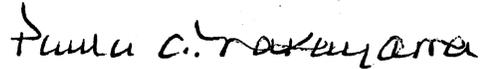
IT IS HEREBY ORDERED that the judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, June 22, 2007.

On the briefs:

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

Edmund K. U. Yee,
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for Respondent-Appellee-
Appellee State Farm Mutual
Automobile Insurance Co.



Barbara E. Dills, Jr.