

DISSENT BY ACOBA, J.

I respectfully disagree that the application for writ of certiorari submitted by Plaintiff-Appellant-Petitioner Emerson M.F. Jou, M.D. (Petitioner) should be denied. This court should further review the summary disposition order of the Intermediate Court of Appeals (ICA) affirming the award of attorneys' fees by the Circuit Court of the First Circuit (the court)¹ to Defendants-Appellees-Respondents City and County of Honolulu (the City) and Hawaii Employers Medical Insurance Company (HEMIC), pursuant to Hawai'i Revised Statutes (HRS) § 607-14 (Supp. 1997) and the ICA's orders granting the motions for attorneys' fees on appeal filed by the City, HEMIC, and Marriott Claim Services Corporation (Marriott) [the City, HEMIC, and Marriott are hereinafter collectively referred to as "the insurers"] pursuant to HRS § 607-14 because the complaint sounded in tort rather than assumpsit as required under HRS § 607-14. The bad faith claim, tortious interference with a prospective business advantage claim, and statutory tort claim under HRS § 663-1 (Supp. 1997)² asserted by Petitioner brought against the insurers were all tort claims rather than assumpsit claims.

¹ The Honorable Gary W.B. Chang presided.

² Although Petitioner in his complaint cites HRS § 463-1 (1993 & Supp. 2004) in reference to his statutory tort claim, the record indicates that he meant to cite HRS § 663-1 (Supp. 1997).

I.

Petitioner's action arises from the alleged failure of the insurers to pay for massage therapy services Petitioner rendered to certain clients where payment was allegedly owed pursuant to workers' compensation policies. The insurers refused to pay on the basis that Petitioner did not have a massage therapy establishment license as required under HRS § 452-3 (1993).³

On July 11, 2003, Petitioner filed a complaint against insurers entitled, "COMPLAINT IN TORT FOR INSURER BAD FAITH," alleging bad faith, tortious interference with a prospective business advantage, and statutory tort. In his prayer for relief, Petitioner sought (1) actual damages, (2) punitive damages, (3) attorneys' fees and costs, and (4) other relief as the court deemed proper.

The court granted the City's motion for summary judgment on May 14, 2004, Marriott's substantive joinder to the City's motion for summary judgment on August 30, 2004, and HEMIC's motion for summary judgment on August 5, 2004. On August 2, 2004, the City moved for attorneys' fees under HRS § 607-14 and HEMIC filed a substantive joinder to that motion on August 17, 2004. In its orders of August 31, 2004, the court granted the City's motion and HEMIC's joinder, awarding the City its requested attorneys' fees of \$5,321.50. Petitioner filed a

³ HRS § 452-3 (1993) provides that "[n]o massage therapy establishment shall be operated unless it has been duly licensed as provided for in this chapter."

motion for reconsideration of the court's decision to grant the City's motion for attorneys' fees and HEMIC's joinder.

On August 25, 2004, HEMIC moved for attorneys' fees in the amount of \$9,491.50 under HRS § 607-14. The court granted in part and denied in part HEMIC's motion on September 22, 2004, awarding HEMIC \$855.00 in attorneys' fees. On October 6, 2004, the court invited HEMIC to move for reconsideration of its motion for attorneys' fees because in the court's view, the amount of punitive damages sought should have been taken into account in determining the amount in controversy upon which the twenty-five percent limitation on attorneys' fees is based, pursuant to HRS § 607-14. The court heard Petitioner's and HEMIC's motion for reconsideration of HEMIC's attorneys' fees motion on November 8, 2004 and awarded HEMIC \$8,750.00 in attorneys' fees.

On appeal before the ICA, Petitioner asserted in his opening brief, inter alia, that the court erred by (1) granting the City's motion for attorneys' fees, (2) granting in part and denying in part HEMIC's motion for attorneys' fees, (3) granting HEMIC's motion for reconsideration of its motion for attorneys' fees, and (4) denying his motion for reconsideration of the attorneys' fees orders against him.

The City, HEMIC, and Marriott moved for attorneys' fees on appeal in the amount of \$6,204.00, \$9,791.72, and \$4,451.50, respectively. The ICA granted all of the attorneys' fees

requested by the insurers, again pursuant to HRS § 607-14, with the exception of that portion of HEMIC's attorneys' fees relating to the state general excise tax.

II.

In his application for writ of certiorari before this court, Petitioner argues, inter alia, that the court and the ICA erred in awarding attorneys' fees because (1) the action was not in the nature of assumpsit within the meaning of HRS § 607-14; (2) HRS § 386-93(a) (1993)⁴ precludes an award of attorneys' fees under HRS § 607-14; (3) the court and the ICA should have apportioned fees among assumpsit and non-assumpsit claims.⁵

III.

All of Petitioner's claims against the insurers are tort claims notwithstanding the fact that it was alleged the insurers violated insurance contract obligations owed to Petitioner's clients and intended to benefit Petitioner as a third-party beneficiary to the contract. In light of the fact that all of the claims are clearly tort claims, no court is at

⁴ HRS § 386-93(a) (1993) states as follows:

If the director of labor and industrial relations, appellate board or any court finds that proceedings under this chapter have been brought, prosecuted, or defended without reasonable ground the whole costs of the proceedings may be assessed against the party who has so brought, prosecuted, or defended the proceedings.

⁵ Petitioner also argued that (4) the court's and the ICA's conclusion that the action is in the nature of assumpsit should be applied prospectively; (5) it was a violation of Petitioner's rights under the fourteenth amendment to the United States Constitution for the court and the ICA to award attorneys' fees to the insurers; and (6) the attorneys' fees requested by the insurers was excessive.

liberty to reclassify those claims as assumpsit claims on the ground that the tort claims would not be actionable without the existence of an insurance contract between insurers and employers of Petitioner's clients.

A.

With respect to Petitioner's bad faith claim, Petitioner stated in his complaint that

9. At all times, [the insurers] owed a duty of good faith and fair dealing to [Petitioner], as their intended third-party beneficiary, to pay for medical services [Petitioner] rendered to [the insurers'] other intended beneficiaries.

10. In breach, or in circumvention of this duty, and without proper cause, [the insurers] are unreasonably avoiding and refusing payment to [Petitioner] for medical services rendered, thus committing the independent tort of Insurer Bad Faith.

(Emphasis added.) In Best Place, Inc. v. Penn Am. Ins. Co., 82 Hawai'i 120, 132, 920 P.2d 334, 346 (1996), this court said "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." (Emphasis added.)

Petitioner's bad faith claim was presented as a tort claim inasmuch as Petitioner's complaint entitled "COMPLAINT IN TORT FOR INSURER BAD FAITH" (emphasis added), alleged that the insurers had committed the "independent tort of Insurer Bad Faith[,] " alleged consequences arising from the insurers' "tortious conduct[,] " and requested punitive damages.

It may be contended that Petitioner's bad faith claim is a claim in the nature of assumpsit because in requesting attorneys' fees, Petitioner's prayer did not expressly state that he sought actual damages that included attorney's fees, and Petitioner therefore arguably sought attorney's fees that were in addition to actual tort damages. However, at the November 8, 2004 hearing on the issue of HEMIC's motion for reconsideration of its attorneys' fees, Petitioner cited California case law, arguing that such authority held that "attorney's fees in a bad faith case are an element of damage." Indeed, the California Supreme Court's decision in Brandt v. Superior Court, 693 P.2d 796 (Cal. 1985), which explained that an insurer may be liable in a tort action for attorneys' fees, excluding the fees incurred in bringing the bad faith action itself, if the "insurer's tortious conduct reasonably compels the insured to retain an attorney to obtain the benefits due under a policy[.]" Id. at 798. See also Uyemura v. Wick, 57 Haw. 102, 108-09, 551, P.2d 171, 176 (1976) (allowing for the recovery of attorneys' fees in contract and tort actions where wrongful acts of the defendant involve the plaintiff in litigation with third parties). The mere fact that Petitioner requested attorneys' fees in the prayer of his complaint is not a reasoned basis for deciding that Petitioner's bad faith claim is not a tort claim, particularly in light of the fact that Petitioner clearly alleges an action in tort and Petitioner has cited authority for an award of attorneys' fees on a tort claim.

B.

With respect to Petitioner's tortious interference claim, Petitioner alleges in his complaint that:

20. There existed a prospective advantage, expectancy, or professional relationship sufficiently definite, specific, and capable of acceptance by patients insured by [the insurers]; in the sense that there was a reasonable probability of it maturing into a future benefit to both [Petitioner] and the patient.

22. [The insurers] purposefully[,] maliciously or recklessly intended to interfere with the advantage, relationship or expectancy.

With respect to Petitioner's statutory tort claim under HRS § 663-1, Petitioner asserts that "[the insurers] intentionally caused injury to [Petitioner] and [are] liable to [Petitioner] for damages, according to proof."

In respect to both of the foregoing claims, Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001), also involved a contract which gave rise to the duties allegedly owed by the defendant, the breach of which was the basis for the plaintiffs' tort claim of negligence. There, this court held that the "essential character" of the plaintiffs' action was in the nature of assumpsit. Id. at 332, 31 P.3d at 189. Although this court cited the fact that the plaintiffs' "negligence claim arises out of the alleged implied contract" between the defendant and a third-party in its determination that the action was in the nature of assumpsit, this determination was not based solely on the fact that the negligence claim arose out of the alleged implied contract. Id.

In Blair, the plaintiffs asserted only two claims for relief against the defendant, one of which was a breach of implied contract claim and the other, the negligence claim. Id. Because the number and scope of the tort claims were apparently equal to those of the assumpsit claims, this court presumably looked to other factors such as the fact that the negligence claim originated from the breach of duties owed under an implied contract, in order to decide whether the action in general sounded in tort or in contract. Furthermore, this court concluded in Blair that "the damages alleged were more closely akin to contract damages than to tort damages because they were economic damages arising out of the alleged frustrated expectation that [the defendant] would take advantage of certain tax-saving devices." Id. at 332-33, 31 P.3d at 189-90.

In contrast, here, all of Petitioner's claims were tort claims. That the tort claims would not be actionable without the existence of an underlying insurance contract between insurers and employers of Petitioner's clients is an insufficient justification to redefine Petitioner's tort claims as assumpsit claims. In addition, damages sought by Petitioner are more akin to tort damages than contract damages, as they include damages for harm allegedly suffered by Petitioner transcending any contractual obligations such as harm caused to Petitioner's prospective business opportunities with certain clients.

IV.

Finally, Petitioner sought punitive damages, which "are generally not recoverable in contract." Francis v. Lee Enters., Inc., 89 Hawai'i 234, 241, 971 P.2d 707, 714 (1999) (emphasis in original). The court obviously erred in taking punitive damages into account in calculating the amount in controversy for purposes of determining the limit on that amount of attorneys' fees awardable under HRS § 607-14. Such practice is expressly prohibited under Hong v. Kong, 5 Haw. App. 174, 183, 683 P.2d 833, 841 (1984) (holding that it was error for the lower court to consider the defendants' counterclaim of \$100,000 in punitive damages when calculating the maximum attorneys' fees that could be awarded to the plaintiff under HRS § 607-14). Hawai'i Rules of Evidence (HRE) Rule 103 states that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court." Here, the court's incorrect inclusion of punitive damages in calculating the HRS § 607-14 limit on attorneys' fees was plain error affecting a substantial right of Petitioner because it improperly increased the amount of attorneys' fees for which he was liable. Thus, this court should redress this error.

