IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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MARGRET GILLAN and HOWARD KELLER, M.D.
Plaintiffs-Appellees-Petitioners,

vs.

GOVERNMENT EMPLOYEES INSURANCE COMPANY,
Defendant-Appellant-Respondent,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10; ROE NON-PROFIT CORPORATIONS 1-10; and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.

NO. 28075

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CIV. NO. 05-1-0650-04)

OCTOBER 29, 2008

MOON, C.J., LEVINSON, NAKAYAMA, JJ., CIRCUIT JUDGE LEE, IN PLACE OF DUFFY, J., RECUSED; AND ACOBA, J., CONCURRING SEPARATELY

OPINION OF THE COURT BY LEVINSON, J.

We accepted the application for a writ of certiorari filed by the plaintiffs-appellees-petitioners, a personal injury protection (PIP) claimant, Margret Gillan, and her treating physician, Howard Keller, M.D. (collectively, the Plaintiffs), on June 23, 2008 to review the published opinion of the Intermediate Court of Appeals (ICA) in Gillan v. Government Employees Insurance Co., 117 Hawai'i 465, 477, 184 P.3d 780, 792 (App. 2008), which vacated the July 17, 2006 amended partial judgment of the first circuit court, the Honorable Sabrina S. McKenna

presiding, in favor of the Plaintiffs and against the defendant-appellee-respondent Government Employees Insurance Company (GEICO). The circuit court concluded that GEICO violated the plain language of Hawai'i Revised Statutes (HRS) § 431:10C-308.5(b) (Supp. 2002),[1] because the insurer failed to seek Gillan's consent when it retained a doctor to conduct an "independent medical examination" to determine whether her treatment from Dr. Keller was appropriate, reasonable, and necessarily incurred as a result of her automobile accident, see HRS § 431:10C-103.5(a) (Supp. 2002).[2] The ICA held to the

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[1] HRS § 431:10C-308.5, entitled "Limitation on charges," provides in relevant part:

> (b) The charges and frequency of treatment for services specified in [HRS §] 431:10C-103.5(a), except for emergency services provided within seventy-two hours following a motor vehicle accident resulting in injury, shall not exceed the charges and frequency of treatment permissible under the workers' compensation supplemental medical fee schedule. Charges for independent medical examinations, including record reviews, physical examinations, history taking, and reports, to be conducted by a licensed Hawaii provider unless the insured consents to an out-of-state provider, shall not exceed charges permissible under the appropriate codes in the workers' compensation supplemental medical fee schedule. The workers' compensation supplemental medical fee schedule shall not apply to independent medical examinations conducted by out-of-state providers if the charges for the examination are reasonable. The independent medical examiner shall be selected by mutual agreement between the insurer and claimant; provided that if no agreement is reached, the selection may be submitted to the commissioner, arbitration or circuit court. The independent medical examiner shall be of the same specialty as the provider whose treatment is being reviewed, unless otherwise agreed by the insurer and claimant.

The statute was subsequently amended in respects immaterial to the present matter. See 2006 Haw. Sess. L. Act 198, §§ 2 and 4 at 840-41.

[2] HRS § 431:10C-103.5, entitled "Personal injury benefits; defined; limits," provided in relevant part: "(a) Personal injury protection benefits, with respect to any accidental harm, means all appropriate and reasonable treatment and expenses necessarily incurred as a result of the accidental harm and which are substantially comparable to the requirements for

(continued...)

contrary on the basis that GEICO's doctor did not, in fact, perform an independent medical examination in light of the statute's "clear" language, because, although he reviewed Gillan's medical records, he did not actually examine her, physically or otherwise. See Gillan, 117 Hawai'i at 475-77, 184 P.3d at 790-92. The Plaintiffs argue that the ICA erred in that regard.

Although we depart from the ICA's textual analysis of HRS § 431:10C-308(b), we ultimately arrive at the same conclusion that an actual examination, physical or otherwise, is an essential component of an "independent medical examination" within the meaning of the statute. Thus, the record review performed by the physician retained by GEICO did not constitute an independent medical examination, and, as such, GEICO did not violate the statute when it declined to seek Gillan's consent before hiring the doctor. We affirm the May 7, 2008 judgment of the ICA accordingly.

I. BACKGROUND

A. Factual Background

On December 15, 2002, Gillan was riding in the passenger seat of a Nissan truck owned and operated by her boyfriend, Frank Rainey, when the truck was struck from behind by another vehicle, which caused her to suffer injuries that required medical attention. The truck was covered by an

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[2](...continued)
prepaid health care plans . . . ." The statute was subsequently amended in respects immaterial to the present matter. See 2004 Haw. Sess. L. Act 56, §§ 1 and 4 at 285-86.

automobile insurance policy issued by GEICO that was in full force and effect at the time of the collision. GEICO does not dispute that, as a passenger of the insured motor vehicle at the time of the collision, Gillan was and is entitled to PIP insurance coverage and benefits under Rainey's insurance policy and HRS § 431:10C-303(a) (Supp. 2002).[3] In fact, GEICO initially wrote Gillan a letter notifying her that she was entitled to PIP benefits. GEICO also transmitted a PIP application form, which she completed and returned to GEICO. Gillan received medical treatment from various health care providers, including Dr. Keller, through September 2003. Bills for the treatment were submitted to GEICO for payment under the PIP benefits provided by the insurance policy and as required under Hawaii's no-fault law.

In deciding whether to deny a PIP claim, GEICO's in-house staff, which is comprised of bill reviewers, adjusters, and nursing personnel, routinely perform record reviews, including evaluations of the claimant's medical treatment records. Through these reviews, GEICO assesses whether the benefit claimed has actually been prescribed by a physician, whether the allowed number of visits has been exceeded, whether the statute of limitations has lapsed, whether workers' compensation provides primary coverage, as well as whether the claimant has presented reasonable proof of the claim for benefits. In some cases, GEICO

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[3] HRS § 431:10C-303, entitled "Right to personal injury protection benefits," provides in relevant part: "(a) If the accident causing accidental harm occurs in this State, every person insured under this article, and such person's survivors, suffering loss from accidental harm arising out of the operation, maintenance, or use of a motor vehicle, has a right to personal injury protection benefits."

may request that a physician review records without examining the claimant to determine whether, from the physician's perspective, the claim is for treatment that was appropriate, reasonable, and necessarily incurred as a result of accidental harm sustained in a motor vehicle accident.

GEICO followed that procedure in response to certain claims Gillan made for PIP benefits. GEICO retained Bruce Hector, M.D., who was a physician licensed by the State of Hawai'i, a fellow of the American Back Society, and a certified independent medical evaluator. The doctor never saw or examined Gillan or consulted with her health care providers, but merely reviewed her medical records to determine whether she required medical treatment and care as a result of the injuries she sustained in the December 15, 2002 collision. In his report dated December 8, 2003, Dr. Hector opined that Gillan did not require medical care and treatment as a result of the collision once she had completed her first six physical therapy sessions. Relying on Dr. Hector's report, GEICO sent Gillan various denial of claim forms, the first of which was dated March 11, 2004. GEICO maintained that, pursuant to HRS § 431:10C-103.5(a), Gillan was not entitled to benefits for two of her visits with Dr. Keller and for magnetic resonance imaging services, because those services were not appropriate, reasonable, or necessary. GEICO also advised Gillan that, if she wished to contest its denial, she could bring an action in court.

B. Circuit Court Proceedings

The Plaintiffs filed a complaint against GEICO in circuit court on April 15, 2005, alleging that GEICO had hired an independent medical examiner, Dr. Hector, without first seeking Gillan's consent, in violation of HRS § 431:10C-308.5. On September 8, 2005, they moved for partial summary judgment on this claim, arguing, among other things, that, because GEICO had violated the statute, the circuit court should rule that GEICO's denials of Gillan's claims for benefits and Dr. Keller's bills were improper, null, and void. The Plaintiffs observed that, under the statute, an insurer must seek to obtain a PIP claimant's agreement in selecting an "independent medical examiner." Relying on a circuit court ruling by the Honorable Bert I. Ayabe in Sadoka v. AIG Hawaii, Civ. No. 04-1-0436-03 (Haw. Cir. Ct. July 25, 2005), the Plaintiffs asserted that Dr. Hector was an independent medical examiner under the plain language of HRS § 431:10C-308.5(b), because he performed a record review and because a record review is part of an independent medical examination. The Plaintiffs also cited the legislative history of HRS § 431:10C-308.5 to support their interpretation of the statute. Finally, they made the preemptive charge that, although the United States District Court for the District of Hawaii and the Insurance Commissioner of the State of Hawai'i had reached the opposite conclusion in Engle v. Liberty Mutual Fire Insurance Co., 402 F. Supp. 2d 1157 (D. Haw. 2005), and Weigel v. Liberty Mutual Fire Insurance Co., ATX-2002-134-P (Hawai'i Insurance Commissioner's Final Order Mar. 31, 2005), available at

http://hawaii.gov/dcca/areas/oah/oah_decisions/INS/no-fault/ATX-2002-134-P Weigel v Liberty.pdf (last visited Oct. 17, 2008), those decisions were unpersuasive, because their analyses were inconsistent with the statutory language and legislative intent. GEICO countered that Dr. Hector was not an independent medical examiner, because he had not actually examined Gillan in preparing his report. GEICO's position was premised on the statute's plain language, its legislative history, Engle, and Weigel.

The circuit court heard the motion on October 11, 2005. At the hearing, the circuit court expressed its hope "that both the consumer lawyers, as well as the insurance industry, [would] go[] back to the legislature because . . . clarification would be helpful [with respect to the meaning of the term 'independent medical examination']."[4] After hearing the parties' arguments, the circuit court took the matter under advisement and, on October 20, 2005, the circuit court entered its order partially granting the motion. The circuit court concluded that GEICO was required by HRS § 431:10C-308.5 to seek Gillan's consent before hiring Dr. Hector and that GEICO had failed to meet that obligation. Consequently, pursuant to TIG Insurance Co. v. Kauhane, 101 Hawai'i 311, 67 P.3d 810 (App. 2003), the circuit court prohibited GEICO from relying on Dr. Hector's report as a basis for its denial of PIP benefits to Gillan for treatment

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[4] We endorse the circuit court's aspiration because, as explained infra in section III.A, we believe that HRS § 431:10C-308.5(b) is ambiguous as to whether an "independent medical examination" requires some form of actual examination, physical or otherwise.

rendered by Dr. Keller. Still, the circuit court denied the Plaintiff's motion to the extent that it sought a ruling that GEICO's denials were improper, null, and void, because the Plaintiffs had failed to carry their burden of proof.

On November 21, 2005, GEICO filed a Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b) motion for certification, seeking an order directing the entry of a final judgment in favor of the Plaintiffs and against GEICO based upon the circuit court's order partially granting the Plaintiff's motion for partial summary judgment. The Plaintiffs joined GEICO's motion on November 22, 2005, and the circuit court granted the motion on January 19, 2006. GEICO filed a notice of appeal on February 21, 2006. The circuit court entered its partial judgment on February 27, 2006, and GEICO filed an amended notice of appeal the next day. This court dismissed GEICO's appeal on May 25, 2006, because the circuit court's judgment did not contain the requisite language for HRCP Rule 54(b) certification. The circuit court entered an amended order granting GEICO's motion for certification on June 10, 2006 and an amended partial judgment on July 17, 2006. On August 2, 2006, GEICO filed a second amended notice of appeal.

C. Appellate Proceedings

In its points of error on appeal, GEICO argued that the circuit court had stretched HRS § 431:10C-308.5(b) beyond its plain meaning by concluding that the statute applied whenever an insurer sought any expert medical opinion to inform a decision as to whether to make a PIP payment. GEICO also asserted that the

circuit court erred in ruling that GEICO had violated HRS § 431:10C-308.5(b) by obtaining and relying upon a record review as a part of its PIP claim review and payment decision without agreement from Gillan regarding the selection of the reviewing doctor. Finally, GEICO maintained that the circuit court erred in ruling that GEICO was prohibited at trial from relying on Dr. Hector's report as a basis for its denial of PIP benefits to Gillan for treatment rendered by Dr. Keller. Amicus briefs were filed in support of GEICO's position by the insurance commissioner and by Hawaii Insurers Council.

Adopting the federal district court's reasoning in Engle, the ICA concluded that GEICO did not violate HRS § 431:10C-308.5(b), because the statute's "clear" language and legislative history did not require that GEICO seek Gillan's consent before retaining Dr. Hector to perform a record review. Gillan, 117 Hawai'i at 474-77, 184 P.3d 789-92. As such, the ICA vacated the circuit court's amended partial judgment. Id. at 477, 184 P.3d at 792. The ICA entered its judgment on appeal on May 7, 2008, and the Plaintiffs filed their timely application for a writ of certiorari on May 15, 2008. See Hawai'i Rules of Appellate Procedure Rule 40.1(a). We accepted the application on June 23, 2008 and heard oral argument on August 21, 2008.

II. STANDARDS OF REVIEW

A. Motion For Summary Judgment

This court reviews the circuit court's grant of summary judgment de novo. Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 110, 111 P.3d 1, 5 (2005). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCP Rule 56(c).

B. Statutory Interpretation

This court generally reviews questions of statutory interpretation de novo, 'Olelo v. Office of Info. Practices, 116 Hawai'i 337, 344, 173 P.3d 484, 491 (2007), but, "[i]n the case of . . . ambiguous statutory language, the applicable standard of review regarding an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous," Vail v. Employees' Ret. Sys., 75 Haw. 42, 66, 856 P.2d 1227, 1240 (1993).

III. DISCUSSION

The Plaintiffs' basic argument is that the ICA erred in concluding that GEICO did not violate HRS § 431:10C-308.5(b) in denying her claim for PIP benefits. PIP benefits, "with respect to any accidental harm," are "all appropriate and reasonable treatment and expenses necessarily incurred as a result of the accidental harm and which are substantially comparable to the

requirements for prepaid health care plans." HRS § 431:10C-103.5(a). In deciding whether to deny a PIP claim, see HRS § 431:10C-304(3)(B) (Supp. 2002),[5] HRS § 431:10C-308.5(b) permits an insurer to utilize an "independent medical examination" in order to review the claimant's treatment from his health care provider. If an insurer elects to employ an independent medical examiner to assess whether the claimant's treatment is appropriate, reasonable, and necessarily incurred as a result of the accidental harm, see HRS § 431:10C-103.5(a), HRS § 431:10C-308.5(b) requires that the examiner "be selected by mutual agreement between the insurer and claimant," but also provides the exception that, "if no agreement is reached, the selection may be submitted to the commissioner, arbitration or circuit court."

In this case, GEICO did not seek Gillan's consent in hiring Dr. Hector to assess the appropriateness of her medical treatment. Dr. Hector looked only to her medical records; he did not actually examine her, physically or otherwise. By its terms, HRS § 431:10C-308.5(b) contemplates that certain activities may be associated with an independent medical examination, including "record reviews, physical examinations, history taking, and reports." The Plaintiffs maintain that, in light of the statute's plain language, Dr. Hector's record review was itself an independent medical examination and that GEICO therefore breached its obligation under the statute to seek Gillan's

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[5] HRS § 431:10C-304(3)(B) sets forth some of the procedures that insurers must follow in denying PIP claims.

consent. On the other hand, GEICO, supported by the insurance commissioner and the Hawai'i Insurers Council, asserts that it had no statutory duty to seek Gillan's agreement in selecting Dr. Hector, because, without an actual "examination," the doctor's review of her records did not rise to the level of an "independent medical examination." The fundamental question is therefore whether, absent an actual examination, physical or otherwise, Dr. Hector's record review constitutes an "independent medical examination" within the meaning of HRS § 431:10C-308.5(b).

A. The Term "Independent Medical Examination," As It Appears In HRS § 431:10C-308.5(b), Is Ambiguous With Respect To Whether An Actual Examination Of The Claimant, Physically Or Otherwise, Is An Essential Aspect Of The "Examination."

In interpreting the statute, this court's "'foremost obligation is to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself.'" Colony Surf, Ltd. v. Dir. of the Dep't of Planning & Permitting, 116 Hawai'i 510, 516, 174 P.3d 349, 355 (2007) (quoting Gray v. Admin. Dir. of the Court, 84 Hawai'i 138, 148, 931 P.2d 580, 590 (1997)). The Plaintiffs argue that two of the statute's provisions, the first of which employs the word "reviewed" and the second of which contains the term "records," demonstrate that the legislature intended for an "independent medical examination" to encompass the situation in which only the claimant's medical records are reviewed, but the claimant is not physically examined. The first provision specifically states that "[t]he independent medical

examiner shall be of the same specialty as the provider whose treatment is being reviewed." HRS § 431:10C-308.5(b). Aside from mandating that the examiner have the same specialty as the treating health care provider, the sentence demonstrates that the core function of the examination is to evaluate the propriety of the claimant's treatment by his health care provider. See id. While the sentence sheds light on the purpose of an independent medical examination, it does not speak to the process by which the examination takes place; it does not address whether an actual "examination" is the essence of that process. The second provision that the Plaintiffs cite directs that "[a]ll records and charges relating to an independent medical examination shall be made available to the claimant upon request." Id. This provision serves to illustrate that the review of records may be related to an independent medical examination. See id. Still, the question is not whether a record review is merely "relat[ed] to an independent medical examination," see id. (emphasis added), but, rather, whether a record review is itself an independent medical examination. Thus, the second provision, like the first, does not answer the question at hand because it does not imply, much less direct, that an actual examination is or is not an essential component in an independent medical examination. In summary, although the language of HRS § 431:10C-308.5(b) plainly establishes that an independent medical examination may involve both a record review and a physical examination, the Plaintiffs have not cited, and we have not found, a provision in the statute, or in any other section of the motor vehicle insurance

law, HRS ch. 431:10C, that squarely addresses whether an actual examination is an essential element of an "independent medical examination."

Because the term is not statutorily defined, this court "'may resort to legal or other well accepted dictionaries as one way to determine [its] ordinary meaning.'" Leslie v. Bd. of Appeals of the County of Hawai'i, 109 Hawai'i 384, 393, 126 P.3d 1071, 1080 (2006) (quoting Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 424, 32 P.3d 52, 68 (2001)). As the Plaintiffs point out, Black's Law Dictionary broadly defines "independent medical examination" as "[a]n assessment of a person's physical condition and health that is made by an impartial healthcare professional, usu[ally] a physician." Black's Law Dictionary 785 (8th ed. 2004). A person's physical condition and health could certainly be assessed simply by reviewing his medical records and without examining him physically. Thus, as defined by Black's Law Dictionary, Dr. Hector's review of Gillan's records could fairly be characterized as an independent medical examination.

On the other hand, certain medical dictionaries suggest that an "examination" involves some form of actual in-person contact. Taber's Cyclopedic Medical Dictionary defines an "examination" as "[t]he act or process of inspecting the body and its systems to determine the presence or absence of disease." Taber's Cyclopedic Medical Dictionary 682 (18th ed. 1997). The dictionary further states that the word is generally prefaced by terms indicating the type of examination, such as "physical,

bimanual, digital, oral, rectal, obstetrical, roentgenological, [or] cystoscopic." Id. Dorland's Illustrated Medical Dictionary similarly defines "examination" as "inspection, palpation, ausculation, percussion, or other means of investigation, especially for diagnosing disease, qualified according to the methods employed, as physical examination, radiological examination, diagnostic imaging examination, or cystoscopic examination." Dorland's Illustrated Medical Dictionary 651 (30th ed. 2003); accord Sloane-Dorland Annotated Medical-Legal Dictionary 270 (1987); PDR Medical Dictionary 628 (2d ed. 2000). Thus, these medical dictionaries counsel that an actual "examination" is an indispensable part of a medical examination.

In addition to dictionaries, this court may also consult legal treatises to ascertain the meaning of a term that is not defined by statute. See Allstate Ins. Co. v. Kaneshiro, 93 Hawai'i 210, 215, 998 P.2d 490, 495 (2000) (relying on Couch on Insurance in defining the term "renewal policy" in HRS § 431:10C-301 (1993), because the term was not defined in Hawaii's motor vehicle insurance law, HRS ch. 431:10C). Like the medical dictionaries, Couch on Insurance indicates that an independent medical examination necessarily involves an actual examination. The treatise states that, "[i]n the process of investigating a personal injury or disability claim . . . , an insurer is entitled to obtain medical records pursuant to the claimant's authorization and to request a physical examination of the claimant, commonly known as an independent medical examination or IME." 13 Couch on Insurance § 196:53, at 196-60

(3d ed. 1995); see also id. § 196:67, at 196-72 (similarly equating an independent medical examination with a physical examination). The treatise also teaches that, because the scope of the independent medical examination is guided by the medical condition claimed by the insured, the insurer may be required to conduct a medical record review in advance of seeking an independent medical examination. Id. § 196:67, at 196-72. Hence, Couch on Insurance seems to suggest that an independent medical examination necessarily involves an actual examination of the claimant, physically or otherwise, and that the "examination" is distinct from a mere record review, which precedes the examination. See id. §§ 196:53, 196:67, at 196-60, 196-72.

Another textual guide that this court has utilized in interpreting statutory terms is common usage. See Bishop Trust Co. v. Burns, 46 Haw. 375, 399, 381 P.2d 687, 701 (1963) ("Courts will presume that the words in a statute were used to express their meaning in common usage."); see also Sherman v. Sawyer, 63 Haw. 55, 59, 621 P.2d 346, 349 (1980) (interpreting the statutory phrase "exclusive jurisdiction" according to its "general and common usage"). In reviewing the proceedings at trial in Nelson v. University of Hawai'i, we explained that the defendants had relied upon the testimony of "a psychiatrist who had conducted an independent medical examination . . . of [the plaintiff] in March 1997 and had reviewed her medical history." 97 Hawai'i 376, 383, 38 P.3d 95, 102 (2001). Our use of the conjunctive "and" implies that we regarded an independent medical examination as being distinct from a medical history review. See id. We later

observed that the psychiatrist had conducted a two-hour interview of the plaintiff. Id. at 386, 38 P.3d at 105. Thus, what appears to have distinguished the independent medical examination from the medical history review was that the former involved an actual examination of the plaintiff, whereas the latter did not. See id. at 383, 386, 38 P.3d at 102, 105. The manner in which we employed the term "independent medical examination" in Nelson is consistent with the notion that an actual examination of the claimant is an essential aspect of an independent medical examination.

Courts across the country appear to have a similar understanding of the term. See Engle, 402 F. Supp. 2d at 1162 ("Courts routinely use the term 'IME' to describe procedures in which in-person examinations were conducted.");[6] Doss v. Manfredi, 40 P.3d 333, 334-35 (Kan. Ct. App. 2002) (explaining that a doctor retained by an insurer to review the PIP claimant's chiropractic treatment "only reviewed the chiropractic records relating to the treatment of [the claimant] without any IME"); Glover v. Jefferson Pilot Fin. Ins. Co., No. 4:06-CV323 GTE, 2007 U.S. Dist. LEXIS 12079, at *17, *28 (E.D. Ark. Feb. 21, 2007) (observing that, in response to a claim for long-term disability benefits, an insurer sent the claimant's file to a doctor who "did not conduct an independent medical examination on the

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[6] Contrary to the impression expressed in the concurring opinion, we do not cite Engle for the proposition that HRCP Rule 35 and Federal Rules of Civil Procedure Rule 35 are in fact instructive in determining whether a record review alone constitutes an "independent medical examination" under HRS § 431:1-308.5. See concurring opinion at 19. We merely cite the Engle decision as illustrative of how courts have generally employed the term.

[claimant]," but who instead "only reviewed records"); O'Connell v. Unum Provident, Civ. No. 04-3499, 2006 U.S. Dist. LEXIS 4826, at *25-*27, *42 (D.N.J. Feb. 3, 2006) (noting that, although a disability insurer's experts reviewed the claimant's medical records, the "experts did not examine the [claimant]," and that the insurer's "failure to conduct an independent medical examination is not itself sufficient grounds to reverse a determination"); United Founders Life Ins. Co. v. Carey, 363 S.W.2d 236, 242 (Tex. 1962) ("A medical examination imports a physical examination as distinguished from a medical history investigation." (emphases in original)).

Yet, at the same time, other courts have characterized a doctor's evaluation as an independent medical examination, even where the physician never physically examined the claimant. See Nickel v. Unum Life Ins. Co. of Am., No. 06-10476-BC, 2008 U.S. Dist. LEXIS 16777, at *26-*28 (E.D. Mich. Mar. 3, 2008) (explaining that a disability insurer's physician performed an independent medical examination of the claimant even though the doctor "never examined [the claimant] in person," but, instead, only "reviewed [the claimant's] records"); Johnson v. Park N Shop, 446 S.W.2d 182, 187-88 (Mo. Ct. App. 1969) (holding that a doctor who reviewed the workers' compensation claimant's medical records and prepared a report, but who did not physically examine the claimant, was an "examining physician," such that the report was subject to a statute requiring disclosure of medical reports prepared by examining physicians, because the only difference between a physician who conducted a physical examination and the

doctor who simply reviewed records was the claimant's presence in the doctor's office).

In light of these conflicting interpretations of the term "independent medical examination," we do not agree with the ICA, the circuit court, the parties, or the amici curiae that the meaning of the term, as it appears in HRS § 431:10C-308.5(b), is "plain" or "clear" with respect to the necessity of an actual examination. See Gillan, 117 Hawai'i 477, 184 P.3d at 792. "'When there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. Put differently, a statute is ambiguous if it is capable of being understood by reasonably well-informed people in two or more different senses.'" Farmer v. Administrative Dir. of the Court, 94 Hawai'i 232, 236, 11 P.3d 457, 461 (2000) (quoting Konno v. County of Hawai'i, 85 Hawai'i 61, 71, 937 P.2d 397, 407 (1997)). From our perspective, reasonable minds could differ as to whether an "independent medical examination" pursuant to HRS § 431:10C-308.5(b) requires some form of actual examination, and, as such, we hold that the term is ambiguous. See id.; see also Mehau v. Reed, 76 Hawai'i 101, 108-09, 869 P.2d 1320, 1327-28 (1994) (concluding that the word "court" in HRS § 93E-11(c) (1985) was ambiguous because it could be interpreted as meaning either "judge" or "jury").

B. Because The Term "Independent Medical Examination" In HRS § 431:10C-308.5(b) Is Ambiguous, This Court Defers To The Insurance Commissioner's Interpretation, Unless His Interpretation Is Palpably Erroneous.

"In the case of . . . ambiguous statutory language, the applicable standard of review regarding an agency's interpretation of its own governing statute requires this court to defer to the agency's expertise and to follow the agency's construction of the statute unless that construction is palpably erroneous." Vail, 75 Haw. at 66, 856 P.2d at 1240; see also Morgan v. Planning Dep't, 104 Hawai'i 173, 180, 86 P.3d 982, 989 (2004). "Such deference 'reflects a sensitivity to the proper roles of the political and judicial branches,' insofar as 'the resolution of ambiguity in a statutory text is often more a question of policy than law.'" In re Water Use Permit Applications, 94 Haw. 97, 145, 9 P.3d 409, 457 (2000) (quoting Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 696 (1991)). In the present matter, the insurance commissioner correctly observes that he was entrusted with enforcing the insurance code in general, see HRS § 431:2-201(b), and with reviewing the propriety of denials of PIP claims in particular, see HRS §§ 431:2-102(b) and 431:10C-212.

He reviewed one such claim in Weigel, wherein a medical provider asserted that an insurer's denials were improperly based upon medical records reviews performed by an independent medical examiner who only reviewed the claimants' medical records and who was not selected by mutual agreement between the insurer and the claimants, in contravention of HRS § 431:10C-308.5(b). ATX-2002-

134-P, hearings officer's findings of fact, conclusions of law, and recommended order (RO) at 2, 4-7. In the hearings officer's recommendation to the commissioner, he concluded that, although the statute did not define "independent medical examination," the term necessarily "includes a physical examination, which requires doctor-patient interaction." Id. at 9. According to the hearings officer, the statute requires that an insurer seek a claimant's consent in light of the potentially invasive nature of that physical interaction. Id. The insurance commissioner adopted the hearings officer's recommendation, id., commissioner's final order (CFO) at 2, specifically ruling that "the conditions placed on the . . . selection of a provider of an [i]ndependent [m]edical [e]xamination do[] not apply to a medical records reviewer whose activities do not require a medical providers' license," id. at 2 n.1. According to the commissioner, the insurer's "decision to employ a medical professional to provide consultation in support of, or to perform the duties typically undertaken by[,] adjusters and bill reviewers does not subject the [insurer] to compliance with the obligations associated with performing an [i]ndependent [m]edical [e]xamination." Id.

Because the insurance commissioner has been charged with reviewing PIP benefit denials, see HRS §§ 431:2-102(b) and 431:10C-212, and because, in the course of reviewing such denials in Weigel, he specifically ruled that a record review without a physical examination did not qualify as "an independent medical examination" within the meaning of HRS § 431:10C-308.5(b), see

ATX-2002-134-P, RO at 9, CFO at 2 n.1, we believe that his ruling is entitled to deference, unless it is palpably erroneous. See Vail, 75 Haw. at 65-66, 856 P.2d at 1239-40 (deferring to the employees' retirement system's interpretation of the term "part-time employees" in HRS § 88-43, as evidenced by its arguments on appeal and its implementation of the statute through an administrative rule, because the statutory term was ambiguous); Holi v. AIG Haw. Ins. Co., 113 Hawai'i 196, 205-06, 150 P.3d 845, 854-55 (App. 2007) (according deference to the insurance commissioner's interpretation of the word "relative," appearing in HRS § 431:10C-103, which was not defined by statute, because the meaning of the word was less than clear and because the commissioner had promulgated a rule defining the term for purposes of administering the Hawai'i motor vehicle insurance law, HRS ch. 431:10C); Treloar v. Swinerton & Walberg Co., 65 Haw. 415, 421, 424-26, 653 P.2d 420, 424, 426-27 (1982) (deferring to the department of labor and industrial relations' construction of an ambiguous provision in HRS § 386-54, which the department enunciated in an administrative ruling, because the department was charged with carrying out the workers' compensation law, HRS ch. 386).

C. The Insurance Commissioner's Interpretation That An Actual Examination Is A Necessary Component Of An "Independent Medical Examination" Under HRS § 431:10C-308.5(b) Is Not Palpably Erroneous.

The Plaintiffs essentially assert that, in light of the statute's legislative history, the insurance commissioner's understanding of the term "independent medical examination" in

HRS § 431:10C-308.5(b) is palpably erroneous. An agency's interpretation of a statute is palpably erroneous when it is inconsistent with the legislative intent underlying the statute. Cf. Treloar, 65 Haw. at 425-26, 653 P.2d at 427 (holding that an agency's interpretation of a workers' compensation statute was not palpably erroneous because it was consonant with the legislative intent underlying the statute). In construing an ambiguous statute, this court "'may resort to extrinsic aids in determining legislative intent,'" one of which is "'legislative history.'" Hawaii Home Infusion Assocs. v. Befitel, 114 Hawai'i 87, 91, 157 P.3d 526, 530 (2007) (quoting Courbat v. Dahana Ranch, Inc., 111 Hawai'i 254, 261, 141 P.3d 427, 434 (2006)); Silva v. City & County of Honolulu, 115 Hawai'i 1, 6, 165 P.3d 247, 252 (2007). Thus, in the present matter, because the term "independent medical examination" as employed in HRS § 431:10C-308.5(b) is ambiguous, see supra section III.A, this court may consult the statute's legislative history to ascertain the meaning of the term. See Haw. Home Infusion Assocs., 114 Hawai'i at 91, 157 P.3d at 530.

The Plaintiffs begin their analysis with the legislative history underlying the 1998 amendments to the statute. Prior to those amendments, HRS § 431:10C-308.5(b) provided in relevant part that "[c]harges for independent medical examinations to be conducted by a licensed Hawaii provider, unless the insured consents to an out-of-state provider, shall not exceed the charges permissible under the workers' compensation schedules for consultation for a complex medical

problem." HRS § 431:10C-308.5(b) (Supp. 1997). The legislature amended this provision by adding the following underscored language: "Charges for independent medical examinations, including record reviews, physical examinations, history taking, and reports, to be conducted by a licensed Hawaii provider unless the insured consents to an out-of-state provider, shall not exceed the charges permissible under the workers' compensation schedules for consultation for a complex medical problem." 1998 Haw. Sess. L. Act 275, § 26 at 935 (emphasis in original) (footnote omitted). The legislative history reflects that the amendment was specifically "designed to eliminate abuses and excessive charges associated with independent medical examinations (IMEs)" by "clarif[ying] that the workers' compensation fee schedule charge allowable for IMEs may not be exceeded by submitting a separate charge for the report or other ancillary procedures incident to the conducting of an IME." Hse. Conf. Comm. Rep. No. 117, in 1998 House Journal, at 1000; Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794. The amendment also served, more generally, to decrease "automobile insurance rates for [the] driving public." Hse. Conf. Comm. Rep. No. 117, in 1998 House Journal, at 999; Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 793.

In effect, the Plaintiffs argue that interpreting "independent medical examination" to include record reviews without a physical examination would advance the legislature's goal of limiting insurance costs because, so construed, a record review would be subject to the workers' compensation fee

schedule. See HRS § 431:10C-308.5(b). While it is true that the legislative history reflects that the amendment was aimed at containing the costs of activities associated with independent medical examinations, the committee reports do not suggest that the particular activity of reviewing medical records is, without more, an independent medical examination. See Engle, 402 F. Supp. 2d at 1164. If anything, the legislative history militates in favor of the opposite conclusion insofar as it draws a distinction between an independent medical examination and a "report or other ancillary procedures incident to the conducting of an IME." Hse. Conf. Comm. Rep. No. 117, in 1998 House Journal, at 1000; Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794; see also Engle, 402 F. Supp. 2d at 1164. Although the committee reports do not specifically state that a record review is an ancillary procedure that is incident to an independent medical examination, we believe that the legislature probably viewed it as such, especially because record reviews are generally understood to be measures undertaken in preparation for independent medical examinations, see 13 Couch on Insurance § 196:67, at 196-72.

Aside from the 1998 amendment to the cost containment provision, the Plaintiffs draw attention to one of the sentences added in 2000, which directed that "[t]he independent medical examiner shall be selected by mutual agreement between insurer and claimant; provided that if no agreement is reached, the selection may be submitted to the commissioner, arbitration or circuit court." 2000 Haw. Sess. L. Act, 138 § 2 at 270 (emphasis

omitted). The committee reports indicate that this provision was intended "to establish a fair selection process that favors selection by agreement." Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865. The legislature emphasized that "the selection should not be a perfunctory matter" and that "every effort should be made to select a neutral examiner with a balanced approach that favors neither insurer [n]or claimant." Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865. The legislature further indicated that "[t]hose examiners who have acquired reputations for favoring one side or the other should not be selected" and that "[e]xaminers who are primarily treating doctors who are familiar with community treatment protocols, injury patterns and cultural factors, that do not rely heavily on IME income that may affect bias, are to be favored." Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865.

The Plaintiffs contend that the term "independent medical examination" should be read to encompass record reviews, in the absence of a patient-contact examination, such that all medical experts who review records must be selected pursuant to the "mutual agreement" provision. See HRS § 431:10C-308.5(b). The Plaintiffs urge that their interpretation would effectuate the legislature's goal of ensuring that an independent medical examination is indeed "independent." While the committee reports relating to the 2000 amendments no doubt address what it means to

be "independent," they simply do not speak to the contours of the "examination," particularly whether an actual examination of the claimant is required or whether a review of the claimant's records would suffice. See Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865. Simply put, the reports consider who performs the examination, but not how the examination is to be performed. See Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865.

Apart from the "mutual agreement" provision, the Plaintiffs highlight that, in the 2000 amendments, the legislature inserted the condition that "[t]he independent medical examiner shall be of the same specialty as the provider whose treatment is being reviewed, unless otherwise agreed by the insurer and claimant." 2000 Haw. Sess. L. Act, 138 § 2 at 270 (emphasis omitted). During the floor debates, Representative Ron Menor had this to say about the provision:

> Doctors representing the Hawai'i Medical Association who requested [the specialty provision] were concerned about the use of unqualified persons performing IME reviews of their work. I agreed to do so because I felt that the inclusion of this requirement made common sense. For example, it makes sense to require a neurosurgeon IME to review spinal surgery. Moreover, it would not make sense to allow an IME psychiatrist to review the treatment of a broken leg by an orthopedist. In addition, a person performing an IME review of a knee reconstruction by an orthopedic surgeon should have training in orthopedic surgery.

Comment by Representative Menor, in 2000 House Journal, at 710 (emphases added) (quotation marks omitted). Representative Romy

M. Cachola likewise spoke about the specialty provision, noting that:

> Given as an example, is a case wherein a claimant with foot and spinal injuries, whose treatment records are to be reviewed, has undergone treatment by a podiatrist, physical therapist, chiropractor and orthopedic surgeon. In this example, the question to ask is, does the specialty provision . . . mean that you have to require four IMEs with the same specialty to review treatment conducted by the podiatrist, physical therapist, chiropractor and orthopedic surgeon? I believe that if the provision of this bill is narrowly interpreted, then the answer is "yes."
>
> However, if we acknowledge that there are clinical overlaps, and thus a medical specialist or multi-specialist is knowledgeable about a given clinical problem then the answer is "no" -- there is no requirement for four IMEs.
>
> It is for the aforementioned reasons that in the committee report, to clarify the specialty provision, that language is included to insure that IME doctors possess adequate knowledge necessary to properly review the treatment rendered by the treating medical provider.

Comment by Representative Cachola, in 2000 House Journal, at 711 (emphases added) (quotation marks omitted).

The Plaintiffs maintain that the statements by Representatives Menor and Cachola during the floor debates in connection with the specialty provision illustrate that a record review is an independent medical examination, because the representatives repeatedly asserted that an independent medical examination involves a "review" of the claimant's treatment "records." Although independent medical examinations often, if not usually, involve record reviews, from our perspective, the representatives' statements do not address whether a record review is, in and of itself, an independent medical examination. Moreover, "'[s]tray comments by individual legislators, not

otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted for the bill.'" Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 411 n.8, 142 P.3d 265, 275 n.8 (2006) (quoting Bennett v. Yoshina, 98 F. Supp. 2d 1139, 1150 (D. Haw. 2000), aff'd, 259 F.3d 1097 (9th Cir. 2001)). As discussed earlier, the specialty provision does not, by its terms, unequivocally dictate that a record review is an independent medical examination. See supra section III.A. Looking past the statutory language, the committee reports reflect that the provision was intended to ensure "that IME doctors possess adequate knowledge necessary to properly evaluate the treatment rendered by the treating doctor or medical provider." Sen. Conf. Com. Rep. No. 37, in 2000 Senate Journal, at 742; Hse. Conf. Com. Rep. No. 37, in 2000 House Journal, at 865. Like the statutory language, the committee reports are silent with respect to whether a record review alone is an independent medical examination. Therefore, even assuming, arguendo, that the comments of Representatives Menor and Cachola could be read to suggest that a record review is, without more, an independent medical examination, those comments could not be imputed to the full legislature that voted for the bill because they would not be supported by the statutory language or committee reports. See Wright, 111 Hawai'i at 411 n.8, 142 P.3d at 275 n.8.

The Plaintiffs also analogize the independent medical examination process to the peer review organization system prescribed in HRS § 431:10C-308.6 (1993), which was repealed in

1998 because it was too expensive and time-consuming. See 1997 Haw. Sess. L. Act 251, §§ 59 and 70 at 551, 553; Hse. Stand. Com. Rep. No. 250, in 1997 House Journal, at 1211. Under the peer review system, if a PIP insurer wanted to dispute the appropriateness of certain treatments or charges, it had to initially request a peer review. See HRS §§ 431:10C-308.6(a) (1993) and 431:10C-308.5(c) and (d) (1993). A peer review was conducted by an organization that was approved by the insurance commissioner. HRS § 431:10C-308.6(b). Additionally, the organization was required to designate an individual who practiced the same specialty as the claimant's treating health care provider. Id. The Plaintiffs point out that the independent medical examination process is similar to the peer review system to the extent that the examiner must be "independent," insofar as he is selected by agreement or tribunal and of the same specialty as the provider whose treatment is being reviewed. See HRS §§ 431:10C-308.5(b) (Supp. 2002) and 431:10C-308.6(b). The Plaintiffs appear to assert that, just as the legislature regulated record reviews in the peer review system, so too did it intend to regulate record reviews through independent medical examinations. The Plaintiffs' argument begs the question of what it means to be "examined," because, unlike the peer review system, the independent medical examination process clearly contemplates an "examination." HRS § 431:10C-308.5(b). Thus, we believe that the Plaintiffs' analogy to the repealed peer review system ultimately breaks down.

Beyond citing legislative history, the Plaintiffs attempt to demonstrate legislative intent by invoking the cannon of construction that "'the legislature is presumed not to intend an absurd result.'" Colony Surf, 116 Hawai'i at 516, 174 P.3d at 355 (quoting Gray, 84 Hawai'i at 148, 931 P.2d at 590). They maintain that it would be absurd to interpret HRS § 431:10C-308.5 as governing PIP benefit denials based on actual examinations, but not record reviews, because either type of evaluation can be used to support a denial of payments to medical providers. But, as the district court observed in Engle and the hearings officer noted in Weigel, there is in fact a logical distinction between a physical examination and a record review. See Engle, 402 F. Supp. 2d at 1164-65; Weigel, ATX-2002-134-P, RO at 8. The claimant understandably has a more substantial interest in selecting the doctor who actually examines her person than in choosing the person who reviews her medical records, especially when the examination is invasive or the medical problem is of a private nature. See Engle, 402 F. Supp. 2d at 1164-65; Weigel, ATX-2002-134-P, RO at 9. Hence, we conclude that interpreting the term "independent medical examination" as necessarily including an actual examination as a component does not yield an absurd result in contravention of legislative intent. See Colony Surf, 116 Hawai'i at 516, 174 P.3d at 355.

In short, the legislative intent underlying HRS § 431:10C-308.5(b) does not undermine the insurance commissioner's understanding that an "independent medical examination" requires some type of actual examination.

Consequently, we believe that his interpretation is not palpably erroneous and is therefore worthy of deference. See Vail, 75 Haw. at 65-66, 856 P.2d at 1239-40 (deferring to the employees' retirement system's reading of an ambiguous term in HRS § 88-43, because the plaintiff had failed to demonstrate that the reading was palpably erroneous); Nelson, 97 Hawai'i at 390-91, 38 P.3d at 109-10 (deferring to the Hawai'i Civil Rights commission's decision interpreting Hawai'i Administrative Rules § 12-46-109, which in turn construed HRS § 378-2 (Supp. 1994), because the agency's interpretation was not palpably erroneous); Treloar, 65 Haw. at 424-26, 653 P.2d at 426-27 (according deference to the department of labor and industrial relations' construction of an ambiguous statutory provision in HRS § 386-54, because the department's construction was not palpably erroneous); State v. McCully, 64 Haw. 407, 411-14, 642 P.2d 933, 937-38 (1982) (according deference to a postal inspector's testimony regarding the United States Postal Service's customary interpretation of a federal statute governing the opening of mail pursuant to a search warrant authorized by law, because that interpretation was not palpably erroneous); Holi, 113 Hawai'i at 198, 205-06, 150 P.3d at 847, 854-55 (deferring to the insurance commissioner's interpretation of HRS § 431:10C-103, which he had enunciated in an administrative rule, in an appeal from a judgment entered in a dispute initiated in the circuit court).[7] We therefore hold that

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[7] The concurrence maintains that Vail, Treloar, Nelson, and Holi are distinguishable from the present matter on the ground that they involved either an appeal from an agency decision interpreting a statute, see Vail, 75 Haw. at 46-51, 856 P.2d at 1231-33; Treloar, 65 Haw. at 418-20, 653 P.2d

(continued...)

an actual examination, physical or otherwise, is an essential aspect of an "independent medical examination" under HRS § 431:10C-308.5(b).

D. Because An "Independent Medical Examination" Under HRS § 431:10C-308.5(b) Requires An Actual Examination, Physical Or Otherwise, Dr. Hector's Record Review Did Not Constitute An Independent Medical Examination, And, Therefore, GEICO Did Not Violate The Statute.

In the present matter, Dr. Hector did not actually examine Gillan, but, instead, limited his evaluation to a review

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[7](...continued)
at 422-24, or an administrative rule interpreting a statute, see Nelson, 97 Hawai'i at 387-88, 38 P.3d at 106-07; Holi, 113 Hawai'i at 205-06, 150 P.3d at 854-55. Concurring opinion at 5-6. The applicability of the deference principle did not, however, turn on those factual circumstances. Rather, the dispositive considerations in the cases were that the statute at issue contained broad or ambiguous language, that an agency had been charged with carrying out the mandate of the statute, that the agency had interpreted the broad or ambiguous language, and that the agency's interpretation was not palpably erroneous. See Vail, 75 Haw. at 66, 856 P.2d at 1240; Treloar, 65 Haw. at 423-25, 653 P.2d at 426-27; Nelson, 97 Hawai'i at 391, 38 P.3d at 110; Holi, 113 Hawai'i at 206, 150 P.3d at 855. Thus, the fact that this case does not concern an agency appeal or an administrative rule is a distinction without a difference.

Were it otherwise, the applicability of the deference principle would, in some cases, depend on a party's choice of forum. The facts of this case provide an instructive illustration. If the Plaintiffs had elected to initiate this proceeding before the commissioner, see HRS § 431:10C-212, instead of the circuit court, see HRS § 431:10C-314, then, under the concurrence's approach, the deference principle would apply to the commissioner's interpretation of HRS § 431:10C-308.5. Concurring opinion at 5-6. It is because the Plaintiffs elected to submit the dispute to the circuit court that the concurrence does not believe that the principle applies. Id. Although the deference principle may not have been dispositive in the present matter, see concurring opinion at 18-19 (discussing Sen. Conf. Comm. Rep. No. 117, in 1998 Senate Journal, at 794), it may well have a controlling effect in other cases. Individuals should not be allowed to circumvent the deference principle through forum shopping, a practice that "should be discouraged as 'inimical to sound judicial administration.'" See Moss v. Am. Int'l Adjustment Co., 86 Hawai'i 59, 65, 947 P.2d 371, 377 (1997) (quoting Jordan v. Hamada, 64 Haw. 446, 448, 643 P.2d 70, 72 (1982)) (holding that, in light of, inter alia, forum shopping concerns, "the first party to choose a forum for the resolution of a no-fault dispute binds the other party to that forum unless the circuit court finds that the parties have entered into a mandatory and binding arbitration agreement" (emphasis omitted)). Yet that is precisely what the concurrence's approach would permit.

of her medical records. Therefore, Dr. Hector did not perform an independent medical examination on Gillan in evaluating the appropriateness of her treatment from Dr. Keller. Because Dr. Hector did not perform an independent medical examination within the meaning of HRS § 431:10C-308.5(b), it follows that the statute did not require GEICO to seek Gillan's consent before selecting the doctor. Accordingly, GEICO did not violate the statute when it declined to seek Gillan's consent in selecting Dr. Hector to review her records. The ICA was correct in so holding. See Gillan, 117 Hawai'i at 477, 184 P.3d at 792.

IV. CONCLUSION

In light of the foregoing, we affirm the May 7, 2008 judgment of the ICA.

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