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CLERK, APPELLATE COURTS
STATE OF HAWAII

2005 DEC 23 AM 10:03

FILED

NO. 26131

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

TERENCE MANN and CHRISTIE MANN, Claimants-Appellees, v.
AIG HAWAII INSURANCE CO., INC., Respondent-Appellant

APPEAL FROM THE CIRCUIT COURT OF THE FIFTH CIRCUIT
(S.P. NO. 01-1-0028)

MEMORANDUM OPINION

(By: Lim, Acting C.J., Foley and Fujise, JJ.)

Respondent-Appellant AIG Hawaii Insurance Company, Inc.

(AIG) appeals from the Order Confirming Arbitration Award (Order) filed on September 19, 2003 in the Circuit Court of the Fifth Circuit (circuit court).^{1/} The Order (1) confirmed an April 14, 2003 arbitration award of \$40,984.29 granted to Claimants-Appellees Christie and Terence Mann (the Manns), (2) awarded \$13,324.67 in attorney's fees and \$392.17 in costs to the Manns, and (3) denied prejudgment interest to the Manns.

On appeal, AIG claims the circuit court erred by (1) awarding attorney's fees and costs on the Mann's Motion to Confirm Arbitration Award, which was brought pursuant to Hawaii Revised Statutes (HRS) § 658-8 (1993)^{2/}; (2) awarding attorney's

^{1/} The Honorable George M. Masuoka presided.

^{2/} Hawaii Revised Statutes (HRS) § 658-8 (1993) provides in relevant part:

§658-8 Award; confirming award. . . . At any time within one year after the award is made and served, any party to the (continued...)

fees and costs to the Manns pursuant to HRS § 431:10-242 (1993)^{3/}; and (3) improperly reconsidering its prior determination, which was law of the case, that the parties were responsible for their own respective attorney's fees and costs.^{4/}

I. BACKGROUND

On May 17, 1998, the Manns were involved in an automobile collision on Kauai. Christie Mann (Christie) was a passenger in the automobile, which Terence Mann (Terence) was operating. While the Manns were driving, a second vehicle crossed the center line and slammed into the Manns' automobile, pushing it nearly off of an embankment. The driver of the second vehicle stopped, asked the Manns if they were alright, and then drove off. He was later identified as Guy Holt (Holt), who was

^{2/}(...continued)

arbitration may apply to the circuit court specified in the agreement, or if none is specified, to the circuit court of the judicial circuit in which the arbitration was had, for an order confirming the award. Thereupon the court shall grant such an order, unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10. The record shall be filed with the motion as provided by section 658-13, and notice of the motion shall be served upon the adverse party, or the adverse party's attorney, as prescribed for service of notice of a motion in an action in the same court.

^{3/} HRS § 431:10-242 (1993) provides:

§431:10-242 Policyholder and other suits against insurer.
Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded reasonable attorney's fees and the costs of suit, in addition to the benefits under the policy.

^{4/} No answering brief was filed by Claimants-Appellees Terence and Christie Mann.

uninsured and unlicensed and was driving the second automobile without permission of the registered owner. According to the Kauai Office of the Prosecuting Attorney, Holt was engaged in the following criminal conduct when he caused injury or damage to the Manns: (1) unauthorized control of a propelled vehicle, (2) driving without a driver's license, (3) inattention to driving, (4) failing to provide information and render aid, and (5) causing an accident involving bodily injury.

Christie sustained injuries resulting from the collision. At the time of the accident, the Manns were insured under a Personal Automobile Policy (the Policy) issued by AIG. The Policy included Uninsured Motorist (UM) coverage and indicated that by providing UM coverage AIG had agreed to

pay compensatory damages which an insured is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of bodily injury:

1. Sustained by an insured; and
2. Caused by an accident.

The Policy provided for arbitration between AIG and an insured in the event the two parties did not agree on whether the insured was "legally entitled to recover damages from the owner or operator of the uninsured motor vehicle," or "[a]s to the amount of damages." The Policy also stated that arbitration would "only determine whether the insured is legally entitled to recover damages from the owner or operator of the uninsured motor vehicle" and that each party was to "[p]ay the expenses it

incur[red]" and "[b]ear administrative fees and other arbitration expenses equally."

On April 23, 2001, the Manns' attorney, Susan Marshall (Marshall), made a written demand for UM benefits from AIG for Christie. Marshall explained that Christie was qualified to make her UM claim pursuant to HRS §§ 431:10C-301(b)(3) (Supp. 2004)^{5/} and 431:10C-306(e)(2) (Supp. 1997). *Id.* at 30 On May 17, 1998, the latter section read in relevant part:

§431:10C-306 Abolition of tort liability.

.

(e) No provision of this article shall be construed to exonerate, or in any manner to limit:

.

(2) The criminal or civil liability, including special and general damages, of any person who, in the maintenance, operation, or use of any motor vehicle:

.

(B) Engages in criminal conduct which causes injury or damage to person or property[.]

^{5/} HRS § 431:10C-301(b)(3) (Supp. 2004) provides:

§431:10C-301 Required motor vehicle policy coverage.

.

(b) A motor vehicle insurance policy shall include:

.

(3) With respect to any motor vehicle registered or principally garaged in this State, liability coverage provided therein or supplemental thereto, in limits for bodily injury or death set forth in paragraph (1), under provisions filed with and approved by the commissioner, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom; provided, however, that the coverage required under this paragraph shall not be applicable where any named insured in the policy shall reject the coverage in writing[.]

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On May 7, 2001, AIG notified Marshall that it would not make Christie a settlement offer, given the fact that she did not appear to be qualified for a UM claim. AIG stated that Christie did not qualify because the amount of medical benefits paid on her behalf had not "exceeded the threshold of \$5,000" and because she had not shown that an exception to the abolition of tort liability requirement existed.

On May 17, 2001, Marshall made a formal request for arbitration of Christie's UM claim.

An "Order Regarding Claimants' Request for Arbitration Filed October 18, 2001" was filed in the circuit court on December 12, 2001. This order indicated, among other things, that the Manns and AIG were to proceed to arbitration with a three-person arbitration panel. The order further stated that the Manns were responsible for the fees and costs of the arbitrator they designated, as was AIG for the arbitrator it selected, and the Manns and AIG were to share equally in the fees and costs of the third arbitrator. Also, the court ordered, the Manns and AIG were responsible for their own respective attorney's fees and costs.

On April 10, 2003, the matter came before an arbitration panel, which awarded Christie \$40,484.29 in special and general damages and for wage loss. The panel also awarded

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Terence \$500 for loss of consortium. On April 14, 2003, Marshall demanded immediate payment of the arbitration award from AIG.

AIG's attorney mailed Marshall a check for \$35,984.29, made payable to the Manns, in satisfaction of the arbitration award. Apparently, AIG had deducted a \$5,000 covered loss deductible from the amount it had been ordered to pay by the arbitration panel.

On June 25, 2003, the Manns filed a "Motion to Confirm Arbitration Award and for Attorneys [sic] Fees, Costs, and Prejudgment Interest" (Motion to Confirm) in the circuit court. In the Motion to Confirm, the Manns moved the circuit court "for an Order confirming the Arbitrator's Decision and Award served on April 14, 2003, and requiring Respondent [AIG] to pay their attorneys [sic] fees, costs, and prejudgment interest arising out of their claim for [UM] benefits for injuries" pursuant to the Policy. In their memorandum in support of the motion, the Manns cited to HRS § 431:10-242 and Gladd v. Kelley, 66 Haw. 431, 444-45, 667 P.2d 251, 260 (1983), in support of their argument that "[c]laimants are entitled to recover all attorneys [sic] fees and costs of enforcing and protecting their interests after an arbitration award is rendered."

On July 15, 2003, AIG filed its opposition memorandum to the Motion to Confirm. In its memorandum, AIG maintained that the Manns' request for attorney's fees and costs had been denied

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previously by the circuit court's order filed December 12, 2001. AIG added that a request for costs and attorney's fees was essentially a request for the court to modify or correct the arbitration award. AIG also contended that HRS § 431:10-242 was not applicable because

AIG Hawaii did not take the position that [the Manns] were excluded from receiving UM coverage. [The Manns] did not file a declaratory judgment action requesting determination as to the applicability of coverage. Rather, coverage was acknowledged and the parties proceeded to arbitration because there was a dispute as to the amount of compensatory damages resulting from the May 17, 1998 motor vehicle accident. The issue at arbitration was the nature and extent of [the Manns'] claimed injuries and damages caused by the May 17, 1998 accident. Therefore, HRS § 431:10-242 is not applicable and [the Manns'] request for costs and attorney's fees should be denied.

On July 21, 2003, the Manns filed their reply memorandum, in which they argued that they were forced to demand arbitration due to AIG's denial of liability. Additionally, the Manns contended they were "required to file a motion to confirm the arbitration because AIG failed and refused to pay the amount awarded." The Manns argued that although the circuit court did order, in its December 12, 2001 order, that the parties would bear their own respective attorney's fees and costs, the court was "free to reconsider its position . . . now that it ha[d] been apprized [sic] of the facts requiring arbitration."

On July 29, 2003, Marshall filed a declaration setting forth the amount of hours she had spent and the costs she had incurred working on the case. On August 5, 2003, AIG filed an opposition memorandum to Marshall's declaration. AIG contended

therein, among other things, that the Manns' costs for expert witnesses and arbitrators' fees were not awardable costs under the Policy. AIG also contended that Marshall's hourly rate of \$175 was excessive and that her fees for services rendered prior to the arbitration demand and subsequent to the arbitration award should not be awarded.

The Manns responded to AIG's opposition memorandum in a reply brief filed on August 14, 2003. The Manns argued that they had been forced to incur expert witness fees, the fees of one arbitrator, and half of the fees of the third arbitrator because AIG had failed "to compensate them voluntarily." The Manns also argued that Marshall's rate of \$175/hour was within the range for attorneys in binding arbitrations with over ten years of experience, that Marshall's fees prior to the arbitration demand were incurred in an attempt to educate the AIG UM adjuster regarding the facts and the law, and that Marshall's fees subsequent to the arbitration award were incurred in an attempt to recover the entire amount of the award for the Manns. The Manns requested that the circuit court award them \$13,452.26 for attorney's fees and \$3,778.56 for costs.

At the July 24, 2003 arbitration confirmation hearing, the circuit court held:

With reference to the matter of attorney's fees and costs, the Court looks at it this way, to say that at the time of arbitration, liability or exposure under the uninsured motorists was not contested when it was all the

way until the time of the arbitration, would be unfair to the insured.

So under the circumstances, the Court finds that attorney's fees should be and is [sic] going to be awarded, because liability in itself was questioned until the time of the arbitration when they [AIG] said, "Now we're not going to question liability." That's the Court's decision.

On September 19, 2003, the circuit court filed the Order, which read in relevant part:

1. The total amount of the arbitration award of \$40,984.29 issued on April 14, 2003 by the panel of three arbitrators is hereby CONFIRMED.
2. Claimants [sic] request for prejudgment interest is DENIED.
3. In as much [sic] as the issue of the covered loss deductible was not raised in the arbitration, Respondent [AIG] was not authorized to and should not have unilaterally deducted \$5,000 from the arbitration award for the covered loss deductible. However, the Court makes no determination as to whether the covered loss deductible is applicable.
4. The amount of the arbitration award withheld by Respondent for the covered loss deductible shall be paid forthwith to the Claimant.
5. Claimants are entitled to judgment against Respondent [AIG] for their reasonable attorney's fees in the amount of \$13,324.67 and costs in the amount of \$392.17 which were incurred in bringing the uninsured motorist claim.

(Emphasis in original.)

On October 6, 2003, AIG filed its Notice of Appeal.

II. DISCUSSION

AIG argues that the circuit court erred in awarding Marshall's attorney's fees and costs. AIG finds support for this contention in Labrador v. Liberty Mutual Group, 103 Hawai'i 206, 81 P.3d 386 (2003).

Labrador was involved in an automobile accident in which she suffered severe facial scarring. Id. at 208, 81 P.3d at 388. She had been a passenger in a vehicle driven by Elisa Tolfree (Tolfree) when "an unidentified truck swerved into [Tolfree's] lane, causing [Tolfree] to lose control of her vehicle and collide with a telephone pole." Id.

At the time of the accident, Tolfree's vehicle was covered under an automobile insurance policy issued by PEMCO Mutual Insurance Company (PEMCO) that provided underinsured motorist insurance (UIM). Id. Tolfree also had an insurance policy with Sentinel Insurance Company, Ltd. (Sentinel) that provided UM coverage. Id. Also, at the time of the accident, Labrador was covered by her parents' personal automobile insurance, which included UM coverage, issued by Liberty Mutual. Id.

Pursuant to the Liberty Mutual insurance policy, Labrador and Liberty Mutual agreed to proceed to arbitration to resolve "the issue of Labrador's UM claim." Id. Liberty Mutual sent a letter to Labrador detailing the issues that would be addressed in the arbitration. Id. In the letter, Liberty Mutual "reserved the right to file a declaratory judgment action with respect to the coverage issues." Id.

Prior to the arbitration, Liberty Mutual filed a complaint for declaratory judgment and other relief "to resolve

issues that had arisen concerning the priority of UM coverages under the policies issued by PEMCO, Sentinel, and Liberty Mutual, the effect of Labrador's prior settlement with Tolfree upon Liberty Mutual's subrogation and reimbursement rights, and other issues." Id. at 209, 81 P.3d at 389

The arbitration was held, and the arbitrators awarded Labrador a total of \$250,000 in damages. Id.

Labrador's attorney sent a letter to Liberty Mutual requesting payment of the award and proposing how Liberty Mutual might make the payments. Id. Liberty Mutual's response was that "Labrador was not entitled to UM or UIM benefits." Id. Liberty Mutual added that it had not previously "'contested its liability' for UM benefits under the Liberty Mutual policy," but had "merely asserted that the UM coverage provided thereunder [was] excess to the primary UM coverages under the [Sentinel] policy and/or the PEMCO policy." Id. (brackets in original). Therefore, Labrador was not entitled to pursue attorney's fees pursuant to HRS § 431:10-242, as she intended to do. 103 Hawai'i at 209, 81 P.3d at 389.

Labrador filed a motion asking the court to confirm the arbitration award and to award her attorney's fees, costs, and post-judgment interest. Id. Labrador argued she was entitled to attorney's fees since Liberty Mutual had denied her claim for

UIM/UM benefits and she had to pursue Liberty Mutual to enforce payment of policy benefits. Id.

In its memorandum in opposition to Labrador's motion to confirm, Liberty Mutual contended that "confirmation of an arbitration award is inappropriate where there are several issues that need to be decided in connection with a pending declaratory judgment action." Id. (internal quotation marks omitted). Two days later, Liberty Mutual filed a motion for a stay of the proceedings. Id.

"[T]he court granted Labrador's motion to confirm on the issues of liability and damages and denied Labrador's motion for attorneys' fees, costs, and/or post-judgment interest." Id. However, the court stayed the proceedings to enforce the arbitration award pending the final disposition of the declaratory judgment action initiated by Liberty Mutual. Id. at 210, 81 P.3d at 390.

Labrador filed a notice of appeal in the Hawai'i Supreme Court on the issue of "whether the court erred by refusing to award attorneys' fees and costs pursuant to HRS § 431:10-242." 103 Hawai'i at 210, 81 P.3d at 390. Labrador argued that "a circuit court may award fees and costs under HRS § 431:10-242 in a motion to confirm an UM arbitration award." 103 Hawai'i at 210, 81 P.3d at 390.

The supreme court held:

Broadly speaking, a proceeding to confirm an arbitration award is a proceeding brought by one or more parties against others in a court of law. However, for HRS § 431:10-242 to apply, the suit must be one in which an insurer "has contested its liability under a policy and is ordered to pay benefits under the policy." The instant court proceeding is for confirmation of the underlying arbitration award. Therefore, it is evident that HRS § 431:10-242 does not apply in this case. The court is mandated to award attorneys' fees and costs only when such fees and costs arise in a judicial proceeding in which an insurer has contested its liability.

103 Hawai'i at 211, 81 P.3d at 391 (emphasis added).

In the instant case, because the circuit court awarded attorney's fees and costs to the Manns in an arbitration confirmation hearing, HRS § 431:10-242 does not apply and the circuit court should not have awarded the Manns attorney's fees and costs pursuant to that HRS section.


III. CONCLUSION

The Order Confirming Arbitration Award filed on September 19, 2003 in the Circuit Court of the Fifth Circuit is vacated, and this case remanded for proceedings consistent with this opinion.

DATED: Honolulu, Hawai'i, December 23, 2005.

On the briefs:

James V. Myhre
(Miyagi, Nohr & Myhre)
for Respondent-Appellant.


Acting Chief Judge


Associate Judge


Associate Judge