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NO. 26665

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

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LINDA C. WADDELL, Plaintiff-Appellant, v.
GOVERNMENT EMPLOYEES INSURANCE COMPANY, Defendant-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 03-1-0934)

SUMMARY DISPOSITION ORDER
(By: Recktenwald, C.J., Watanabe and Fujise, JJ.)

Plaintiff-Appellant Linda C. Waddell (Waddell) appeals from the June 10, 2004 Judgment entered by the Circuit Court of the First Circuit (circuit court)[1] in favor of Defendant-Appellee Government Employees Insurance Company (GEICO). Specifically, Waddell argues that the circuit court erred when it granted GEICO's cross-motion for summary judgment and confirmed the Arbitration Award entered on April 25, 2003. A majority of the arbitration panel that entered the Arbitration Award determined that Waddell's negligence exceeded that of a phantom truck driver, and accordingly, GEICO was not liable on Waddell's claim for uninsured motorist benefits.

After a careful review of the issues raised, arguments advanced, law relied upon, and the record in the instant case, we dispose of Waddell's appeal as follows:

Waddell has failed to show that the circuit court erred in confirming the Arbitration Award. According to Waddell, where it is factually shown that a hit-and-run auto was involved in an accident, there are no issues of liability and GEICO must merely pay damages suffered by the insured. This construction of Waddell's Uninsured Motorist (UM) Policy (Policy) language is contrary to the terms and conditions set forth in the rest of the

[1] The Honorable Dexter D. Del Rosario presided.

Policy as well as legislative purpose behind UM protection. Hawaii Revised Statutes (HRS) § 431:10-237 (2005).[2]

The Policy states:

> LOSSES WE PAY
> Under the Uninsured Motorists coverage, we will pay damages for ***bodily injury*** caused by accident which the ***insured*** is legally entitled to recover from the owner or operator of an ***uninsured motor vehicle*** or ***hit-and-run auto*** arising out of the ownership, maintenance or use of that auto.
> The amount of the ***insured's*** recovery for these damages will be determined by agreement between the ***insured*** or his representative and us. The dispute may be arbitrated if an agreement cannot be reached.

(Emphasis in original). The foregoing language unambiguously provides that GEICO will pay UM benefits only for bodily injury caused by an accident that Waddell was legally entitled to recover from the owner or operator of a hit-and-run auto. Waddell's construction of the UM Policy as mandating payment of damages anytime a hit-and-run accident occurs equates a driver who "causes an accident resulting in bodily injury" with one who is legally liable for injuries resulting from an accident. Under the comparative negligence doctrine, codified in Hawai'i under HRS § 663-31 (1993),[3] even if the phantom vehicle's sudden

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[2] Hawaii Revised Statutes (HRS) § 431:10-237 (2005) reads, in relevant part: "Every insurance contract shall be construed according to the entirety of its terms and conditions as set forth in the policy[.]"

[3] HRS § 663-31 (1993) reads:

> **Contributory negligence no bar; comparative negligence; findings of fact and special verdicts.**
>
> (a) Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.
>
> (b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact or, in a jury trial, the jury shall return a special verdict which shall state:

(continued...)

braking caused Waddell's accident, she is not legally entitled to recover from the driver of the phantom vehicle if it is found that her negligence was greater than the negligence of the driver of the phantom vehicle. See also Dorrance v. Lee, 90 Hawai'i 143, 150-151, 976 P.2d 904, 911-912 (1999) (arbitration award apportioning appellant as 70% negligent bars any recovery by him). The term "legally entitled to recover" connotes a finding of fault in addition to damages. See Nat'l Union Fire Ins. Co. v. Reynolds, 77 Hawai'i 490, 494, 889 P.2d 67, 71 (1995) (arbitration on the issue of whether the insured was "legally entitled to recover damages" includes a determination of fault and resulting liability); State Farm Mut. Auto. Ins. Co. v. Fernandez, 582 F. Supp. 1283, 1286-1287 (D. Haw. 1984) (UM provision to arbitrate claimant's "legal entitlement to recover damages from the owner or operator of an uninsured motor vehicle" refers to issues of liability resulting from the accident and the amount of damages).

Furthermore, the purpose of UM coverage in this State is "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[.]" HRS

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[3](...continued)

(1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and

(2) The degree of negligence of each party, expressed as a percentage.

(c) Upon the making of the findings of fact or the return of a special verdict, as is contemplated by subsection (b) above, the court shall reduce the amount of the award in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made; provided that if the said proportion is greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, the court will enter a judgment for the defendant.

§ 431:10C-301(b)(3) (2005).[4] Indeed, the legislative history of a predecessor statute, HRS § 431-448 (1985),[5] stated that a claim for UM protection

> becomes payable when the innocent victim shows that his claim is valid, that is, that there is legal liability on the person alleged to be responsible and that the claim cannot be collected because . . . of the inability to identify the person or persons responsible.

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[4] HRS § 431:10C-301(b)(3) (2005) reads, in relevant part:

> 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 that the coverage required under this paragraph shall not be applicable where any named insured in the policy shall reject the coverage in writing;

[5] HRS § 431-448 (1985) read, in relevant part:

> **Automobile liability; coverage for damage by uninsured or underinsured motor vehicle.**
>
> (a) No automobile liability or motor vehicle liability policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle, shall be delivered, issued for delivery, or renewed in this State, with respect to any motor vehicle registered or principally garaged in this State, unless coverage is provided therein or supplemental thereto, in limits for bodily injury or death set forth in section 287-7, under provisions filed with and approved by the insurance 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 that the coverage required under this section shall not apply where any insured named in the policy shall reject the coverage in writing.
>
> . . . .
>
> (c). . . A motor vehicle shall also be deemed uninsured within the meaning of this section if, after the occurrence of a loss described in this section, the owner or operator thereof is unknown.

DeMello v. First Ins. Co. of Hawaii, Inc., 55 Haw. 519, 523 n.4, 523 P.2d 304, 307 n.4 (1974) (quoting Hse. Stand. Comm. Rep. No. 194, in 1965 House Journal, at 582).

When the provisions in the Policy relating to UM arbitration are viewed in the context and accepted sense of the entire Policy, we conclude that the arbitration panel correctly apportioned comparative liability in determining whether Waddell was legally entitled to recover UM benefits under her Policy. Waddell's interpretation of a hit-and-run auto, as defined in the Policy, as presuming a determination of liability is not supported by the language of the Policy as a whole and results in an absurdity. Wayland Lum Constr., Inc. v. Kaneshige, 90 Hawai'i 417, 422, 978 P.2d 855, 860 (1999); see also Masaki v. Columbia Casualty Co., 48 Haw. 136, 142, 395 P.2d 927, 930 (1964) (insurance policy must "be given a reasonable construction, and not one that leads to an absurd result"). It would not be a reasonable interpretation to deem all hit-and-run drivers legally at fault for their accidents regardless of the circumstances of the accident. Thus, Waddell has failed to show that the arbitrators exceeded the scope of their authority under the arbitration agreement and absent an order vacating the Arbitration Award, the circuit court properly confirmed the Arbitration Award in conformity with HRS § 658-8 (1993).

Therefore,

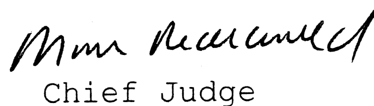
IT IS HEREBY ORDERED that the June 10, 2004 Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, July 16, 2007.

On the briefs:

T.J. Lane,
for Plaintiff-Appellant.

Kathy K. Higham,
(Kessner Duca Umebayashi Bain & Matsunaga),
for Defendant-Appellee.



Chief Judge

Associate Judge

Associate Judge