IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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SABINO GEPAYA and NENITA GEPAYA,
Petitioners-Appellants

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
a foreign corporation, Respondent-Appellee

NO. 23219

APPEAL FROM THE FIRST CIRCUIT COURT
(S.P. NO. 98-0622)

DECEMBER 20, 2000

LEVINSON, NAKAYAMA, RAMIL, AND ACOBA, JJ.;
AND MOON, C.J., DISSENTING

OPINION OF THE COURT BY ACOBA, J.

We hold that the Circuit Court of the First Circuit (the court) committed plain error in a Hawaiʻi Revised Statutes (HRS) § 658-8 proceeding to confirm an arbitration award when it determined a legal question not decided by the arbitrators and modified the arbitration award accordingly. Unless the award was subject to review under the statutory grounds set forth in HRS § 658-9, or § 658-10, or either one of the two judicially

recognized exceptions our appellate courts have adopted, the court was mandated to confirm the award according to its terms.

I.

On December 14, 1998, Petitioners-Appellants Sabino Gepaya (Sabino) and Nenita (Nenita) Gepaya (collectively, Petitioners) filed an application for appointment of arbitrators pursuant to HRS chapter 658 (1993).[1] The application alleged that Nenita and Sabino, her husband, were in their vehicle on January 1, 1998, when they were involved in a motor vehicle accident with a vehicle driven by an uninsured motorist. The application further alleged that Petitioners' insurer, Respondent-Appellee State Farm Mutual Automobile Insurance Co.

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[1] Although the application should have, but did not designate the statutory section involved, it appears HRS § 658-3 applies. HRS § 658-3 states in pertinent part as follows:

> **Compelling compliance with agreement** . . . . A party aggrieved by the failure, neglect, or refusal of another to perform under an agreement in writing providing for arbitration, may apply to the circuit court for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' notice in writing of the application shall be served upon the party in default. Service thereof shall be made in the manner provided for service of a summons. The court shall hear the parties, and upon being satisfied that the making of the agreement or the failure to comply therewith is not in issue, the court hearing the application shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default is in issue, the court shall proceed summarily to the trial thereof.

(Emphases added.)

(Respondent), had made personal injury protection benefit payments of $10,797.14 on behalf of Nenita and $10,647.39 on behalf of Sabino, that Petitioners had requested further compensation under the uninsured motorist coverage provision of their policy with Respondent, that Respondent had failed to make payment under such coverage, that their policy with Respondent provided for arbitration of the matter, and that the court should enforce their policy's arbitration clause.

On February 19, 1999, the court granted the application and ordered the selection of three arbitrators and the initiation of arbitration proceedings "according to the terms of the contract and based on [HRS c]hapter 658, 'Arbitration and Awards.'"

On January 11, 2000, Petitioners filed a motion to confirm the arbitration award dated October 4, 1999, and for entry of judgment thereon (the motion), pursuant to HRS § 658-8 (1993).[2] The memorandum attached to the motion related that

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[2] HRS § 658-8 states in pertinent part, as follows:

> **Award; confirming award.** The award shall be in writing and acknowledged or proved in like manner as a deed for the conveyance of real estate, and delivered to one of the parties or the party's attorney. A copy of the award shall be served by the arbitrators on each of the other parties to the arbitration, personally or by registered or certified mail. At any time within one year after the award is made and served, any party to the 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

(continued...)

pursuant to the February 19, 1999 court order, an arbitration hearing was held on September 21, 1999 and an arbitration award was issued on October 4, 1999. In pertinent part, the award stated as follows:

> Mrs. Gepaya
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> | Medical Special Damages | $10,258.62 |
> | General Damages | $12,000.00 |
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> Mr. Gepaya
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> | | |
> |---|---|
> | Medical Special Damages | $ 9,556.26 |
> | General Damages | $12,000.00 |
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> | | |
> |---|---|
> | Costs to Mr. & Mrs. Gepaya | $ 1,639.01 |
>
> The possible application of HRS § 431:10C-301.5 covered loss deductible is specifically not being addressed in this award.

(Emphasis added.) The parties' instructions to the arbitrators, if any, are not a part of the record.

In the memorandum in support of the motion, Petitioners stated that Respondent sought to reduce the amount of the awards based on the "covered loss deductible" provision in HRS § 431:10C-301.5 (Supp. 1997), which became effective on January 1, 1998. HRS § 431:10C-301.5 provides as follows:

> **Covered loss deductible.** Whenever a person effects a recovery for bodily injury, whether by suit, arbitration, or settlement, and it is determined that the person is entitled to recover damages, the judgment, settlement, or award shall be reduced by $5,000 or the amount of personal injury protection benefits incurred, whichever is greater, up to the maximum limit.

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[2](...continued)
prescribed in sections 658-9 and 658-10. . . .

(Emphases added). Relying on Sol v. AIG Hawai'i Ins. Co., 76 Hawai'i 304, 875 P.2d 921 (1994), Petitioners maintained that this statutory provision did not apply to additional insurance coverage obtained at Petitioners' option, such as uninsured motorist coverage. Petitioners noted that HRS § 431:10C-301.5 was amended on July 20, 1998 to read that "[t]he covered loss deductible shall not include benefits paid or incurred under any optional additional coverage[;]" thus, had the accident taken place after July 20, 1998, the question raised by Respondent would not arise. Petitioners then requested that the court "apply the reasoning of" Sol, "confirm" the award, and enter judgment "in the amounts stated in the arbitration award." Additionally, according to the memorandum, Petitioners and Respondent had apparently agreed that the costs awarded in arbitration would be paid in full by Respondent and the amount of the awards not in dispute, i.e., the "general damages" portions of the arbitration award, would be paid to Petitioners.

Subsequently, partial payment of the awards, as agreed, was purportedly made and in a November 2, 1999 pleading filed by Petitioners, they "acknowledg[ed] that they ha[d] received payment in partial satisfaction of the Arbitration award[]" from Respondent. This pleading stated, as to the unpaid balance of the award, that

> [t]he remaining amount is fairly an amount subject to dispute in good faith. Counsel for Petitioners . . . and said Petitioners, accept the dispute as to the remaining, as yet unpaid and unsatisfied portion [of the arbitration award], as a "good faith" dispute as to which future clarification or legal decision or agreement will be required, to be initiated by either or both parties.

(Emphasis added).

In its opposition memorandum, Respondent argued that Petitioners' motion to confirm should be denied "because the covered loss deductible statute in effect at the time of the subject motor vehicle accident on January 1, 1998, namely HRS § 431:10C-301.5, allowed for a reduction [in the arbitration award], up to the maximum amount of $10,000, in the amount of the arbitration award." Respondent maintained that, "(1) the statutory language of HRS § 431:10C-301.5, allowing a reduction for covered loss deductible, is plain and unambiguous and[,] thus, the court cannot alter its plain meaning under Hawaii law, and (2) the subsequent 1988 [sic] amendment to HRS § 431:10C-301.5 has no retroactive operation under Hawaii law."

On February 29, 2000, the court in effect adopted Respondent's position, granting the motion in part and denying it in part, and ordered confirmation of the arbitration award less the covered loss deductible claimed by Respondent:

> IT IS HEREBY ORDERED that the Arbitration Award be confirmed in favor of Petitioner NENITA GEPAYA in the amount of $12,258.62, the amount already paid based upon deduction from the Uninsured Motorist Arbitration Award of the amount representing the statutory covered loss deductible.

> IT IS HEREBY ORDERED that the Arbitration Award be confirmed in favor of Petitioner SABINO GEPAYA in the amount of $12,000.00, the amount already paid based upon deduction from the Uninsured Motorist Arbitration Award of the amount representing the statutory covered loss deductible.

(Emphases added.)

On March 2, 2000, Petitioners appealed. On appeal, the parties argue the question of whether a reduction in the amount of the covered loss deductible up to the statutory maximum as provided for in HRS § 431:10C-301.5 must be applied to the February 29, 2000 arbitration award. They do not address whether it was error for the court to render that decision in the HRS § 658-8 proceeding. Despite their failure to address this issue, we "may notice plain error not presented" and do so here. See Hawai'i Rules of Appellate Procedure Rule 28(b)(4); Inlandboatmen's Union v. Sause Bros., Inc., 77 Hawai'i 187, 191, 881 P.2d 1255, 1259 (App. 1994).

II.

It is well established that this court has "confine[d] judicial review of [arbitration awards] to the strictest possible limits." Mars Constructors, Inc. v. Tropical Enters., 51 Haw. 332, 335, 460 P.2d 317, 319 (1969). This is because "of the legislative policy . . . encourag[ing] arbitration and thereby discourag[ing] litigation[.]" Gadd v. Kelley, 66 Haw. 431, 441,

667 P.2d 251, 258 (1983) (citing Mars Constructors, 51 Haw. at 336, 460 P.2d at 319). See also Mathewson v. Aloha Airlines, Inc., 82 Hawai‘i 57, 69, 919 P.2d 969, 681 (1996). Thus, "review of [arbitration] awards by the [circuit and appellate] courts [is] limited by the provisions of the arbitration statute." Mars Constructors, 51 Haw. at 335, 460 P.2d at 319. See Kalawaia v. AIG Hawai‘i Ins. Co., 90 Hawai‘i 167, 173, 977 P.2d 175, 181 (1999); Arbitration of Bd. of Directors of Ass'n of Apartment Owners of Tropicana Manor, 73 Haw. 201, 204, 830 P.2d 503, 507 (1992). In that regard, it is mandated by HRS § 658-8 that the circuit courts "shall grant . . . an order [confirming an arbitration award] unless the award is vacated, modified, or corrected, as prescribed in sections 658-9 and 658-10." See Morrison-Knudsen Co. v. Makahuena Corp., 66 Haw. 663, 672, 675 P.2d 760, 767 (1983) (stating that "HRS § 658-8 contemplates a judicial confirmation of the award issued by the arbitrator, 'unless the award is vacated, modified, or corrected' in accord with HRS §§ 658-9 and 658-10"). "HRS § 658-9 provides only four specific grounds upon which an award can be vacated, while HRS § 658-10 provides only three grounds for modifying or correcting an award." Excelsior Lodge Number One v. Eyecor, Ltd., 74 Haw. 210, 219-20, 847 P.2d 652, 657 (1992) (footnotes omitted). Additionally, two judicially recognized exceptions to confirmation exist; one, to allow remand to the

arbitrator to clarify an ambiguous award, Gozum v. American Int'l Adjustment Co., 72 Haw. 41, 44, 805 P.2d 445, 446 (1991); another, to allow vacation of an arbitration award clearly violative of public policy. Inlandboatmen's Union, 77 Hawai'i at 193, 881 P.2d at 1261. There is nothing in the record implicating the provisions of HRS § 658-9.[3] Similarly, none of the three grounds for modifying or correcting an award are

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[3] HRS § 658-9 states:

> **Vacating award.** In any of the following cases, the court may make an order vacating the award, upon the application of any party to the arbitration:
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> (1) Where the award was procured by corruption, fraud, or undue means;
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> (2) Where there was evident partiality or corruption in the arbitrators, or any of them;
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> (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced;
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> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final, and definite award, upon the subject matter submitted, was not made.
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> Where an award is vacated and the time, within which the agreement required the award to be made, has not expired, the court may in its discretion direct a rehearing by the arbitrators.

With respect to HRS § 658-9(4), the record does not disclose what instructions the parties provided the arbitrators, assuming such instructions were transmitted, concerning the scope of the issues to be decided by the arbitrators.

involved.[4] There is no ambiguity in the language of the award justifying remand to the arbitrators for clarification. Gozum, 72 Haw. at 44-46, 805 P.2d at 446-47. Assuming arguendo the public policy exception to be an issue, the award is not "clearly" violative of public policy since the arbitrators did not decide the application of HRS § 431:10C-301.5. Inlandboatmen's Union, 77 Hawai'i at 194, 881 P.2d at 1262. Moreover, the parties purportedly agreed in the arbitration proceeding to defer their dispute over the unpaid award amount to "future clarification or legal decision, or agreement." In that context, a determination by the court or this court of any public policy issue raised by the award would rest on "speculation or assumption." Id.

In effect, the parties sought, in a HRS § 658-8 proceeding, the determination by the court of a legal question

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[4] HRS § 658-10 states:

> **Modifying or correcting award.** In any of the following cases, the court may make an order modifying or correcting the award, upon the application of any party to the arbitration:
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> (1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property, referred to in the award;
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> (2) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;
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> (3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.
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> The order may modify and correct the award, so as to effect the intent thereof, and promote justice between the parties.

which was not decided by the arbitrators. See also Excelsior Lodge, 74 Haw. 210, 847 P.2d 652. That is plainly not permissible in a proceeding to confirm an arbitration award. In this case, the arbitration award and the pleadings can be reasonably construed as reserving for the future the determination of the amount to be deducted, if any, from the damages awarded by the arbitrators. As it stands, the arbitration award merely quantifies the amount of damages incurred by Petitioners. Thus, while the award may be confirmed by the court, no obligation as to further payment, if any, can be enforced before the resolution of the question reserved.[5]

An arbitration award is subject to vacation only on the four specific grounds set forth in HRS § 658-9, id. at 219-20, 847 P.2d at 657, or for a clear violation of public policy, Inlandboatmen's Union, 77 Hawai'i at 193, 881 P.2d at 1261; to modification or correction only under the three grounds listed by HRS § 658-10, Excelsior Lodge, 74 Haw. at 219-20, 847 P.2d at 657; or to remand to the arbitrators for clarification of a patent ambiguity. Gozum, 72 Haw. at 44-46, 805 P.2d at 446-47. None of the foregoing grounds apply to this case. If the motion

[5] We do not "perceive[] the circuit court's actions in this case as attacking the merits of the award," as the dissent claims. Dissenting opinion at 2. All we are saying here is that the course chosen by the court and the parties and suggested by the dissent would have resulted in an alteration or modification of the award. Since the arbitration award simply represented the amounts the petitioners would receive and since the deductibility issue "[was] specifically not being addressed in this award," the court could not decide the deductibility issue in the proceeding to confirm the award.

brought by the moving party does not come within one of the foregoing specific grounds, the circuit court is "powerless to [vacate,] modify[,] or correct [an] award" and has "no alternative but to confirm the award and to enter a judgment accordingly." Mars Constructors, 51 Haw. at 336, 460 P.2d at 319. Therefore, the court was required to confirm the award by the arbitrators subject, as the parties had agreed, to "future" determination of the covered loss deductible issue.

III.

For the foregoing reasons, the court's February 29, 2000 order is vacated, and the case is remanded to the court with instructions to enter an order reflecting confirmation of the amounts awarded and reservation of the question of any deductions, and the resulting enforceability of further payment, if any, to Petitioners, for future determination as the parties had agreed.

On the briefs:

Richard C. Monks for
petitioners-appellants.

Richard B. Miller and
David R. Harada-Stone
(Tom & Petrus) for
respondent-appellee.