

NO. 23000

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---

ALAN W. HARRIS, Plaintiff-Appellee,

vs.

PROGRESSIVE HAWAII INSURANCE CORPORATION,  
a Hawaii corporation, Defendant-Appellant,

and

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

---

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 98-5386)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, Ramil, and Acoba, JJ.)

Defendant-appellant Progressive Hawai'i Insurance Corporation (Progressive) appeals the orders of the First Circuit Court, the Honorable Gail C. Nakatani presiding, granting plaintiff-appellee Alan W. Harris's request for declaratory relief that Progressive was required to arbitrate his underinsured motorist claim and granting in part Harris's motion for attorneys' fees and costs, as well as the November 26, 1999 final judgment entered thereon. On appeal, Progressive argues that the circuit court erred: (1) because the declaratory

judgment action was moot; and (2) in awarding attorneys' fees and costs. We agree with Progressive and reverse the judgment of the circuit court.

#### I. BACKGROUND

Harris was injured in a motor vehicle accident on August 16, 1998. He received \$10,000 in personal injury protection benefits. The other party involved in the accident was insured by TIG Insurance Company (TIG) under a policy providing bodily injury coverage of \$100,000 per person. On November 20, 1998, Harris settled his bodily injury claim against TIG's insured for \$90,000. Harris then made a claim for underinsured motorist (UIM) benefits under his own insurance policy, which had been issued by Progressive. Progressive denied Harris's claim because Harris's tort settlement had not exhausted TIG's bodily injury limit of liability. The basis for Progressive's denial was a so-called "exhaustion clause" in Harris's UIM policy which stated that Progressive would pay benefits "only after the limits of liability under all applicable bodily injury bonds and policies have been exhausted by payment of judgments or settlements." Progressive contended that, because Harris had settled for \$90,000, rather than the tortfeasor's policy limit of \$100,000, he had not exhausted the available bodily injury benefits. In its letter denying UIM coverage, Progressive also wrote to Harris's attorney that,

"after a review of your settlement demand and supporting documentation, it appears [that] your client has been adequately compensated for his injuries with the [bodily injury] settlement."

Harris, on the other hand, contended that TIG's limit of liability had been exhausted because of the application of the "covered loss deductible" statute, Hawai'i Revised Statutes (HRS) § 431:10C-301.5 (Supp. 1998). The statute provides that, "[w]henever 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." Harris contended that his settlement with TIG's insured took into account the application of the covered loss deductible statute, which is reflected by the reduction of his settlement by the \$10,000 in personal injury protection benefits he received; Harris, therefore, submitted that bodily injury coverage available to him was indeed exhausted.

On December 17, 1998, Harris filed a declaratory judgment action against Progressive, contending that he was entitled to a claim for UIM benefits because his \$90,000 settlement had exhausted TIG's \$100,000 limit of liability due to

the application of the covered loss deductible. Harris sought a declaration that he was "entitled to UIM coverage under the subject policy as a result of injuries sustained" in the accident and that, consequently, he was "entitled to an arbitration as provided for in the policy to determine the amount of his damages[.]" In other words, Harris sought to compel Progressive to participate in arbitration. Harris also sought attorneys' fees and costs for "having to bring this action." Harris did not specify any additional basis for demanding fees and costs.

While the declaratory judgment action was pending, this court issued its opinion in Taylor v. Government Employees Insurance Co., 90 Hawai'i 302, 978 P.2d 740 (1999). In Taylor, this court held that "exhaustion clauses," such as the one in Harris's policy, were unenforceable as against public policy. See Taylor, 90 Hawai'i at 312, 978 P.2d at 750. Consequently, on May 25, 1999, Harris and Progressive tentatively reached an agreement whereby Harris would drop the declaratory judgment action in exchange for Progressive's agreement to participate in arbitration. Apparently, however, the parties misunderstood one another concerning who would pay Harris's attorneys' fees and costs, which, as of May 25, 1999, totaled approximately \$1,315, and, by June 15, 1999 -- the date that it was apparent that the parties would not agree on payment of fees and costs -- totaled

approximately \$1,641.<sup>1</sup> Harris offered to waive fees and costs if Progressive paid \$25,000 in UIM coverage, Progressive did not respond.

Subsequently, Progressive filed a motion to dismiss the declaratory judgment action on the grounds that, because Progressive had agreed to participate in arbitration, the declaratory judgment action was moot.<sup>2</sup> Harris opposed the motion and thereafter filed his own motion for summary judgment, arguing that the case was not moot because the parties had not reached an agreement concerning attorneys' fees and costs. Harris claimed that he was entitled to fees and costs pursuant to HRS § 431:10-242 (1993), which requires payment of attorneys' fees and costs to an insured "[w]here an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy[.]". Progressive argued that under HRS § 431:10-242, a declaratory judgment requiring it to participate

---

<sup>1</sup> This figure was determined from the time sheet and cost itemization submitted by Harris's attorneys to the circuit court and includes excise taxes and the filing fee. The costs also included photocopy costs. Because the photocopy costs are not itemized by date, the foregoing figure assumes that all of the photocopy costs were incurred prior to May 25, 1999.

<sup>2</sup> Progressive moved for dismissal pursuant to Hawai'i Rules of Civil Procedure (HRCPP) Rule 41(b) (1972). Under HRCPP Rule 41(b), a defendant may move for dismissal for failure to prosecute a claim or comply with court rules, or, in a bench trial, for dismissal at the close of the plaintiff's case for failure to show grounds for relief. Thus, HRCPP Rule 41(b) was not the correct rule to bring a motion to dismiss on mootness grounds. However, inasmuch as courts are required to dismiss a case sua sponte if it becomes moot, see generally In Re J.T. Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254-55 (1992), Credit Assocs. of Maui, Ltd. v. Leong, 56 Haw. 104, 106, 529 P.2d 198, 199-200 (1974), Territory v. Damon, 44 Haw. 557, 562, 356 P.2d 386, 390 (1960), it is irrelevant which substantive rule Progressive used.

in arbitration would not establish Progressive's obligation to pay benefits under the UIM policy, but, rather, would merely establish that Harris was entitled to an arbitration.

Accordingly, Progressive contended that, because it had already agreed to participate in arbitration, Harris's sole motive for continuing the action was to collect attorneys' fees and costs.

The circuit court granted Harris's motion for summary judgment and denied Progressive's motion to dismiss. Thereafter, Harris filed a motion for attorneys' fees and costs pursuant to HRS § 431:10-242, requesting a total of \$6,449.60. The circuit court granted the motion, in part, allowing a total of \$6,057.21 in fees and costs. Following the entry of final judgment on November 26, 1999, Progressive timely appealed.

## II. STANDARDS OF REVIEW

It is well-settled that the mootness doctrine encompasses the circumstances that destroy the justiciability of a case previously suitable for determination. A case is moot where the question to be determined is abstract and does not rest on existing facts or rights. Thus, the mootness doctrine is properly invoked where events have so affected the relations between the parties that the two conditions for justiciability relevant on appeal -- adverse interest and effective remedy -- have been compromised.

AIG Hawai'i Ins. Co., Inc. v. Bateman, 82 Hawai'i 453, 458-59, 923 P.2d 395, 400-01 (1996) (quoting In Re J.T. Thomas, 73 Haw. 223, 225-26, 832 P.2d 253, 254 (1992), and Wong v. Board of Regents, Univ. of Hawaii, 62 Haw. 391, 394, 616 P.2d 201, 203-04 (1980)).

### III. DISCUSSION

#### A. Mootness

Progressive contends that the circuit court erred in denying its motion to dismiss and granting Harris's motion for summary judgment because the declaratory judgment action was moot once Progressive agreed to participate in arbitration. We agree. HRS § 632-1 (1993), the declaratory judgment statute, states in relevant part:

Relief by declaratory judgment may be granted in civil cases where an actual controversy exists between contending parties, or where the court is satisfied that antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation, or where in any such case the court is satisfied that a party asserts a legal relation, status, right, or privilege in which the party has a concrete interest and that there is a challenge or denial of the asserted relation, status, right, or privilege by an adversary party who also has or asserts a concrete interest therein, **and the court is satisfied also that a declaratory judgment will serve to terminate the uncertainty or controversy giving rise to the proceeding.**

(Emphases added.)

When Harris filed his complaint, he sought relief in two ways. First, he asked for a declaratory judgment that Progressive was required to participate in arbitration. Second, he sought payment of attorneys' fees and costs. Although Progressive agreed to participate in arbitration, the parties did not agree as to the second issue -- who would pay Harris's attorneys' fees and costs. Consequently, an "actual controversy" still existed between the parties that concerned a "legal right"

to fees and costs in which Harris had a "concrete interest" that was "challenged" by Progressive.

However, prior to issuing declaratory relief, HRS § 632-1 requires that the court be satisfied that the relief "will serve to terminate the uncertainty or controversy giving rise to the proceeding." (Emphasis added.) The controversy giving rise to the proceeding concerned whether Progressive was required to participate in arbitration; it did not concern whether Progressive was required to pay Harris's attorneys' fees and costs. The question of payment for attorneys' fees and costs was derivative of the action seeking to compel arbitration and did not stand alone. See supra at 4 (noting that Harris sought fees and costs for "having to bring this action"). Consequently, because the question whether Progressive was required to participate in arbitration was no longer disputed, a declaratory judgment would not "serve to terminate the uncertainty or controversy giving rise to the proceeding" and should not have been issued. Accordingly, we hold that the case was moot, and the circuit court erred in denying Progressive's motion to dismiss and granting Harris's motion for summary judgment.

B. Motion for Fees and Costs Pursuant to HRS § 431:10-242

Progressive contends that Harris was not entitled to fees and costs pursuant to HRS § 431:10-242 because the circuit court's declaratory judgment did not order Progressive to "pay

benefits" under the UIM policy, but merely compelled Progressive to participate in arbitration. Given our holding that the circuit court erroneously granted the declaratory relief sought, we need not address this issue in detail. Progressive was not ordered to "pay benefits" and is not liable for attorneys' fees and costs. Cf. Hawaiian Ins. & Guar. Co., Ltd. v. Blair, Ltd., 6 Haw. App. 447, 448-49, 456 726 P.2d 1310, 1311-12, 1316 (1986) (where insurer successfully sought declaratory judgment that it was not obligated to defend its insured, insured was not entitled to fees and costs pursuant to HRS § 431-455 (1985), the predecessor to HRS § 431:10-242, because "an insurer's liability for the insured's attorney[s'] fees and costs arises only when [the insurer] is ordered to pay policy benefits"). Accordingly, the circuit court erred in awarding fees and costs to Harris.

#### IV. CONCLUSION

Based on the foregoing, we reverse the judgment of the circuit court.

DATED: Honolulu, Hawai'i, May 17, 2002.

On the briefs:

Keith K. Hiraoka and  
Jodie D. Roeca (of  
Roeca Louie & Hiraoka),  
for defendant-appellant

Ian L. Mattoch and  
Daniel P. Kirley (of  
Law Offices of Ian L.  
Mattoch), for plaintiff-  
appellee