
NO. 22140

IN THE SUPREME COURT OF THE STATE OF HAWAII

MICK McCLAVERTY, Plaintiff-Appellant

vs.

LIBERTY MUTUAL INSURANCE COMPANY, Defendant-Appellee

and

MITCHELL YOSHIMURA, ALICIA McCLAVERTY, KALANI CHANG, STEVEN
CHANG, NOELANI CHANG, and DOE DEFENDANTS 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-4568)

SUMMARY DISPOSITION ORDER

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

Plaintiff-appellant Mick McClaverty appeals from the judgment of the First Circuit Court, the Honorable R. Mark Browning presiding, in favor of defendant-appellee Liberty Mutual Insurance Company (Liberty) on all claims. Specifically, McClaverty appeals from (1) the December 9, 1998 judgment in favor of Liberty, and (2) the November 25, 1997 order denying McClaverty's motion for summary judgment.

On appeal, McClaverty raises the following points of error: (1) the circuit court erred in concluding that Liberty did not have a duty to defend and indemnify McClaverty, a minor, even though Liberty did have a duty to defend and indemnify McClaverty's mother, Alicia McClaverty; (2) erred in concluding that the reasonableness of an insurer's decision to deny coverage

should be based on all information available in the case at the time the court makes its determination rather than based on the information available to the insurer at the time the decision was made; (3) the circuit court erred in ruling that an insurer has no duty to investigate where the claim is clearly excluded by the unambiguous policy language; (4) the circuit court abused its discretion in permitting two defense witnesses to testify via telephone; (5) the circuit court erred in issuing findings of fact and conclusions of law regarding McClaverty's responsibility for his attorney's fees; and (6) the circuit court erred in concluding that McClaverty's recovery was barred by his breach of the insurance policy's Concealment of Fraud provision.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows: (1) the circuit court did not err in concluding that Liberty did not have a duty to defend McClaverty. In Fortune v. Wong, 68 Haw. 1, 702 P.2d 299 (1985), this court specifically rejected the argument that Hawai'i Revised Statutes (HRS) § 577-3 (1993) trumps the plain language of insurance contract exclusions. Where the plain language of the insurance contract excludes certain events from coverage, HRS § 577-3 does not compel insurers to cover those events; the plain language of the insurance policy will control provided that the policy provisions

“are not in contravention of statutory inhibitions or public policy.” Estate of Doe v. Paul Revere Ins. Group, 86 Hawai‘i 262, 271, 948 P.2d 1103, 1112 (1997) (Citations and internal quotation signals omitted). The insurance policy provision excluding intentional acts from coverage was not trumped by HRS § 577-3, so Liberty did not have a duty to defend McClaverty;

(2) the circuit court erred in ruling that the reasonableness of an insurer’s decision to deny coverage should be based on all information available in the case rather than based on the information available to the insurer at the time the decision was made. As we stated in Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawai‘i, 76 Hawai‘i 277, 288, 875 P.2d 894, 905 (1994), “[W]hether an insurer’s refusal to defend was justified must be answered in light of the information available to the insurer at the time it made the refusal.” See also Dairy Road Partners v. Island Ins. Co., Ltd., 92 Hawai‘i 398, 413, 992 P.2d 93, 108 (2000) (noting that an insurer’s “duty to defend must be determined, at least initially, as of the time of [the insured’s] tender of its defense in the underlying lawsuits”). However, this error was harmless. Even if the circuit court had used the correct standard, it would have reached the same result: that Liberty’s refusal to provide coverage was reasonable in light of the information available to Liberty at the time it made its decision; (3) the circuit court did not err in ruling that an

insurer has no duty to investigate where the claim is excluded by the insurance policy's clear and unambiguous language. Where there is no possibility of coverage, there is no duty to investigate. Bd. of Directors of the Ass'n of Apartment Owners of Discovery Bay Condominium v. United Pacific Ins. Co., 77 Hawai'i 358, 361, 884 P.2d 1134, 1137 (1994) ("It is well established that an insurer has no duty to investigate where the claim is excluded by the clear and unambiguous language in the insurance policy."). McClaverty provided no evidence to suggest that the assault and battery was unintentional, and the Liberty policy clearly excluded intentional acts from coverage. Therefore, the circuit court did not err in ruling that an insurer owes no duty to investigate where the insurance policy language clearly excludes the insured's claim; (4) even if the circuit court had abused its discretion in admitting telephonic testimony, the error was harmless. During Liberty's motion in limine regarding introduction of the telephonic testimony, McClaverty's counsel told the circuit court that McClaverty's position would not be prejudiced by the circuit court's allowance of telephonic testimony. Hawai'i Rules of Evidence (HRE) Rule 103(a) (1993) provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected[.]" Since McClaverty's substantial rights were not affected, we need not address the

question whether the circuit court abused its discretion; (5) the circuit court did not err in issuing findings and conclusions regarding McClaverty's responsibility for his attorneys' fees. The dispositive issue in this case was whether Liberty was required to defend McClaverty against a suit by a third party; therefore, whether McClaverty incurred legal expenses, and the amount of those expenses, were issues properly adjudicated by the circuit court; and (6) the circuit court erred in issuing findings and conclusions regarding McClaverty's breach of the Concealment of Fraud provision of the policy. Hawai'i Rules of Civil Procedure (HRCP) Rule 9 (1998) requires fraud to be pled with particularity; this requirement exists, in part, because "fraud and mistake embrace such a wide variety of potential conduct that a defendant needs a substantial amount of particularized information about plaintiff's claim in order to enable him to understand it and effectively prepare his response." 5 Wright & Miller, Federal Practice and Procedure § 1296 at 580 (1990). In the instant case, McClaverty did not receive particular notice from the pleadings that fraud would be an issue in the case. Therefore, the circuit court erred in concluding that McClaverty's recovery was barred by his breach of the Concealment of Fraud provision of the contract. Therefore,

IT IS HEREBY ORDERED that the circuit court's

conclusion of law number 30 ("Mick McClaverty's recovery is

barred by his breach of the Concealment of Fraud provision of the Policy") is vacated, and the judgment from which the appeal is taken is affirmed in all other respects.

DATED: Honolulu, Hawai'i,

On the briefs:

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Plaintiff-Appellant
Mick McClaverty

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Appellee Liberty Mutual
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