

\*\*\* NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER \*\*\*

NO. 26540

IN THE SUPREME COURT OF THE STATE OF HAWAII

EMERSON M.F. JOU, M.D., Petitioner-Appellant-Appellant,

vs.

J.P. SCHMIDT, Insurance Commissioner, Department of Commerce and Consumer Affairs, State of Hawai'i, Appellee-Appellee,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY  
Respondent-Appellee-Appellee.

APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 03-1-2065)

K. HAMAKA'AO  
CLERK, APPELLATE COURTS  
STATE OF HAWAII

2007 JUN 22 AM 8:19

FILED

SUMMARY DISPOSITION ORDER

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

Petitioner-Appellant-Appellant, Emerson M.F. Jou, M.D. ("Jou"), appeals from the first circuit court's March 30, 2004 judgment in favor of Respondent-Appellee-Appellee, State Farm Mutual Automobile Insurance Company ("State Farm").<sup>1</sup> On appeal, Jou presents the following points of error: (1) the circuit court reversibly erred by granting State Farm's Hawai'i Rules of Civil Procedure ("HRCP") Rule 41(b)<sup>2</sup> motion to dismiss based upon a HRCP Rule 72(d)(1) violation; (2) the circuit court thereby deprived him of his right to a fair trial under the state and federal constitutions; (3) the circuit court "is depriving [him] of his right to work for a living in a common occupation in the community" under the state and federal constitutions; (4) the

<sup>1</sup> The Honorable Eden Elizabeth Hifo presided.

<sup>2</sup> HRCP Rule 41(b) provides, in relevant part, that "[f]or failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against it."

circuit court's dismissal violated his right to equal protection under the state and federal constitutions; (5) the circuit court's ruling constituted state action that amounted to a regulatory taking in violation of the state and federal constitutions; and (6) the circuit court's dismissal "violated [his] constitutional rights and was therefore more egregious than an abuse of discretion."

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we hold that:

(1) The circuit court did not abuse its discretion<sup>3</sup> by dismissing Jou's appeal, inasmuch as Jou failed to cause the record on appeal to be transmitted to the circuit court by (a) failing to make due return of service of his "Designation Of Record" and "Order For Certification And Transmission Of Record[,]"<sup>4</sup> and (b) failing to serve the "Notice Of Appeal"<sup>5</sup> and

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<sup>3</sup> See Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 420, 5 P.3d 407, 410 (2000) (stating that a court's order dismissing a case under HRCF Rule 41(a)(2) "would be reviewable for an abuse of discretion[]").

<sup>4</sup> HRCF Rule 72(d)(1) (2003) unambiguously requires that the appellant "make due return of service . . . to the clerk of the circuit court." HRCF Rule 4(g) (2003) describes the return of service procedure as follows: "The person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to process." There is no evidence in the record that Jou made "due return of service." The certificates of service attached to Jou's designation and order state, in relevant part, "I hereby certify that a copy of the foregoing will be served on the following party(ies) by U.S. Mail, court jacket, or personal delivery[.]" (Emphasis added.) A certificate of service promising to serve a document does not comply with the HRCF Rule 4(g) requirement that appellant prove that service has in fact been made.

<sup>5</sup> Service of a notice of appeal must comply with the service of process rules set forth in HRCF Rule 4 (2003). See Munoz v. Chandler, 98 Hawai'i 80, 89, 42 P.3d 657, 666 (App. 2002) (stating that service of a document entitled "Agency Appeal" on the director of the Department of Human Services violated HRCF Rule 4(d)(4)-(5) because appellant did not serve the state attorney general). HRCF Rule 4(d)(5) requires that service be made "[u]pon an officer or agency of the State by serving the State and by

(continued...)

"Order For Certification And Transmission Of Record"<sup>6</sup> on the state attorney general. Jou's failure to comply with the foregoing procedural rules resulted in the record on appeal not being transmitted to the circuit court. Jou offered no explanation for his noncompliance except for his incomplete reading of the relevant court rules. The circuit court was thus well within its discretion to dismiss the matter.<sup>7</sup>

(2) Jou failed to raise the issues presented in his remaining points of error in the court below, and they have

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<sup>5</sup>(...continued)  
delivering a copy of the summons and of the complaint to such officer or agency." (Emphasis added.) Service upon "the State" must be accomplished by "delivering a copy of the summons and of the complaint to the attorney general of the State or to the assistant attorney general or to any deputy attorney general who has been appointed by the attorney general." HRCF Rule 4(d)(4). Jou's certificate of service attached to his "Notice Of Appeal" certified only that the notice "will be served" on the Commissioner and State Farm's attorney.

<sup>6</sup> HRCF Rule 5(a) (2003) states that "[e]very order required by its terms to be served, . . . every written . . . designation of record on appeal, and similar paper shall be served upon each of the parties . . ." HRCF Rule 5(b) goes on to explain that "[w]henver under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court." (Emphasis added.) The state attorney general is statutorily designated as the attorney for the State. See HRS § 26-7 (1993) ("The department [of the attorney general] shall . . . represent the State in all civil actions in which the State is a party . . ."). The Commissioner is a party, see HRCF Rule 72(a) ("'Appellee' means every governmental body or official (other than a court) whose decision, order or action is appealed from, and every other party to the proceedings."), and an official of the State, see HRS § 431:2-102 (1993) (establishing the Commissioner as the administrator in control of the insurance division of the department of commerce and consume affairs). Accordingly, HRCF Rule 5 required Jou to serve the "Order For Certification And Transmission Of Record" on the Commissioner's attorney, the state attorney general.

<sup>7</sup> See Holiona v. Kamai, 24 Haw. 636, 637 (1918) (dismissing an appeal because appellant failed to ensure the timely filing of the record on appeal and failed to make a showing excusing such noncompliance); In re Estate of Brown, 24 Haw. 711, 712-13 (1919) (same); Oahu Sav. & Loan Ass'n v. DeCosta, 36 Haw. 73, 74 (1942) (same); In re Estate of Nukushima, 33 Haw. 658, 659 (1935) (same); In re Estate of Holi, 42 Haw. 74, 75 (1957) (same); Independence Mortgage Trust v. Glenn Constr. Corp., 57 Haw. 554, 556, 560 P.2d 488, 490 (1977) ("[T]his court finds that dismissal of the entire appeal is appropriate, due to appellant's flagrant disregard of the rules of court.").

therefore been waived.<sup>8</sup> Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, June 22, 2007.

On the briefs:

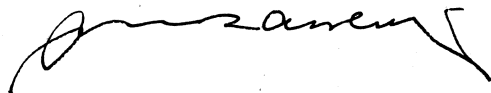
Stephen M. Shaw,  
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Appellant Emerson M.F.  
Jou, M.D.

Edmund K.U. Yee,  
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Appellee State Farm Mutual  
Automobile Insurance Company



Steven Levinson

Paula C. Tuckey



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<sup>8</sup> See Hawaii Ventures, LLC v. Otaka, Inc., No. 25344, 2007 WL 1346603, at \*41 (Haw. May 9, 2007) (holding that the failure to preserve an issue by raising it at the circuit court level waives the issue on appeal); In re Tax Appeal of Subway Real Estate Corp. v. Dir. of Taxation, State of Hawaii, 110 Hawaii 25, 30, 129 P.3d 528, 533 (2006) ("[A]s a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal[.]") (Citing State v. Moses, 102 Hawaii 449, 456, 77 P.3d 940, 947 (2003)).