Hawaiian Insurance & Guaranty Co. Limited v. Ho

101 P.3d 689 (2004) | Cited 0 times | Hawaii Intermediate Court of Appeals | November 24, 2004

NOT FOR PUBLICATION

SUMMARY DISPOSITION ORDER

In this secondary appeal, Claimant-Appellee-Appellant Sheung Ho (Ho) appeals the November 15, 2002 judgment that the circuit court of the first circuit[1] entered in an agency appeal, Civil No. 02-1-1058-04 (the second agency appeal), in favor of Respondent-Appellant-Appellee The Hawaiian Insurance & Guaranty Company, Limited (HIG) and against Ho and Appellee-Appellee Insurance Commissioner (the Commissioner), State of Hawaii Department of Commerce and Consumer Affairs (the DCCA).

The circuit court's November 15, 2002 judgment reversed an April 1, 2002 final order that the Commissioner handed down in MVI 94-391, an administrative proceeding Ho initiated in the DCCA's Office of Administrative Hearings, Insurance Division, over HIG's June 15, 1994 partial denial of motor vehicle insurance coverage.

The Commissioner's April 1, 2002 final order was entered after remand proceedings required by the circuit court's[2] October 30, 1998 order and judgment in a prior agency appeal, Civil No. 97-1197-03 (the first agency appeal). The circuit court's October 30, 1998 order and judgment reversed a prior final order, entered by the Commissioner on February 18, 1997 in the original proceedings in MVI 94-391, and remanded for specified further proceedings.

After a painstaking review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we observe that the polar positions taken by the parties on appeal stem, respectively, from equally divergent interpretations of the import and intent of the circuit court's October 30, 1998 order and judgment in the first agency appeal. This was also the case in the underlying second agency appeal and the further underlying remand proceedings. This is and was so because the October 30, 1998 order and judgment, facially, are profoundly and irremediably ambiguous. This being so, the record of the first agency appeal and the transcript of the April 27, 1998 hearing therein out of which the October 30, 1998 order and judgment issued, are desiderata to our informed consideration and decision in this appeal, without which our consideration and decision would be based on mere speculation. But neither is included in the record on appeal.

We acknowledge that none of the parties to this appeal saw fit to designate the necessary record and

transcript to the record on appeal. "The record on appeal shall consist of . . . . the original papers filed in the court or agency appealed from; . . . . exhibits admitted into evidence or refused; [and] the transcript of any proceedings prepared pursuant to the provisions of Rule 10(b)[.]" Hawaii Rules of Appellate Procedure (HRAP) Rule 10(a) (2003) (enumeration omitted; format modified).

However, it was the responsibility of the appellant, Ho, to do so. Indeed, it is Ho and Ho alone who expressly claims that he is "appealing from an interlocutory Circuit Court Judgment filed on October 10, 1998 and the final Circuit Court Judgment filed November 15, 2002." Opening Brief at 2 (citation to the certified record on appeal omitted; emphasis supplied). HRAP Rule 10(b)(1)(A) (2003) places on the appellant the affirmative burden of providing the transcript of the relevant proceedings: When an appellant desires to raise any point on appeal that requires consideration of the oral proceedings before the court or agency appealed from, the appellant shall file with the clerk of the court appealed from, within 10 days after filing the notice of appeal, a request or requests to prepare a reporter's transcript of such parts of the proceedings as the appellant deems necessary that are not already on file. See also HRAP Rule 10(b)(3) (2003). Thus, it is well settled that, "'The burden is upon appellant in an appeal to show error by reference to matters in the record, and he or she has the responsibility of providing an adequate transcript.'" Bettencourt v. Bettencourt, 80 Hawaii 225, 230, 909 P.2d 553, 558 (1995) (brackets omitted) (quoting Union Bldg. Materials Corp. v. The Kakaako Corp., 5 Haw. App. 146, 151, 682 P.2d 82, 87 (1984)). See alsoLepere v. United Pub. Workers, Local 646, 77 Hawaii 471, 474, 887 P.2d 1029, 1032 (1995) ("Lepere, as appellant, had a duty to include the relevant transcripts of proceedings as a part of the record on appeal." (Footnote omitted.)); State v. Hawaiian Dredging Co., 48 Haw. 152, 158, 397 P.2d 593, 598 (1964) ("It is elementary that an appellant must furnish to the appellate court a sufficient record to positively show the alleged error." (Citation omitted.)); Marn v. Reynolds, 44 Haw. 655, 663, 361 P.2d 383, 388 (1961) ("facts set forth in a brief, unsupported by the record, cannot be considered"; the transcript of proceedings must be provided to the appellate court unless "evidence is not necessary for the disposition of an appeal on its merits" (citation omitted)); Ling v. Yokoyama, 91 Hawaii 131, 135, 980 P.2d 1005, 1009 (App. 1999); Costa v. Sunn, 5 Haw. App. 419, 430, 697 P.2d 43, 50 (1985);Johnson v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 178, 664 P.2d 262, 265 (1983); Hawaiian Trust Co., Ltd. v. Cowan, 4 Haw. App. 166, 168, 663 P.2d 634, 636 (1983).

In addition, we insist upon a complete as well as relevant record, even if parts of it might not favor the designating party: Moreover, if the appellant wishes to urge that a finding or conclusion is unsupported by the evidence, he must include a transcript of all the evidence relevant to such finding or conclusion. . . . An appellant may not pick and choose what he would like to see, but he has the burden to designate all the evidence, good and bad, material to the point he wishes to raise.

The law is clear in this jurisdiction that the appellant has the burden of furnishing the appellate court with a sufficient record to positively show the alleged error. An appellant must include in the record all of the evidence on which the lower court might have based its findings and if this is not done, the lower court must be affirmed. Union Bldg. Materials Corp., 5 Haw. App. at 151-52, 682 P.2d at 87 (citations omitted). Thereupon, we concluded: The state of the appellate record is such that all

of the evidence presented to the trial court is not presented here and we have no way of knowing if the evidence omitted is relevant. Therefore, we cannot say that the court's findings are not supported by substantial evidence and are clearly erroneous. Id. at 153, 682 P.2d at 88. See alsoState v. Goers, 61 Haw. 198, 202-3, 600 P.2d 1142, 1144-45 (1979);Hawaiian Trust Co., Ltd., 4 Haw. App. at 168, 663 P.2d at 636; Marn, 44 Haw. at 663, 361 P.2d at 388.

Moreover, an appellant has a continuing responsibility to ensure that the record as constituted is both complete and relevant. HRAP Rule 11(a) (2003) ("After the filing of the notice of appeal, the appellant . . . shall comply with the provisions of [HRAP] Rule 10(b) and shall take any other action necessary to enable the clerk of the court to assemble and transmit the record."). See alsoBettencourt, 80 Hawaii at 231, 909 P.2d at 559 ("it is counsel's responsibility to review the record once it is docketed and if anything material to counsel's client's case is omitted or misstated, to take steps to have the record corrected" (brackets, citation and internal quotation marks omitted) (referring to the then-applicable Hawaii Rules of Civil Procedure Rule 75(d), the predecessor court rule to HRAP Rule 10(e)(2) (2003))).

As we have stated: In appeals from the circuit court, as in agency appeals to the circuit court, the burden is on appellant to convince the appellate body that the presumptively correct action of the circuit court is incorrect. To that end, an appellant is required to file a notice of appeal, order the transcript of the proceedings below, and arrange for transmission of the record. The burden is upon appellant to comply with the rules. The only positive requirement placed on an appellee is to file an answering brief, except where appellee files a cross-appeal, or may wish to respond to an act by appellant. So great is the burden on appellant to overcome the presumption of correctness that appellee's failure to file an answering brief does not entitle appellant to the relief sought from the appellate court, even though the court may accept appellant's statement of facts as correct. Costa, 5 Haw. App. at 430, 697 P.2d at 50-51 (citations omitted).

Given the presumption of correctness accorded on appeal to the proceedings below, id.,

IT IS HEREBY ORDERED that the November 15, 2002 judgment of the circuit court is affirmed. SeeJohnson, 4 Haw. App. at 178, 664 P.2d at 265-66 (insufficient designation of the record on appeal "is cause for dismissal of the appeal or affirmation of the lower court decision" (citations omitted)).

1. The Honorable Eden Elizabeth Hifo, judge presiding.

2. The Honorable Kevin S.C. Chang, judge presiding.