

NO. 26434

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAII

TUNG NG, Plaintiff-Appellant, and GUANG CAI LO, and LI LING LO,
Plaintiffs, v.

THOMAS Y. KAWAHARA, Defendant-Appellee, and JOHN DOE 1-10, DOE
CORPORATION 1-10, DOE PARTNERSHIP 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 02-1-0591)

SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Lim and Fujise, JJ.)

KENNETH M. KAKADO
CLERK OF APPELLATE COURTS
STATE OF HAWAII
2006 OCT 31 AM 7:56

FILED

In this automobile accident case, Tung Ng (Plaintiff) appeals the February 23, 2004 final judgment that the Circuit Court of the First Circuit (circuit court)¹ entered upon a jury's verdict against him and in favor of Thomas Y. Kawahara (Defendant).

After a meticulous 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 dispose of Plaintiff's points of error on appeal as follows:

1. The circuit court was correct to deny Plaintiff's December 10, 2003 motion for judgment as a matter of law as to his alleged neck and low back injuries because the light most favorable to Defendant illuminates in the evidence and inferences therefrom substantial evidence, Stanford Carr Dev. Corp. v. Unity House, Inc., 111 Hawai'i 286, 296, 141 P.3d 459, 469 (2006), that

¹ The Honorable Victoria S. Marks presided.

Plaintiff did not suffer any injury in the accident and/or that Plaintiff's damages were caused by a pre-existing condition or conditions, such that there was a "legally sufficient evidentiary basis for a reasonable jury to find for [Defendant] on th[ose] issue[s.]" Hawai'i Rules of Civil Procedure (HRCPP) Rule 50(a)(1) (2003). By the latter token, the circuit court was correct to deny Plaintiff's December 10, 2003 motion for judgment as a matter of law as to pre-existing injury and apportionment of damages. By the same token, the circuit court's jury instruction no. 7.3 on pre-existing injury and apportionment of damages did not render its jury instructions, "when read and considered as a whole, . . . prejudicially insufficient, erroneous, inconsistent, or misleading." State v. Klinge, 92 Hawai'i 577, 583, 994 P.2d 509, 515 (2000) (citations and internal quotation marks omitted).

2. Plaintiff contends the circuit court erred in refusing his proposed jury instructions nos. 10, 13 and 14, purporting to instruct the jury on the "eggshell plaintiff rule." Even assuming, *arguendo*, that this rule is law in this jurisdiction, there was absolutely no evidence adduced at trial that a pre-existing injury or condition was exacerbated by the accident, or that Plaintiff had a predisposition to injury. Accordingly, the circuit court's refusal did not render its jury instructions, "when read and considered as a whole, . . . prejudicially insufficient, erroneous, inconsistent, or misleading." Klinge, 92 Hawai'i at 583, 994 P.2d at 515

(citations and internal quotation marks omitted).

3. Plaintiff contends the circuit court erred in allowing one of Defendant's expert witnesses to read directly from his medical records on direct examination, because they "were not marked as exhibits prior to trial and pursuant to the trial court's deadline to submit exhibits." Opening Brief at 8 (citation to the record omitted). Plaintiff's contention lacks merit. The medical records were not proffered as trial exhibits or as evidence. The transcript clearly shows that they were instead a writing used to refresh memory, per Hawaii Rules of Evidence (HRE) Rule 612 (1993), or, if not, a past recollection recorded, per HRE Rule 802.1(4) (1993). Plaintiff's attempt to show a lack of foundation for the application of HRE Rule 612 is an argument waived on appeal by his failure to object on that basis below, State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) ("there can be no doubt that the making of an objection upon a specific ground is a waiver of all other objections" (citation and internal quotation marks omitted)), and by his raising the argument for the first time in his reply brief. In re Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994) ("[b]ecause those arguments were not raised in the tax appeal court or in [appellant's] opening brief on appeal, they are deemed waived" (citation omitted)). Never mind that on cross-examination, Plaintiff himself had the witness testify extensively directly from his medical records.

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

Therefore,

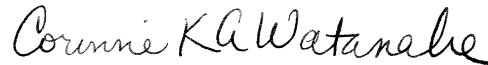
IT IS HEREBY ORDERED that the February 23, 2004 final judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, October 31, 2006.

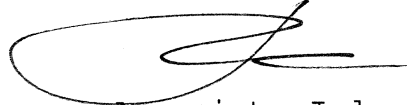
On the briefs:

Ronald G.S. Au and
Ryan G.S. Au,
for Plaintiff-Appellant.

Mark T. Ichiyama,
for Defendant-Appellee.



Presiding Judge



Associate Judge



Associate Judge