NO. 27235

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

JOHN A. JONES, Plaintiff-Appellant, v. CHAWEEWAN[1] IAMWONG, TYRONE P. COLLINS, ROCKY'S LIMOUSINE SERVICE, Defendants-Appellees, and JOHN DOES 1-99, JANE DOES 1-99, DOE PARTNERSHIPS, CORPORATIONS, and/or OTHER ENTITIES 1-99, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 01-1-2939)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Foley, and Nakamura, JJ.)

Plaintiff-Appellant, pro se, John A. Jones (Jones) appeals from the final judgment entered by the Circuit Court of the First Circuit (the circuit court)[2] on March 28, 2005 against Jones and in favor of Defendants-Appellees Chaweewan Iamwong (Iamwong), Rocky's Limousine Service (RLS), and Tyrone P. Collins (Collins) (RLS and Collins are hereinafter referred to collectively as "Taxi Defendants[,]" and Iamwong, RLS, and Collins are hereinafter referred to collectively as "Defendants"). The final judgment was entered following the circuit court's entry of the following orders: (1) the order filed on December 7, 2004, granting the motion for summary

[1] The complaint filed by Plaintiff-Appellant John A. Jones named "Chaneewan Iamwong" (Iamwong) as a Defendant. In pleadings filed by Iamwong, she referred to herself as "Chaweewan Iamwong, incorrectly identified as Chaneewan Iamwong[.]"

[2] The Honorable Victoria S. Marks presided.

judgment filed by Iamwong; (2) the order filed on January 18, 2005, granting the motion for summary judgment filed by Taxi Defendants; and (3) the order filed on February 17, 2005, dismissing the December 13, 2001 cross-claim filed by Taxi Defendants against Iamwong and the May 21, 2004 cross-claim filed by Iamwong against Taxi Defendants.

We affirm.

A.

The record on appeal indicates that on October 9, 2001, Jones filed a complaint seeking damages for injuries he allegedly suffered as a result of an August 29, 1999 motor vehicle accident (the accident) involving a car driven by Iamwong and a taxicab driven by Collins, owned by RLS, and in which Jones was a passenger.

The complaint alleged that Iamwong "was driving her vehicle while drunk and intoxicated and in a negligent and uncontrolled manner, causing her vehicle to collied [sic] with a taxicab that [Jones] was a passenger in." Additionally, Iamwong "failed to stop after the accident and was arrested later that night and charger [sic] with [Driving Under the Influence of Intoxicating Liquor (DUI)] and leaving the scene of the accident. [Jones] was taken by ambulance to Queen's Hospital."

The complaint further alleged that prior to the accident, Jones orally contracted with Collins to take Jones to

Waikīkī, but Taxi Defendants breached that contract. Furthermore, Taxi Defendants "were negligent in the operation, maintenance, inspection and/or testing of said taxicab, including its brakes. Said taxicab was not operated or in a proper, safe or fit condition, which conditions were known or should have been known to the said defendants, and each of them, by a proper training and selection of the operator and inspection of said vehicle, including its brakes, which selection and inspection was the duty of the defendants and each of them, to make, thereby breaching their oral contract with [Jones]."

B.

At the time Jones filed his lawsuit, Hawaii Revised Statutes (HRS) § 431:10C-306 (Supp. 2000), which abolished the right to sue in tort for damages arising from the ownership, operation, maintenance, or use of a motor vehicle except under specified circumstances, provided, in relevant part, as follows:

> **Abolition of tort liability.** (a) Except as provided in subsection (b), this article abolishes tort liability of the following persons with respect to accidental harm arising from motor vehicle accidents occurring in this State:
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> (1) Owner, operator, or user of an insured motor vehicle; or
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> (2) Operator or user of an uninsured motor vehicle who operates or uses such vehicle without reason to believe it to be an uninsured motor vehicle.
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> (b) Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in the following circumstances:
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> (1) Death occurs to the person in such a motor vehicle accident;

(2) Injury occurs to the person which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body;

(3) Injury occurs to the person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering; or

(4) Injury occurs to the person in a motor vehicle accident and as a result of such injury that the personal injury protection benefits incurred by such person equal or exceed $5,000; . . . :

. . . .

(e) No provision of this article shall be construed to exonerate, or in any manner to limit:

(1) The liability of any person in the business of manufacturing, retailing, repairing, servicing, or otherwise maintaining motor vehicles, arising from a defect in a motor vehicle caused, or not corrected, by an act or omission in the manufacturing, retailing, repairing, servicing, or other maintenance of a vehicle in the course of such person's business;

(2) The criminal or civil liability, including special and general damages, of any person who, in the maintenance, operation, or use of any motor vehicle:

(A) Intentionally causes injury or damage to a person or property;

(B) Engages in criminal conduct which causes injury or damage to person or property;

(C) Engages in conduct resulting in punitive or exemplary damages; or

(D) Causes death or injury to another person in connection with the accident while operating the vehicle in violation of section 291-4[3] or 291-7.[4]

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[3] Hawaii Revised Statutes (HRS) § 291-4 (Supp. 2000) defined the offense for driving under the influence of intoxicating liquor.

[4] HRS § 291-7 (Supp. 2000) defined the offense for driving under the influence of drugs.

HRS § 431:10C-306 (emphases and footnotes added). At the time Jones filed his lawsuit, HRS § 431:10C-103 (Supp. 2000) defined "[c]riminal conduct" as follows:

> (1) The commission of an offense punishable by imprisonment for more than one year;
>
> (2) The operation or use of a motor vehicle with the specific intent of causing injury or damage; or
>
> (3) The operation or use of a motor vehicle as a converter without a good faith belief by the operator or user that the operator or user is legally entitled to operate or use such vehicle.

Id.

On October 13, 2004, Iamwong filed a motion for summary judgment, arguing that she was entitled to judgment as a matter of law because:

> 1. [Jones] cannot meet his burden of proving that he meets an exception to the abolition of tort liability [pursuant to HRS § 431:10C-306], and, therefore, this Court lacks subject matter jurisdiction.
>
> 2. [Jones] cannot meet his burden of proving that [Iamwong] was intoxicated at the time of the subject accident.
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> 3. [Jones] cannot meet his burden of proving that [Iamwong] was negligent.
>
> 4. [Jones] cannot meet his burden of proving his damages.
>
> 5. Therefore, [Jones] has failed to state a claim upon which relief may be granted.

Iamwong argued that: (1) it was undisputed that Jones did not die as a result of the August 29, 1999 accident; (2) the only physical and/or mental injuries or conditions that Jones claimed to have sustained were "[h]ead, neck and back injuries[,]" which, as a matter of law, do not constitute "a significant permanent

loss of use of a part or function of [his] body[,]" HRS § 431-10C-306; (3) the injuries Jones claims he suffered as a result of the accident do not, as a matter of law, constitute a permanent and serious disfigurement resulting in mental or emotional suffering; (4) the total cost incurred by Jones as a result of the accident, as reflected in the medical records and bills provided by Jones pursuant to a request for production of documents, do not equal or exceed $5,000; (5) Jones has proffered no admissible evidence that at the time of the accident, Iamwong engaged in criminal conduct or operated a motor vehicle in violation of HRS § 431:10C-306(e)(2)(D), and even if the State of Hawai'i Motor Vehicle Accident Report produced by Jones during discovery were considered admissible evidence, which Iamwong disputes, such report only identified offenses for which Iamwong was arrested, not convicted, and Iamwong is presumed innocent of the offenses; (6) Jones has not identified any witnesses who will be testifying at trial, and therefore, Jones will be unable to meet his burden of proving that Iamwong was negligent, intoxicated, or engaged in criminal conduct; (7) Jones has not provided any evidence to substantiate his claims for punitive damages; and (8) Jones has not cited any authority for the proposition that Iamwong, as a driver in a motor vehicle accident, can be subject to strict liability.

On October 15, 2004, Taxi Defendants filed a motion for summary judgment. They similarly argued that Jones had failed to meet the jurisdictional requirements set forth in HRS § 431:10C-306 for bringing a tort action against them for injuries arising out of the accident. They therefore urged the circuit court to dismiss Jones's claims against them as a matter of law.

In Jones's November 9, 2004 memorandum in opposition to Defendants' motions for summary judgment, he stated that there was admissible evidence, i.e., a State of Hawai'i Motor Vehicle Accident Report, that Iamwong "engaged in criminal conduct, or operated a motor vehicle in violation of the sections identified in HRS §431:10C-306(e)(2)(D), at the time of the subject accident." According to Jones, this report clearly established that on the night of the accident, Iamwong made an illegal U-turn, collided with Collins's taxicab, and was arrested for DUI. Therefore, Jones argued, he was exempt from establishing an exception to the abolition of tort liability. Jones also argued that Defendants had failed to comply with the rules of discovery and were not entitled to summary judgment. Finally, he argued that he suffered "permanent injury by the fact that he was subjected to head and neck x-rays at Queens hospital [sic] as a result of the accident. Head and neck x-rays radiate brain cells and causes them to die."

On December 7, 2004, the circuit court entered an order granting Iamwong's motion for summary judgment and entered summary judgment in favor of Iamwong and against Jones as follows:

> IT IS HEREBY ORDERED, ADJUDGED, and DECREED that any and all claims asserted against [Iamwong] in [Jones's] Complaint, filed herein on October 9, 2001, be and hereby are DISMISSED WITH PREJUDICE.

The circuit court specifically mentioned in the order that: Jones's "Memorandum in Opposition was untimely, and contained hearsay and unauthenticated documentation[;] . . . there was no proof that [Iamwong] was convicted for driving under the influence; . . . [Jones] has failed to demonstrate an exception to the abolition of tort liability[;] . . . [and Iamwong] is entitled to judgment as a matter of law, and for good cause shown[.]"

On January 18, 2005, the circuit court entered an order granting Taxi Defendants' motion for summary judgment as to all claims asserted by Jones.

On February 17, 2005, the circuit court entered an order dismissing the cross-claims filed by Taxi Defendants and Iamwong against each other.

On March 28, 2005, the circuit court entered the final judgment from which Jones appeals. The final judgment "ORDERED, ADJUDGED AND DECREED that Final Judgment be and hereby is ENTERED in favor of Defendants CHAWEEWAN IAMWONG, Incorrectly Identified

as CHANEEWAN IAMWONG, ROCKY'S LIMOUSINE SERVICE, and TYRONE P. COLLINS, and against Plaintiff JOHN A. JONES."

C.

On appeal, Jones urges this court to reverse the circuit court's final judgment and orders granting Defendants' motions for summary judgment. Jones claims that: (1) he was exempt from establishing an exception to the abolishment of tort liability in motor vehicle accident cases because Iamwong "was driving under the influence of alcohol with and [sic] ethanol blood level of almost 3 times the legal limit[,]" (2) the circuit court committed reversible error in not allowing the police accident report to be considered evidence of Iamwong's intoxication, and (3) there were genuine issues of material fact regarding Taxi Defendants' breach of contract and negligence.

In First Hawaiian Bank v. Weeks, 70 Haw. 392, 772 P.2d 1187 (1989), the Hawai'i Supreme Court held that a defendant moving for summary judgment "may discharge his [or her] burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his [or her] opponent." Id. at 396, 772 P.2d at 1190 (internal quotation marks omitted). In so holding, the supreme court referred to the United States Supreme Court's opinion in Celotex Corp. v. Catrett, 477 U.S. 317 (1986), and observed that

> [o]ne moving for summary judgment under Fed. R. Civ. P. 56 need not support his [or her] motion with affidavits or

> similar materials that negate his [or her] opponent's claims, but need only point out to the district court that there is absence of evidence to support the opponent's claims. For if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless. 10A Wright, Miller & Kane, [Federal Practice and Procedure: Civil 2d § 2727], at 130.

First Hawaiian Bank, 70 Haw. at 397, 772 P.2d at 1190 (parenthesis, internal quotation marks, brackets, and ellipsis omitted).

Subsequently, in GECC Fin. Corp. v. Jaffarian, 80 Hawai'i 118, 905 P.2d 624 (1995), the Hawai'i Supreme Court held that a plaintiff moving for summary judgment "is not required to disprove affirmative defenses asserted by a defendant in order to prevail on a motion for summary judgment." Id. at 119, 905 P.2d at 625. The supreme court agreed with the concurring opinion in GECC Fin. Corp. v. Jaffarian, 79 Hawai'i 516, 904 P.2d 530 (App. 1995), which stated:

> Placing an initial burden on the plaintiff to disprove every affirmative defense asserted against it has several practical effects, none of which appear . . . to be helpful in promoting the speedy and economical disposition of non-viable issues. First of all, the plaintiff will be put to the time and expense of initially disproving an issue on which the defense has the burden of proof at trial, but upon which such proof may ultimately be lacking. It would seem . . . that in the allocation of burdens, the burden of producing materials regarding an affirmative defense in a summary judgment proceeding should be placed upon the defendant. If the defendant lacks such evidence then in all probability the defense will not be raised in opposition to the plaintiff's motion. If, on the other hand, there is evidence in support of the defense, what party is more suited to present the defense in all its permutations and contours than the defendant? If this task is left to the defendant, then the court and the plaintiff may be afforded the information essential to make a realistic appraisal of the defense, and the appropriate action to take--granting summary judgment or partial summary judgment, denial of the motion, or conceivably, the refinement of a subsequent

> motion for summary or partial summary judgment--will be evident.
>
> We may reasonably expect that where affirmative defenses have been raised *pro forma*, they will, if not supported by evidence at the time of the plaintiff's motion, simply be abandoned. *See K.M. Young & Assoc. v. Cieslik*, 4 Haw. App. 657, 663-66, 675 P.2d 793, 799-800 (1983) (affirming award of summary judgment where nonmoving party raised the affirmative defense of usury in its memorandum in opposition to the motion without showing facts which would establish the elements of usury). It is also conceivable that in establishing a prima facie case, the plaintiff will also expose weaknesses in certain defenses or affirmative defenses, which the defendant will then, for strategic reasons, discard. This newly added requirement, however, suggests to the plaintiff that before filing its motion for summary judgment, it must conduct an investigation and discovery of every affirmative defense raised, although, ultimately, it may turn out that such efforts were unnecessary. The prerequisite that the plaintiff must disprove every affirmative defense asserted against it may be a harbinger of greater delay and expense.
>
> The plaintiff should be *obligated* to disprove an affirmative defense in moving for summary judgment when, but only when, the defense produces material in support of an affirmative defense.

GECC Fin. Corp. 79 Hawai'i at 526, 904 P.2d at 540 (footnote, internal quotation marks, and ellipsis omitted).

Under the First Hawaiian Bank/GECC Fin. Corp. standard, therefore, a plaintiff moving for summary judgment is not initially required to disprove the elements of an affirmative defense and is only required to produce admissible evidence to disprove an affirmative defense if the defendant first produces admissible evidence in support of the affirmative defense. Similarly, a defendant moving for summary judgment is not initially required to disprove the elements of a plaintiff's claim(s) in order to prevail on a motion for summary judgment. The defendant need only point out that the plaintiff has produced

no evidence, even after discovery, to support the plaintiff's claim(s). It is only when the plaintiff produces admissible evidence to counter the defendant's motion for summary judgment that the defendant is required to produce evidence to disprove the plaintiff's claim(s).

Applying the First Hawaiian Bank/GECC Fin. Corp. standard to the record in this case, we agree with the circuit court that in opposing Defendants' motions for summary judgment, Jones produced no admissible evidence to support his claim that Iamwong was intoxicated at the time of the accident or that he met the jurisdictional requirements to bring the underlying lawsuit.

Accordingly, we affirm: (1) the December 7, 2004 order granting Iamwong's October 13, 2004 motion for summary judgment; (2) the January 18, 2005 order granting Taxi Defendants' October 15, 2004 motion for summary judgment; (3) the February 17, 2005 order dismissing (a) Taxi Defendants' December 13, 2001 cross-claim against Iamwong; and (b) Iamwong's

May 21, 2004 cross-claim against Taxi Defendants; and (4) the final judgment entered on March 28, 2005.

DATED: Honolulu, Hawai'i, April 30, 2007.

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