

NO. 20853

IN THE SUPREME COURT OF THE STATE OF HAWAII

MARK TIMOTHY SCHMALZ, Plaintiff-Appellee,

vs.

FRED GOLDBLATT and CAROL GOLDBLATT,
husband and wife, Defendants-Appellants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 95-2015)

SUMMARY DISPOSITION ORDER

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

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 by the parties, we hold that:

(1) the trial court did not abuse its discretion when it denied defendants-appellants Fred Goldblatt, D.O., and Carol Goldblatt's (collectively, the Goldblatts) motion to consolidate the present contract action with their medical malpractice action against plaintiff-appellee Mark Schmalz, M.D., see Kainz v. Lussier, 4 Haw. App. 400, 667 P.2d 797 (1983) (holding that the trial court has broad discretion to deny consolidation of separate actions if it will cause delay or lead to confusion or prejudice);

(2) the exclusion of evidence under Hawai'i Revised Statutes (HRS) § 671-16 (1993) does not extend to the instant

contract action to exclude a reference to a witness's affidavit created for the Goldblatts' Medical Claims Conciliation Panel (MCCP) proceeding, see generally Franks v. City & County of Honolulu, 74 Haw. 328, 334, 843 P.2d 668, 671 (1993) (noting that the language of a statute is read in the context of the entire statute and construed in a manner consistent with its purpose);

(3) the trial court did not violate Hawai'i Rules of Civil Procedure (HRCP) Rules 32(a)(4) and 32(b) (1999) when it admitted the redacted deposition of an unavailable witness because the omitted portions were not probative of untruthfulness, see Hawai'i Rules of Evidence (HRE) Rule 608(b) (providing that "[s]pecific instances of the conduct of a witness, for the purpose of attacking the witness' credibility, if probative of untruthfulness, may be inquired into on cross-examination of the witness and, in the discretion of the court, be proved by extrinsic evidence");

(4) the trial court did not erroneously exclude the alleged vicarious admissions of Michael Schmalz in violation of HRE Rule 803(a)(2) because the Goldblatts failed to lay the proper foundation of an agency relationship between Michael Schmalz and Mark Schmalz, see HRE Rule 803(a)(2) (recognizing that certain prerequisites must be established to qualify as a vicarious admission: (1) the statement is "offered against a party" and (2) it was either made by "the party's agent or

servant concerning a matter within the scope of the agent's or servant's agency or employment");

(5) HRS § 656-1(4), the statute of frauds, is inapplicable to the present case involving a contract for a personal loan of money, see HRS 656-1(4) (specifying that any contract for the sale of lands, tenements, or hereditaments, or of any interest in or concerning them be evidenced in writing);

(6) there was no plain error when the trial court allowed Schmalz's counsel during closing arguments to (a) analogize their defense as "smoke and mirrors," (b) refer to the Goldblatts' MCCP proceeding as a retaliatory action, and (c) refer to a person named "Scott Zusack," who was not in evidence, see Shanghai Investment Co., Inc. v. Alteka Co., Ltd., 91 Hawai'i 482, 933 P.2d 516 (2000). Accordingly,

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

DATED: Honolulu, Hawai'i, September 22, 2000.

On the briefs:

Gary Victor Dubin
Gregg Young,
for defendants-appellants

Mal Gillin,
for plaintiff-appellee