DISSENTING OPINION BY ACOBA, J.,
WITH WHOM CIRCUIT JUDGE PERKINS JOINS

Plaintiffs-Appellants/Cross-Appellees Byung H. Ho (Ho) and Moon S. Ho (collectively, Plaintiffs) appeal the August 20, 1998 judgment of the circuit court of the first circuit[1] (the court) entered against Plaintiffs and in favor of Defendant-Appellee/Cross-Appellant Gary Nishijima (Defendant), together with costs awarded against Plaintiffs. I believe the judgment and order as to costs should be affirmed on the grounds stated herein,[2] except I would vacate and remand to the court certain items of the court's June 3, 1998 order pertaining to witness fees for the reasons stated in Part VII.B.1. herein.

I.

A.

The facts follow.

This case arose from separate motor vehicle accidents in which Ho allegedly suffered neck and low back injuries. The first accident occurred on November 9, 1993, in which Defendant allegedly rear-ended Ho's vehicle while Ho was stopped in traffic. The second accident occurred on March 3, 1995 and

[1] The Honorable Virginia Crandall heard the motion to strike Defendant's final naming of witnesses and the Honorable Marie Milks presided over the trial herein.

[2] Inasmuch as I would affirm the judgment except for the matter of costs, it is not necessary to address Defendant's cross-appeal.

involved Defendant Albert S. Lagrimas. Ho claims, inter alia, that he suffered neck and low back injuries, in addition to a neurogenic[3] bladder and sexual dysfunction as a result of that accident.

Prior to the November 9, 1993 accident, Ho injured his lumbar spine in a 1984 work accident when he fell off the roof of a bus, and again in 1989 when he was rear-ended in a traffic accident. In both instances, Ho was able to return to work as a bus mechanic. According to Ho's testimony, he had no further neck symptoms and only occasional back symptoms from 1989 to the November 9, 1993 accident. Plaintiffs also maintain that there is no evidence Ho injured his cervical discs in the 1989 accident. In addition, there is no evidence that Ho experienced bladder or impotence problems prior to the November 1993 accident.

Two days after the November 9, 1993 accident, Dr. Timothy Olderr, a Straub Physiatrist, examined Ho. His diagnosis was 1) cervical facet strain and possible mild osteoarthritis and 2) lumbar pain secondary to osteoarthritis and possible left radicular symptoms with discogenic origins. Plaintiffs allege that later, on April 14, 1994, Ho complained of sexual relationship problems and Dr. Olderr immediately referred him to the Straub Urology Department for evaluation. On

[3] Neurogenic is defined as follows: 1. Forming nervous tissue, or simulating nervous energy. 2. Originating in the nervous system. Dorland's Illustrated Medical Dictionary 887 (26th ed. 1987)

April 18, 1994, Ho saw Dr. Walter S. Strode, a board-certified urologist at Straub, who ordered hormonal, vascular, and nerve tests on Ho's genitourinary tract to determine the cause of Ho's impotence complaints.

Dr. Strode ruled out hormonal or vascular causes for Ho's impotence after the tests were completed. Based upon the abnormal cystometrogram test on Ho's bladder and an electromyogram (EMG) of his genitourinary nerves, Dr. Strode concluded that Ho's problems were neurogenic. Dr. Strode's diagnosis was "ORGANIC IMPOTENCE, NOT VASCULOGENIC, PROBABLY NEUROGENIC."

Dr. Olderr referred Ho to Dr. Yoshio Hosobuchi, a board-certified neurosurgeon, who examined Ho on July 16, 1994. Dr. Hosobuchi confirmed that Ho's neurogenic bladder and impotence problem were the result of a large posterior midline protrusion at L5-S1 causing moderate spinal stenosis and cortical compression. Dr. Hosobuchi concluded that the herniated disc at L5-S1 "would explain [Ho's] sphincter problems, as well as sexual dysfunction."

B.

On June 29, 1995, Plaintiffs brought an action in Civil No. 95-2308-06 against Defendant Nishijima. On August 19, 1995, the parties stipulated to amend the Complaint, adding Defendants Lagrimas and his employer, Mercantile Trucking Service, Ltd.

(Mercantile Trucking). The case proceeded through the Court Annexed Arbitration Program (CAAP) which found in favor of Plaintiffs. The arbitrator also awarded costs of the suit in favor of Plaintiffs and against Defendant, Lagrimas, and Mercantile Trucking.

Dr. Hosobuchi submitted a July 1997 letter as an exhibit in the CAAP arbitration proceeding. He stated that, "as Dr. Strode indicated, Mr. Byung Ho's sphincter problem, which is bladder and sexual dysfunction, does arise from the motor vehicle accident[s] of 11/9/93 and 3/3/95." Dr. Hosobuchi testified about causation during his deposition.

> Q: Now Doctor, as of the June 1st, 1994[] visit, did you have a diagnosis or an impression?
> A: Well, my impression was, as I stated, that central disc herniation at L4-5 and L5-S1 causing spinal stenosis and cauda equina[4] compression.
> Q: Anything else?
> A: And probably resulting in the sexual dysfunction and bladder difficulty.
> Q: And to the best of your recollection, in reviewing Dr. Strode's letter as well as whatever conversations you had with him, was it that the sexual dysfunction and bladder problems that Mr. Ho was facing was as a result of the November 9th, 1993 accident?
> A: I think so.

(Emphasis added.)

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[4] Cauda Equina is defined as follows:

> The collection of spinal roots that descend from the lower part of the spinal cord and occupy the vertebral canal below the cord; their appearance resembles the tail of a horse.
> . . . .
> The first, second, third, fourth and fifth sacral nerves pass through the spinal column in the cauda equina at the L4 L5 and the L5 S1 level. At each intervertebral space following the fist lumbar vertebra, a nerve root extends from the cauda equina to the right and left of the intervertebral disc.

The Sloane-Dorland Annotated Medical-Legal Dictionary 126 (1987).

Dr. Hosobuchi agreed with Dr. Strode's finding of neuorogenic bladder and sexual dysfunction and that the diagnosis was consistent with the back injury suffered in the November 1993 accident.

> Q [DEFENSE COUNSEL]: Okay. And you did in connection with the review of Dr. Nicholson's letter report to Mr. Nakamura and - or you were aware at the time that Dr. Strode had performed a cystometrogram and in fact opined that the bladder and sexual dysfunction problem was neurogenic and not vasulargenic [sic] in origin.
>
> A: That's correct.
>
> Q: Okay. So to the extent that you disagree with Dr. Nicholson in this letter report to me of July 30th, 1997, it's to the point that you concur with Dr. Strode that the objective test performed on Mr. Ho's urologic system indicates that it is neurogenic in origin and consistent with the kind of back problem you had examined Mr. Ho for?
>
> A: That's correct.

(Emphases added.)

Dr. Olderr's letter report dated April 9, 1997, which was given to Defendant during the CAAP proceedings, stated that "[i]t would seem from the descriptions of the clinic notes and tests that apportionment between the [1993 and 1995] incident[s] are perhaps equal."

Dr. Olderr testified at the defense deposition as follows:

> Q: [DEFENSE COUNSEL] Now, Doctor, as you sit here today, do you have an opinion as to what caused his sexual dysfunction?
>
> A: Well, as I stated earlier, I think its [sic] related to the problem in his back personally, but I would have to defer that to Dr. Strode who's more of an expert in that area. My feeling has been that it's -- and that was why I was worried about it, because it has been related to his back.
>
> . . . .
>
> Q: Other than the cervical facet syndrome and the lumbar pain, are there any other symptoms or injuries which you are attributing to the November 1993 accident?
>
> A: Well, I guess I'm attributing those symptoms to that, and my feeling about it, as I've said, was that the symptoms when he did admit to his -- of his bladder, my feeling has been that those also were attributed to that

> injury. But I would have to leave that -- I'm not a urologist -- and I would have to leave that impression or that conclusion up to Dr. Strode.

(Emphases added.)

On September 2, 1997, Defendant and Lagrimas filed their respective notices of appeal and requests for trial de novo after the CAAP arbitration.

On October 21, 1997, Defendant filed a Second Supplemental Responsive Pretrial Statement together with his Final Naming of Witnesses.

On October 31, 1997, Plaintiffs filed a motion to strike Defendant's final naming of witnesses filed on October 21, 1997 and Defendants Lagrimas and Mercantile Trucking's final naming of witnesses filed on October 20, 1997 or, in the alternative, to grant their motion in limine to exclude urologist, William J. Yarbrough, M.D., and biomechanical engineer, Dr. Carley C. Ward, as defense experts. Based on the court's reading of Glover v. Grace Pac. Corp., 86 Hawai'i 154, 948 P.2d 575 (App. 1997), the court granted Plaintiffs' motion in limine to exclude the testimony of Defendant's experts, Dr. William Yarbrough and Carley Ward. The court ruled that Dr. Yarbrough and Dr. Ward were not permitted to testify because their opinions were not rendered and produced prior to the discovery cutoff date of November 20, 1997 pursuant to Rules of the Circuit Courts of the State of Hawai'i (RCCH) Rule 12(r) (1997).

Plaintiffs' claims against Lagrimas and Mercantile Trucking were dismissed by stipulation prior to trial, and Defendant Nishijima's cross-claims against these defendants were dismissed by stipulation filed on July 28, 1998. Trial date for Plaintiffs and Defendant was set for January 22, 1998.

C.

Prior to trial, On January 21, 1998, Defendant filed a motion in limine to limit testimony of Ho's treating doctors, Dr. Olderr and Dr. Hosobuchi. Defendant's motion in limine asserted that neither Dr. Olderr nor Dr. Hosobuchi offered opinions about the cause of Ho's genitourinary injuries at their defense depositions taken on October 25, 1997 and October 24, 1997, respectively. In opposition, Plaintiffs argued that both doctors had rendered opinions on causation before and during their defense depositions.

After Defendant's motion was heard on January 21, 1998, the court ruled that Dr. Olderr and Dr. Hosobuchi could testify about their treatment of Ho, but neither could give opinions about the cause of the neurological injury to Ho's genitourinary tract.

> You can have them testify to their treatment. So the [c]ourt is going to grant the motion in part and deny in part. And . . . will permit Doctors Olderr and Hosobuchi to testify to their treatment of Mr. Ho. But the [c]ourt will not permit Dr. Olderr . . . to express an opinion as to what caused the sexual dysfunction.
>
> He can say he treated it. But he's not permitted to get into that. He says that he thinks it's related to the back, personally. But he said he would have to defer that to Dr. Strode.

(Emphases added.) It is unclear whether the court would have allowed Dr. Hosobuchi to testify as to the cause of the bladder and sexual dysfunction, if a proper foundation was laid:

> With regard to Dr. Hosobuchi, he said he did not have his own opinion as to what the cause was of Mr. Ho's bladder and sexual dysfunction. . . . If you lay the appropriate foundation, the [c]ourt will permit. . . . [H]e can testify as to what he was treating for, the information he had, and how he recommended treatment to Mr. Ho.

(Emphasis added.)

The court later ruled that Dr. Strode was limited to opinions expressed prior to the discovery cutoff. These opinions included Ho's bladder and sexual dysfunctions being neurogenically based.

II.

During trial, Defendant's counsel objected to the following opinion from Dr. Olderr on the ground that his response violated the January 21, 1998 order granting Defendant's motion in limine limiting the opinions of Dr. Olderr and Dr. Hosobuchi.

> Q: [PLAINTIFF'S COUNSEL]: Dr. Olderr, notwithstanding the sexual problem that we've talked about earlier, are you able to say with a reasonable medical probability as to whether or not Mr. Ho sustained a permanent injury to his low back in the 1993 accident?
>
> A: I believe that he experienced an injury which gave him symptoms throughout this period that we've talked about.
>
> And that some of those symptoms are -- have been injuries to nerves, to the bladder, and it's hard to determine, but most likely those are permanent, yes.

(Emphasis added.)

The court instructed the jury to disregard the entire question and answer.

On January 28, 1998, before Dr. Hosobuchi testified at trial, the court stated that "[Dr. Hosobuchi] cannot testify in any way that the accident of November 9, 1993 caused Mr. Ho's bladder and sexual dysfunction problems." It further instructed Dr. Hosobuchi not to "refer at all to the automobile accident."

During trial, Dr. Hosobuchi proceeded to testify at length concerning the injury to Ho's back. He gave an opinion about the cause of Ho's back injury and referred to Ho's "bladder and sexual problem."

> Q [PLAINTIFFS' COUNSEL]: Doctor[,] based upon reasonable degree of medical probability, what was the cause of the back problem that you saw Mr. Ho for?
>
> A: Well, he had multiple back injuries, back problems, and there was entry in the chart that he has been seen by other physicians for that problem. But it appeared that he was more or less under control.
>
> And nowhere in the chart I could find the symptom or cauda equina compression of bladder and the sexual problem. So I though this recurrent back pain and these dysfunction[s], I was concerned were -- injury.

(Emphases added.)

Defendant objected to the question. He subsequently renewed his previously filed motion for declaration of mistrial and/or to strike Dr. Hosobuchi's entire testimony on the ground that Dr. Hosobuchi violated the restrictions placed on his testimony.[5] Upon Defendant's request, the court ruled that it was striking Dr. Hosobuchi's entire testimony and instructed the jury to disregard all of his testimony.

[5] Defendant filed a motion for declaration of mistrial on January 26, 1998, arguing that he had been denied a fair trial because Dr. Olderr had violated the court's orders barring reference to insurance and from giving an opinion on the cause of Mr. Ho's neurogenic bladder and impotence. In the alternative, Defendant asked the court to sanction Plaintiffs by allowing Dr. Yarbrough to testify.

Following a hearing on Defendant's request to sanction Plaintiffs, the court stated that "[t]he court will permit Dr. Yarbrough to testify, and this will be a sanction short of mistrial but to avoid any potential prejudice to the defense."[6]

On January 22, 1998, Plaintiffs inquired of the court whether Defendant would be permitted on cross-examination to ask Edward Ho, Ho's son, and a passenger in the November 9, 1993 accident, if he was injured in that accident. Defendant responded that, by having Edward testify that he was not injured or severely injured, he could show that Ho's injuries were not as serious as Plaintiffs claimed.

The following day, the court held a hearing on this inquiry. Plaintiffs argued that the questioning on whether Edward was injured was not allowed under Walsh v. Chan, 80 Hawai'i 212, 908 P.2d 1198 (1995).

The court ruled that Defendants could question Edward regarding any injury:

> [S]o the court at this time finds that the nature of the testimony defense wishes to elicit is relevant, and [the c]ourt does not find that the degree of prejudice is substantial and far outweighs the probative value of the testimony so the [c]ourt will permit the cross-examination as to Edward Ho and his own physical condition.
>
> . . . .
>
> If [Ho] had claimed absolutely no injury, then that would fall squarely within, Walsh, and the [c]ourt would have limited the testimony. But they're not claiming no injuries, they're just claiming that the extent of the injuries is not as serious as claimed, so the [c]ourt will permit.

(Emphasis added.)

[6] Dr. Yarbrough, Defendant's expert, testified as to the problems of urological causation.

Although Defendant's counsel questioned Edward about the extent of his injuries, he also questioned Edward on whether or not he was injured in the 1993 accident.

> Q: Isn't that true that the force of the impact wasn't enough so that your car was pushed into the car in front of you?
> A: Yes, that is true.
> Q: Now, you testified somewhat as to what happened with your body while you were in the truck, isn't that true that you don't remember the force of the impact wasn't enough so that you hit the dashboard in front of you?
> . . . .
> A: No, I don't remember.
> . . . .
> Q: And isn't that true, Mr. Ho, that as a result of this impact, you didn't suffer any damage? You didn't suffer any injuries?
> A: I didn't suffer any injuries.

(Emphasis added.)

On February 3, 1998, Dr. Maurice W. Nicholson, Defendant's medical expert specializing in the field of neurosurgery, testified at length as to the degenerative nature of Ho's disc herniation injuries. He did not find any neurological abnormalties that would be consistent with an acute injury to the nerves in the lower back. However, during cross-examination, Dr. Nicholson agreed that the Straub emergency room physician's diagnosis was "acute lumbar strain . . . after a motor vehicle accident":

> Q [PLAINTIFFS' COUNSEL]: Okay. And, doctor, on that first page, did the doctor who examine Mr. Ho in the emergency room make a diagnosis concerning lumbar strain?
> A: Yes, he diagnosed acute lumbar strain.
> Q: SP. what does that mean?
> A: After a motor vehicle accident.
> Q: So it does appear that at least the doctor in the ER room is diagnosing [Ho] as having acute lumbar strain following the motor vehicle accident on November 9[], 1993; is that correct?
> A: That's correct.

(Emphasis added.)

At the close of Plaintiffs' case on February 3, 1998, Plaintiffs moved for a directed verdict (DV) to the effect that the 1993 accident was a substantial factor in causing injuries to Ho's neck and back. The court denied the motion for DV on this issue.

On February 5, 1998, the jury returned a Special Verdict finding that Defendant's negligence was not a "substantial factor in causing injury to Mr. Ho."

III.

Subsequently, on March 3, 1998, Plaintiffs filed their motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, for a new trial pertaining to the same issue as their motion for DV. The court denied Plaintiffs' motion for JNOV or, in the alternative, for a new trial and filed its order on June 18, 1998.

On March 6, 1998, Defendant filed his notice of taxation of costs, which was amended on March 9, 1998, taxing a total of $54,049.55. Plaintiffs filed a motion to strike in whole or in part, Defendant's March 9, 1998 first amended notice of taxation of costs (motion to strike taxation of costs). The court entered its order granting in part and denying in part Plaintiffs' motion to strike taxation of costs, reducing Defendant's award to $17,652.74 as costs against Plaintiffs. On June 15, 1998, Plaintiffs filed a motion for reconsideration of

the order taxing costs against Plaintiffs. The court denied the motion without a hearing.

On September 17, 1998, Plaintiffs filed their notice of appeal from the judgment entered on August 20, 1998 and the order denying Plaintiffs' motion for reconsideration of the order granting in part Defendant's motion to strike taxation of costs.

Defendant filed his Notice of Cross-Appeal on October 5, 1998.

IV.

On appeal, Plaintiffs argue that the court erred: (1) in prohibiting Dr. Olderr and Dr. Hosobuchi from mentioning the 1993 accident as the cause of Ho's bladder and sexual dysfunctions; (2) in further restricting and striking the testimony of Dr. Hosobuchi, which included neurosurgical testimony tying Ho's back injury to the 1993 accident; (3) in allowing Dr. Yarbrough, Defendant's urological expert, to testify as a sanction against Plaintiffs; (4) in allowing Defendant to cross-examine Edward about whether or not he was injured in the 1993 accident; (5) in denying Plaintiffs' motion for a DV on causation as to the neck and back injuries sustained by Ho (6) in denying the motion for JNOV or Plaintiffs' alternative motion for new trial; (7) in failing to consider the equities of the parties in taxing costs against Plaintiffs; (8) in awarding Defendant (a) witness fees of persons who did not testify or appear at trial;

(b) $3,891.74 in copying and duplication costs; and (c) Defendant's deposition costs of $11,562.98.

In response, Defendant argues that: (1) the court did not abuse its discretion (a) in limiting the testimony of Dr. Olderr and Dr. Hosobuchi, (b) in allowing Dr. Yarbrough to testify, (c) in striking Dr. Hosobuchi's testimony in its entirety, and (d) in allowing Edward's testimony that he was not injured in the 1993 accident; (2) the court properly denied (a) Plaintiffs' motion for DV on causation as to the neck and back injuries claimed by Ho, and (b) Plaintiffs' motion for JNOV; and (3) the court did not abuse its discretion (a) in denying Plaintiffs' motion for a new trial, (b) in taxing costs against Plaintiffs, specifically, (i) witness fees, (ii) copying costs, and (iii) deposition costs.

V.

This court applies the abuse of discretion standard in reviewing whether the court erred in 1) limiting the testimony of Dr. Olderr and Hosobuchi, 2) further striking Dr. Hosobuchi's testimony, 3) allowing Dr. Yarbrough to testify, and 4) allowing Defendant to cross-examine Edward regarding his injuries. "Whether expert testimony should be admitted at trial rests within the sound discretion of the trial court and will not be overturned unless there is a clear abuse of that discretion." Mantalvo v. Lapez, 77 Hawai‘i 282, 301, 884 P.2d 345, 264 (1994)

(decision of the court to exclude expert testimony on hedonic damages was not an abuse of discretion); see also Title Guar. Escrow Servs. Inc. v. Powley, 2 Haw. App. 265, 270, 630 P.2d 642, 645 (1981) (trial court did not abuse its discretion in excluding proffered testimony of attorney for escrow company). "Abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregard rules or principles of law or practice to the substantial detriment or party litigant." State by Bronster v. U.S. Steel Corp., 82 Hawai'i 32, 54, 919 P.2d 294, 316 (1996) (internal quotation marks and citations omitted).

A.

The court had the discretion to limit the testimony of Doctors Olderr and Hosobuchi as to Ho's bladder and sexual dysfunction. The court noted that, although Dr. Olderr had a personal opinion regarding Ho's back problems relating to his bladder and sexual dysfunction, he would defer to Dr. Strode who was an expert in the area of urology. Dr. Olderr was not an expert on the issue of bladder dysfunction or sexual dysfunction. Furthermore, Dr. Hosobuchi testified at his deposition that he did not have his own opinion on the cause of Ho's bladder and sexual dysfunction problem, and that in his letter of July 3, 1997 to Plaintiffs counsel, he was "merely repeating Dr. Strode's opinion regarding causation."

Moreover, the issue of whether the 1993 accident caused Ho's bladder and sexual dysfunctions would be testified to by Plaintiff's urologist, Dr. Strode. Hawai'i Rules of Evidence (HRE) Rule 403 (1993) provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (Emphasis added.)

Any testimony from Doctors Olderr and Hosobuchi could be excluded on the basis that it would cause undue delay, be a waste of time, or was cumulative. See Aga v. Hundahl, 78 Hawai'i 230, 241, 891 P.2d 1022, 1033 (1995). (A trial court's decision to exclude the incomplete and cumulative deposition testimony of appellee's expert doctor did not constitute an abuse of discretion since he did not offer an opinion different from that of the appellants' expert.) Therefore, it cannot be said that the court abused its discretion in limiting Ho's treating doctors' testimonies.

B.

1.

While it is a close question, it cannot be said that the court abused its discretion in striking all of Dr. Hosobuchi's testimony as a sanction against Plaintiffs for

violation of the court's January 21, 1998 order limiting Dr. Hosobuchi's testimony. A trial court may properly exclude or strike testimony as a sanction for a failure to comply with court rules or orders. See Magyar v. United Fire Ins. Co., 811 F.2d 1330, 1331 (9th Cir. 1987) (affirming the striking of plaintiffs' witness's entire testimony after he had violated the court's order by giving non-responsive answers). As stated supra, Dr. Hosobuchi was specifically instructed by the court that he could not testify that the 1993 accident caused Ho's bladder and sexual dysfunctions.

The court further instructed Dr. Hosobuchi not to refer to the automobile accident at all. According to the record, Plaintiffs' line of questioning invited Dr. Hosobuchi to render opinions regarding the link between Ho's low-back problems and the sexual problems, and making these connections to his most recent injuries. During trial, Defendant argued that these connections were a "clear link by Dr. Hosobuchi of low back injury, [because of] no prior incidences, [no] injury, no prior bladder or sexual problems[,] no [sic] prior sexual problems low-back injury relat[ing] to the [1993] accident[.]" Moreover, Dr. Hosobuchi testified that he thought recurrent back pain and sexual dysfunctions were related to injuries from the accident. This was a violation of the court's January 21, 1998 order and Defendant properly objected to this portion of the testimony.

2.

Plaintiffs further argue that the court's sanction was extreme because the court's order resulted in excluding Dr. Hosobuchi's testimony as to injury to Ho's low back area and recommended treatment.

However, Dr. Olderr had testified at trial regarding these same injuries. At trial, Dr. Olderr testified regarding Ho's first visit to him on August of 1984, which was for evaluation of a workplace injury when Ho fell off the roof of a bus. Dr. Olderr diagnosed that one of Ho's vertebra had been compressed as a result of fall. The location of the compressed fracture occurred in areas L-2 and L-3 of Ho's spine. Dr. Olderr further testified that Ho did not have any bowel or bladder problems at the time of his 1984 visit. On March 22, 1986, Dr. Olderr treated Ho again for the same back injuries sustained in 1984. In that visit, Ho was not having any problems with his bladder.

Three days after the 1993 accident, Ho visited Dr. Olderr and complained of pain in his lower left back. Dr. Olderr opined that, in the course of taking history and examination of Ho, he was able to determine that the cause of the back problems were compatible with the 1993 accident. At this time, Dr. Olderr did not inquire of whether Ho suffered from any bladder problems. During a follow-up appointment, Dr. Olderr ordered diagnostic tests of Ho's low back. After his assessment,

Dr. Olderr found that Ho's symptoms were compatible with an injury to his disc (i.e., herniated disc). Dr. Olderr testified as to what is and where a herniated disc occurs, and concluded that this type of condition matched that of Ho's. Although it presents a close question, it cannot be said, in light of the other evidence, that the court exceeded the bounds of reason when it exercised its discretion to exclude all of Dr. Hosobuchi's testimony.

C.

Plaintiffs next argue that allowing Dr. Yarbrough, Defendant's urological expert, to testify as a sanction against Plaintiffs, was an abuse of discretion. As mentioned, the court had directed in its January 27, 1998 order that witnesses would not be permitted to testify unless their opinions were rendered prior to the discovery cutoff date of November 20, 1997. This ruling precluded Defendant from calling Dr. Yarbrough as a witness at trial. At trial, on January 23, 1998, Dr. Olderr had testified to the cause of Mr. Ho's neurogenic bladder and impotence. See supra Part I. This testimony violated the January 21, 1998 court order limiting Dr. Olderr's testimony.

Defendant argues that when Dr. Olderr gave an opinion on Ho's bladder dysfunction, in contravention of the court's order, prejudice resulted to Defendant because Plaintiffs then had two physicians (Dr. Olderr and Dr. Strode) testifying about

the sexual and bladder dysfunction. On the other hand, Defendant had no physicians to testify on such dysfunction inasmuch as the court had struck Dr. Yarbrough as a witness. To avoid any potential prejudice resulting from Plaintiffs' violations of the court's order in limine, the court could properly exercise its discretion in allowing Dr. Yarbrough to testify. See Zantop Int'l Airlines, Inc. v. Eastern Airlines, 503 N.W.2d 915, 924 (Mich. App. 1993) (dismissing buyer's claims against manufacturers for violation of order in limine was not an abuse of discretion).

D.

1.

Plaintiffs argue that under Walsh, the court abused its discretion because it admitted Edward's testimony regarding whether he was injured in the 1993 accident. In Walsh, plaintiff was a passenger in a car driven by a Ms. Pynchon and was struck from behind by another vehicle driven by defendant. 80 Hawai'i at 213, 908 P.2d at 1199. Plaintiff named Pynchon as a witness to testify as to Pynchon's own injuries. Id. This would bolster the existence of plaintiff's injuries and refute defendant's accident reconstruction expert's testimony that the force generated by the impact between the two vehicles was insufficient to cause injury. Id.

In a motion in limine, the defendant moved to exclude the admission of Pynchon's testimony as to her injuries on the grounds that such testimony was irrelevant and unduly prejudicial. Id. The trial court granted the motion and denied plaintiff's motion for new trial. Id. at 214, 908 P.2d at 1200. On appeal, the Intermediate Court of Appeals (ICA) concluded that Pynchon's testimony was relevant and not prejudicial to the plaintiff. Id. at 215, 908 P.2d at 1201. On certiorari, this court agreed with the ICA that Pynchon's testimony was relevant under HRE Rule 401 (1993),[7] but disagreed with the ICA's conclusion that the testimony's probative value was not prejudicial pursuant to HRE Rule 403.[8] Id. at 216-17, 908 P.2d at 1202-03. In Walsh, this court held that Pynchon's testimony was excludable under HRE Rule 403. Id. at 217, 908 P.2d at 1203. It was said that "a basis existed for the trial court to conclude that the probative value of Pynchon's testimony was substantially outweighed by the negative admissibility factors delineated in HRE Rule 403." Id. Therefore, this court held that the trial court did not abuse its discretion in excluding Pynchon's testimony. Id. at 218, 908 P.2d at 1204.

[7] HRE Rule 401 provides that "'[r]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

[8] HRE Rule 403 states that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

In Walsh, it was noted, first, that, "the probative value of Pynchon's testimony regarding her injuries as it relates to the ultimate issue of the existence and extent of [Plaintiff's] injuries . . . is minimal." Id. at 217, 908 P.2d at 1203. Second, the "probative value of Pynchon's testimony was further diminished by the lack of need for her testimony" because plaintiff was not without evidence to refute defendant's witness's testimony. Id. Third, this court recognized that "the admission of Pynchon's testimony would cause substantial delay and confusion that may alone counterbalance its probative value [because] . . . plaintiff must initially establish, as foundation that Pynchon's injuries were caused by the accident." Id. This was because "[e]stablishing causation[] . . . would likely involve inquiry into the nature of Pynchon's injuries . . . [,] backgrounds . . . [and] the presentation of time-consuming expert medical testimony." Id. Finally, it was said that "there is substantial danger that [Plaintiff] would be unfairly prejudiced because the jury might misconstrue the relevance of Pynchon's testimony and accord it more probative value than it deserves." Id. at 217-18, 908 P.2d 1203-04.

2.

In this case, Ho and Edward are two different people "with two different tolerances and predispositions to injury." Id. at 217, 908 P.2d 1203. On re-direct examination, Edward

testified that at the time of the 1993 accident he was heavier and taller than his father, and approximately twenty-one years old. Therefore, Edward's testimony regarding his injuries could be said to assist the jury in determining the nature of Ho's injuries.

As distinguished from Walsh, both Plaintiffs and Defendant did not have expert testimony as to the degree of force of the 1993 collision. On cross-appeal, Defendant argues that the court precluded Defendant from calling their expert biomechanical engineer (Dr. Ward) at trial, which left them with no evidence that the impact of the accident was not as severe as Plaintiffs claimed. Edward testified to a "jerking motion" during the accident. During Defendant's cross-examination, Edward also testified at length regarding the force of the collision. Thus, there was some probative value to Edward's testimony.

Furthermore, when Defendant cross-examined Edward pertaining to the force of the collision, he asked whether or not Edward was injured. According to the record, the question as to Edward's injuries involved only "a single question and answer." Thus, it appears there was no substantial delay and confusion that could counterbalance the probative value of Edward's testimony. The majority is incorrect in arguing that admission of Edward's testimony would result in an overly extensive review of Edward's medical history. Majority opinion 17. In fact,

because the examination of Edward was limited and brief, there was no substantial delay and confusion of the sort Walsh was concerned with. Walsh, 80 Hawai‘i at 217, 908 P.2d 1203. Moreover, in light of the limited examination of Edward there was no "danger of confusing the jury." Id. Contrary to the majority's assertion, see majority opinion at 17 n.5, there was no evidence of "the presentation of time-consuming expert medical testimony[,]" Walsh, 80 Hawai‘i at 217, 908 P.2d at 1203, regarding Edward that was condemned in Walsh with respect to the non-party occupant there.

Finally, in Walsh, there was the factor that "the inherent dissimilarities between [the arguments]--and, in the general case, any two people--would threaten to undermine the probative value of the testimony altogether." Id. at 218, 908 P.2d 1204. However, Edward testified that at the time of the accident he lifted weights three times a week, recently left the army, and did not have any neck or back problems prior to the 1993 accident. This placed in context Edward's physical differences from his father at the time of the 1993 accident. The majority misstates this proposition. See majority opinion 17. The point is that Edward's testimony indicated for the fact finder the physical differences with his father, thus, removing any undue influence unexamined dissimilarities might have in "threaten[ing] to undermine the probative value of the testimony." Walsh, 80 Hawai‘i at 218, 908 P.2d 1204.

The four factors in Walsh appear to counterbalance each other in this case. Therefore, under the circumstances, it cannot be said that the court abused its discretion in allowing cross-examination of Edward as to whether he suffered any injury. Contrary to the majority's view, majority opinion at 18, Walsh applied a balancing test. This court held that the driver's testimony was excludable under HRE Rule 403, Walsh, 80 Hawai'i at 216-17, 908 P.2d 1202-03, based on the record in that case. Id. at 217, 908 P.2d 1203 (concluding that "[o]ur review of the record indicates that a basis existed for the trial court to conclude that the probative value of Phynchon's testimony was substantially outweighed by the negative admissibilty factors delineated in HRE Rule 403" after applying the "balancing" test). Counterpoised to the majority's view that this case is not substantially different from Walsh is the fact that in Walsh, both parties presented experts with respect to whether "the forces generated by the collision between the accident vehicles [were or] were not sufficient to cause injury." Id. This court observed that "Walsh was not without evidence to refute [Chan's expert's] testimony" and "[t]he need for Pynchon's testimony, therefore, was not as crucial as it would be without [Chan's expert's] testimony." Id. Here, such experts were not permitted to testify. Hence, Edward's testimony may reasonably be viewed as of more than minimal probity. On the substantially different

record of this case, Walsh would not require this court to hold that the court, exercising its discretion, abused it.

VI.

A.

On February 3, 1998, Plaintiffs moved for a directed verdict to the effect that 1) causation of Ho's neck and back injuries was shown through uncontroverted medical evidence and 2) Plaintiffs had mitigated their damages. The court's denial of Plaintiffs' motions for DV and JNOV are reviewed de novo. Takayama v. Kaiser Found. Hosp., 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996).

> It is well settled that denials of directed verdict or judgment notwithstanding the verdict (JNOV) motions are reviewed de novo.
>
> Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. We have defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.
>
> In deciding a motion for [DV] or JNOV, the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the nonmoving party and either motion may be granted only where there can be but one reasonable conclusion as to the proper judgment.

Id. (citing Carr v. Strode, 79 Hawai'i 475, 486, 904 P. 2d 489, 500 (1995)) (emphasis added).

As for the court's denial of the motion for DV, Plaintiffs argue that there was no conflicting evidence that the 1993 accident caused Ho's neck and back injuries. Plaintiffs rely on Dr. Nicholson's testimony that the Straub Emergency physician's diagnosis was "acute lumbar strain . . . after a

motor vehicle accident." Dr. Nicholson conceded at trial that Ho injured his neck and back in the 1993 accident and agreed that Ho's preexisting back condition made him more susceptible to sustaining a neurogenic genitourinary injury in the 1993 accident. Plaintiffs also rely on Dr. Olderr's testimony that Ho sustained a neck and back injury in the 1993 accident.

In opposition, Defendant argues that Ho testified at trial that he sustained injuries to his neck and low back during previous and subsequent accidents in 1984, 1989 and 1995. Defendant further argues that "Dr. Nicholson emphasized the curious lack of neurological symptomtatology following the November, 1993 accident." Dr. Olderr testified in his deposition and at trial that Ho's computerized tomography (CT) scans and other objective indicators showed no clinical abnormalities as a result of the 1993 accident. In fact, Dr. Olderr stated that one of the conclusions that could be derived from the 1993 CT scan was that Ho's low back had degenerated further since 1986. At trial, Dr. Olderr testified about the serious fractures sustained by Ho to his lower spine as a result of Ho's 1984 accident where he fell from the top of a double-decker bus. Dr. Olderr further related that Ho did not complain of neck pain or radiating symptoms while at the emergency room on November 3, 1993. Also, there was no palpable tenderness along Ho's spine.

Plaintiffs contend that Dr. Hosobuchi testified that Mr. Ho sustained an injury to his lumbar spine in the 1993 accident. However, this evidence was struck in its entirety.

Next, Plaintiffs argue that Dr. Yarbrough, Defendant's urology expert, testified that Ho had a sexual impotence problem, agreed Ho's sexual impotence problem was not caused by Ho's high blood pressure medication, testified that the problem was permanent, and testified that he could not rule out the accident as the cause of Ho's problems. In response, Defendant asserts that this testimony pertains to Plaintiff's sexual dysfunction and is beyond the scope of Plaintiffs' motion for DV.

In viewing the evidence in the light most favorable to Defendant as the non-moving party in this case, there was evidence of a factual dispute that raised a jury question as to whether Ho's injuries to his neck and back were sustained as a result of the 1993 accident. Thus, it cannot be said that "there can be but one reasonable conclusion as to the proper judgment," Takayama, 82 Hawai'i at 495, 923 P.2d at 912, with respect to Plaintiffs' DV motion. Moreover, there was substantial evidence, as recounted above, to support the verdict. Because the same standard applies to a JNOV motion, that motion was also appropriately denied by the court.

B.

Also, the court did not abuse its discretion in denying Plaintiffs' motion for a new trial. "[I]n the proper case [the court has] both the power and duty to order a new trial either where the evidence is insufficient to support a verdict or where a verdict is clearly against the manifest weight of the

evidence." Petersen v. City & County of Honolulu, 53 Haw. 440, 442, 496 P.2d 4, 7 (1972) (citations omitted). As previously discussed, the jury found that Defendant's negligence was not a substantial factor in causing Ho's injuries.

There was a factual dispute as to whether Ho's injuries were caused by the 1993 accident. As stated supra, Defendant presented evidence that could have led the jury to reasonably conclude that Ho's injuries were primarily sustained in his 1984 accident. Accordingly, the evidence was not insufficient to support the verdict reached. Moreover, based on the same factors, the jury's verdict was not clearly against the manifest weight of the evidence.

VII.

A.

Plaintiffs next argue that the court failed to consider the equities of the parties in taxing $17,652.74 as costs against them. Costs may be awarded to the prevailing party in the sound discretion of the court. See Harkins v. Ikeda, 57 Haw. 378, 387, 557 P. 2d 788, 794 (1976) (trial court did not abuse its discretion when it denied plaintiffs' hotel lodging costs for their witnesses). Hawai'i Rules of Civil Procedure (HRCP) Rule 54(d) (1998) provides that

> [e]xcept when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the State or a county, or an officer or agency of the State or a county, shall be imposed only to the extent permitted by law. Costs may be taxed by

> the clerk on 48 hours notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

Relatedly, HRS § 607-9 (1993) states as follows:

> No other costs of court shall be charged in any court in addition to those prescribed in this chapter in any suit, action, or other proceeding, except as otherwise provided by law.
>
> All actual disbursements, including but not limited to, intrastate travel expenses for witnesses and counsel, expenses for deposition transcript originals and copies and other incidental expenses, including copying costs, intrastate long distance telephone charges, and postage, sworn to by an attorney or a party, and deemed reasonable by the court, may be allowed in taxation of costs. In determining whether and what costs should be taxed, the court may consider the equities of the situation.

(Emphases added.)

Defendant filed his first amended notice of taxation of costs of $54,172.11 on March 9, 1998. Subsequently, Plaintiffs filed a motion to strike in whole or in part Defendant's first amended notice of taxation of costs. After a hearing held on April 17, 1998, the court granted Plaintiffs' motion to strike as to $10,080.61 in costs, and denied as to $17,652.74 in costs. The court found the $17,652.74 in costs reasonable because they were "actual disbursements incurred in the course of litigation."

Citing Schaulis v. CTB McGraw Hill, Inc., 496 F. Supp. 666 (N.D. Cal. 1980), Plaintiffs contend that taxing costs against them would be an unduly harsh penalty. In that case, the court concluded that "it would place an undue burden to tax costs against plaintiff. To do so in this context could only chill individual litigants of modest means seeking to vindicate their individual and class rights under the civil rights laws." Id. at 680. This case is distinguishable because, in Schaulis, the

plaintiff was an individual litigant suing a large corporation defendant. Under the circumstances, the court stated in this case that,

> [w]hile Defendant admitted negligence in causing the subject collision, he vigorously contested the issue of causation for Plaintiffs' alleged damages for personal injuries. Thus, the court finds that in balancing the position of the parties as they related to negligence and liability for damages there are no compelling equitable considerations to further reduce the amount of costs taxed against the Plaintiffs.

(Emphasis added.) For the foregoing reasons, the court did not fail to consider the equities of the situation when it taxed costs against Plaintiffs.

B.

Plaintiffs assert that the court abused its discretion by determining and awarding the following costs as reasonable:

(1) witness fees of persons who did not testify at trial;

(2) $3,891.24 in duplication and copying charges; and

(3) $11,562.98 in deposition costs.

In determining which expenses and costs are "reasonable" under the circumstances, "[t]he trial court is vested with discretion in allowing or disallowing costs but this discretion should be sparingly exercised when considering whether or not to allow expenses not specifically allowed by statute and precedent." Mist v. Westin Hotels, Inc., 69 Haw. 192, 201, 738 P.2d 85, 92 (1987) (deposition costs must be reasonable in order to be taxed as costs).

1.

Plaintiffs argue that under HRS § 607-12 (1993), only the witness fees of witnesses who actually testified at trial or who are subpoenaed and actually attended trial are recoverable. Plaintiffs contend that none of the witnesses listed on Defendant's "witness fees" list testified at trial. Contrary to Plaintiffs' contentions, Edward, listed as number 8, testified at trial. As to the witness fees of individuals numbered 1 through 7, and 10 through 13, the court determined them unreasonable and, thus, it did not tax these costs.

As to items 14 through 20,[9] the witness fees incurred on January 30, 1998, Defendant contends that it was necessary to subpoena these potential witnesses at the outset of trial. In his memorandum in opposition, Defendant states, "The necessity for the testimony could not be measured in advance."[10] It appears that these witnesses were custodians of Ho's medical records. In their reply brief, Plaintiffs did not argue that these witnesses were unnecessary and improper.

Witness fees awarded to Edward Ho were authorized under

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[9] The witness fees dated January 30, 1998 are listed as follows:

Custodian of Records:	Hayashi, MD	5.75
Custodian of Records:	Straub Clinic	5.75
Custodian of Records:	Yeung, MD	5.75
Custodian of Records:	Cleveland Wu, MD.	5.75
Custodian of Records:	Makino, MD	11.00
Custodian of Records:	Medical Arts Clinic	18.00

[10] Plainitffs did not respond to Defendant's contentions.

HRCP Rule 54(d) and HRS § 607-9[11] inasmuch as he testified at trial. As to Laurie Hamano (item 9) and witnesses listed under items 14 through 20, these "fees [were] dependant on whether they were present at trial." Turner, 59 Haw. at 331, 582 P.2d at 718. Although these witnesses did not testify at trial, the record does not reveal whether or not these witnesses "attended" trial. Therefore, I would vacate that part of the court's June 3, 1998 order pertaining to these fees and remand that matter to the court to determine whether these witnesses, who did not testify, had actually "attended" the trial.

2.

Plaintiffs contend that the court had no basis to find that $3,891.24 in duplication and copying charges were reasonably incurred by Defendant. HRS § 607-9 allows for the award of "copying costs." Defendant asserts that copying costs of $1,230.19 (shown on Page 9) include the cost of copying records sent to Defendant's experts to review and trial exhibits. The other copying costs (shown on page 10) reflect the copying costs of pleadings served on counsel, correspondence (to client, other counsel, and experts, etc.), records for Defendant's experts to review, exhibits for court-annexed arbitration, and trial exhibits. In light of the authorization in HRS § 607-9, it cannot be said that the court abused its discretion in awarding

[11] See HRCP Rule 54(d) supra page **27**, and HRS § 607-9 supra pages **27-28.**

copying costs to Defendant.

3.

Lastly, Plaintiffs argue that taxing $11,562.98 in deposition costs was an abuse of discretion. Citing Mist, 69 Haw. at 268, 738 P.2d at 1172, Plaintiffs assert that while expenses for original copies of deposition transcripts are allowed under HRS § 607-9, the court has held that such expenses must be reasonable. The court in Mist held that the reasonablenes test should be whether the depositions were "necessarily obtained for use in the case." Id.

Plaintiffs object to the cost of records depositions from insurers, medical providers, medical entities, Defendant's IME doctors and Defendant's biomechanical expert. Plaintiffs argue that these were witnesses who never testified and whose records were never offered into evidence or relied upon by any witness at trial. In response, however, Defendant states that "the oral depositions, particularly those of Mr. Ho's medical providers, were necessary for Defendant to evaluate the various medical issues, including (1) the nature and extent of Mr. Ho's claimed injuries; (2) whether certain injuries were caused or aggravated by the subject accident; and (3) apportionment issues." Under these circumstances, it cannot be said that the court abused its discretion in awarding the costs of such oral and record depositions.

VIII.

For the foregoing reasons, I would affirm the August 20, 1998 judgment, except I would vacate and remand with respect to items 14-20 of the June 3, 1998 order pertaining to costs.