

\*\*\* NOT FOR PUBLICATION \*\*\*

NO. 21910

IN THE SUPREME COURT OF THE STATE OF HAWAII

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BYUNG H. HO and MOON S. HO,  
Plaintiffs-Appellants/Cross-Appellees,

vs.

GARY NISHIJIMA, Defendant-Appellee/Cross-Appellant

and

ALBERT S. LAGRIMAS, and MERCANTILE TRUCKING SERVICE, LTD., a  
Hawai'i corporation, Defendants

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 95-2308-06)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, and Nakayama, JJ.,  
Acoba, J., Dissenting, With Whom Circuit Judge Perkins,  
Assigned by Reason of Vacancy, Joins)

Plaintiffs-appellants/cross-appellees Byung H. Ho (Mr. Ho) and Moon S. Ho (Mrs. Ho) [hereinafter, collectively, "the Hos"] appeal from (1) the August 20, 1998 judgment of the circuit court of the first circuit, the Honorable Marie N. Milks presiding, finding in favor of Defendant-appellee/cross-appellant Gary Nishijima (Nishijima), and (2) the August 25, 1998 order denying their motion for reconsideration of the circuit court's order granting in part and denying in part Nishijima's first amended notice of taxation of costs.

On appeal, the Hos argue that the circuit court: (1) abused its discretion in granting Nishijima's motion in limine to limit the testimony of Timothy Olderr, M.D. (Dr. Olderr) and Yoshio Hosobuchi, M.D. (Dr. Hosobuchi), inasmuch as the court

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incorrectly relied on Glover v. Grace Pacific Corp., 86 Hawai'i 154, 948 P.2d 575 (App. 1997), to bar Mr. Ho's treating physicians from rendering opinions about the cause of the injuries Mr. Ho sustained in the November 9, 1993 accident [hereinafter, "the accident"]; (2) abused its discretion in sanctioning them for violating the court's rulings and orders limiting their experts' testimony by striking Dr. Hosobuchi's entire testimony; (3) abused its discretion in sanctioning them for violating the court's rulings and orders limiting their experts' testimony by allowing Nishijima's urological expert, William J. Yarbrough, M.D. (Dr. Yarbrough), to testify after previously barring Dr. Yarbrough's testimony because Nishijima failed to disclose his opinions prior to the discovery cutoff date; (4) abused its discretion in permitting Nishijima's counsel to cross-examine Mr. Ho's son, Edward Ho (Edward), about whether he was injured in the accident, inasmuch as the court's permission was contrary to Walsh v. Chan, 80 Hawai'i 212, 908 P.2d 1198 (1995); (5) erred in denying their motion for directed verdict, inasmuch as the evidence uncontrovertedly proved that the accident was a substantial factor in causing Mr. Ho's neck and back injuries; (6) abused its discretion in denying their motion for judgment notwithstanding the verdict (JNOV) or, in the alternative, a new trial, inasmuch as there was no dispute that Mr. Ho injured his neck and back in the accident and the verdict was against the weight of the evidence presented; (7) improperly awarded costs to Nishijima because it failed to consider equities in taxing costs against them; and (8) erred in awarding Nishijima

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(a) witness fees for persons who did not testify or appear at trial, (b) \$3,891.74 in copying and duplication costs, and (c) \$11,562.98 in deposition costs, inasmuch as these fees are not recoverable under Hawai'i law.

On cross-appeal, Nishijima argues that the circuit court abused its discretion in: (1) excluding the testimony of his biomechanical engineer expert, Carley Ward, M.D. (Dr. Ward); and (2) initially excluding the testimony of Dr. Yarbrough, inasmuch as the court erroneously concluded that, under Glover, he was required to disclose his experts' opinions prior to the discovery cutoff date.

We hold that the circuit court abused its discretion by allowing Nishijima's counsel to cross-examine Edward about whether he was injured in the accident, for purposes of comparison, inasmuch as this court's decision in Walsh prohibited this testimony. This abuse of discretion requires that the August 20, 1998 judgment in favor of Nishijima be vacated and remanded for a new trial. Because we remand this case for a new trial, awarding costs at this time is premature, and, therefore, we decline to address the Hos' appeal of the August 25, 1998 order denying the Hos' motion for reconsideration of the circuit court's order granting in part and denying in part Nishijima's first amended notice of taxation of costs. In all other respects, the Hos' arguments are moot. Nonetheless, we address their points of error, as well as Nishijima's points of error on cross-appeal, as guidance to the circuit court on remand.

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**I. BACKGROUND**

**A. Factual History**

The present matter arises out of two motor vehicle accidents which occurred on November 9, 1993 and March 3, 1995, respectively. On November 9, 1993, Mr. Ho was traveling east-bound along the H-1 viaduct near the Honolulu International Airport, in the City and County of Honolulu, when Nishijima's pickup truck rear-ended Mr. Ho's pickup truck. Mr. Ho sustained permanent injuries to his neck and back and suffered from sexual dysfunction. In addition, Mr. Ho allegedly suffered from pain to his body and mind, emotional distress and loss of enjoyment of life as a result of the accident. On March 3, 1995, Mr. Ho was involved in another motor vehicle accident when Albert Lagrimas (Lagrimas) sideswiped and then struck Mr. Ho's pickup truck with a semi-tractor trailer, from which Mr. Ho sustained further injury to his neck and back.

**B. Procedural History**

On June 29, 1995, the Hos filed a complaint against Nishijima. Mr. Ho sought special and general damages in an amount to be determined at trial. Mrs. Ho sought damages for emotional distress and loss of affection, society, companionship and consortium.

On August 19, 1996, the Hos and Nishijima stipulated to amend the complaint to add Lagrimas as an additional defendant. Lagrimas' employer, Mercantile Trucking Service, Ltd. (Mercantile Trucking) was later added as another defendant.

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The matter proceeded through the Court Annexed Arbitration Program (CAAP), wherein, on August 5, 1997, the arbitrator awarded the Hos \$134,060.50 in damages, comprised of \$66,723.43 in special damages and \$66,666.66 in general damages.<sup>1</sup> Subsequently, on September 2, 1997, Nishijima, Lagrimas and Mercantile Trucking filed their respective notices of appeal and requests for a trial de novo.

Prior to the commencement of trial, the Hos settled their claims against Lagrimas and Mercantile Trucking. Both the Hos and Nishijima, thereafter, agreed to dismiss, with prejudice, the case against Lagrimas and Mercantile Trucking.

On October 31, 1997, the Hos filed a motion (1) to strike Nishijima's final naming of witnesses, on the ground that Nishijima's witnesses were untimely named, or, (2) in the alternative, to exclude Drs. Yarbrough and Ward as defense experts. On November 26, 1997, a hearing was held on the Hos' motion, the Honorable Virginia L. Crandall presiding. The court denied the Hos' motion and further ordered Nishijima to produce Dr. Ward's final opinions to the Hos' counsel on December 1, 1997, eleven days after the discovery cutoff date. Subsequently, on December 1, 1997, the Hos received Dr. Ward's report. On December 4, 1997, the Hos received Dr. Yarbrough's report.

On January 21, 1998, one day before trial was to commence, the Hos filed a motion in limine to limit the testimony of Drs. Yarbrough, Ward, and Maurice W. Nicholson, M.D. (Dr.

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<sup>1</sup> The arbitrator also awarded costs to the Hos in the amount of \$640.41.

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Nicholson), arguing, inter alia, that their final opinions were not timely disclosed. That same day, a hearing was held on the Hos' motion and the court granted the motion, holding that Drs. Yarbrough and Ward would not be permitted to testify unless their opinions were rendered and produced prior to the discovery cutoff date. On January 27, 1998, the court entered its order to that effect. On January 28, 1998, Nishijima filed a motion for reconsideration of the court's order granting in part and denying in part the Hos' motion in limine to exclude the testimony of Drs. Yarbrough, Ward and Nicholson. At the hearing on Nishijima's motion, held January 30, 1998, the court initially ruled that Dr. Ward could testify if her opinion was reached by the discovery cutoff date. Specifically, the court held that, although Judge Crandall's order allowed Dr. Ward's report to be produced beyond the discovery cutoff date, this court still adhered to the ruling in Glover, which requires that expert opinions be reached prior to the discovery cutoff date. Later that day, the court held a second hearing on Nishijima's motion. Subsequently, the trial court reversed its earlier ruling, specifically explaining that, at the January 21, 1997 hearing on the Hos' motion in limine, Nishijima failed to bring up Judge Crandall's order directing Nishijima to produce Dr. Ward's report by December 1, 1997, and, therefore, the court cannot now reconsider Judge Crandall's order:

This court was not aware until it had reviewed the motion for reconsideration that Judge Crandall had extended and set December 1, 1997, as the deadline by which Dr. Ward was to produce her report to doctor -- to Mr. Kim.

Had this [c]ourt taken that fact into consideration at the time the motion in limine was originally heard, it would

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have ruled as it did earlier this morning.

If defense counsel did not bring the matter to the [c]ourt's attention at the time of the motion in limine hearing, it was a fact that should not now be reconsidered[.]

The court denied Nishijima's motion for reconsideration.

On January 21, 1997, Nishijima also filed a motion in limine to limit the testimony of Mr. Ho's treating physicians, Drs. Hosobuchi and Olderr. Nishijima argued that, because Drs. Hosobuchi and Olderr did not offer opinions about the cause of Mr. Ho's injuries at their defense depositions, the court should limit or strike their testimony to prevent surprise and undue prejudice to him. The Hos filed a position statement on Nishijima's motions in limine, arguing, in particular, that both Drs. Hosobuchi and Olderr rendered opinions on causation before and during their depositions and, thus, should be allowed to testify on causation. At the hearing on Nishijima's motion, the Honorable Marie N. Milks orally ruled that both Drs. Hosobuchi and Olderr could testify about their treatment of Mr. Ho but that only Dr. Hosobuchi could potentially render an opinion about the cause of Mr. Ho's injuries if a sufficient foundation was laid.

The Hos' jury trial commenced on January 22, 1998. During Nishijima's opening statement, his counsel told the jury, inter alia, that "the evidence will show . . . that [Edward] was seated in the truck with his father. The evidence will show that [Edward] was not injured in this accident and neither was [Nishijima]." Concerned with a Walsh situation arising from Nishijima's opening statement, inasmuch as Walsh prohibits the testimony of a passenger relating injuries sustained in an

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accident, for purposes of comparison, because the probative value of the testimony is substantially outweighed by the negative admissibility factors delineated in Hawai'i Rules of Evidence (HRE) Rule 403, the Hos inquired whether the court would allow Nishijima's counsel to cross-examine Edward about whether he was injured in the accident. The court instructed the parties to review Walsh overnight and analyze its application to the present situation. The next day, the court held a hearing on the Hos' inquiry and ruled that, because the probative value of Edward's testimony far outweighed any prejudice to the Hos, Nishijima could question Edward about any injuries he sustained in the accident.<sup>2</sup> On January 23, 1998, Nishijima questioned Edward about whether he was injured in the accident.

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<sup>2</sup> In permitting Nishijima to question Edward about any injuries he sustained in the accident, the court explained that

[i]n this particular case, Mr. Ho has put the degree of force in issue, and Mr. Ho has testified to his own response to the impact on the rear of [his] truck.

When that is put in issue, then it is fair game for the cross-examiner to examine on the result of the degree of force that was applied against the rear of the truck, and all of the relevance is not outweighed by the same degree where a biomechanical expert lends credence or lends an extra degree of credibility to the nature of the injury or lack of injury which the Supreme Court said was -- was unduly prejudice.

. . . .

So the [c]ourt at this time finds that the nature of the testimony defense wishes to elicit is relevant, and [the c]ourt does not find that 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 . . . and his own physical condition.

And that is relevant to put the force in issue and to put the nature of injuries in issue. If they 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.



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During a two-week jury trial, the Hos adduced medical expert testimony calculated to establish legal causation, the extent of damages, and the monetary tort threshold<sup>3</sup> under Hawai'i Revised Statutes (HRS) § 431:10C-306 (1993).<sup>4</sup>

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<sup>3</sup> The monetary tort threshold is an exception to the general abolition of tort liability.

<sup>4</sup> HRS § 431:10C-306 provided in relevant part:

**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:

- (1) Owner, operator or user of an insured motor vehicle; or
- (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.
- (b) Tort liability is not abolished as to the following persons, their personal representatives, or their legal guardians in the following circumstances:
  - (1) (A) Death occurs to such persons in such a motor vehicle accident;
  - (B) Injury occurs to such persons which consists, in whole or in part, in a significant permanent loss of use of a part or function of the body;
  - (C) Injury occurs to such person which consists of a permanent and serious disfigurement which results in subjection of the injured person to mental or emotional suffering;
- (2) Injury occurs to such person in a motor vehicle accident in which the amount paid or accrued exceeds the medical-rehabilitative limit established in section 431:10C-308 for expenses provided in section 431:10C-103(10) (A) and (B); provided that the expenses paid shall be presumed to be reasonable and necessary in establishing the medical-rehabilitative limit; or
- (3) Injury occurs to such person in such an accident and as a result of such injury that the aggregate limit of no-fault benefits outlined in section 431:10C-103(10) payable to such person are exhausted.

In 1997, the legislature amended HRS § 431:10C-306 by eliminating the medical-

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At the close of the Hos' case, the Hos orally moved for a directed verdict, arguing that: (1) uncontroverted medical evidence adduced at trial sufficiently demonstrated that the accident was a substantial factor in causing Mr. Ho's injuries; (2) Nishijima lacked proof that Mr. Ho failed to mitigate his damages when he declined surgery offered by Dr. Hosobuchi; and (3) Mr. Ho's medical expenses from the accident exceeded the monetary tort threshold requirement set forth in HRS §§ 431:10C-306 (b)(1)(B) and (b)(2). The court granted a directed verdict on the tort threshold, finding that Mr. Ho's medical bills exceeded \$10,000, but denied the motion as to mitigation and causation. On February 4, 1998, after Nishijima rested, the Hos renewed their motion for directed verdict on causation and mitigation. The court again denied the motion, deferring instead to the jury on mitigation and causation.

On February 5, 1998, the jury returned a special verdict finding that Nishijima's negligent act was not a "substantial factor" in causing Mr. Ho's injuries. On March 3, 1998, the Hos filed a motion for JNOV or, in the alternative, a new trial, arguing that, inasmuch as the weight of the evidence

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rehabilitative limit and, instead, allowing tort actions if: (1) the claim meets any of the three thresholds described in HRS §§ 431:10C-306(b)(1) through (3) (1997) [formerly, HRS § 431:10C-306(b)(1)(A) through (C)] or (2) the personal injury protection (PIP) benefits equal or exceed \$5,000, pursuant to HRS § 431:10C-306(4) (1997) [formerly, HRS § 431:10C-306(b)(3)]. See 1997 Haw. Sess. L. Act 251, § 43 at 541-42. In 1998 and 2001, the legislature further amended the statute. See 1998 Haw. Sess. L. Act 275, §§ 22 and 23 at 934-35; 2001 Haw. Sess. L. Act 157, § 31 at 401. Insofar as the subject accident occurred on November 9, 1993, the amended version of the statute is not implicated in the present matter.

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failed to support the jury's finding of no legal causation, a verdict should have been directed in their favor or a new trial should be granted. On March 16, 1998, Nishijima filed a memorandum in opposition to the Hos' motion, arguing that the Hos' arguments were unwarranted because the evidence adduced at trial supported the jury's verdict. On June 18, 1998, the court issued a written order denying the Hos' motion for JNOV or, in the alternative, a new trial.

On March 6, 1998, Nishijima filed his notice of taxation of costs, seeking to tax the Hos with litigation costs in the amount of \$54,172.11. Three days later, on March 9, 1998, Nishijima filed an amended notice of taxation of costs to reflect misposted cost entries, thereafter seeking to tax the Hos with litigation costs in the amount of \$54,049.55. On March 13, 1998, the Hos filed a motion to strike in whole or in part Nishijima's amended notice of taxation of costs, arguing that the costs taxed are excessive, improper, punitive and not supported by law or equities. Following a hearing on the motion on April 17, 1998, the court entered its order granting in part and denying in part the Hos' motion to strike in whole or in part Nishijima's first amended notice of taxation of costs, awarding Nishijima \$17,652.74 in costs.

On June 15, 1998, the Hos filed a motion for reconsideration of the court's order taxing costs against them. The court denied the motion without oral argument.

On August 20, 1998, judgment against the Hos and in favor of Nishijima was entered, together with the court's cost

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award. The parties timely appealed.

**II. STANDARD OF REVIEW**

**A. Admissibility of Expert Testimony**

“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 discretion.” State v. Fukagawa, 100 Hawai‘i 498, 503, 60 P.3d 899, 904 (2002) (citing State v. Fukusaku, 85 Hawai‘i 462, 472, 946 P.2d 32, 42 (1997) (quoting State v. Maelega, 80 Hawai‘i 172, 180, 907 P.2d 758, 766 (1995))). “An abuse of discretion occurs when the decisionmaker exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.” Fukagawa, 100 Hawai‘i at 503, 60 P.3d at 904 (citation omitted).

**B. Sanctions**

The trial court’s imposition of sanctions for violation of motions in limine is reviewed under the “abuse of discretion” standard. See Ross v. Coleman Co., Inc., 761 P.2d 1169, 1201 (Idaho 1988).

**C. Evidentiary Rulings**

[D]ifferent standards of review must be applied to trial court decisions regarding the admissibility of evidence, depending on the requirements of the particular rule of evidence at issue. When application of a particular evidentiary rule can yield only one correct result, the proper standard for appellate review is the right/wrong standard.

Where the evidentiary ruling at issue concerns admissibility based upon relevance, under HRE Rules 401 and 402, the proper standard of appellate review is the right/wrong standard.

Evidentiary decisions based on HRE Rule 403, which require a “judgment call” on the part of the trial court, are reviewed for an abuse of discretion. The trial court

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abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Staley, 91 Hawai'i 275, 281, 982 P.2d 904, 910 (1999) (citations, internal quotations, and formatting omitted).

**D. Directed verdict and judgment notwithstanding the verdict**

[D]enials 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 directed verdict 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.

Shanghai Inv. Co., Inc. v. Alteka Co., Ltd., 92 Hawai'i 482, 491, 993 P.2d 516, 525 (2000) (citing O'Neal v. Hammer, 87 Hawai'i 183, 186, 953 P.2d 561, 564 (1998) (quoting Takayama v. Kaiser Found. Hosp., 82 Hawai'i 486, 495, 923 P.2d 903, 912 (1996))).

**E. Motion for New Trial**

As a general matter, the granting or denial of a motion for new trial is within the sound discretion of the trial court and will not be disturbed absent a clear abuse of discretion. The same principle is applied in the context of a motion for new trial premised on juror misconduct.

The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Furutani, 76 Hawai'i 172, 178-79, 873 P.2d 51, 57-58 (1994) (citations and internal quotations omitted).

### III. DISCUSSION

**A. The circuit court abused its discretion by allowing Nishijima's counsel to cross-examine Edward about whether he was injured in the accident, inasmuch as Walsh prohibited this testimony.**

The Hos argue that the court abused its discretion when it permitted Nishijima's counsel to cross-examine Edward about whether he was injured in the accident, inasmuch as the court's permission was contrary to Walsh. The Hos contend that allowing Nishijima to cross-examine Edward was unfairly prejudicial to them because "Nishijima simply wanted to inject the improper and prejudicial inference that because [Edward] was not injured, Mr. Ho was not injured." Inasmuch as the court concluded that, because Mr. Ho put the degree of force in issue, the nature of the testimony Nishijima wished to elicit from Edward was relevant and its probative value outweighed any prejudice to the Hos, the court's conclusion was wrong. Contrary to Walsh, the court improperly allowed Edward to testify about whether he was injured in the accident.

In Walsh, the plaintiff attempted to have the driver of the car he was a passenger in, at the time of the accident, testify about the injuries she sustained, for purposes of comparison. Walsh, 80 Hawai'i at 213, 908 P.2d at 1199. This court held that, because the testimony's probative value was substantially outweighed by the negative admissibility factors delineated in HRE Rule 403, the driver's testimony was inadmissible. Id. at 217-18, 908 P.2d at 1203-04. Specifically, this court excluded the driver's testimony under HRE 403 because:

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(1) the probative value of the testimony was minimal; (2) the plaintiff already had expert testimony about the force of the collision; (3) the probative value of the testimony was counterbalanced by the substantial delay and confusion that would result; and (4) there was substantial danger that the jury would misconstrue the relevance of the testimony and accord it more probative value than it deserved. Id.

Similarly, in the instant case, Nishijima wanted to cross-examine Edward about his injuries for no other reason than to inject the inference that, because Edward was not injured, Mr. Ho was, therefore, not injured. This court, however, made clear in Walsh that, because the probative value of a passenger's testimony relating injuries sustained in an accident, for purposes of comparison, is substantially outweighed by the negative admissibility factors delineated in HRE Rule 403, it is inadmissible. Walsh, 80 Hawai'i at 217, 908 P.2d at 1203. Therefore, inasmuch as Edward was in Mr. Ho's pickup truck during the accident and would testify to injuries he did, or did not suffer, for the purpose of comparison, this court's holding in Walsh prohibited such testimony. Accordingly, the circuit court abused its discretion by permitting Edward's testimony.

The dissent incorrectly analyzes and interprets Walsh to conclude that "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." Dissent at 24-25. Inasmuch as the dissent believes that the probative value of Edward's testimony outweighs its prejudicial effect because (1)

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Mr. Ho and Edward are "two different people 'with two different tolerances and predispositions to injury[,]" (2) no expert testimony was presented regarding the degree of force of the accident, (3) the question as to Edward's injuries only involved a single question and answer, and (4) Edward's physique was different from Mr. Ho's physique at the time of the accident, the dissent's analysis is flawed. Dissent at 23-24. Like Walsh, the dissent agrees that Edward's testimony regarding his injuries lends minimal assistance "to the jury in determining the nature and extent of [Mr. Ho's] injuries[,]" inasmuch as Mr. Ho and Edward are "two different people 'with two different tolerances and predispositions to injury.'" Dissent at 22. The dissent, however, misconstrues the remaining factors discussed in Walsh. Specifically, unlike the dissent's belief that there was no substantial delay and confusion regarding Edward's testimony because "the question as to Edward's injuries involved only 'a single question and answer,'" Walsh makes clear that, in order for the driver's testimony to be admissible, "Walsh must initially establish, as foundation, that [the driver's] injuries were caused by the accident[,] . . . [which] would likely involve inquiry into the nature of [the driver's] injuries, her medical and work histories, backgrounds, and previous injuries, which, in turn, would likely require the presentation of time-consuming expert medical testimony."<sup>5</sup> Walsh, 80 Hawai'i at 217, 908 P.2d at

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<sup>5</sup> The dissent clearly misinterprets this court's holding. Inasmuch as the dissent argues that, "because the examination of Edward was limited and brief, there was no substantial delay and confusion of the sort Walsh was concerned with[,]" the dissent is wrong. Dissent at 23. In Walsh, this court was concerned about the substantial delay and confusion that would result from



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1203 ("The jury's attention would be drawn away from the ultimate issue of the nature and extent of Walsh's injuries by a mini-trial on the nature and extent of [the driver's] injuries, creating a substantial danger of confusing the jury."). Furthermore, the dissent mistakenly claims that, because Edward and Mr. Ho were physically different at the time of the accident, Edward's testimony would remove "any undue influence unexamined dissimilarities might have in 'threatening to undermine the probative value of the testimony.'" Dissent at 24 (internal brackets omitted). Even if Edward's testimony "placed in context Edward's physical differences from his father at the time of the . . . accident[,]" Dissent at 24 (emphasis in the original), Walsh made clear the substantial danger and unfair prejudice that would result from such testimony, inasmuch as "the jury might misconstrue the relevance of the driver's testimony and accord it more probative value than it deserves." Walsh, 80 Hawai'i at 217-18, 908 P.2d at 1203-04. Specifically,

at such time as [the driver's] testimony regarding the nature and extent of her injuries were offered to prove the nature and extent of Walsh's injuries, the inherent dissimilarities between [the driver] and Walsh--and, in the general case, any two people--would threaten to undermine the probative value of the testimony altogether. The circumstantial similarities between [the driver] and Walsh would render tantalizing the forbidden conclusion that, because [the driver] and Walsh were side-by-side in the same car in the same accident, if [the driver] were injured, Walsh must also have been similarly injured. This temptation would be further amplified by the amount of time that would invariably be spent on establishing the foundation for the admission of [the driver's] testimony.

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establishing a foundation for admitting the testimony, which entailed a review of the driver's medical history, Walsh, 80 Hawai'i at 217, 908 P.2d at 1203 (emphasis added), not whether a question regarding injuries involved only "a single question and answer," as the dissent claims. Dissent at 23.

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Walsh, 80 Hawai'i at 217-18, 908 P.2d at 1203-04. Contrary to the implication of the dissent, Walsh clearly holds that the probative value of a passenger's testimony relating injuries sustained in an accident, for purposes of comparison, is substantially outweighed by the negative admissibility factors delineated in HRE Rule 403, and, is therefore, inadmissible.<sup>6</sup> Id. at 217, 908 P.2d at 1203. As such, we reiterate that, pursuant to Walsh, the circuit court abused its discretion by permitting Edward's testimony.

**B. The circuit court did not abuse its discretion when it limited the testimony of Drs. Olderr and Hosobuchi to prevent cumulative testimony.**

Although the previous issue is dispositive of this case, this court addresses the Hos' remaining points of error, as well as Nishijima's points of error on cross-appeal, in order to give guidance to the circuit court on remand.

The Hos argue that the court improperly granted Nishijima's motion in limine to limit Drs. Olderr and Hosobuchi's testimony, inasmuch as the court's reliance on Glover to bar Mr. Ho's treating physicians from giving opinions about the cause of the injuries Mr. Ho sustained in the accident was misplaced. The Hos contend that, because both Drs. Olderr and Hosobuchi rendered opinions on causation before and during their respective

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<sup>6</sup> The dissent incorrectly assumes that the record of the instant case was substantially different from Walsh. Dissent at 25. However, like Walsh, Nishijima wanted to cross-examine Edward about his injuries for no other reason than to inject the inference that, because Edward was not injured, Mr. Ho was, therefore, not injured. Walsh prohibited this testimony. As such, based on the record of this case, as well as this court's holding in Walsh, the dissent's conclusion is wrong.

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depositions, they should have “been allowed to testify freely about their opinions concerning diagnosis, causation, treatment and prognosis” at trial. Because the court wanted to prevent cumulative testimony, inasmuch as Drs. Olderr and Hosobuchi would defer to Dr. Strode on causation, the court limited their testimony. Thus, the court did not abuse its discretion in granting Nishijima’s motion in limine to limit Drs. Olderr and Hosobuchi’s testimony.

The admission of opinion testimony by an expert is authorized pursuant to Hawai‘i Rules of Evidence (HRE) Rule 702, which provides that, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.” HRE Rule 702. However, the trial court is vested with the sound discretion in determining whether expert testimony should be admitted at trial, and its decision will not be overturned unless there is a clear abuse of discretion. Fukagawa, 100 Hawai‘i at 503, 60 P.3d at 904; see also State v. Matias, 74 Haw. 197, 203, 840 P.2d 374, 377 (1992) (“[T]he general rule is that admissibility of expert testimony is a matter within the broad discretion of the trial judge, and his [or her] decision will not be overturned on appeal unless manifestly erroneous or clearly an abuse of discretion.”) (citation omitted). Moreover, HRE Rule 403 provides that “[a]lthough relevant, evidence may be excluded if its probative

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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.” HRE Rule 403.

In the instant case, the court did not abuse its discretion when it limited Drs. Olderr and Hosobuchi’s testimony with respect to causation. The court limited their testimony to prevent cumulative testimony, inasmuch as Drs. Olderr and Hosobuchi would defer to Dr. Strode on the cause of Mr. Ho’s bladder and sexual dysfunction. Furthermore, contrary to the Hos’ contention that the court improperly relied on Glover to limit Drs. Olderr and Hosobuchi’s testimony, the record does not reflect that the court cited to or relied on Glover prior to or during the hearing on Nishijima’s motion in limine. Accordingly, the circuit court did not abuse its discretion in limiting the testimony of Drs. Olderr and Hosobuchi.

**C. The circuit court did not abuse its discretion when it sanctioned the Hos for repeatedly violating the court’s rulings and orders by striking Dr. Hosobuchi’s entire testimony.**

The Hos argue that the court abused its discretion in restricting and thereafter striking Dr. Hosobuchi’s entire testimony as a sanction against them for Dr. Hosobuchi’s alleged violation of the court’s ruling limiting his testimony. The Hos contend that the court lacked a basis to impose such an extreme sanction. In striking Dr. Hosobuchi’s entire testimony as a sanction against the Hos, the court expressed concern about the Hos’ daily violations of the court’s rulings and orders and the

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cumulation of prohibited testimony that resulted. Because the Hos repeatedly failed to comply with the court's rulings and orders, the court did not abuse its discretion in sanctioning them by striking Dr. Hosobuchi's entire testimony.

A trial court may properly exclude or strike testimony as a sanction for 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 lower court's sanction of striking a witness's entire testimony for repeatedly violating the court's order).

In the instant case, the court did not abuse its discretion in sanctioning the Hos by excluding Dr. Hosobuchi's entire testimony. The court specifically instructed Dr. Hosobuchi that he could not testify that the accident caused Mr. Ho's bladder and sexual dysfunctions. The court further instructed Dr. Hosobuchi not to refer to the accident at all. A careful examination of the record, however, reveals that the Hos' counsel's line of questioning invited Dr. Hosobuchi to render an opinion about the link between Mr. Ho's injuries and the accident.<sup>7</sup> In direct contravention of the court's ruling, Dr.

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<sup>7</sup> The following colloquy between Dr. Hosobuchi and the Hos' attorney took place:

[Mr. Kim]: Doctor, based on ... the history that was taken from Mr. Ho on your visit of June 1, 1994, your physical examination of Mr. Ho, your review of the CT scan, revealing herniations at L-4 -5, L-5, S -1, were you able to come to an opinion as to what was his problem?

. . . . .  
[Dr. Hosobuchi]: Well, he had two herniated disks, and he had a mechanical sign, which is back pain and inability to extend because when you extend, this is not the lateral view where you [sic] looking at the back, but you

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Hosobuchi testified that he thought Mr. Ho's injuries were related to the accident. This was a clear violation of the court's order.

In requesting either a mistrial or that Dr. Hosobuchi's entire testimony be stricken, Nishijima pointed to the cumulative prejudicial effect of the Hos' repeated violation of the court's

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can imagine, when you extend, the cushion that's come out more, so ineffect [sic], you narrow the spinal canal, so it's more painful.

. . . . .  
[Mr. Kim]: Doctor, based upon a reasonable degree of medical probability, what was the cause of the back problem that you saw Mr. Ho for?

[Dr. Hosobuchi]: Well, he had multiple back injuries, back problems, and there was entry in the chart that he had 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 that symptom of the cuada equina compression or the bladder and the sexual problem. So I thought this recurrent pain and these dysfunction, I was concerned were -- injury.

. . . . .  
[Mr. Kim]: Doctor, based upon your experience as a neurosurgeon who is familiar with these type of injuries, is surgery offered to every patient who has a herniated nucleus pulposus?

[Dr. Hosobuchi]: No, sir.

[Mr. Kim]: Why is it that not every patient who has a disc problem offered surgery?

[Dr. Hosobuchi]: Well, they often -- the pressure of the herniated disk involves one nerve, because often the herniation goes to sideways, but that may end by either ... doing nothing or physical therapy that the pain using --

[Mr. Kim]: In other words, there's a healing process that occurs naturally, is that what you're talking about?

[Dr. Hosobuchi]: Yes . . . . .

[Mr. Kim]: Does that healing process which you've just described to us, Doctor, account for the fact that Mr. Ho was not having these kind of problems prior to this incident on November 9, 1993?

. . . . .  
[Mr. Kim]: Based upon that history, Doctor, that you have and had before you at the time that you were treating Mr. Ho in 1993, can you account for Mr. Ho being able to go back to work and be -- and not have any problems prior to the accident in 1993 with respect to the L-5 S-1 area?

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ruling limiting the testimony of both Dr. Hosobuchi and Dr. Olderr:<sup>8</sup>

We already have two of the treating physicians who weren't supposed to testify in the manner that they did, did [sic] testify. And if the [c]ourt will allow this to go unpunished, then, you know, it makes a mockery of the whole sense of filing motions in limine.

You know, we plan our cases based on those motions. We have a clear understanding of what is or should not come in, you know.

Thus, contrary to the Hos' argument, the court's decision to strike Dr. Hosobuchi's entire testimony was not extreme because Dr. Olderr had previously testified about Mr. Ho's injuries and therefore, Dr. Hosobuchi's testimony would be cumulative.<sup>9</sup> Moreover, the court expressed great concern about the Hos' daily violations of the court's rulings:

The Court: Well, one possibility is that I've thought of telling the jury they can only consider the testimony of Dr. Hosobuchi to his treatment and to no other basis, that any -- any question to him about what caused the injury, they're to disregard.

. . . .  
Mr. Kim: Because you've already instructed the jury with respect to the mention that was made during Dr. Olderr's opinion to the cause of the injuries that he treated him for, you instructed them to disregard that

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<sup>8</sup> At the same time the court limited Dr. Hosobuchi's testimony, the court also limited Dr. Olderr's testimony with respect to causation. Completely disregarding the court's order, however, Dr. Olderr testified, prior to Dr. Hosobuchi, that, in the course of taking Mr. Ho's history and examination three days after the accident, he was able to determine that Mr. Ho's injuries were compatible with the accident. This was a clear violation of the court's ruling.

<sup>9</sup> Dr. Olderr initially testified about Mr. Ho's first visit to him in August 1984, which was for evaluation of a workplace injury that occurred when Mr. Ho fell off the roof of a bus. Dr. Olderr diagnosed that one of Mr. Ho's vertebra had been compressed as a result of his fall. Dr. Olderr further testified that at the time of Mr. Ho's 1984 visit, he did not have any bowel or bladder problems. Moreover, Dr. Olderr testified that, on March 22, 1986, he again treated Mr. Ho for his back injuries and at that visit, Mr. Ho was not having any problems with his bladder. In addition, Dr. Olderr testified that, when Mr. Ho visited him three days after the accident, he was able to determine that Mr. Ho's injuries were compatible with the accident.

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testimony, and I think some sanction along that line may be more appropriate.

The Court: I know there's just too much. There's just the cumulation, I mean, everyday. This is not something that came up once during the trial, but I'm dealing with it everyday.

(Emphasis added.) Furthermore, the Hos fail to suggest any lesser sanction that would be more appropriate.

Therefore, given the cumulation of prohibited testimony and the prejudice to Nishijima, the circuit court did not abuse its discretion to sanction the Hos for repeatedly violating the court's rulings and orders by striking Dr. Hosobuchi's entire testimony.

**D. The circuit court did not abuse its discretion when it sanctioned the Hos for repeatedly violating the court's rulings and orders by allowing Dr. Yarbrough to testify, despite previously barring his testimony.**

The Hos argue that the court abused its discretion when it sanctioned them by allowing Dr. Yarbrough to testify after Dr. Olderr violated the court's order limiting his testimony. Specifically, the Hos contend that, because the court previously barred Dr. Yarbrough from testifying after Nishijima failed to produce his opinions prior to the November 20, 1997 discovery cutoff date, allowing his testimony would unjustly reward Nishijima. Because the Hos violated the court's rulings, which resulted in them gaining two experts testifying about sexual and bladder dysfunction whereas Nishijima had none, the court allowed Dr. Yarbrough to testify to avoid any prejudice that would result to Nishijima. Thus, the court did not abuse its discretion in sanctioning the Hos by allowing Dr. Yarbrough to testify.

A trial court has the discretion to impose sanctions on



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a party who violates a motion in limine. See Ross, 761 P.2d at 1201 (supporting the trial court's imposition of sanctions for repeated violations of the court's order on a motion in limine); see also Zantop Int'l Airlines, Inc. v. Eastern Airlines, 503 N.W.2d 915, 922-24 (Mich. App. 1993) (affirming the lower court's assessment of penalty, award of attorney's fees, and dismissal of action due to violations of motions in limine).

In the instant case, the court did not abuse its discretion when it sanctioned the Hos for violating the court's rulings and orders by allowing Dr. Yarbrough to testify, despite previously barring his testimony. In its January 27, 1998 order, the court directed that, because Nishijima failed to produce Dr. Yarbrough's final opinions rendered prior to the discovery cutoff date, he would not be permitted to testify at trial. Later, however, the court permitted Dr. Yarbrough to testify. Significantly, this permission was the court's sanction against the Hos after Dr. Olderr violated the court's order limiting his testimony on causation. Because Dr. Olderr opined as to the cause of Mr. Ho's injuries, in direct violation of the court's order, Nishijima claimed he was prejudiced because, at that point, the Hos had two physicians testifying about sexual and bladder dysfunction and he had none, inasmuch as the court had previously barred Dr. Yarbrough from testifying. Consequently, to avoid any prejudice resulting from the Hos' violations, the court exercised its discretion by allowing Dr. Yarbrough to testify. The Hos, moreover, fail to suggest any lesser sanction that would be more appropriate. Therefore, the circuit court did

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not abuse its discretion when it permitted Dr. Yarbrough to testify as a sanction against the Hos.

**E. The circuit court did not err in denying the Hos' motion for directed verdict.**

The Hos argue that the court erred in denying their motion for directed verdict because the evidence uncontrovertedly proved that the accident was a substantial factor in causing Mr. Ho's neck and back injuries. Nishijima, however, contends that the court correctly denied the Hos' motion for directed verdict, inasmuch as Nishijima introduced considerable evidence regarding the pre-existing etiology of Mr. Ho's injuries. In denying the Hos' motion for directed verdict, the court explained that, because there was sufficient evidence of a factual dispute as to the cause of Mr. Ho's injuries, the issue of causation was a question of fact for the jury. Thus, inasmuch as reasonable minds could have differed as to whether the accident was a substantial factor in causing Mr. Ho's injuries, the court did not err in denying the Hos' motion for directed verdict.

Hawai'i negligence cases reveal that a causal connection between the negligent act and the injury must exist. See Mitchell v. Branch, 45 Haw. 128, 131, 363 P.2d 969, 973 (1961). "The mere co-existence of negligence and injury or the existence of negligence prior to the injury is not in itself sufficient to establish this necessary causal relationship. The injury must be the result of, or flow from, the negligent act before the negligent party is held liable." Id. at 131, 363 P.2d at 973 (citations omitted). It is well-settled that, in order to

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establish legal causation, a plaintiff must prove that the alleged wrongdoer's conduct was a "substantial factor" in bringing about the harm. Id.

Moreover, when reasonable persons might differ on the issue of legal causation, e.g., where the evidence conflicts or involves more than one probable cause of a plaintiff's injury, the question is one for the jury. See Taylor-Rice v. State, 91 Hawai'i 60, 75, 979 P.2d 1086, 1101 (1999) (citation omitted); see also Wong v. City and County of Honolulu, 66 Haw. 389, 398-99, 655 P.2d 157, 164 (1983) (quoting Collins v. Greenstein, 61 Haw. 26, 41-42, 595 P.2d 275, 284 (1979)). Where reasonable minds would not dispute the absence of causation, however, the trial judge must decide the issue of causation as a matter of law. Wong, 66 Haw. at 398-99, 655 P.2d at 164.

In the instant case, the court did not err in denying the Hos' motion for directed verdict because there was substantial evidence to support the jury's verdict that Nishijima's negligence was not a substantial factor in causing Mr. Ho's injuries. Both parties presented evidence regarding Mr. Ho's neck and back injuries.<sup>10</sup> Significantly, the court expressly ruled that the evidence adduced at trial sufficiently raised a question of fact for the jury with respect to causation.

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<sup>10</sup> Expert testimony indicated that Mr. Ho may have injured his neck and back in the accident. Contrary to this testimony, expert testimony also established that: (1) Mr. Ho never complained of neck pain or radiating symptoms and had normal range of movement while at the emergency room on November 9, 1993; (2) Mr. Ho's CT scans and other objective indicators revealed no clinical abnormalities resulting from the accident; and (3) there was a curious lack of neurological symptomatology immediately following the accident.

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Viewing the evidence in the light most favorable to Nishijima, there was evidence of a factual dispute that raised a jury question as to whether Mr. Ho's injuries resulted from the accident. Inasmuch as reasonable minds could differ regarding causation, the circuit court correctly denied the Hos' motion for directed verdict.

**F. The circuit court did not err in denying the Hos' motion for JNOV and did not abuse its discretion in denying their alternative motion for a new trial, inasmuch as the weight of the evidence supported the jury's verdict.**

The Ho's contend that the court erred in denying their motion for JNOV or, in the alternative, a new trial, inasmuch as the weight of the evidence did not support the jury's verdict that Nishijima's negligence was not a substantial factor in causing Mr. Ho's injuries. In denying the Hos' motion, the court explained that, although there was no dispute that Mr. Ho was injured, there was conflicting evidence as to whether the accident was a "substantial factor" in causing his injury, and therefore, determined that the jury should decide causation. Accordingly, because the jury's verdict was not against the manifest weight of the evidence, the court did not err in denying the Hos' motion for JNOV and properly exercised its discretion in denying their alternative motion for a new trial.

"A motion for [JNOV] is technically a renewal of a motion for directed verdict made at the close of the evidence and cannot assert a ground that was not included in the motion for directed verdict." Shishido v. State, 4 Haw. App. 321, 324, 666 P.2d 608, 611 (1983) (citations omitted). A denial of a motion

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for JNOV is reviewed de novo. Aga v. Hundahl, 78 Hawai'i 230, 237, 891 P.2d 1022, 1029 (1995). "Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings." Id. at 237, 891 P.2d at 1029 (citations and brackets omitted). In deciding a motion for JNOV, "the evidence and the inferences which may be fairly drawn therefrom must be considered in the light most favorable to the non-moving party and either motion may be granted only where there can be but one reasonable conclusion as to the proper judgment." Id. (citations omitted).

Unlike a motion for JNOV, on a motion for a new trial, "the movant need not convince the court to rule that no substantial evidence supports its opponent's case, but only that the verdict rendered for its opponent is against the manifest weight of the evidence." Id. (citations and brackets omitted). "Both the granting and denial of a motion for new trial is within the trial court's discretion" and will not be reversed absent a clear abuse of that discretion. Id. (citations and brackets omitted). "[I]n the proper case [the court has] both the power and the 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." Peterson v. City & County of Honolulu, 53 Haw. 440, 442, 496 P.2d 4, 7 (1972) (citations omitted).

In the instant case, the court did not err when it denied the Hos' motion for JNOV and did not abuse its discretion when it denied their alternative motion for a new trial, inasmuch

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as the manifest weight of the evidence was not against the jury's verdict. The court explained that the weight to be given to the testimony in determining whether the accident was a substantial factor in causing Mr. Ho's injuries was for the jury to decide. Therefore, even assuming that the ground asserted in the Hos' motion was proper, after viewing the evidence in the light most favorable to Nishijima, the court explained that it "cannot substitute its judgment as to how the jurors interpreted the evidence and how the jurors drew inferences." Although there was conflicting evidence as to whether Nishijima's negligence was a substantial factor in causing Mr. Ho's injuries, a review of the record revealed that there was a basis upon which reasonable inferences could be drawn, and therefore, the jury's verdict was not against the manifest weight of the evidence. See supra note 10. Accordingly, the circuit court did not err in denying the Hos' motion for JNOV and did not abuse its discretion in denying their alternative motion for a new trial.

**G. The circuit court did not abuse its discretion in excluding the testimony of Dr. Ward and in initially excluding the testimony of Dr. Yarbrough, inasmuch as Glover requires expert witnesses to render their final opinions by the discovery cutoff date.**

On cross-appeal, Nishijima argues that the circuit court abused its discretion in (1) excluding Dr. Ward's testimony, and (2) initially excluding the testimony of Dr. Yarbrough, inasmuch as the court erroneously concluded under Glover that he was required to disclose the opinions of his experts prior to the discovery cutoff date. Nishijima contends

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that, because he named his experts in a timely manner and "it [cannot] be properly be (sic) inferred from Glover, that a party must disclose the final opinions of the party's expert by the discovery cutoff date where the adverse party did not request the opinions[,]" he did not have a duty to disclose his experts' opinions prior to the discovery cutoff date. Nishijima further maintains that, inasmuch as the Hos failed to request that Nishijima provide them with his experts' opinions prior to the discovery cutoff date, the Hos "should bear the consequences of their own failure to conduct timely discovery[,]" and, therefore, the trial court abused its discretion in excluding Dr. Ward's testimony and initially excluding the testimony of Dr. Yarbrough. Because Glover mandates that a witnesses expert furnish his or her final opinion before the discovery cutoff date, Nishijima's arguments are erroneous.

In Glover, the Intermediate Court of Appeals [hereinafter, "the ICA"] addressed, inter alia, whether the circuit court erred when it issued an order striking Glover's expert witness, Jack P. Suyderhoud (Suyderhoud), from the witness list because he failed to furnish his final opinion before the August 20, 1993 discovery cutoff date. Glover, 86 Hawai'i at 162, 948 P.2d at 583. Concluding that the circuit court acted within its discretion when it entered the order striking Suyderhoud as a witness, the ICA reasoned that "fair import of the policies underlying the discovery cutoff date is that an expert should have arrived at his or her final opinions by that date. Otherwise, the party seeking discovery of such opinions

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would be prevented from adequately preparing for trial". Id. at 164, 948 P.2d at 585. As such, the ICA held that an expert witness must arrive at his or her final opinions by the discovery cutoff date in order to testify regarding the opinion at trial. Id.

In the instant case, the circuit court ruled, pursuant to Glover, that "[n]one of the[] named witnesses will be permitted to testify unless opinions were rendered and produced prior to the discovery cutoff date. So if any witness submitted testimony prior to the cutoff date, they will be permitted to testify and limited to the opinions rendered prior to that particular date." Despite Nishijima's insistence that, because the Hos made no attempt to obtain the final opinions of Drs. Ward and Yarbrough prior to the discovery cutoff date, Glover is distinguishable, Glover expressly holds that an expert's final opinion should be furnished before the discovery cutoff date. Furthermore, because the court permitted Dr. Yarbrough to testify as a sanction against the Hos for repeatedly violating the court's rulings and orders, Nishijima's argument is moot. As such, the circuit court did not abuse its discretion in excluding the testimony of Dr. Ward and in initially excluding the testimony of Dr. Yarbrough.



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**IV. CONCLUSION**

Based on the foregoing, we vacate the circuit court's August 20, 1998 judgment and remand for a new trial.

DATED: Honolulu, Hawai'i, December 30, 2003.

On the briefs:

Bruce B. Kim for  
plaintiffs-appellants/  
cross-appellees

Richard F. Nakamura and  
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