NO. 24401

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

EMERSON M. F. JOU, M.D., Plaintiff-Appellant, v.
TIM STANTON, Defendant-Appellee

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-3013)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiff-Appellant Emerson M. F. Jou, M.D. (Dr. Jou), appeals from the Final Judgment entered on June 15, 2001, by First Circuit Court Judge Victoria S. Marks. We affirm.

BACKGROUND

On August 9, 1999, Dr. Jou, *pro se*, filed a complaint against Defendant-Appellee Tim Stanton (Stanton)[1] alleging that Dr. Jou had provided "physical therapy and medical care" to Stanton "for injuries allegedly sustained on or about February 7, 1995, as a result of being hit by an automobile while walking." In his complaint, Dr. Jou asserted the following four causes of action relating to Stanton's failure to pay: (1) malicious breach of agreement, (2) fraud, (3) negligence, and (4) equitable relief. Dr. Jou sought judgment in the amount of $5,378.67.

[1] The record indicates that the full name of Defendant-Appellee Tim Stanton (Stanton) is "Timothy M. Stanton."

On March 30, 2000, attorney Stephen M. Shaw entered his appearance as counsel for Dr. Jou.

The Findings of Fact and Conclusions of Law (FsOF and CsOL) were entered on May 17, 2001. With those FsOF and CsOL challenged by Dr. Jou outlined in bold print, the relevant FsOF and CsOL are as follows:

FINDINGS OF FACT

. . . .

2. [Dr. Jou] is a licensed physician and does business as a doctor in the City and County of Honolulu, State of Hawaii.

. . . .

4. On February 7, 1995, Mr. Stanton was involved in an automobile accident,[2] and he was injured.

5. Through a recommendation of a business associate, Mr. Stanton was contacted by Attorney Roy Yoshino (hereinafter "Mr. Yoshino") about representation relating to the accident.

6. Prior to this contact, Mr. Yoshino and Dr. Jou had established a business relationship with each other.

7. As a matter of course, Mr. Yoshino would refer an injured client to Dr. Jou for treatments. Over time, about 20 clients of Mr. Yoshino were referred to Dr. Jou for treatment.

8. Dr. Jou and Mr. Yoshino entered in agreements whereby Mr. Yoshino would guarantee the payment of the medical bills of Mr. Yoshino's clients. Further, Mr. Yoshino agreed to give Dr. Jou lien rights on the claims Mr. Yoshino asserted on behalf of his clients.

9. After meeting Mr. Stanton, Mr. Yoshino suggested that Mr. Stanton be treated by Dr. Jou.

10. On February 22, 1995, Mr. Yoshino took Mr. Stanton to Dr. Jou's office and introduced them to each other.

11. Prior to the accident and at the time of the introduction, Mr. Stanton had Kaiser medical insurance coverage for the injuries he suffered.

---

[2] It is undisputed that Stanton was, as alleged in the complaint, "hit by an automobile while walking."

12. Prior to the visit to Dr. Jou, Mr. Stanton had received treatment from Kaiser for his injuries.

13. At the meeting between Dr. Jou, Mr. Yoshino and Mr. Stanton, based upon the creditable evidence, Mr. Stanton understood that Dr. Jou would collect any medical expenses for treatment from the no-fault insurance carrier and not from Mr. Stanton.

14. Mr. Stanton could have been treated by Kaiser at little or no cost to himself, but he was convinced by Dr. Jou that payment would be made by the no-fault carrier.

15. The creditable evidence, as indicated by the conduct of Dr. Jou, supports Mr. Stanton's understanding.

16. Dr. Jou's internal documents indicated that Dr. Jou expected others to pay for Mr. Stanton's medical bills and related services. Exhibit JT-1 (an internal record of charges) clearly indicates that the charges were incurred and charged to either the insurance carrier or various attorneys. The only charge on the exhibit directed to Mr. Stanton was a summary of the medical expenses after Dr. Jou decided to charge Mr. Stanton.

17. Dr. Jou decided to attempt to collect the medical fees from Mr. Stanton only after a court determined that the no-fault carrier was not responsible for Dr. Jou's fees because those fees did not relate to the injuries suffered in the accident or those fees were not reasonably or necessarily incurred.[3]

18. Prior to that court determination, Dr. Jou never billed Mr. Stanton and never asserted any claim for medical expenses against Mr. Stanton.

19. The first time Dr. Jou billed Mr. Stanton for services was on May 3, 1996-well after the services were performed. (See Exhibit 17).

20. Given the relationship between Dr. Jou and Mr. Yoshino, the internal records of Dr. Jou concerning who he expected payment from, the late billing of Mr. Stanton, and the creditable testimony of Mr. Stanton and Dr. Jou, the court finds that Mr. Stanton had no obligation to pay Dr. Jou for the medical services because the agreement was that the no-fault carrier or others would pay for those services.

---

[3] On August 1, 1995, in the District Court of the First Circuit, Honolulu Division, Civil No. 1RC95-6629, Stanton, represented by attorneys Kelly K. Kotada and Roy M. Yoshino, filed a complaint against Dai-Tokyo Royal State Insurance Company, Ltd., a Hawai‘i corporation, for no-fault benefits pursuant to Hawaii Revised Statutes § 431:10C-303.

> 21. During the trial, Dr Jou claimed total damages of $19,344.45 against Mr. Stanton.[4]
>
> **CONCLUSIONS OF LAW**
>
> . . . .
>
> **2. Based upon the findings stated above, the Court dismisses the complaint with prejudice because there is no contractual or other claim against Mr. Stanton.[5]**
>
> **3. The claims asserted by [Dr. Jou] in this case were based on an assumpsit claim.**
>
> **4. Based on Section 607-14 of the Hawaii Revised Statutes, [Stanton] is entitled to an award of attorneys' fees up to 25 percent of the amount claimed by [Dr. Jou].**
>
> 5. The Court will award attorneys' fees and costs incurred to [Stanton] upon proper application by [Stanton] and will issue a judgment accordingly.

(Footnotes added.)

DISCUSSION

A.

In addition to the challenged FsOF and CsOL, Dr. Jou also challenges the following alleged actions by Judge Marks: (1) her alleged "lengthy cross-examination" of him and (2) her alleged "refusal to allow [Dr. Jou's] legitimate lines of inquiry regarding Mr. Stanton's understanding about his obligation to Dr. Jou" or "Stanton's understanding about his agreement with Dr. Jou."

---

[4] In addition to $5,336.24 for medical bills, this amount of $19,344.45 includes charges for a court fee, an attorney fee, $5,348.08 interest, and a $4,800 "Pro Se Litigant Fee ([Plaintiff-Appellant Emerson M. F. Jou, M.D.(Dr. Jou)]'s Work at $160 per hour for 30 hours)."

[5] The word "denies" is a more accurate word than "dismisses."

1.

Trial Court's Questions to Dr. Jou

Dr. Jou testified in support of his case. He was cross-examined by counsel for Stanton. At the end of this cross-examination, the court asked Dr. Jou a number of questions. Dr. Jou then testified on redirect examination. At the conclusion of the redirect examination, there was a recross examination. Stanton was the second and final witness called by Dr. Jou. Stanton was the only witness called as a witness for Stanton's defense.

Dr. Jou asserts that the court's examination of him did not promote public confidence in the integrity and impartiality of the judiciary. We disagree. It is well settled that an impartial judge is required to ensure a fair trial. Peters v. Jamieson, 48 Haw. 247, 255, 397 P.2d 575, 582 (1964). It is also well settled that "a trial judge has the right to examine witnesses to elicit pertinent and material facts not brought out by either party or to clarify testimony." State v. Hutch, 75 Haw. 307, 327, 861 P.2d 11, 21 (1993). During a nonjury trial, the judge has great discretion in questioning the witnesses. State v. Silva, 78 Hawai‘i 115, 117, 890 P.2d 702, 704 (App. 1995).

In the opening brief, it is alleged that

> [t]he context of the cross-examination by the judge . . . demonstrated that the judge was allowing social or other

> relationships to influence her conduct and judgment. Canon 2.B, [Code of Judicial Conduct]. The Judge's examination was an effort to justify a preconceived opinion about [Dr. Jou's] bills to Mr. Stanton.

This accusation is no less than reckless. Nothing in the record on appeal supports it.[6]

2.

Trial Court's Refusal to Admit Testimonial Evidence

Dr. Jou asserts that the trial court abused its discretion in sustaining objections to some of his counsel's questions to Stanton on the subject of whether Stanton and/or Mr. Yoshino promised to pay for services provided to Stanton at Dr. Jou's "Comprehensive Clinic of Rehabilitation Medicine" also known as "The Rehab Clinic" at the Kuakini Medical Plaza. The following is typical of the instances cited. It occurred during direct examination of Dr. Jou by his attorney:

> Q. Did [Mr. Stanton] . . . ever say he was going to pay you the bill if the insurance company didn't pay him?
>
> [COUNSEL FOR STANTON]: Object. Leading, again, Your Honor.
>
> THE COURT: It's direct. Sustained.

Upon a review of the record, we conclude that the trial court did not abuse its discretion in sustaining the objections in the instances cited.

---

[6] We remind counsel for Dr. Jou that the Hawai'i Rules of Professional Conduct Rule 8.2 commands that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."

B.

Dr. Jou challenges various FsOF and CsOL. His challenge of the FsOF has no merit.[7] However, FOF no. 20 is a conclusion of law and it and COL no. 2 warrant discussion because, as noted by Dr. Jou in the "Statement of the Case" part of the opening brief, Stanton "readily admit[ted] that he signed an agreement promising to pay for the services."

Dr. Jou's Exhibit 11, in evidence, is the one-page, one-sided "Registration" form filled out and signed by Stanton on February 22, 1995, at Dr. Jou's Comprehensive Clinic of Rehabilitation Medicine. Concerning this signing, Stanton testified, in relevant part, as follows:

> Q. Do you recall signing this document?
>
> A. I signed it, but I can't really recall it. I'm not sure.
>
> Q. Do you recall whether you read the document before you signed it?
>
> A. Um, I signed -- I think I read most of it, yes, I did.
>
> . . . .
>
> Q. Okay. Do you agree that, at the time you signed this paper, . . . that you had promised to pay at that time?
>
> A. At the time I signed it, I didn't realize that's what it really meant.
>
> Q. I see. How did you meet Dr. Jou?

---

[7] In his opening brief, Dr. Jou quotes the challenged findings and the conclusions. After each finding, Dr. Jou states why it is challenged by him. The reason given for all but one is "misstates the evidence." The reason given for the remaining one is "irrelevant." After each conclusion, Dr. Jou states why it is challenged by him. The sole reason given is "reversible error." These challenges are not mentioned in the "argument" section of the opening brief. As noted in Hawai‘i Rules of Appellate Procedure Rule 28(b)(7), "[p]oints not argued may be deemed waived."

A. I was introduced to him in his offices. I was taken in by a Mr. Yoshino.

Q. And how did you find Yoshino?

A. I had suffered an accident, and I had to take some time off work, and one of the people there made a recommendation, and . . . Mr. Yoshino called me at my home.

. . . .

Q. And he called you after you received the recommendation from a friend at work?

A. I didn't received the recommendation; he did.

Q. Well, no. I mean how did you -- did you know Mr. Yoshino was going to call you before he called you?

A. No.

The printed line on the Registration form immediately above Stanton's signature states, "I Promise To Pay All Fees For Services Rendered[.]" In his closing argument, counsel for Dr. Jou argued that the evidence showed "a valid promise [to pay], but there was no payment."

The record presents us with the following three relevant facts:

1. Although the FsOF and CsOL are silent on this relevant fact, there is undisputed documentary evidence that, before Dr. Jou rendered any services to Stanton, Stanton signed the Registration form and therein promised to pay all fees for services rendered.

2. Based on the evidence, FsOF nos. 13 through 19 validly find that before Dr. Jou rendered any services to Stanton, Dr. Jou and Stanton orally agreed that only the no-fault insurance carrier was liable for the amounts due for Dr. Jou's

services to Stanton. There is no evidence that Stanton was aware of the fact stated in FOF no. 8.

3. After the occurrence of facts 1 and 2, Dr. Jou provided services to Stanton.

Dr. Jou's claim is based on a contract formed by the combination of facts 1 and 3.

Stanton's defense is based on a contract formed by the combination of facts 2 and 3. In other words, Stanton relies on the court's FsOF nos. 13, 14, and 15 that Dr. Jou orally promised Stanton that, if Dr. Jou should provide services to Stanton, only the no-fault insurance carrier, and not Stanton, was liable for the amounts due for those services, and Stanton received those services from Dr. Jou based on that oral promise by Dr. Jou.

The following are statements of the relevant law:

> The term "unilateral" has also been used to describe what is sometimes denominated a contract but which in reality is merely an offer to contract, as, for example, a promise to pay one for services if he should perform them, the latter being under no obligation to perform such services.

17A AM. JUR. 2D, *Contracts* § 5 (1991).

> [W]here one makes a promise conditioned upon the doing of an act by another, and the latter does the act, . . . upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration which renders the promise obligatory.

17A AM. JUR. 2D, *Contracts* § 19 (1991).

Thus, the decisive factual question is, which came first: fact 1 or fact 2? To win in this case, Dr. Jou had the burden of proving that fact 1 occurred after fact 2 occurred.

The contract was formed by the combination of facts 1 and 3 only if fact 1 occurred after fact 2 occurred. If fact 2 occurred after fact 1 occurred, the contract was formed by the combination of facts 2 and 3.

The court did not, and could not, answer this decisive factual question because there is no evidence in the record on the question of which occurred after the other occurred, facts 1 or 2. Therefore, Dr. Jou failed his burden of proof.

CONCLUSION

Accordingly, we affirm the trial court's Final Judgment entered on June 15, 2001, in favor of Stanton.

DATED: Honolulu, Hawai‘i, September 10, 2002.

On the briefs:

Stephen M. Shaw
for Plaintiff-Appellant.

Chief Judge

Edward C. Kemper
(Kemper & Watts, of counsel)
for Defendant-Appellee.

Associate Judge

Associate Judge