NO. 25303

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DARDANELA SALES, Plaintiff-Appellant, Cross-Appellee, v. TOKUHISA MANNING, Defendant-Appellee, Cross-Appellant, and JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE CORPORATIONS 1-10; ROE "NON-PROFIT" CORPORATIONS 1-10; and ROE GOVERNMENTAL ENTITIES 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIV. NO. 01-1-0201)

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

Plaintiff-Appellant/Cross-Appellee Dardanela Sales (Sales) appeals from that part of the circuit court's August 6, 2002 Final Judgment awarding her only $850 special damages and $1,500 general damages against Defendant-Appellee/Cross-Appellant Tokuhisa Manning (Manning). Manning cross-appeals from that part of the August 6, 2002 Final Judgment awarding her only $2,786.57 costs. We vacate the August 6, 2002 Final Judgment and remand for a new trial.

RELEVANT BACKGROUND

In April 2002, Sales was a 51-year-old self-employed hairdresser, and Manning was a 74-year-old widowed retiree.

On May 6, 1998, Manning drove her car such that it collided with the back of Sales' car. In her answering brief,

Manning states that "[t]his May 1998 accident involved a minimal impact that was never even reported to police."

On January 19, 2001, Sales filed a Complaint against Manning for damages. In a November 29, 2001 Trial Setting Conference Order, the court[1] scheduled (1) a four-day jury trial, with expert witnesses, for the week of June 24, 2002, and (2) a settlement conference on April 29, 2002.

Rule 12 of the Rules of the Circuit Court of the State of Hawai‘i (RCCH) states, in relevant part, as follows:

> RULE 12. READY CIVIL CALENDAR
>
> (a) Preparation of Calendar by Clerk. At least once in each calendar month, the clerk shall prepare a list of all civil cases wherein a pretrial statement has been filed. Such list shall be known as the "Ready Calendar" and shall be available for public examination.
>
> (b) Pretrial Statement. No case shall be placed on the "Ready Calendar" unless a "Pretrial Statement" has been filed and served in accord with Rule 5 of the Hawai'i Rules of Civil Procedure. The pretrial statement shall be filed within 8 months after a complaint has been filed or within any further period of extension granted by the court. It shall contain the following information:
>
> (1) A statement of facts;
>
> (2) Admitted facts;
>
> (3) All claims for relief and all defenses advanced by the party submitting the pretrial statement and the type of evidence expected to be offered in support of each claim and defense;
>
> (4) The names, addresses, categories (i.e., lay, eye, investigative), and type (i.e., liability, damages) of all non-expert witnesses reasonably expected to be called by the party submitting the statement and a general statement concerning the nature of the testimony expected;
>
> (5) The name, address and field of expertise of each expert witness expected to testify and a general statement concerning the nature of the testimony expected;

[1] The Honorable Sabrina S. McKenna presided in this case.

(6) A statement that each party, or the party's lead counsel, conferred in person with the opposing party, or with lead counsel for each opposing party, in a good faith effort to limit all disputed issues, including outstanding discovery, and considered the feasibility of settlement and alternative dispute resolution options. A face-to-face conference is required under these rules and shall not be satisfied by a telephone conference or written correspondence. The face-to-face conference shall take place in the judicial circuit where the action is pending unless otherwise agreed by counsel and/or the parties; and

. . . .

(c) Selection of Trial Date and Consideration of Alternative Dispute Resolution.

(1) Except in cases which have been designated as complex litigation, within 60 days of the filing of the initial pretrial statement, the plaintiff in all cases filed in the First Circuit shall schedule a trial setting status conference that shall be attended by each party or each party's lead counsel and shall be conducted by the Civil Administrative Judge, or the Civil Administrative Judge's designee. The Civil Administrative Judge, or designee, shall:

(A) Establish the trial date; and

(B) Discuss alternative dispute resolution options.

The court may consider other matters which may be conducive to the just, efficient and economical determination of the case.

(2) . . . .

(d) Extension of Time to File Pretrial Statement. . . .

(e) Designation and Order of Actions. . . .

(f) Motion to Strike From Calendar. . . .

(g) Restoration to Calendar. . . .

(h) Responsive Pretrial Statement. Every defendant shall file a "Responsive Pretrial Statement", served as required by Rule 5 of the Hawai'i Rules of Civil Procedure, that sets forth the same kind of information required in the pretrial statement within 60 days of the filing of the first pretrial statement.

(i) Extension of Time to File Responsive Pretrial Statement. Parties may stipulate once as a matter of course at any time before the responsive pretrial statement is due to extend the time in which to file the responsive pretrial statement. Parties shall not extend the time in which to file the responsive pretrial statement for more than 30 days. Otherwise, a motion seeking court approval to file a responsive pretrial statement more than 60 days after the filing of a pretrial statement shall be filed within 30 days of filing of a pretrial statement and shall specifically state why a responsive pretrial statement cannot be

> timely filed. If incomplete discovery is the reason why a responsive pretrial statement cannot be submitted, the motion shall include a schedule for completing discovery and the date when the responsive pretrial statement shall be filed.
>
> (j) Amending Pretrial Statements. . . .
>
> (k) Designation as Complex Litigation. . . .
>
> (l) Final Naming of Witnesses. Sixty (60) days prior to the discovery cut off date plaintiff must name all theretofore unnamed witnesses. Thirty (30) days prior to the discovery cut off date defendant must name all theretofore unnamed witnesses.
>
> (m) Further Discovery. After the deadline for Final Naming of Witnesses, a Motion for Further Discovery can be filed upon a showing of good cause and substantial need.
>
> (n) Exclusion of Witnesses. Any party may move the court for an order excluding a witness named by an opposing party if said witness was or should have been known at an earlier date and allowing the witness to testify will cause substantial prejudice to the movant. The movant under this motion must make a statement concerning the prejudice that will be suffered should this new witness be allowed to testify, and why the opposing party either knew or should have known of the witness at an earlier date. The opposing attorney must submit an affidavit stating that the witness was not known at an earlier date, nor with due diligence should have been known.
>
> (o) Additional Witness. At any time after the time for Final Naming of Witnesses, upon a showing of good cause and substantial need a party may move for the addition of a witness.
>
> (p) Deviation in Time for Filing. . . .
>
> (q) Dismissal for Want of Prosecution. . . .
>
> (r) Discovery Cut Off. Discovery shall be cut off 60 days before the assigned trial date.
>
> (s) Additional Party Practice. . . .
>
> (t) Sanctions. Failure of a party or his attorney to comply with any section of this rule is deemed an undue interference with orderly procedures and unless good cause is shown, the court may, in its discretion, impose sanctions in accord with Rule 12.1(a)(6) of these rules.

As noted above, RCCH Rule 12(r) states, "Discovery shall be cut off 60 days before the assigned trial date." In this case, the trial having been set for the week of June 24, 2002, the discovery cut off date was April 25, 2002.

On January 23, 2002, counsel for Manning deposed Dr. Jon F. Graham.

On February 25, 2002, counsel for Sales filed a "Final Naming of Witnesses" as required by RCCH Rule 12(l) and therein stated, in relevant part, as follows:

> II. Expert Medical Witnesses
>
> The following physicians and/or physical therapists are expected to testify regarding their care and treatment of [Sales], the nature of the injuries sustained by [Sales] and her prognosis and causation, related matters including causation, the value of their medical services and medical bills:
>
> 1. John Sandor, M.D.
> Mary T. Greulick, M.D.
> Jon Graham, M.D.
> Physical Therapy Department
> Kaiser Permanente
> . . . .
>
> 2. Ruby De Alday, M.D.
> . . . .
>
> III. Other Expert Witnesses
>
> 1. Thomas Sakoda, M.D.
> . . . .
>
> Physician is expected to testify regarding his medical examination of [Sales], prognosis and related matters, causation and medical bills.

The Court Annexed Arbitration Program hearing occurred on March 6, 2002. On March 13, 2002, the arbitrator valued special damages at $21,866.10 and general damages at $210,000 and apportioned them 50% to pre-existing conditions and 50% to the motor vehicle collision. On March 19, 2002, Manning (1) appealed the arbitration award and requested a trial de novo and (2) filed and served by mail a Hawai‘i Rules of Civil Procedure Rule 68 Offer of Judgment of $50,000 inclusive of fees and costs.

On March 27, 2002, Manning filed her "Final Naming of Witnesses." One of the expert witnesses she named was "Calvin C. M. Kam, M.D." to "testify as to damages, including his review of [Sales'] medical records and/or his independent medical examination of [Sales]."

In a memorandum accompanying a motion filed on March 28, 2002, counsel for Manning stated, in relevant part, as follows:

> [Sales'] **pre-accident** medical history is significant and warrants an apportionment in this case. [Sales'] history of neck and back complaints dates back more than seven years before the subject accident. Indeed, these symptoms were so bad that in September 1991 Raymond Taniguchi, M.D. performed a C5-6 diskectomy and fusion.
>
> . . . .
>
> Initially, [Sales] did well after surgery, but she then began to experience a recurrence of symptoms, dating to October 1994. A cervical MRI scan was taken on October 6, 1995 to evaluate [Sales'] ongoing complaints. This scan revealed multiple degenerative changes throughout the spine. Significantly, disc bulges were noted at C4-5 and C6-7. Bilateral stenosis was also noted at C6-7.
>
> When symptoms persisted, [Sales] was by [sic] John Graham, M.D., a neurosurgeon, for a consultation on November 28, 1995. Dr. Graham diagnosed residual cervical disc disease with increasing right upper extremity radiculopathy. Dr. Graham discussed the option of surgery, with the C5-6 and C6-7 levels being the most likely candidates for intervention. Ultimately, [Sales] did not proceed with surgery.
>
> [Sales'] medical records do reveal, however, that she continued to complain of neck and/or back pain to other Kaiser doctors on multiple occasions after the November 1995 visit with Dr. Graham. Moreover, [Sales] acknowledged during her oral deposition that she was symptomatic for these pre-existing conditions during the one-year before the subject accident. Accordingly, [Sales'] damages from the subject accident must be apportioned.
>
> [Manning] conducted the oral deposition of Dr. Graham in order to determine his opinion regarding apportionment. Dr. Graham, however, refused to provide such medical testimony.

(Emphasis in original.)

On April 16, 2002, at the request of Manning, Dr. Calvin Kam (Dr. Kam) made an Independent Medical Evaluation (IME) report on Sales. A copy of Dr. Kam's IME was received by counsel for Sales on or about April 22, 2002, three days before the April 25, 2002 discovery cutoff date.

On April 29, 2002, Judge McKenna presided over a settlement conference.

On May 8, 2002, Judge McKenna held a pretrial conference and then filed Pretrial Order No. 1 which stated that jury selection would begin on June 25, 2002, motions in limine were due by June 10, 2002, exhibit lists were due on June 14, 2002, and deposition designations with complete transcripts were due on June 17, 2002. This Pretrial Order No. 1 does not mention any problems created by Manning's nonreceipt of an IME from Dr. Thomas H. Sakoda, the expert hired by Sales.

The nonreceipt of an IME from Dr. Sakoda is discussed for the first time in the record on June 3, 2002, when counsel for Manning filed "Defendant Tokuhisa Manning's Motion in Limine to Exclude Any and All Testimony by Thomas H. Sakoda, M.D." In an accompanying declaration, the attorney for Manning stated, in relevant part, as follows:

> 2. [Sales] identified [Dr. Sakoda] as an expert witness on February 25, 2002. As of the date of that identification, Dr. Sakoda had never treated the patient.

> 3. After the appeal from the CAAP arbitration on March 19, 2002, [the attorney for Manning] attempted to conduct the oral deposition of Dr. Sakoda.
>
> 4. [The attorney for Manning] was advised, however, by counsel for [Sales] that Dr. Sakoda had not yet seen the patient and therefore was not ready to be deposed. [Sales'] counsel did not intend to schedule an appointment with Dr. Sakoda until after the settlement conference on April 29, 2002.
>
> 5. After the settlement conference [counsel for Manning] again tried to conduct Dr. Sakoda's oral deposition, but was advised that [Sales] had still not been evaluated by Dr. Sakoda and Dr. Sakoda had no opinions. Opposing counsel promised that the appointment would be scheduled "soon."
>
> 6. On May 29, 2002 [counsel for Manning] again asked [counsel for Sales] if Dr. Sakoda had seen [Sales]. [Counsel for Sales] said that Dr. Sakoda had **still** not seen [Sales], but that an appointment was scheduled "in a few days." [Counsel for Sales] promised to provide Dr. Sakoda's report.
>
> 7. As of the date of this declaration, [counsel for Manning] . . . still has not been provided with Dr. Sakoda's report and has effectively been precluded from discovering Dr. Sakoda's trial opinions. . . .
>
> 8. Based on the foregoing, [counsel for Manning] requests that any and all testimony by Dr. Sakoda be excluded from trial.

(Emphasis in original.)

On June 3, 2002, Manning filed "Defendant Tokuhisa Manning's Motion in Limine to Limit the Trial Testimony of Jon F. Graham, M.D. to the Opinions Disclosed During Oral Deposition."

On June 3, 2002, Sales filed a "Motion in Limine to Exclude Some Potential Evidence of Defendant." In an accompanying memorandum, counsel for Sales stated, in relevant part, as follows:

> This is [a] personal injury case arising from a traffic accident where [Manning's] vehicle struck the rear of the vehicle of [Sales]. Subsequent to the accident, [Sales] had surgery done to the **C4-5 and C6-7** levels of her cervical spine by Dr. Graham, a neuro-surgeon. [Sales] claims said injuries to be caused by the subject accident.
>
> The damage to [Sales] vehicle was "nominal" at best and was

> not repaired; and [Manning] testified in her deposition that she had no damages to her car.
>
> During discovery, [Manning] subpoenaed [Sales'] current and previous medical records. [Manning] discovered that [Sales] had "pre-existing" medical condition, particularly a fusion to the level of **C5-6**, done on September 25, 1991, seven years before the subject accident. The Kaiser Medical Records show that after said fusion, [Sales] was seen on occasions by the Kaiser medical personnel particularly for problems of her diabetis [sic], sometimes cough or colds, and sometimes shoulder pains or numbness.
>
> In a vague and isolated note or scribble dated December 2, 1997, presumably by the Kaiser therapist, [Sales] allegedly remarked or implied that she wanted to go through surgery again. See Exhibit "1" for accuracy of words allegedly said by [Sales], wherein she allegedly stated, as follows: "pt is thinking about having surgery again."

(Emphases in original.)

On Monday, June 10, 2002, counsel for Sales filed "Plaintiff Dardanela Sales' Memorandum in Opposition to Defendant Tokuhisa Manning's Motion in Limine (to Exclude All of Dr. Sakoda's Testimony, Some of Dr. Graham's Testimony and References to Liability Insurance)." In this memorandum, counsel for Sales stated, in relevant part, as follows:

> **I. BACKGROUND:**
>
> . . . .
>
> In view of the severity of injuries and the rather simultaneous arbitration proceedings and the critical short weeks prior to the scheduled trial, [Sales] and [Manning], through their counsel, agreed although there was no written stipulation filed, that the [discovery] will continue virtually up to and including the "eve" of trial. This has all along been known to [Manning]. The parties have also exerted great efforts to have Dr. Gruellick and Dr. [D]e Alday, treating doctors, to be deposed orally notwithstanding that the period of discovery has lapsed except for the mutual agreement of the parties to extend. . . .
>
> **II. ARGUMENTS:**
>
> **(a) Dr. Graham's testimony:**
>
> Foremost, it must be emphasized here that Dr. Graham is not

> an independent medical expert hired and retained by [Sales]. He is the surgeon who did surgery to the cervical disks after the motor vehicle accident complained of. . . .
>
> . . . [Sales] never stopped [Manning] from requiring [Dr. Graham's] oral deposition to occur. And when it did happen, it was not the idea of [Sales] that Dr. Graham had an attorney representing him. Atty. Playdon, during the oral deposition. If [Manning's] counsel really feels aggrieved for what he thinks is an "incomplete" deposition, said counsel could have asked the intercession of the Court, perhaps, by a Motion to Compel, or any other proper motion, **but [Manning] failed to do so and now shifts the responsibility to [Sales]. There is nothing to stop [Manning's] counsel from cross-examining Dr. Graham and [Sales] does not agree that anything that this doctor would say comes as a "prejudicial surprise" to [Manning].**
>
> . . . .
>
> **(b) The testimony of Dr. Sakoda:**
>
> . . . .
>
> In good faith, [Sales] retained the services of Dr. Sakoda as soon as trial was imminent. In good faith, [Sales'] attorneys have periodically advised [Manning's] counsel of the scheduling attempts with Dr. Sakoda. There are volumes of records that Dr. Sakoda had to read. His report alone consists of 54 pages, a full set was delivered to [Manning's] counsel today. The report was only available this past week-end. **It is not true and [Sales] and her attorneys deny that there was no intent to schedule an appointment with Dr. Sakoda till [sic] after the settlement conference with the Court**. . . .
>
> **There is no justifiable reason than [sic] Dr. Sakoda and/or Dr. Graham would be excluded. To do so is to deprive [Sales] of her case and her Day in Court. Exclusion is not the proper remedy and should be denied.**

(Emphases in original.)

Dr. Sakoda's IME states, in relevant part, as follows:

> [A]n [IME] . . . was performed on two separate dates. The initial evaluation was performed on 17 May 2002 as scheduled. However, it was apparent that the medical records that were provided for review were not complete, and [Sales] was not able to provide the information necessary to complete the history of the events and treatment. Therefore, the missing medical records were requested and the evaluation was continued after the records were received and reviewed. After reviewing all of the records, [Sales] was examined on 29 May 2002.
>
> . . . .
>
> PRIOR OPERATIONS:

> September 1991: Anterior Cervical Fusion of C5-7 performed at Queen's Medical Center by Dr. Raymond Taniguchi for neck and right upper extremity pain
>
> 1992: Total Abdominal Hysterectomy and Bilateral Salpingo-oophorectomy
>
> 1999: Anterior Cervical Fusion of C4-5 & C6-7
>
> 15 May 2002: Laparoscopic Cholecystectomy
>
> . . . .

[Sales] is the owner of Hair Concept Inc., a beauty salon. She also works there as a Hair Stylist and Cosmetologist. She colors, cuts, trims, and styles hair. She works 5-6 days a week and works 6-8 hours a day. She used to perform manicures and pedicures before the motor vehicle accident. However, at the present time, she is unable to do the manicures and pedicures because of the limitation of her neck and the pain associated with prolonged flexion of her neck. She also has difficulty washing her client's hair for the same reason. She has to flex her neck to wash their hair. She now has one of her employees take over and do the hair washing for her clients. She used to work 12 hour days but no longer can she work for such a length of time because of the problems with neck pain. She, however, is working and working full time. Since she is the owner of her beauty salon, she can make the adjustments to her work schedule.

. . . .

CERVICAL DISK SYNDROME

> [Sales] has an injury to the Cervical Spine and the Cervical Disk Complex. Although the major complaint is the stiffness and rigidity of the neck, the major problem appears to be the pain that results from prolonged flexion, extension, and rotation of the neck. Although she has a fusion of the C4, C5, C6, and C7 vertebral bodies, if there was not pain, these individuals often have normal or near normal movement. At least, they are functional. The presence of pain indicates that there may be pain originating from other disk complexes. Since the disks have been excised and the vertebral bodies fused from C4 to C7, it is hard to believe that the present pain and difficulty with movement is related to the C4-5, C5-6, and C6-7 disk complexes. She no longer has disks at these levels and there is no movement to elicit pain from the ligaments and facet joints. Therefore, the only conclusion is that the pain is from another site or sites.

PROGNOSIS

The PROGNOSIS would be FAIR. There is no indication that the condition will improve with the passage of time. It has not been established where the present pain originates and what is the exact injury that causes the pain. It is for these reasons that the prognosis is only fair. . . .

RECOMMENDATIONS

I have no special recommendations for [Sales]. She does see her doctor routinely for her medical illnesses, and if there is any problem with her neck, she can have the problem evaluated. Thus, it appears that there is not much more that she needs to do. She is exercising and is doing her work. I see no real need to do anything different at this time.

If there is a need to know what is the diagnosis and what is the cause of her pains, further evaluation is definitely needed. The question of what to do under these circumstances can be addressed at that time.

ANSWERS TO QUESTIONS

[We] are asking you to address specifically the following issues:

1. CAUSATION: WHAT IS THE SIGNIFICANCE OR RELATION OF THE SUBJECT MOTOR VEHICLE ACCIDENT TO THE SYMPTOMS AND INJURIES CLAIMED BY MRS. SALES?

After reviewing the medical records provided and after interviewing [Sales], it is my opinion that the diagnosis of what was the injury causing the disabling pains was made only to the degree of "reasonable medical *probability*" and not to the degree of "reasonable medical *certainty*". Although the Neurological Surgeon, Dr. Jon Graham, performed disectomies and fusions of C4-5 and C6-7 disks, it was never established to the degree of reasonable medical certainty what was the condition causing the disabling pains before or after the operation. The clinical picture based on the history of the injury, the general clinical course, the findings at the time of examination, and the diagnostic tests performed do not tell what is the injury to the degree of reasonable medical certainty other than the injury is to the Cervical Spine and, most likely, to the Cervical Disk complex. In addition, at the time of operation, it appears that no attempt was made or it was not possible to identify the presence or absence of a disk protrusion which could be causing the pain. However, [Sales] indicates that the severely disabling pains were alleviated by the operation. Therefore, removing the disks at C4-5 and C6-7 and the fusion of the spine from C4 to C7 contributed to the alleviation of the disabling symptoms, i.e. the severe headaches and the severe upper extremity pains. The conclusion that can be reached is that the pain may have been of discogenic origin since removing the discs alleviated the pain. It also can be stated that stabilizing the spine from C4 to C7 also may have contributed to the alleviation of the pain which indicates that the pain may also have been related to the ligaments and articulating joints of the disk complexes that were fused.

. . . .

In summary, although the rear impact to [Sales'] car was not severe enough to warrant calling the police to file a report, there were conditions that led to an injury to [Sales'] cervical disk complex. The Cervical Spine was turned or rotated to the

> left as she looked at the on coming [sic] traffic while planning to make a right turn onto Salt Lake Boulevard. The rotated spine was then subjected to sudden extension and flexion. The spine was further vulnerable to injury because of the degenerative changes that had occurred from wear and tear of daily living. There was absent a head rest on the seat which may have resulted in more hyper extension of the neck than if the head rest had been present. The doctors that all examined [Sales] agreed that there was an injury to the neck and Cervical Spine. The clinical course was consistent with such an injury. After the operation was performed, she was much improved with the severely disabling pains being alleviated. Therefore, the only conclusion which can be reached is that the motor vehicle accident resulted in the injuries to the Cervical Spine of [Sales].
>
> 2. PRE-EXISTING: IF YOU FIND THAT [SALES] WAS "SYMPTOMATIC" BEFORE THE ACCIDENT AND TOWARDS THE TIME OF THE ACCIDENT ON THE RELEVANT PORTIONS OF HER BODY AFFECTED BY THE ACCIDENT, HOW MUCH PERCENTAGE WOULD YOU ATTRIBUTE TO THE PRE-EXISTING CONDITION?
>
> . . . The diagnoses given by the doctors who treated her all indicated that the pains were consistent with a neck or Cervical Strain. Therefore, there was a pre-existing condition involving the Cervical Spine that caused pain. An apportionment of [Sales'] present condition is therefore indicated.
>
> . . . Her condition is much more severe than the condition in which she found herself prior to the motor vehicle accident of 06 May 1998. Therefore, it is my opinion that an apportionment of her prior condition is indicated.
>
> Based on an evaluation of [Sales'] present condition as compared to what it was prior to the motor vehicle accident, I have arrived at an apportionment of her condition of the Cervical Spine.
>
> APPORTIONMENT OF THE PRESENT CONDITION OF THE CERVICAL SPINE:
>
> Prior to 06 May 1998 Motor Vehicle Accident: 4.6%
>
> Present Condition related to Motor Vehicle Accident . .95.4%

At a hearing on Wednesday, June 12, 2002, the following was stated, in relevant part:

> THE COURT: . . . .
>
> Motion number 2 is [Manning's] motion to exclude any and all testimony by Thomas Sakoda. . . . [W]as the report ever provided?
>
> [COUNSEL FOR MANNING]: Yes, Your Honor. It was delivered on Monday. This past Monday [June 10, 2002].
>
> THE COURT: This past Monday?

. . . .

THE COURT: Isn't it a little late to be providing expert opinions at this point? This is a retained expert?

. . . .

THE COURT: Two weeks before trial you provide a report of a retained expert?

[COUNSEL FOR SALES]: . . . [W]e have mentioned him already in our pretrial statements. And [counsel for Manning] was knowledgeable of that. He knew that all along. Even during our settlement conferences, Your Honor, he was already known. It was just that we have difficulty having him examine our client.

And also, there was a lot of records that he had to review. And the report itself is I think over 50 pages, 54 pages. So there is really no surprise, no prejudice for [counsel for Manning]. . . .

THE COURT: . . . [I]n the Court's view, the fact that the report itself is 54 pages creates prejudice in and of itself. I don't think that two weeks before a jury trial that's been pending for -- a year and a half is it? Two weeks before trial is just much too late. And the Court is going to grant the motion to exclude any testimony by Dr. Sakoda.

. . . .

THE COURT: He's a retained expert who reviewed records and examined. So he basically conducted . . . [a] plaintiff's medical examination. . . .

. . . .

THE COURT: Two weeks before trial is much too late to provide a 54 page report to defense counsel.

. . . .

THE COURT: It's completely prejudicial. And we cannot allow those kinds of litigation procedures.

. . . .

THE COURT: . . . .

Let's see. Next is [Manning's] motion . . . to limit the trial testimony of Jon F. Graham, [M.D.,] to the opinions disclosed during oral depo. And your objection to this was?

[COUNSEL FOR SALES]: Our objection is that it wasn't our fault that he testified the way he testified. And we did not have any control over that. . . . And he is not . . . an independently retained expert witness too. He was the surgeon. . . .

THE COURT: Well, you did list him as an expert witness; is

> that correct?
>
> [COUNSEL FOR SALES]: Treating and expert witness, I believe.
>
> . . . .
>
> THE COURT: Well, the kinds of opinions you were requesting were causation and apportionment; is that correct?
>
> [COUNSEL FOR MANNING]: Yes, Your Honor.
>
> THE COURT: Okay. Then I think it's only fair that they be provided notice or have notice of what opinions or have notice of what opinions would be stated. Since he stated no opinions, then basically I see no alternative but to grant this motion.
>
> This motion will be granted. He will be limited to the opinions that he has already expressed in his deposition, or which are clearly included in his medical records that you already have.
>
> . . . .
>
> THE COURT: . . . Did you serve interrogatories?
>
> [COUNSEL FOR MANNING]: Yes, Your Honor.
>
> THE COURT: Okay. So you are required to provide him with the subject matter on which the expert is expected to testify, and the substance and facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Whether or not it's a specially retained expert or not. And if you haven't provided him with that, then the expert will not be allowed to testify.
>
> [COUNSEL FOR SALES]: I cannot answer that right now, Your Honor. I think that we provided [counsel for Manning] that. I don't have the records with me. But in any event, [counsel for Manning] has no problems about that.
>
> THE COURT: He has filed this motion to exclude him from testifying as to any opinions not expressed in his deposition. And my ruling is that Dr. Graham will only be able to testify to opinions that he testified to in his deposition that are stated in the medical records, his medical records, and were properly provided pursuant to Rule 26 of the Rules of Civil Procedure. Whatever those opinions are.

On June 13, 2002, counsel for Sales filed notice that she would be taking Dr. De Alday's oral deposition on June 14, 2002, at 3:00 p.m. On June 18, 2002, counsel for Sales filed "Plaintiff Dardanela Sales's Designation of Depositions." One of

the depositions designated was the deposition of Dr. De Alday taken on June 14, 2002.

On June 19, 2002, counsel for Sales filed "Plaintiff Dardanela Sales's Motion for Reconsideration of Court Order Granting Defendant Tokuhisa Manning's Motion in Limine to Exclude Any and All Testimony by Thomas H. Sakoda, M.D." In an accompanying memorandum, counsel for Sales stated, in relevant part, as follows:

> Trial was scheduled in the week of June 24, 2003. Thus, the parties' attorneys agreed verbally, unreduced to writing, that oral depositions can continue up to and including the day before trial, an open period so to speak, to accommodate any need for such in view of the approaching trial. **This open discovery agreed to by the parties is deemed to be a waiver of the cutoff date of discovery**.
>
> Thus, pursuant to agreement as stated above, the parties continued with their ongoing discovery. Without the agreement, discovery cut-off date would have been April 25, 2002. On April 16, 2002, Dr. Calvin Kam who was independently retained as an "expert" witness by [Manning], made an extensive IME report on [Sales]. A copy may have been received by [Sales'] counsel on April 22, 2002, the Monday following mailing by [Manning's] counsel. This would have been three days before the discovery cutoff date. However, [Sales] did not complain because of the verbal agreement among counsel extending the discovery period.
>
> Having received the said report of [Manning's] expert, [Sales] proceeded to retain the services of Dr. Thomas H. Sakoda. **Dr. Sakoda was already named in [Sales'] final naming of witnesses filed Feb. 25, 2002 and the substance of his testimony and opinions were stated therein**. . . .
>
> . . . .
>
> The 54 pages of medical report of Dr. Sakoda was [sic] immediately transmitted to [Manning's] counsel on June 10, 2002, upon receipt thereof by [Sales'] counsel. Exhibit "3." The doctor's report starts by showing the dates when Dr. Sakoda examined [Sales], and these were **May 17 and May 29, 2002**. (See Plaintiff's Trial Exhibit Number P-48 for a copy of Dr. Sakoda's report.) Notwithstanding, [counsel for Manning] in his Motion in Limine implied that on May 29, 2002, he was being told by [Sales'] counsel that an appointment with Dr. [S]akoda was still "to be scheduled". This was not true.

> When [Manning's] counsel filed his Motion in Limine and when it was heard, said counsel did not argue the discovery cutoff date . . . . Neither did he argue that [Sales] is in violation of the discovery rules and as amended by the agreement of the parties. He just advanced a nebulous excuse that "[counsel for Manning] has still not been provided with Dr. Sakoda's report and has effectively been precluded from discovery [of] Dr. Sakoda's opinions. His declaration is dated . . . June 2, 2002, the certificate of service [is] dated June 3, 2002, yet, he admits he was still inquiring for the report as late as May 29, 2002, **and without cautioning [Sales'] counsel that he was to end the discovery period agreed on**. In the Motion in Limine heard on June 24, 2002, [Manning's] counsel complained of "lateness" for the first time. Meantime, [Manning] has already been provided with the written report of Dr. Sakoda on June 10, 2002, as soon as the report was received by [Sales'] counsel.
>
> Although the report is 54 pages, the opinions of Dr. Sakoda in answer to the questions of [Sales] consist of six and a half (6½) pages from page 48 to page 54 and the rest is just a summation of past and present events and physical conditions of [Sales] which [Manning] already know [sic] or should know from the records and from the report of their alleged witness, Dr. Kam.
>
> . . . .
>
> During the hearing of the Motion in Limine, [Sales'] attorneys did not have an immediate and ready response to the Court on the questions of the Court regarding responses to interrogatories, etc. because this was no[t] specifically addressed and placed in issue by [Manning's] Motion in Limine. [Sales] was not prepared to address an issue that was not there. Regardless, the files and records of this case support what the events were **except that [Manning] did not specifically admit that there was an open discovery going on**.

(Emphases in original.)

At a hearing on Monday, June 24, 2002, the following was stated, in relevant part:

> THE COURT: . . . The motion in limine was filed on June 3rd. And you had, you know, sufficient period of time to respond before the June 12th hearing. You said nothing about . . . an agreement to keep discovery open. You said nothing about this Dr. Kam's report being received in April. None of these arguments were raised.
>
> . . . .
>
> THE COURT: You didn't say that you had received their expert's report in April. You had a lot of time to respond to their motion in limine.
>
> Now, [counsel for Manning,] . . . was there an agreement to

keep discovery open until the date before trial?

[COUNSEL FOR MANNING]: Your Honor, no. There was . . . an agreement to the extent that [Sales] did not want to retain Dr. Sakoda before the settlement conference which was held on April 29th. And so if we can settle, I don't want to incur the cost. I did not have a problem with that. That is correct. That is true; we did agree to that.

But there was never an agreement, your Honor, nor would I ever agree in any case to say that discovery is open up until the day before trial. That's ridiculous.

THE COURT: So when were you expecting Dr. Sakoda's report?

[COUNSEL FOR MANNING]: Well, you know, honestly, Your Honor, once we went to the settlement conference and we failed to settle and [Sales'] demand at that time was more than the available policy limits I found out, then I expected the report to be produced shortly thereafter. And that's why . . . I asked after the conference, Okay, let's get going. I was trying to prod them to let's go on this.

And then a month after the conference on May 29th, still nothing. And that's when I had to file the motion, Your Honor, because I couldn't take the risk that I might have the report dropped on my desk on Friday before we start trial on Monday or Tuesday.

[COUNSEL FOR SALES]: Your Honor, please, if I may call the attention of the Court on the declaration of [counsel for Manning] under oath. He declared that on May 29 he was still trying to call up our office inquiring about the report of Dr. Sakoda. May 29, Your Honor.

Now, within two to three days thereafter, he was already swearing under oath that . . . he was prejudiced because of the late reporting. That is the date of his declaration. But why would he still be inquiring two to three days before if indeed there was no discovery -- open discovery that was agreed on? There was. It is, I think, a misstatement that [counsel for Manning] would say to the Court that there was no such agreement.

There's a reason why he was inquiring as late as May 29, because the parties have agreed that discovery is ongoing. That's the only reason, Your Honor, he was inquiring up to May 29. And the declaration was June 2nd. About three days thereafter I think is the date of the declaration.

[COUNSEL FOR MANNING]: Your Honor, the reason I was inquiring is because I thought there may be a chance . . . that the report was done and was sitting in a file and somebody had just over looked sending it to me because I hadn't been calling every day and saying, Hey, where's Dr. Sakoda's report?

So I thought, [o]kay. I'm going to call and see if the report's there. Then, you know, we had an agreement and that would be okay. But the report wasn't there yet.

> And also, the deadline for filing the motions in limine was June 3rd. If I did not file the motion in limine by that time and the report was dropped on my desk the Friday before we start the Monday or Tuesday trial and then I objected at that time, then I'm sure the argument back would have been, [w]ell, [counsel for Manning], you never raised the motion in limine to exclude the witness; you agreed to an open extension.
>
> So I had to protect my client's interest as well. I had to protect my ability to defend this case as well. So that's why, yes, I did ask on the chance that maybe the report was sitting somewhere in their office on May 29.
>
> But short of that, I have to file the motion, Your Honor. I had no choice, and I stand by that motion.
>
> . . . .
>
> [COUNSEL FOR SALES]: June 12th was the hearing of the motion in limine.
>
> THE COURT: Yes.
>
> [COUNSEL FOR SALES]: June 10 [counsel for Manning] has already received . . . because I think it was delivered to his office.
>
> [COUNSEL FOR MANNING]: It was.[2]
>
> [COUNSEL FOR SALES]: So he admitted it was delivered to his office. You're talking about two days before the hearing of the motion in limine. That's my point, Your Honor.
>
> On May 29 he was still looking for the report. That means that he knew that there was this open discovery going on. And when he made the declaration, it was about the same thing, about two to three days he was already declaring that he was prejudiced. But he received the report on June 10. So what difference does it make, two to three days?
>
> THE COURT: The difference it makes, [counsel for Sales], is

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[2] In Defendant Appellee/Cross-Appellant Tokuhisa Manning's Answering Brief, counsel for Defendant-Appellee/Cross-Appellant Tokuhisa Manning states that

> Dr. Sakoda's 54 page report was finally provided to Tokuhisa Manning on June 12, 2002, less than two weeks before trial. Even as of the June 12, 2002 production, however, the report was **not** final as Dr. Sakoda stated that "If there is a need to know what is the diagnosis and what is the cause of her pains, further evaluation is definitely needed."

(Citation omitted; emphasis in original.)

The reference to "June 12, 2002, less than two weeks before trial" is wrong. The record shows that Dr. Sakoda's report was provided to Manning on June 10, 2002, exactly two weeks before the scheduled trial.

that unfortunately these are arguments you should have raised in your memorandum in opposition to the June 3rd motion in limine and/or at the June 12th hearing on the motions in limine.

You filed this motion for reconsideration one week after the hearings on June 12th. We granted this ex parte to shorten time. This motion was filed on June 19. You could have raised these arguments well before the June 12th hearing. You did not do so. If you had raised these arguments, I may have not ruled the way I did.

But now you didn't raise these arguments. We have a hearing on June 12th. I grant the motion to strike. I have no idea that this other stuff is going on. You file a motion for recon one week later which is heard today, the day before we start jury trial, within 24 hours. And at this point, this motion for reconsideration is too late.

. . . .

THE COURT: We are not continuing the trial.

. . . .

[COUNSEL FOR SALES]: . . . .

When [counsel for Manning] said in his declaration that he was still calling on May 29 and I told him or somebody in my office told him we were still going to schedule Dr. Sakoda, that is not true, Your Honor, because Dr. Sakoda already saw my client on May 17. He already saw my client on May 17. And the second interview with my client was on May 29.

. . . .

[COUNSEL FOR SALES]: Your Honor, if you're inclined to deny our motion for reconsideration, I think it's only fair and just . . . that [Dr. Sakoda] should be allowed as a rebuttal witness. We will not ask for more. But he should be allowed to come in as a rebuttal. . . .

THE COURT: Rebuttal to Dr. Kam?

. . . .

[COUNSEL FOR SALES]: Yes. Yes, Your Honor. I think that would be fair. It's just I just couldn't believe that because of our good-faith efforts to accommodate, as a matter of fact both sides here on the ongoing discovery, that would . . . cause a severe injustice to my client.

And right now my client is looking at a possible malpractice against the lawyers for trying to protect her interest, for trying to do things in good faith with the other side.

. . . .

[COUNSEL FOR MANNING]: Your Honor, as far as rebuttal, I

> believe the case law is clear that it wouldn't be appropriate. I believe the case is [Cafarella v. Char. 1 Haw. App. 142, 615 P.2d 763 (1980)] that sets forth that rebutttal witnesses are only for matters that are surprise or could not have been anticipated with reasonable preparation. I don't see how Dr. Sakoda fits in those parameters.
>
> THE COURT: [Counsel for Manning], when did you provide Dr. Kam's report to [Sales]?
>
> [COUNSEL FOR MANNING]: I . . . was not prepared to address that today. I did not know that was going to be an issue.
>
> But I will say that the report was provided certainly by the discovery cutoff. I personally delivered the report, ...
>
> And again it was -- it would clearly have been done before the discovery cutoff. To the extent that it was close to the end of the discovery cutoff, I told them any time they wanted to take his deposition, that would be fine. . . .
>
> . . . .
>
> THE COURT: . . . .
>
> . . . At this time, your motion for reconsideration is denied.
>
> . . . .
>
> [COUNSEL FOR SALES]: I know that you made a ruling. Could I have -- I wish to be allowed to renew some kind of a motion to the effect depending on how the trial goes because Dr. Sakoda is really very important to the case of my client.
>
> THE COURT: I'm so sorry, [counsel for Sales]. But . . . the Court cannot allow Dr. Sakoda to testify. We have the trial tomorrow. Jury is coming in tomorrow morning, all right? Thank you.

In the answering brief, counsel for Manning states, in relevant part, as follows:

> [Sales] knew, however, at least as of Dr. Graham's oral deposition on January 23, 2002, that her own treating surgeon did **not** support her claim that the 1999 diskectomy was caused by this accident. Dr. Graham's testimony that this accident "might be related" is insufficient to carry [Sales'] burden of proof, which requires a preponderance of the evidence, not a mere possibility. Bluntly, at least as of Dr. Graham's January 2002 deposition, [Sales] **must** have known that her case was in trouble.
>
> In the wake of Dr. Graham's deposition testimony, it would have been most prudent for [Sales] either (1) to settle this case or (2) to ensure that [Sales'] designated forensic expert would support her theory since her treating doctor did not. Indeed,

> when [Sales] refused to allow Dr. Sakoda to be deposed before the April 29, 2002 settlement conference, [Manning] honestly expected that [Sales] planned to settle this case.
>
> Instead, [Sales] appeared at the settlement conference and demanded a settlement amount substantially greater than the available insurance coverage, meaning that [Manning] would have had to pay a part of the settlement our of her own pocket. [Sales'] militant stance thereby **forced** this case to trial.
>
> But, if [Sales] intended to force this case to trial, there is absolutely no good reason why [Sales] delayed in retaining Dr. Sakoda and no good reason why [Sales] failed to make sure that Dr. Sakoda reached his final opinions before the April 25, 2002 discovery cut-off. Again, [Sales] had the burden of proof in this case. Since [Sales'] own treating doctor did not support her position, [Sales] had absolutely no way to prevail except through retained testimony from a forensic expert. That being the case, [Sales] should have provided Dr. Sakoda with all necessary records and materials at the **earliest opportunity** to prepare for trial, but inexplicably she did not.
>
> In compliance with the court's pre-trial order, on June 2, 2002 [Manning] filed a motion in limine to exclude Dr. Sakoda's testimony from trial in order to avoid undue surprise and prejudice. Even then, [Manning] did not receive Dr. Sakoda's report until June 12, 2002, **seven weeks** after the discovery-cut-off and **less than two weeks** before the start of trial. Dr. Sakoda's report turned out to be 54 pages long. And even then, report was not final. It is unclear when the report would have been produced had [Manning] refrained from filing the motion in limine. Under the circumstances there was no time for [Manning] to conduct Dr. Sakoda's oral deposition or otherwise to prepare adequately for trial. The trial court correctly granted [Manning's] motion in limine to exclude Dr. Sakoda's testimony. . . .
>
> . . . .
>
> To the extent that [Manning] did agree to a relaxation of the discovery cut-off in this case, this was solely to allow [Sales] to avoid litigation costs and expert's fees in **anticipation of reaching a settlement** at the April 29, 2002 settlement conference. [Sales] was **well aware** that [Manning] needed to conduct Dr. Sakoda's oral deposition and to have the report submitted to [Manning's] medical expert, amongst other things, in order to prepare properly for trial if this case did not settle.
>
> Since there was no time to do any of these things following receipt of Dr. Sakoda's report on June 12, 2002, the trial court's exclusion of Dr. Sakoda as a forensic expert was completely consistent with the principles established in Glover.

(Emphases in original.)

The jury trial commenced on June 25, 2002, and the jury

rendered its verdict on July 1, 2002.

DISCUSSION

1.

Sales contends that the court reversibly erred on June 12, 2002 when it granted Manning's motion and barred Sales from presenting her retained expert, Dr. Sakoda, as a witness. Sales alleges that "[t]he parties mutually agreed to continue with their discovery to trial, which was not terminated at any time, not even by a 'courtesy notice' by one to the other." Sales argues that "the Court completely disregarded the obvious fact that the parties had reached an agreement to proceed with discovery, waiving the discovery cut off date provided by the rules."

As noted above, counsel for Manning admitted that he had agreed to allow Sales not to retain Dr. Sakoda until after the April 29, 2002 settlement conference and to keep discovery open for that purpose.[3] In other words, he agreed that after the April 29, 2002 settlement conference, Sales would have time to retain Dr. Sakoda, and then Dr. Sakoda would have time to obtain

[3] In light of this agreement, it is difficult, if not impossible, to understand the following argument in the answering brief:

> But, if [Sales] intended to force this case to trial, there is absolutely no good reason why [Sales] delayed in retaining Dr. Sakoda and no good reason why [Sales] failed to make sure that Dr. Sakoda reached his final opinions before the April 25, 2002 discovery cut-off.

and review the relevant records, examine Sales, and prepare his IME. The only denial by counsel for Manning was that he agreed to keep discovery open until the day before trial. He admitted that had the report been available on May 29, 2002, it would have been acceptable. His only stated concern was that

> the deadline for filing the motions in limine was June 3rd. If I did not file the motion in limine by that time and the report was dropped on my desk the Friday before we start the Monday or Tuesday trial and then I objected at that time, then I'm sure the argument back would have been, [w]ell, [counsel for Manning], you never raised the motion in limine to exclude the witness; you agreed to an open extension.

At the reconsideration hearing on June 24, 2002, the court said to counsel for Sales that, in response to Manning's June 3, 2002 motion, "You said nothing about . . . an agreement to keep discovery open. You said nothing about this Dr. Kam's report being received in April. None of these arguments were raised." When counsel for Sales pointed out that counsel for Manning was still looking for Dr. Sakoda's IME on May 29, 2002, that he had received the report on June 10, 2002, and there was no evidence of any prejudice to Manning, the court responded, in relevant part, as follows:

> THE COURT: . . . [U]nfortunately these are arguments you should have raised in your memorandum in opposition to the June 3rd motion in limine and/or at the June 12th hearing on the motions in limine.
>
> . . . You did not do so. If you had raised these arguments, I may have not ruled the way I did.
>
> But now you didn't raise these arguments. We have a hearing on June 12th. I grant the motion to strike. I have no idea that this other stuff is going on. . . .

This response by the court indicates that the court was

unaware that, in the June 10, 2002 memorandum in opposition to Manning's June 3, 2002 motion, counsel for Sales stated, in relevant part, as follows:

> In view of the severity of injuries and the rather simultaneous arbitration proceedings and the critical short weeks prior to the scheduled trial, [Sales] and [Manning], through their counsel, agreed although there was no written stipulation filed, that the [discovery] will continue virtually up to and including the "eve" of trial. Thus, Dr. Sakoda finished his evaluation of [Sales]. This has all along been known to [Manning]. The parties have also exerted great efforts to have Dr. Gruellick and Dr. [De] Alday, [Sales'] treating doctors, to be deposed orally notwithstanding that the period of discovery has lapsed except for the mutual agreement of the parties to extend.

Moreover, as indicated by the transcript of the hearing on June 12, 2002, quoted above, counsel for Sales cannot be faulted for not discussing these matters. The court did not allow counsel for Sales the opportunity to discuss these matters. As noted above, the court summarily concluded, as if a matter of law rather than discretion, as follows:

> [I]n the Court's view, the fact that the report itself is 54 pages creates prejudice in and of itself. I don't think that two weeks before a jury trial that's been pending for -- a year and a half is it? Two weeks before trial is just much too late. And the Court is going to grant the motion to exclude any testimony by Dr. Sakoda.

Moreover, the court came to this conclusion without knowing the content of Dr. Sakoda's 54-page IME.

We take judicial notice that it is the practice of the trial courts to allow counsel to agree to extend the discovery cutoff date imposed by RCCH Rule 12(r). There was such an agreement in this case. If Manning had received Dr. Sakoda's IME on May 29, 2002, there would have been no problem. Manning

received Dr. Sakoda's IME on June 10, 2002.

RCCH Rule 12.1(a)(6) (2003) states, in relevant part, as follows:

> (6) Sanctions. The failure of a party or his attorney . . . , the neglect of a party or his attorney . . . , or the failure of a party . . . shall, unless a good cause for such failure or neglect is shown, be deemed an undue interference with orderly procedures. As sanctions, the court may, in its discretion:
>
> (i) Dismiss the action on its own motion, or on the motion of any party or hold a party in default, as the case may be;
>
> (ii) Order a party to pay the opposing party's reasonable expenses and attorneys' fees;
>
> (iii) Order a change in the calendar status of the action;
>
> (iv) Impose any other sanction as may be appropriate.

In Azer v. Courthouse Racquetball Corp., 9 Haw. App. 530, 539-40, 852 P.2d 75, 81 (1993), however, this court stated, in relevant part, as follows:

> A trial court's imposition of a discovery abuse sanction is reviewable on appeal for abuse of discretion. A trial court abuses its discretion whenever it exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party.
>
> Moreover, dismissal of a pending action by the trial court with prejudice is not favored, and a full trial on the merits is favored. An appellate court will uphold a dismissal with prejudice only where the record clearly shows delay or contumacious conduct and where lesser sanctions would not serve the best interest of justice.

(Citations omitted.)

In this case, the trial court's order barring Dr. Sakoda from testifying was, in essence, a dismissal of most of Sales' case. An appellate court will affirm such action by the trial court "only where the record clearly shows delay or contumacious conduct and where lesser sanctions would not serve

the best interest of justice."

Manning received Dr. Sakoda's IME on June 10, 2002. At the June 12, 2002 hearing, the relevant questions were (a) what else, if anything, Manning reasonably wanted and was entitled to, (b) whether and how he could obtain it, and (c) whether lesser sanctions were appropriate and would serve the best interest of justice. If Manning needed a deposition of Dr. Sakoda, he may have had time for it. We note that on June 18, 2002, counsel for Sales filed "Plaintiff Dardanela Sales's Designation of Depositions" including Dr. De Alday's deposition taken on June 14, 2002.

In light of the record, we conclude that the court abused its discretion when it granted Manning's motion barring Dr. Sakoda from testifying.

2.

Sales contends that the court reversibly erred when it granted Manning's motion and ruled "that Dr. Graham will only be able to testify to opinions that he testified to in his deposition that are stated in the medical records, his medical records, and were properly provided pursuant to Rule 26 of the Rules of Civil Procedure. Whatever those opinions are." Sales argues that

> [t]he Court disregarded the fact that [Manning] chose not to Move to Compel answers from Dr. Graham in the five months [sic] period from the date of his deposition to the trial. The Court further disregarded the reason why the testimony of Dr. Graham in his oral

> deposition was limited - such was upon the directions of his independent counsel, and this was not attributable to [Sales'] conduct.

In her answering brief, Manning responds, in relevant part, as follows:

> Dr. Graham's oral deposition was completed on January 23, 2002. During his oral deposition, Dr. Graham provided testimony regarding the legal causation issue, but refused to provide testimony regarding an apportionment of [Sales'] claimed injuries and treatment.
>
> Neither Dr. Graham nor [Sales] ever gave any notice of any potential change in these opinions. Under the circumstances Dr. Graham's trial testimony was properly limited to those opinions disclosed during his oral deposition so as to avoid unfair prejudice and surprise.

Sales responds that Manning "fails to address its own duty to **move to compel** the witness to comply with an **order of the Court** so that the expert could supplement his deposition and before the opposing party is sanctioned." (Emphases in original.)

We disagree with Sales and cite Hawai‘i Rules of Civil Procedure (HRCP) Rule 26(e) (2003):

> (e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:
>
> (1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.
>
> (2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

> (3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

In light of HRCP Rule 26(e), we conclude that when, during oral deposition, a treating physician whom plaintiff has named as her expert witness refuses to render an opinion on a relevant issue and thereafter does not express any willingness to render such an opinion, the court does not abuse its discretion when it rules that said treating physician "will only be able to testify to opinions that he testified to in his deposition that are stated in the medical records, his medical records, and were properly provided pursuant to Rule 26 of the Rules of Civil Procedure. Whatever those opinions are."

3. and 4.

Point 3 challenges a document received into evidence at trial, and point 4 challenges an instruction given to the jury. Our decision to vacate the judgment and remand for a new trial is the basis for our decision not to discuss or decide these issues.

CROSS-APPEAL

Manning cross-appeals the August 6, 2002 order granting in part and denying in part Manning's motion for costs. Our decision to vacate the judgment and remand for a new trial is the basis for our decision not to discuss or decide these issues.

CONCLUSION

Accordingly, the August 6, 2002 Final Judgment is vacated and this case is remanded for a new trial.

DATED: Honolulu, Hawai‘i, January 28, 2004.

On the briefs:

Erlinda Dominguez and
Ronald N. Federizo
for Plaintiff-Appellant,
Cross-Appellee.

Curtis C. Kim
for Defendant-Appellee,
Cross-Appellant.

Chief Judge

Associate Judge

Associate Judge