

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26003

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

ARTHUR J. BERBIG, Plaintiff-Appellant,
and
WORKCOMP HAWAII INSURANCE COMPANY, INC.,
Plaintiff-Intervenor-Appellee,

vs.

JARROD A. JENSEN, Defendant-Appellee,
and

JOHN DOES 1-50, JANE DOES 1-50, DOE CORPORATIONS 1-50,
DOE NONPROFIT CORPORATIONS 1-50, DOE PARTNERSHIPS 1-50,
DOE UNINCORPORATED ASSOCIATIONS 1-50,
DOE LIMITED LIABILITY COMPANIES 1-50,
DOE GOVERNMENTAL AGENCIES 1-50, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CV. NO. 01-1-0659)

SUMMARY DISPOSITION ORDER

(Watanabe, Presiding Judge, Foley, and Nakamura, JJ.)

In this personal injury negligence action, Plaintiff-Appellant Arthur J. Berbig (Berbig or Plaintiff) appeals from the April 16, 2003, Judgment of the Circuit Court of the First Circuit (circuit court).¹ Based on a jury's special verdict, the circuit court entered judgment in the amount of \$30,000 in favor of Berbig and Plaintiff-Intervenor Workcomp Hawai'i Insurance Company, Inc. (Workcomp Hawai'i) and against Defendant-Appellee Jarrod A. Jensen (Jensen or Defendant).

Berbig and Jensen were involved in a multi-vehicle, rear-end-collision accident (the accident). The Toyota Camry driven by Jensen rear-ended Jean Carr's Plymouth Reliant, which

¹ The Honorable Karen N. Radius presided.

K. HAMAKAHO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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rear-ended Berbig's Dodge van, which struck Harlene Simonelli's motorcycle. Berbig sued Jensen, seeking damages based on Jensen's alleged negligence. Workcomp Hawai'i, which had paid Berbig approximately \$146,000 in workers' compensation benefits on behalf of his employer, intervened to recoup the benefits it had paid from any judgment or settlement in favor of Berbig. Prior to trial, Jensen stipulated to liability for the accident. The jury returned a special verdict finding that Jensen's negligence was the legal cause of damages to Berbig/Workcomp Hawai'i and that Berbig's damages were \$20,000 in special damages and \$10,000 in general damages.

After careful review and consideration of the record and the briefs submitted by the parties, we hold as follows:

1. Berbig argues that the circuit court erred in: 1) refusing to compel Dr. Clarissa Burkert (Dr. Burkert), Jensen's primary medical expert, to provide records or information that would provide a more specific breakdown of the percentage of medical-legal work Dr. Burkert performed for defense interests versus plaintiff's/claimant's interests; and 2) precluding Berbig from eliciting evidence at trial that the defense had paid for an attorney to represent Dr. Burkert in opposing Berbig's request for documents. Berbig claims that the jury's verdict must be overturned because the circuit court's errors prevented him from showing that Dr. Burkert had a "defense bias" or a built-in "defense mindset," thereby depriving him of a fair trial.

We need not address whether the circuit court's rulings constituted error because the alleged errors were harmless and did not affect Berbig's substantial rights. Hawai'i Rules of Civil Procedure (HRCP) Rule 61. Although the circuit court did not compel Dr. Burkert to disclose information that would allow Berbig to determine the percentage of medical-legal work Dr. Burkert performed for defense interests, Dr. Burkert testified at trial that the "majority" of the medical-legal work she did was for the defense side.² Berbig and Workcomp Hawai'i further elicited evidence at trial that Dr. Burkert had been chosen and hired by the defense to examine Berbig; that the fees for her services in this case were approximately \$8,400; that 90 percent of the work she did was medical-legal and only the remaining 10 percent involved the treatment of patients; and that she handled between 20 and 30 medical-legal cases per month.

Berbig was precluded from eliciting evidence that the defense had hired a lawyer to represent Dr. Burkert in opposing Berbig's attempt to obtain records from Dr. Burkert. The jury, however, heard evidence that Dr. Burkert did not pay for the lawyer who represented her at her deposition.

We conclude that the jury had "sufficient information to appraise the biases and motivations of [Dr. Burkert]" and, accordingly, that the circuit court's rulings did not deprive

² Dr. Clarissa Burkert (Dr. Burkert) testified in her deposition and at trial that she did not know the percentage of medical-legal work she performed for defense interests; she could only state that a majority of such work was performed for defense interests.

Berbig of his right to fair trial. State v. White, 92 Hawai'i 192, 205-06, 990 P.2d 90, 103-04 (1999) ("When the trial court excludes evidence tending to impeach a witness, it has not abused its discretion as long as the jury has in its possession sufficient information to appraise the biases and motivations of the witness.") Given the substantial evidence of bias adduced at trial, the impeachment value of the additional evidence sought by Berbig would not have been significant. Any errors in the circuit court's rulings were harmless and did not affect the outcome of the case. HRCF Rule 61; see Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214, 243-44, 948 P.2d 1055, 1084-85 (1997) (holding that an erroneous jury instruction was harmless where "it is not reasonably likely an outcome more favorable to [the losing party] would have resulted absent the error").

2. Berbig argues that the circuit court erred in permitting Dr. Burkert to testify that certain of the injuries claimed by Berbig were not caused by the accident but were more likely attributable to Berbig's participation in sports activities or to incidents involving injuries unrelated to the accident. Berbig contends that Dr. Burkert's testimony, which suggested causes unrelated to the accident for the injuries claimed by Berbig, should have been excluded because Jensen had stipulated that he was not seeking apportionment with respect to the injuries claimed by Berbig and because there was no evidence to support apportionment. We disagree.

Berbig confuses apportionment with causation. Jensen did not concede that all of the injuries claimed by Berbig were caused by the accident. Berbig had the burden of proving that the injuries he claimed were caused by the accident, and Jensen was entitled to introduce evidence casting doubt on Berbig's allegations.

At trial, Dr. Burkert opined that Berbig sustained only a mild whiplash injury to his neck as a result of the accident that should have resolved within six weeks. She further opined that Berbig's right shoulder and carpal tunnel injuries were not causally related to the accident because there was "no mechanism" for such injuries presented by the accident. Dr. Burkert testified that Berbig stated he was an "adrenaline junkie" and had participated in a variety of sports, including extreme skiing, rock climbing, kick-boxing on a competitive level, surfing, jet skiing, "weight [sic] boarding," and basketball. She also stated that he had a history of injuries to his right shoulder and shoulder girdle area, including a broken collar bone and dislocated right elbow. Dr. Burkert testified that Berbig's right shoulder injury was more likely to have been caused by his participation in sports activities or by prior injuries than by the accident. We conclude that Dr. Burkert's testimony regarding Berbig's sports activities and prior injuries was relevant to whether the injuries claimed by Berbig were caused by the accident. Hawaii Rules of Evidence (HRE) Rule 401 (1993). The

circuit court did not err in permitting such testimony. HRE Rule 402 (1993).

3. We reject Berbig's contention that the circuit court's admission of Dr. Burkert's curriculum vitae into evidence constituted "reversible error." Berbig does not identify anything unduly prejudicial in Dr. Burkert's curriculum vitae. We conclude that any error in the admission of Dr. Burkert's curriculum vitae was harmless and did not affect Berbig's substantial rights. HRCP Rule 61.³

4. Berbig argues that the circuit court committed reversible error in permitting Jensen's counsel to argue in closing that Jean Carr's lack of visible injuries meant that Berbig must not have been hurt. Jean Carr (Carr) was the driver of the car that rear-ended Berbig's van after Jensen's car rear-ended Carr's vehicle.

There was no explicit reference to Carr's lack of injuries in the closing argument of Jensen's counsel. Jensen argues that during trial, Berbig had constantly "paraded" before the jury the photograph of Carr's vehicle, which Jensen claims had "considerably more damage than [Jensen's] van." Jensen

³ We note that although the trial transcript reflects that Dr. Burkert's curriculum vitae was admitted in evidence, the Exhibit List filed by the Circuit Court of the First Circuit (circuit court) does not show that Dr. Burkert's curriculum vitae was received in evidence. Nor was Dr. Burkert's curriculum vitae included as part of the trial exhibits in the record on appeal. Thus it is not clear that the jury ever saw Dr. Burkert's curriculum vitae. In any event, we were able to review a copy of Dr. Burkert's curriculum vitae that was part of the appellate record as an exhibit to "Defendant Jarrod A. Jensen's Memorandum in Opposition to Plaintiff-Intervenor's Motion In Limine to Limit Expert Testimony of Clarissa T. Burkert, M.D., filed 2/7/03."

contends that his counsel's closing argument was designed to remind the jury that it was Berbig, not Carr, who was suing and thus it was the damage to Jensen's van that was relevant.

Jensen's interpretation of his counsel's closing argument is reasonable and provides a valid justification for his counsel's remarks. On the other hand, the inferences Berbig seeks to draw from the remarks of Jensen's counsel are not obvious. We conclude that any error by the circuit court in permitting the remarks of Jensen's counsel challenged by Berbig was harmless and did not affect the outcome of the case. HRCF Rule 61.

5. We reject Berbig's claim that the circuit court abused its discretion in interrupting Berbig's testimony to permit witnesses of Jensen and Workcomp Hawai'i to be called out of turn. A trial court has "broad discretion in determining the order and mode of interrogation." Commentary to HRE Rule 611 (1993). The circuit court had valid reasons for allowing the witnesses to be called out of turn and did not abuse its discretion in ruling on the sequence of the witnesses. See Aga v. Hundahl, 78 Hawai'i 230, 243, 891 P.2d 1022, 1035 (1995).

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IT IS HEREBY ORDERED that the April 16, 2003, Judgment of the Circuit Court of the First Circuit is affirmed.

DATED: Honolulu, Hawai'i, at August 29, 2006.

On the briefs:

William H. Lawson
for Plaintiff-Appellant

Thomas Tsuchiyama
(Matsui Chung Sumida Tsuchiyama)
for Defendant-Appellee

Corinne K. Watanabe
Presiding Judge

Coniell R. Foley
Associate Judge

Craig H. Makamuro
Associate Judge