NO. 26325

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY AND LARRY HONMA, Plaintiffs-Appellees, v. PACIFIC WASTE, INC. and DOES 1-50, Defendant-Appellant

APPEAL FROM THE DISTRICT COURT OF THE THIRD CIRCUIT CIRCUIT
NORTH AND SOUTH KONA DIVISION
(Civ. No. 03-119KN)

SUMMARY DISPOSITION ORDER
(By: Lim, Presiding Judge, Foley and Fujise, JJ.)

Defendant-Appellant Pacific Waste, Inc. (Pacific), appeals from the Judgment and Order Granting Plaintiffs' Motion for Attorney's Fees and Costs[1] entered on December 5, 2003 in favor of Plaintiffs-Appellees State Farm Mutual Automobile Insurance Company (State Farm) and Larry Honma (Honma) (collectively, Plaintiffs), after a jury-waived trial before the District Court of the Third Circuit (district court).[2]

On appeal, Pacific contends that the district court erred by (1) granting Plaintiffs' motion to compel discovery as

[1] Although Pacific Waste, Inc. (Pacific) states that it appeals from the "Judgment and Order Granting Plaintiff's Motion to Compel Production of Documents entered on December 5, 2003," Pacific is mistaken as to the latter document as none bearing this name was filed on that date. We presume Pacific meant the "Order Granting Plaintiffs' Motion for Attorneys Fees and Costs" as it was filed on December 5, 2003.

[2] The Honorable Joseph P. Florendo, Jr. presided.

the documents were protected by attorney-client and work-product privileges and were trial materials containing "mental impressions, conclusions, opinions, or legal theories;" (2) awarding Plaintiffs' attorney's fees; (3) admitting statements by Pacific's former employee into evidence; (4) finding Pacific's negligence caused damage to Honma's vehicle; and (5) applying the doctrine of *res ipsa loquitur* to determine Pacific's negligence. After careful review of the issues raised and the arguments made by the parties, as well as the record of the proceedings before the district court and the relevant case law, we resolve Pacific's points on appeal as follows and affirm.

1. The district court did not abuse its discretion in granting Plaintiffs' motion to compel discovery under District Court Rules of Civil Procedure (DCRCP) Rule 26. The record supports the district court's conclusions that the subject documents (letters) were written in the ordinary course of business and not reasonably in anticipation of litigation. The "Priviledge [sic] Log," provided by Pacific, listed the letters--between individuals working for Pacific's insurance carrier regarding "analysis of damages" in Honma's claim--and show they were written on April 25, 2002 and April 17, 2002, after initial contact by State Farm but approximately a year before the complaint in this case was filed. There is nothing in the record indicating that Pacific or its insurance carrier had retained

counsel for the purposes of defending itself in a potential lawsuit on this matter before or at the time these letters were written. As such, they constituted "matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" DCRCP Rule 26(b)(1).

Pacific's argument under DCRCP Rule 26(b)(3) is also unavailing. First, as the facts above show, the letters were not "prepared in anticipation of litigation" because Pacific had not retained counsel nor did it know a lawsuit would be filed when they were written. Second, Plaintiffs did not seek disclosure under this Rule and the district court specifically preserved Pacific's right to argue, if it became an issue at trial, that DCRCP Rule 26(b)(3) "applies as to the mental impressions, conclusions or legal theories contained in the withheld documents." Finally, it does not appear that these letters were introduced at trial and Pacific does not identify what prejudice it suffered as a result of the court's decision to reserve ruling. Hawaii Revised Statutes § 641-16 (1993) ("No order, judgment, or sentence shall be reversed or modified unless the court is of the opinion that error was committed which injuriously affected the substantial rights of the appellant.").

2. The district court did not err in awarding Plaintiffs their attorney's fees as a sanction against Pacific for its failure to provide discovery of the letters. Pursuant to

DCRCP Rule 37(a)(4), the court "shall" require the party, whose conduct caused another party to move to compel compliance with discovery obligations, pay the movant's reasonable expenses in bringing the motion. As we agree with the district court's resolution of the motion to compel and can discern no argument by Pacific in its opening brief[3] as to why the amount of the attorneys fee award was "excessive given the total amount in controversy," we sustain the award.

3. Similarly, as Pacific fails to present any argument on appeal in support of its point that the district court erred in admitting the statement of the employee responsible for the accident at issue, Charles Denis (Denis) it is deemed waived. Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai'i 422, 433, 16 P.3d 827, 838 (App. 2000) ("An appellate court does not have to address matters for which the appellant has failed to present discernible argument.").

4. Pacific failed to preserve at trial its argument that there was insufficient evidence supporting the district court's finding Honma's vehicle was damaged through Pacific's

[3] We are aware that Pacific again argued, in its Reply Brief, that the attorneys fee award was "excessive." It also argued in its Reply Brief that it should "not be punished for asserting a valid claim that the documents in question were protected from discovery." As we reject Pacific's argument that their discovery position was "valid," we likewise reject Pacific's position that the amount of the attorneys fees awarded was excessive insofar has it was not punished for asserting a valid position. While Pacific points out that the attorneys fees award amounted to 40% of the amount awarded as damages, this, standing alone, does not support its claim that the award was excessive.

negligence. Earl M. Jorgensen Co. v. Mark Constr., Inc., 56 Haw. 466, 475-76, 540 P.2d 978, 985 (1975) ("A judgment ordinarily will not be reversed upon a legal theory not raised by the appellant in the court below. This is the general rule to which an appellate court will adhere, unless and until justice otherwise requires." (Citations omitted.)).

In any event, there was sufficient evidence to support the district court's finding of negligence. "The question of whether one owes a duty to another must be decided on a case-by-case basis. However, every case is governed by the rule that all persons are required to use ordinary care to prevent the property of others from being injured as a result of their conduct." Waugh v. Univ. of Hawaii, 63 Haw. 117, 135, 621 P.2d 957, 970 (1980). The issue at trial[4] was whether Pacific was responsible for the damage to the rear quarter-panel of Honma's car.

Honma testified that when he left his vehicle, it was undamaged on the passenger side and when he returned, 45-60 minutes later, he saw his car was damaged on the right passenger side, from the rear wheel area to the front wheel area. The

[4] Although there was no formal stipulation as to negligence, Pacific's own witness, Derick Stroud-Macanas had opined in his investigation report, that "liability" was "unfavorable" and that, "[b]ased on our investigation we are certain our trash dumpster collided with the right front fender and door of the claimant vehicle." Although Stroud-Macanas did not inquire during his investigation whether anyone else was present when the incident occurred, no one reported to him that anyone else was present. In Stroud-Macanas's lay opinion, considered by the court, the dumpster did not cause the damage to the rear quarter-panel.

recorded statement of Pacific's employee, Denis, admitted into evidence as an admission, established that Denis left a filled dumpster on wet pavement on level, but higher ground than Honma's vehicle on Lako Street and the dumpster's wheels were not locked, nor was a block used to secure the dumpster before Denis drove away. There was no evidence of anyone else being present at the time. The trash dumpster rolled down Lako Street approximately fifteen hundred feet as measured by Pacific's adjuster Derick Stroud-Macanas (Stroud-Macanas), "spinning in circles," and stopped when it hit Honma's vehicle. The damage to the vehicle was documented by photographs submitted to the district court. The Plaintiffs' auto-body repair expert opined that it was "possible" that the damage to the rear passenger quarter-panel was caused by the dumpster. Pacific's adjuster opined that it was not. The court's finding that Pacific's negligence caused the damage to Honma's automobile was supported by substantial evidence.

5. The district court did not err in applying the *res ipsa loquitur* doctrine as both the nature of the event and the control of the instrumentality established by the evidence presented supported the application of the doctrine. See Carlos v. MTL, Inc., 77 Hawai'i 269, 276, 883 P.2d 691, 698 (App. 1994); Restatement (Second) of Torts § 328D (1965).

Therefore,

IT IS HEREBY ORDERED that the December 5, 2003 Judgment and Order Granting Plaintiffs' Motion for Attorney's Fees and Costs entered by the District Court of the Third Circuit are affirmed.

DATED: Honolulu, Hawai'i, October 25, 2006.

On the briefs:

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Wray H. Kondo and
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for Plaintiffs-Appellees.

Presiding Judge

Associate Judge

Associate Judge