

NO. 26433

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

MICHELLE L. TAYLOR, Plaintiff-Appellant, v  
HAMILTON WINSTON, M.D., Defendant-Appellee, and  
DOES 1-10, Defendants

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STATE OF HAWAII

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIVIL NO. 01-1-1489)

SUMMARY DISPOSITION ORDER

(By: Lim, Presiding Judge, Nakamura and Fujise, JJ.)

In this medical malpractice case, Michelle L. Taylor (Plaintiff) appeals the November 10, 2003 judgment that the Circuit Court of the First Circuit (circuit court)<sup>1</sup> entered upon a jury's verdict against her and in favor of Hamilton Winston, M.D. (Defendant).

After a meticulous review of the record and the briefs submitted by the parties, and giving careful consideration to the arguments advanced and the issues raised by the parties, we dispose of Plaintiff's points of error on appeal as follows:

1. The circuit court did not prejudicially err when it refused to (a) permit Plaintiff's counsel to preface questions to the expert witnesses with the circuit court's standard-of-care jury instructions, Create 21 Chuo, Inc. v. Southwest Slopes, Inc., 81 Hawai'i 512, 522 n.4, 918 P.2d 1168, 1178 n.4 (App. 1996) ("witnesses may be permitted, in a proper case, to give an

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<sup>1</sup> The Honorable Gary W.B. Chang presided.

opinion on an ultimate *fact* involved in the case, [but] there is a strong consensus among the jurisdictions, amounting to a general rule, that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law" (emphasis in the original)); see also State v. Parker, 553 S.E.2d 885, 900 (N.C. 2001) ("[a]n expert may not testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness" (citations and internal quotation marks omitted)); Saltzman v. Saltzman, 475 A.2d 1, 6 (N.H. 1984) ("[o]n mixed questions of law and fact the jury, after being properly instructed by the court as to the law, can draw the required conclusion from the facts as well as can the expert, so that the opinion of the witness, be he expert or layman, is superfluous in the sense that it will be of no assistance to the jury" (citation and internal quotation marks omitted)); or, in the alternative, (b) pre-instruct the jury on the standard of care. Hawai'i Rules of Civil Procedure (HRCP) Rule 51(a) (2003) ("the court may pre-instruct the jury on the elements of the pleaded causes of action and claimed defenses" (emphasis supplied)); cf. Montalvo v. Lapez, 77 Hawai'i 282, 286, 884 P.2d 345, 349 (1994) ("a refusal to give an instruction that correctly states the law is not error if another expressing a substantially similar principle is given" (citation and internal quotation marks omitted)).

2. The circuit court was right to grant Defendant's oral motion for judgment as a matter of law on the issue of punitive damages, because even the light most favorable to Plaintiff does not illuminate in the evidence and inferences therefrom any act or omission on the part of Defendant "done wilfully, wantonly or maliciously or characterized by some aggravating circumstances[,]" Hall v. American Airlines, Inc., 1 Haw. App. 312, 313, 617 P.2d 1230, 1234 (1980), and there was thus "no legally sufficient evidentiary basis for a reasonable jury to find for [Plaintiff] on that issue[.]" HRCF Rule 50(a)(1) (2003).

3. Plaintiff avers that the circuit court prejudicially erred in allowing Defendant's expert witness to enumerate the material risks of laparoscopy that should be disclosed to patients. Plaintiff contends: "Surely, under the Hawai'i Supreme Court's holding in Carr v. Strode, 79 Haw[ai'i] 475, 904 P.2d 489 (1995), which adopted the patient-based standard for informed consent, any normative language such as 'should' was not appropriate." Opening Brief at 31. We disagree. Plaintiff's central but implicit assumption -- that Carr rendered such expert testimony inadmissible *per se* -- is incorrect, Carr, 79 Hawai'i at 485 n.6, 904 P.2d at 499 n.6, ("[t]he standard of disclosure of material risks prior to treatment . . . is capable of determination under the patient-oriented standard without reference to prevailing medical

standards or medical judgment, although such evidence may, subject to a [Hawaii Rules of Evidence (HRE) Rule 403 (1993)] balancing, be relevant and admissible" (emphasis omitted)), and her wholly conclusory follow-on argument -- "any testimony concerning what Dr. Azziz told his residents they 'should' tell patients was irrelevant and highly prejudicial[,] " Opening Brief at 32 (emphasis in the original) -- is too opaque for our review. Hawai'i Rules of Appellate Procedure Rule 28(b)(7) (2004); Ala Moana Boat Owners' Ass'n v. State, 50 Haw. 156, 157-59, 434 P.2d 516, 517-18 (1967).

4. The circuit court did not abuse its discretion in allowing Defendant's expert witness, who testified that pig intestines are oftentimes used in medical school to teach students about human intestines, to utilize a pig's small intestine as a demonstrative aid in his testimony. Lau v. Allied Wholesale, Inc., 82 Hawai'i 428, 434, 922 P.2d 1041, 1047 (App. 1996) ("the issue . . . will be mainly whether the depiction bears substantial similarity to the events in litigation and whether the strain on [HRE] Rule 403 is tolerable" (citation and internal quotation marks omitted)).

Therefore,

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

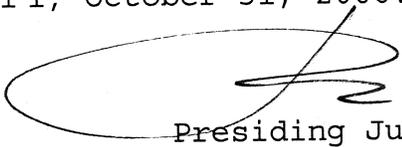
IT IS HEREBY ORDERED that the November 10, 2003  
judgment of the circuit court is affirmed.

DATED: Honolulu, Hawai'i, October 31, 2006.

On the briefs:

John S. Edmunds and  
Ronald J. Verga,  
(Edmunds & Verga)  
for Plaintiff-Appellant.

Arthur F. Roeca,  
April Luria and  
Jodie D. Roeca,  
(Roeca, Louie & Hiraoka)  
for Defendant-Appellee.



Presiding Judge



Associate Judge



Associate Judge