

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 26879

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

CHUN-LIN WU, Plaintiff-Appellant,  
v.  
DANIEL NIFALAR, Defendant-Appellee,  
and

JOHN DOES 1-10, DOE CORPORATIONS 1-10,  
and DOE PARTNERSHIPS 1-10, Defendants.

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APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CV. NO. 02-1-0592)

MEMORANDUM OPINION

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

Plaintiff-Appellant Chun-Lin Wu (Wu or Plaintiff) appeals from the final judgment in favor of Defendant-Appellee Daniel G. Nifalar (Nifalar or Defendant) filed on September 10, 2004, in the Circuit Court of the First Circuit (circuit court).<sup>1</sup> This case arises out of an automobile accident which occurred on September 16, 2001, at the intersection of Kamehameha Highway and Kamananui Road in Wahiawa. The Dodge Dakota pickup truck driven by Nifalar collided with the white Nissan Sentra driven by Wu as Wu was turning left onto Kamehameha Highway from Kamananui Road. Wu filed a complaint alleging that he sustained injuries and damages as a result of Nifalar's negligence in operating Nifalar's motor vehicle. At the conclusion of trial, the jury

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

returned a special verdict finding that Nifalar was not negligent. Pursuant to the special verdict and Nifalar's verified bill of costs, the circuit court entered final judgment against Wu and in favor of Nifalar in the amount of \$11,307.86, which represented Nifalar's costs.

BACKGROUND

At trial, Nifalar testified that on the date of the accident, he was driving his pickup truck on Kamehameha Highway from Waialua to Wahiawa, a route he had frequently traveled. According to Nifalar, he was driving at speeds significantly below the 45-mile-per-hour speed limit in order to maintain a distance from the car in front of him. As Nifalar approached the intersection of Kamehameha Highway and Kamananui Road, he saw a Ford Mustang stopped at the stop sign on Kamananui Road. The Mustang pulled in front of Nifalar as it made a left turn onto Kamehameha Highway heading toward Waialua. Nifalar testified that after the Mustang passed in front of him, "[t]he next thing I know, I see this white object in front of me and then boom." Nifalar's truck had collided with Wu's Nissan Sentra. Nifalar stated that he did not have time to react and hit his brakes.

Wu testified at trial that on the date of the accident, he was driving his Nissan Sentra on Kamananui Road and heading to the North Shore to meet a group of fellow Hawaii Pacific University (HPU) students for lunch. Wu's friend, who was one of the HPU students, was driving a red Mustang that was directly in front of Wu on Kamananui Road. As they reached the intersection

with Kamehameha Highway, the Mustang came to a complete stop at the stop sign and Wu stopped behind the Mustang. Both drivers had their left-turn signals on. The Mustang turned left onto Kamehameha Highway without incident. According to Wu, he then moved forward and "stopped right behind the stop line[,] " where he waited for approximately two seconds. After looking left and right, he proceeded forward slowly and saw a vehicle approaching from about 200 feet away. Believing he had enough time to complete the left turn, Wu continued onto Kamehameha Highway and was struck by Nifalar's vehicle.

Prior to trial, Nifalar took the deposition of Isabella Gutman (Gutman). According to her deposition testimony, Gutman was driving a Hyundai Elantra that was stopped behind the Mustang and Wu's vehicle at the stop sign on Kamananui Road. Gutman stated that the Mustang entered the intersection and successfully completed a left turn. She then saw Wu's car move forward "[p]retty much immediately[]" and proceed into the intersection without making a complete stop at the stop sign. Gutman referred to this maneuver as a "roll over." She witnessed a truck collide with Wu's car in the Wahiawa-bound lane. Gutman testified that, "I saw that he [(Wu)] just went, and I thought to myself, he's not going to make it. The guy in the truck, he couldn't stop."

During trial, Nifalar sought the admission of Gutman's deposition pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 32(a)(3)(D) (2003) on the ground that Nifalar had been unable to procure Gutman's attendance by subpoena. Wu objected,

arguing that Nifalar had failed to make an adequate showing that Gutman was unavailable. The circuit court allowed portions of Gutman's deposition to be read into evidence at trial. After deliberating for approximately an hour, the jury returned its special verdict finding that Nifalar was not negligent.

DISCUSSION

On appeal, Wu asserts that the circuit court erred by permitting excerpts of Gutman's deposition testimony to be read into evidence pursuant to HRCP 32(a)(3)(D) because there was insufficient evidence that Gutman was "unavailable" to testify at trial. For the reasons discussed below, we disagree with Wu and affirm the final judgment.

I.

The record discloses that counsel for Wu and Nifalar were present when Gutman was deposed on October 25, 2002. On March 1, 2004, nine days before trial, Nifalar caused a subpoena to be issued commanding Gutman to appear in court on March 15, 2004, to testify on Nifalar's behalf. The subpoena was issued for Gutman at her last known address, 66-089 Wana Place, Hale'iwa, Hawaii, 96712, which was the address she provided at her deposition. Nifalar hired a certified process server, Dexter Carrasco (Carrasco), who attempted to serve Gutman with the subpoena at the Wana Place address on March 2, 2004, but no one was home. Carrasco returned to the same address on March 4, 2004, and was informed that Gutman did not live there. Carrasco was unable to ascertain a current address for Gutman.

On or about March 10, 2004, Nifalar hired Joe Pavsek (Pavsek), a private investigator, to locate Gutman's address. On March 11, 2004, Pavsek informed Nifalar's counsel that Gutman's current address was 67-091 Lalo Kuilima Place, Kahuku, Hawai'i, and Nifalar caused a new subpoena for Gutman bearing that address to be issued that same day. Nifalar hired a second process server, James Pritchett (Pritchett), who attempted to serve the subpoena at the Lalo Kuilima Place address on Friday, March 12, 2004, at 5:03 p.m., on Saturday, March 13, 2004, at 3:40 p.m., and on Sunday, March 14, 2004, at 8:00 a.m. On all three occasions, no one answered the door. Pritchett attempted to canvas the neighborhood but was unsuccessful in determining whether Gutman resided at the Lalo Kuilima Place address.

Nifalar filed declarations signed by his counsel, by Carrasco, and by Pritchett that set forth the foregoing information regarding Nifalar's unsuccessful attempts to serve Gutman with the subpoenas. On March 16, 2004, the circuit court held a hearing on whether Gutman's deposition testimony would be admitted at trial. On the question of whether Nifalar had exercised diligence in attempting to procure Gutman's attendance, Nifalar's counsel proffered:

[W]e did hire a private investigator. We got another address. We attempted service three times at that address and either she [(Gutman)] wasn't home or she doesn't live there. We then checked also on the internet and we got another address. We found out that she and some other person had filed a small claims suit. And she had her address in there, the same one that we have. We went out there. She's not there. There was phone numbers -- two phone numbers. We called the two phone numbers. It's out of service. We then surmised that she -- one of those numbers actually was for Avis Rent-A-Car. And so we figured that might be her work place. So we sent the sheriff down

there. She doesn't work there. They never heard of her.

We can only do so much to procure a person. . . . I mean [Wu's counsel is] saying she lives there. How does he know that? There's no evidence. I mean I don't know what else I could do quite frankly.

II.

At the time of trial, HRCF Rule 32(a)(3)(D) provided, in relevant part:

**Rule 32. USE OF DEPOSITIONS IN COURT PROCEEDINGS.**

(a) *Use of Depositions.* At the trial . . . , any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition . . . , in accordance with any of the following provisions:

. . . .

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: . . . (D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena[.]

(Emphasis added.) "The admissibility of depositions at trial is reviewable under the abuse of discretion standard. A trial court's exercise of discretion in ruling on the admissibility of depositions will be upheld unless an abuse of discretion is manifest." Aga v. Hundahl, 78 Hawai'i 230, 241, 891 P.2d 1022, 1033 (1995) (quoting Wilart Assocs. v. Kapiolani Plaza, Ltd., 7 Haw. App. 354, 362, 766 P.2d 1207, 1212 (1988)).

We conclude that the circuit court did not abuse its discretion in determining that Nifalar made sufficient efforts to procure the attendance of Gutman by subpoena to satisfy the requirements of HRCF Rule 32(a)(3)(D). See Johnson for Galdeira v. Robert's Hawaii Tour, Inc., 4 Haw. App. 175, 181, 664 P.2d 262, 267 (1983); City of Indianapolis v. Parker, 427 N.E.2d 456,

460, 463-64 (Ind. App. 1981); Weintraub v. PennDOT, 39 Pa. D. & C.3d 367, 369-70 (Pa. Com. Pl. 1983). The information presented to the circuit court was sufficient to support the conclusion that Nifalar exercised due diligence in attempting to procure Gutman's attendance at trial. Accordingly, we hold that the circuit court did not err in permitting certain portions of Gutman's deposition to be read into evidence at trial. See Johnson for Galdeira, 4 Haw. App. at 181, 664 P.2d at 267; Frederick v. Yellow Cab Co. of Philadelphia, 200 F.2d 483, 486 (3rd Cir. 1952).

We reject Wu's contention that HRCF Rule 32(a)(3)(D) only applies to permit the admission of a witness's deposition "when the witness has been subpoenaed, and despite being subpoenaed, fails to appear and testify at trial." Wu's interpretation of HRCF Rule 32(a)(3)(D) is not supported by the plain language of the rule. It is also contrary to this court's decision in Johnson for Galdeira, 4 Haw. App. at 181, 664 P.2d at 267, and decisions from other jurisdictions applying rules containing language identical to HRCF Rule 32(a)(3)(D). See e.g., United States v. Bowen, 411 F.2d 923, 926-27 (5th Cir. 1969); Parker, 427 N.E.2d at 460, 464; Weintraub, 39 Pa. D. & C.3d at 369-70.

We also reject Wu's contention that Nifalar purposefully failed to make diligent efforts to procure Gutman's attendance at trial because she would not make a good appearance as a witness and to avoid further cross-examination by Wu. The

record does not support Wu's contention that Nifalar purposely failed to make diligent efforts to procure Gutman's attendance. In addition, if Gutman was indeed available, nothing prevented Wu from serving a subpoena on Gutman to compel her presence at trial.

III.

In his reply brief, Wu suggests that the circuit court erred in admitting portions of Gutman's deposition on the additional ground that the deposition was incomplete. Wu contends that Gutman's deposition was incomplete because she terminated the deposition before Wu had cross-examined her to his satisfaction. Wu, however, did not file a motion in the circuit court to compel Gutman to answer further deposition questions. Wu also made no proffer to the circuit court of the additional questions he would have asked Gutman.

Wu did not raise Gutman's termination of her deposition as a ground for excluding the deposition in the court below. Nor did he present this argument in his opening brief. Wu therefore waived his right to challenge the circuit court's ruling on this basis. State v. Vliet, 91 Hawai'i 288, 299, 983 P.2d 189, 200 (1999) (concluding that waiver occurs when the objection to the evidence asserted at trial differs from ground pressed on appeal); Matter of Hawaiian Flour Mills, Inc., 76 Hawai'i 1, 14 n.5, 868 P.2d 419, 432 n.5 (1994) (holding that arguments raised for the first time in the reply briefs on appeal were deemed waived); see also Hawai'i Rules of Appellate

Procedure Rule 28(b)(7) (2007) ("Points not argued may be deemed waived."). In any event, our review of Gutman's deposition reveals that Wu had a fair opportunity to cross-examine and did extensively cross-examine Gutman during her deposition.

CONCLUSION

The circuit court's final judgment filed on September 10, 2004, is affirmed.

DATED: Honolulu, Hawai'i, June 5, 2007.

On the briefs:

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Presiding Judge

  
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