

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27253

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

RICHARD MIANO, Plaintiff-Appellee, v.
BRIAN K. PASCUA, Defendant-Appellant,
and JOHN DOE 1-10 AND DOE ENTITIES 1-10, Defendants

K. HAMAKADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

2008 APR 30 AM 7:48

FILED

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 02-1-1344)

SUMMARY DISPOSITION ORDER

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

In this motor vehicle accident case, Defendant-Appellant Brian Pascua (Pascua) appeals from the March 24, 2005 judgment and the April 19, 2005 first amended judgment entered by the Circuit Court of the First Circuit (circuit court).¹ Both judgments were entered in favor of Plaintiff-Appellee Richard Miano (Miano) pursuant to the findings of fact and conclusions of law rendered by the circuit court following a jury-waived trial.

After a careful review of the points raised, the record and the argument and authority presented by the parties, we resolve Pascua's points on appeal as follows:

In his first point on appeal, Pascua challenges a number of the findings and conclusions of the circuit court because, he maintains, he was not negligent as a matter of fact and as a matter of law. Findings of fact are sustained unless the appellant is able to firmly convince the appellate court that a mistake has been committed. Chun v. Bd. of Trs. of the Employees' Ret. Sys. of the State of Hawaii, 106 Hawai'i 416, 430, 106 P.3d 339, 353 (2005). However, the evidence supported the circuit court's findings that Miano was visible to Pascua from the time Miano stepped off the curb, took four steps toward

¹ The Honorable Eden Elizabeth Hifo presided.

the middle of the road and was hit by Pascua's right side-view mirror, giving Pascua enough time to react and avoid hitting Miano.

Moreover, Pascua's arguments that he was not negligent as a matter of law and it was error for the circuit court not to so find, are also unavailing. All of the cases Pascua relies upon were based on a contributory negligence system, where any negligence by the plaintiff would bar recovery. Hawai'i is a comparative negligence state. Hawaii Revised Statutes (HRS) § 663-31(a) (1993 & Supp. 2007).² To the extent that Pascua argues that these cases establish that he was not negligent as a matter of law, his argument is not well-taken.

Pascua's reliance on HRS §§ 291C-72(b) (2007)³ and 291C-73(a) (2007)⁴ in support of his argument that he was not negligent as a matter of law is also misplaced. The circuit court did find that Miano was equally negligent in this accident.

² **Contributory negligence no bar; comparative negligence; findings of fact and special verdicts.** (a) Contributory negligence shall not bar recovery in any action by any person or the person's legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person or in the case of more than one person, the aggregate negligence of such persons against whom recovery is sought, but any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage or death recovery is made.

³ Hawaii Revised Statutes (HRS) § 291C-72(b) (2007) provides now as it did at the time of this accident,

Pedestrians' right-of-way in crosswalks.

. . . .

(b) No pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

⁴ HRS § 291C-73(a) (2007) provides now, as it did at the time of this accident,

Crossing at other than crosswalks. (a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.

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However, the existence of negligence on the part of the plaintiff does not necessarily preclude a finding of negligence on the part of the defendant. See Dunbar v. Thompson, 79 Hawai'i 306, 313-14, 901 P.2d 1285, 1292-93 (App. 1995) (conflict in the answers to a special verdict does not warrant a new trial unless the conflict is irreconcilable). Thus, even if Miano did not observe the standard of care expressed in these statutes, his failure does not support Pascua's argument that he was not negligent as a matter of law.

Finally, we reject Pascua's argument that the circuit court erred in finding he violated HRS § 291C-74 (2007).⁵ The plain language of the statute does not limit its application to pedestrians "lawfully" using the roadway as Pascua argues.

In his second point on appeal, Pascua disputes the apportionment of liability made by the circuit court. As HRS § 663-31(b) (1993 & Supp. 2007) provides,⁶ the "degree of negligence" of each party is a finding of fact. Findings of fact are sustained by the appellate court unless clearly erroneous. Chun, 106 Hawai'i at 430, 106 P.3d at 353. The circuit court determined that both Miano and Pascua were negligent in this

⁵ HRS § 291C-74 (2007) provides,

Notwithstanding other provisions of this chapter, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the driver's horn when necessary and shall exercise proper precaution upon observing any child or any obviously confused or incapacitated person upon a roadway.

(Emphasis added.)

⁶ HRS § 663-31(b) (1993 & Supp. 2007) provides,

(b) In any action to which subsection (a) of this section applies, the court, in a nonjury trial, shall make findings of fact . . . which shall state:

- (1) The amount of the damages which would have been recoverable if there had been no contributory negligence; and
- (2) The degree of negligence of each party, expressed as a percentage.

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accident: Miano by not looking before stepping into the roadway and Pascua for not avoiding Miano when he had the time and opportunity to do so. On this record, the circuit court's apportionment of liability was supported by substantial evidence.

Therefore,

IT IS HEREBY ORDERED that the Circuit Court of the First Circuit's March 24, 2005 judgment and the April 19, 2005 first amended judgment are affirmed.

DATED: Honolulu, Hawai'i, April 30, 2008.

On the briefs:

Dennis E.W. O'Connor and
Kelvin H. Kaneshiro,
(Reinwald O'Connor & Playdon),
for Defendant-Appellant.

Richard Turbin,
Rai Saint Chu, and
Sidney D. Smith, Jr.,
for Plaintiff-Appellee.



Presiding Judge



Associate Judge



Associate Judge