

DISSENTING OPINION OF RECKTENWALD, C.J.

I respectfully dissent, because I believe that the special verdict was against the substantial weight of the evidence, and that accordingly, the circuit court abused its discretion in not granting the motion for a new trial filed by Plaintiff/Appellant/Cross-Appellee Esther R. DeCambra (DeCambra).

In brief summary, the evidence presented to the jury established that on September 29, 1996, Carla Russell and Rachel DeCambra (collectively, the victims) were both shot to death with a shotgun at their home. Hawai'i County Police Officer Clyde Victorine testified that he responded to a "dropped" 911 call made from the victims' house, and that when he arrived, he observed a body in the house. While Officer Victorine was getting his bulletproof vest, he was approached by Defendant/Appellee/Cross-Appellant Tetsuya Yamada, a.k.a "Grizzly" Yamada (Yamada), along with Yamada's wife, Regina Puanani Haaheo Haili (Haili), and Haili's son, Dwayne Kalani (Kalani). Yamada was holding a shotgun. Yamada subsequently told Victorine "[t]hat's what I shot them with."¹ Haili later told Officer Victorine that Yamada had "just lost it."

That evening, Yamada signed a written statement in which he said he didn't remember shooting the victims but that he "must have . . . [b]ecause I was the only one there with a gun." An acquaintance of Haili's, June Amasaki, testified that later that night, Haili called her to cancel a dinner engagement for her and Yamada and said that "'Oh, he - - he killed them,' or something to that effect."

Haili died in September, 1999. When this case was tried in 2005, Yamada testified that he did not murder the

¹ At trial, Yamada denied making this statement, and said that he had instead told Victorine "I may be responsible for what happened in [the victims' house]."

victims, but that he had confessed initially in order to protect Haili. He said that he did not know whether Haili had shot the victims, although he had heard two gunshots coming from the victims' house, and observed Haili coming out of their house holding a shotgun shortly thereafter. Yamada testified that he then entered the house and observed Carla Russell's body.

Yamada introduced prior testimony given by Haili's son, Kalani, in which Kalani said that Haili had admitted to him shortly before her death in 1999 that she had shot the two victims, and told him that Yamada was "innocent." Kalani also testified that he had overheard his mother tell a police officer on the day of the murders that "I did it."

There was prior testimony introduced from an FBI firearms and tool marks examiner, which indicated that of four discharged shotgun shells found in or near the victims' house, (1) one had been fired from the shotgun which Yamada was holding when Victorine arrived on the scene, (2) two had been loaded into that shotgun and removed from it at some time, but it could not be determined whether they had (or had not) been fired from that shotgun, and (3) it could not be determined whether or not the fourth shell had been loaded into, removed from and/or fired from that shotgun. There was testimony at trial indicating that gunpowder residue was found on both of Yamada's hands, although there was no gunpowder residue on the clothing that Yamada was wearing, and no blood from the victims was detected on that clothing.

DeCambra's counsel argued at closing that Yamada had committed the murders, and that the jury should find him liable on that basis. In the alternative, he contended that if the jury found that Haili committed the murders, it should further find that Yamada was liable under the theory that the murders were committed pursuant to a conspiracy between Haili and Yamada:

"[I]f by some wild stretch of the imagination it is determined that Ms. Haili killed these victims, Mr. Yamada can still be found legally responsible under a conspiracy theory."

Yamada's counsel argued that the jury should find that Haili committed the murders, and that there was not a conspiracy between Yamada and Haili: "I say it's time for you to answer the questions that Mrs. Haili shot 'em, both Carla and Rachel. And Mr. Yamada was not in conspiracy with them -- with her."

The jury was given a special verdict form which asked them to determine as follows with regard to Carla Russell:

QUESTION NO. 1:

Do you find by a preponderance of the evidence that Defendant Tetsuya Yamada is liable for causing the death of Carla Russell by the commission of a battery?

Yes _____ No _____

If your answer to Question No. 1 is "yes", skip Question No. 2 and Question No. 3 and answer Question No. 4.

If your answer to Question No. 1 is "no", then answer Question No. 2.

QUESTION NO. 2:

Do you find by a preponderance of the evidence that Regina Puanani Haili is liable for causing the death of Carla Russell by the commission of a battery?

Yes _____ No _____

If your answer to Question No. 2 is "yes", then answer Question No. 3.

If your answer to Question No. 2 is "no", skip Question Nos. 3 through 7 and answer Question No. 8.

QUESTION NO. 3:

Do you find by a preponderance of the evidence that Defendant Tetsuya Yamada was a co-conspirator with Regina Puanani Haili in causing the death of Carla Russell?

Yes _____ No _____

If your answer to Question No. 3 is "yes", then answer Question No. 4.

If your answer to Question No. 3 is "no", then skip Question Nos. 4 through 7 and answer Question No. 8.

Questions 4-7 concerned damages. Questions 8-10 were similar to questions 1-3, but related to liability with regard to Rachel DeCambra, while questions 11 and 12 focused on damages.

The jury answered "no" to questions 1-2 and 8-9, and did not answer the other questions.

As our supreme court has observed, "in the proper case we have both the power and the duty to order a new trial either where the evidence is insufficient to support a verdict or where a verdict is clearly against the manifest weight of the evidence." Peterson v. City & County of Honolulu, 53 Haw. 440, 442, 496 P.2d 4, 7 (1972) (citations omitted). I respectfully submit that this is such a case. The jury here found that neither Yamada nor Haili murdered the victims. However, that conclusion is clearly against the manifest weight of the evidence presented at trial, which established that at least one of them had committed the murders. Indeed, neither DeCambra nor Yamada even suggested in closing argument that anyone else had committed the murders.

The majority is correct that the answers to special interrogatories 1 and 2, and 8 and 9, when viewed individually, were supported by substantial evidence. There was evidence upon which the jury could have concluded that Yamada did not murder the victims, and evidence upon which it could have concluded that Haili did not murder the victims. However, I do not believe that the answers should be evaluated in isolation. See Miyamoto v. Lum, 104 Hawai'i 1, 8, 84 P.3d 509, 516 (2004) ("Answers to a special verdict are to be construed in the context of the surrounding circumstances and in connection with the pleadings, instructions, and issues submitted.") (citation and internal quotation marks omitted). Rather, they should be read together, and, when so read, they are contrary to the manifest weight of the evidence.

While the unique circumstances presented by this case have not previously been considered by appellate courts in Hawai'i, courts in other states have addressed analogous situations. These cases have typically involved motor vehicle accident cases in which there were multiple defendants, and the evidence suggested that the plaintiff was blameless, but at least one of the defendants was necessarily negligent. Nevertheless, the juries in these cases found no negligence on the part of any defendant. The appellate courts which have considered this situation have been split on whether a new trial should be ordered.

Courts in Mississippi and Pennsylvania have reversed orders by trial courts that denied new trials in such circumstances. See Banes v. Thompson, 352 So.2d 812, 814 (Miss. 1977) (trial court abused its discretion in denying plaintiff's motion for new trial since "appellant was entitled to a verdict against one or both of the defendants"); Myers v. Gold, 419 A.2d 663 (Pa. Super. Ct. 1980) (trial court abused its discretion in denying plaintiffs' motion for a new trial); Fair v. Snowball Express, Inc., 310 A.2d 386, 389 (Pa. Super. Ct. 1973) (reversing the trial court's denial of a motion for a new trial, and noting that "it is very difficult from the evidence presented in this case to decide who was negligent. However, the difficulty of such a decision does not justify the jury's avoiding it completely by finding for all of the defendants."); see also Salvo v. Musgrave, 214 A.2d 226 (Pa. 1965) (affirming the grant of a new trial); cf. Platts v. Driscoll, 369 A.2d 381 (Pa. Super. 1976) (upholding denial of new trial motion when "[w]e are not prepared to conclude that some negligence was inevitable in this intersection collision").

The Maryland Court of Special Appeals affirmed the denial of a new trial in similar circumstances. Thodos v. Bland,

542 A.2d 1307 (Md. Ct. Spec. App. 1988). However, the jury in that case was asked not only whether one or both of the two defendants was responsible for the accident, but also whether the plaintiff-passenger "has not proved by a preponderance of the evidence that either [appellee] was responsible for the happening of this accident." Id. at 1310. The jury answered yes to the latter question, and no to the prior ones. Id. The Court of Special Appeals found that the jury "was at liberty to reach the conclusion that it did" since plaintiff-passenger had the burden of proving "which one [of the defendants] actually was responsible." Id. at 1314. However, the court noted its concern with the outcome, observing that the denial of a new trial "patently effects a real injustice to appellant . . . [by placing] the burden of loss on the shoulders of the least blameworthy of all the parties to the action, the appellant." Id. at 1313-14.

Subsequently, the Court of Appeals of Maryland considered whether a trial court had properly denied the plaintiff-passenger's motion for a judgment notwithstanding the verdict in a case involving underlying facts similar to Thodos. Dennard v. Green, 643 A.2d 422, 429 (Md. 1994). The plaintiff-passenger in Dennard did not seek appellate review of the trial court's denial of her motion for a new trial. Id. at 431 n.7. Also, the special verdict submitted to the jury only asked whether the jury found each of the defendants to be negligent, and did not ask whether the jury further found that plaintiff-passenger failed to carry her burden of proof. Id. at 430. The Court of Appeals affirmed the denial of the JNOV motion, but explicitly noted that it was not addressing whether a new trial was warranted since the plaintiff-passenger had failed to appeal that issue, adding "[w]e do not address, therefore, whether the failure of the jury explicitly to find a failure of proof, as it

did in Thodos, represents a significant difference between those two cases as to require, or at least permit, a different result." Id. at 431 n.7. Two judges dissented, indicating that they would have reversed and remanded for a new trial. Id. at 431 (dissenting opinion of Judges McAuliff and Rodowsky).

The jury in this case, unlike the jury in Thodos, was not explicitly asked whether it found that DeCambra had failed to carry her burden of proof. Thus, I believe that Thodos is distinguishable, and that, in any event, the approach taken by the courts in Mississippi and Pennsylvania represents the better-reasoned view. DeCambra was entitled to a verdict which was not against the substantial weight of the evidence, which in this context meant the jury should have resolved whether it was Yamada or Haili who committed the murders.²

Thus, I would vacate and remand for a new trial. In view of that resolution, I would not reach the issues raised by Yamada in his cross-appeal.

Max E. Richtwald

² It is important to note that a finding by the jury that Haili committed the murders would not necessarily have meant that DeCambra would prevail, since the jury would still have had to determine, as asked by special interrogatories Nos. 3 and 10, whether Yamada was a "co-conspirator [with Haili] in causing the death[s]."