

AMENDED CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

I concur with the majority's conclusion that the circuit court's jury instruction regarding foreseeability of third-party criminal acts was prejudicially erroneous. See Majority opinion at 9-13. However, I respectfully dissent from the majority's holding that the Intermediate Court of Appeals (ICA) erred by affirming the circuit court's decision to include interrogatories pertaining to Tupuola in the special verdict form. See Majority opinion at 24-36. In my view, under the facts of this case and our prior case law, I cannot say that the circuit court's decision to include interrogatories pertaining to Tupuola in the special verdict form constitutes an abuse of discretion. Further, contrary to the majority's conclusion, I believe that the ICA did not err in its interpretation of Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000) ("Gump II").

This court has long held that "[t]he trial court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 104, 176 P.3d 91, 103 (2008) (block format and citation omitted). In other words, "an abuse of discretion occurs when the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Id. (block format and citation omitted). Expounding further,

"[d]iscretion" denotes the absence of a hard and fast rule. . . . When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not

arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.

Booker v. Midpac Lumber Co., Ltd., 65 Haw. 166, 172, 649 P.2d 376, 380 (1982) (quoting Langes v. Green, 282 U.S. 531, 541 (1931)). Moreover, "the determination of the existence of clear abuse is a matter which is not free from difficulty and each case in which abuse is claimed must be adjudged according to its peculiar circumstances." State v. Sacoco, 45 Haw. 288, 292, 367 P.2d 11, 13 (1961). "The burden of establishing abuse of discretion is on appellant, . . . and a strong showing is required to establish it." State v. Estencion, 63 Haw. 264, 267, 625 P.2d 1040, 1043 (1981).

As it relates to verdict forms, this court has said that

[a] trial court has "complete discretion" whether to utilize a special or general verdict and to decide on the form of the verdict as well as the interrogatories submitted to the jury "provided that the questions asked are adequate to obtain a jury determination of all factual issues essential to the judgment." . . . Although there is "complete discretion" over the type of verdict form, the questions themselves may be so defective that they constitute reversible error.

Montalvo v. Lapez, 77 Hawai'i 282, 292, 884 P.2d 345, 355 (1994) (citations omitted).

Moyle relies solely on Gump II to assert that the circuit court abused its discretion by including interrogatories pertaining to Tupuola in the special verdict form. To the extent that Gump II applies to this case, I believe that Moyle's assertion is without merit because this court has clearly held

that "[n]on-parties may be considered joint tortfeasors under the UCATA and, in the trial court's sound discretion, may be included on a special verdict form." Id. at 422, 5 P.3d at 412. Because it is undisputed that Tupuola inflicted Moyle's injuries, Moyle "could have recovered damages in a direct action against [Tupuola], had [Moyle] chosen to pursue such an action." Id. (quotation marks and citation omitted). Accordingly, I respectfully disagree with the majority's conclusion that the ICA erred in its interpretation of Gump II.

Notwithstanding Moyle's reliance on Gump II, and the majority's reliance on the explicit statutory relationship between HRS §§ 663-17(c) and 663-12 (1993), I believe that Montalvo's framework is more appropriate for disposing of this issue because, similar to Moyle, the appellant in Montalvo asserted that the chosen contents of the special verdict form constituted an abuse of discretion by the trial court. See 77 Hawai'i at 292, 884 P.2d at 355 ("The City also contends that the trial court unfairly restricted the scope of the jury's deliberation by allowing the submission of a single question on the special verdict form."). In contrast, the issue in Gump II was whether the trial court abused its discretion by leaving a non-party off of a special verdict form. 93 Hawai'i at 422, 5 P.3d at 412.

This court has said that the concept of "[d]iscretion" denotes the absence of a hard and fast rule," Booker, 65 Haw. at 172, 649 P.2d at 380, and, as such, each case where an abuse of discretion is claimed "must be adjudged according to its peculiar

circumstances." Sacoco, 45 Haw. at 292, 367 P.2d at 13. Moyle is essentially arguing that the circuit court's decision to include a few interrogatories pertaining to Tupuola in the special verdict form was "highly prejudicial" to Moyle because it confused the jury on the relevant issues. Thus, the pertinent inquiry is whether those interrogatories are "adequate to obtain a jury determination of all factual issues essential to the judgment." See Montalvo, 77 Hawai'i at 292, 884 P.2d at 355. Accordingly, I believe that Montalvo provides the relevant analytical framework for this issue, and, consequently, Moyle's reliance on Gump II is misplaced.

Addressing the merits of Moyle's argument in light of Montalvo, I believe that any prejudice flowing from the inclusion of interrogatories pertaining to Tupuola in the special verdict form is, at best, unclear, inasmuch as (1) it is an undisputed fact between the parties that Tupuola inflicted Moyle's injuries, and (2) legal causation is a primary issue in this case. This court has held that an

actor's negligent conduct is a legal cause of harm to another if (a) his or her conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his or her negligence has resulted in the harm. The first prong of the test for the presence of legal causation contemplates a factual determination that the negligence of the defendant was more likely than not a substantial factor in bringing about the result complained of.

Doe Parents No. 1 v. State of Hawai'i, Dept. of Educ., 100 Hawai'i 34, 85, 58 P.3d 545, 596 (2002). Relatedly, "[f]oreseeability . . . in the context of breach of duty and causation is a question of fact for the trier of fact to resolve." Pulawa v. GTE

Hawaiian Tel, 112 Hawai'i 3, 13, 143 P.3d 1205, 1215 (2006). In my view, the boundaries of legal causation in this case would be unfairly misrepresented to the jury had the circuit court left the disputed interrogatories off of the special verdict form.

To reiterate, it is undisputed between the parties that Tupuola inflicted Moyle's injuries. During closing arguments, Moyle's counsel argued to the jury that based on the evidence presented at trial, the Do Re Mi Club "was a place that made money by drawing people in who like to drink." As such, Moyle's counsel urged the jury to determine whether or not the nature and history of the Do Re Mi Club "created a condition where what happened to Mr. Moyle was foreseeable." In so arguing, Moyle's counsel repeatedly pointed out to the jury that he was "not suing [Tupuola] for the injury he did[.]" Rather, Moyle's counsel argued that "[t]he injury here . . . is not having provided security. Security cannot stop everything bad from happening, but it can deter assaults, it can keep people out of situations they may not go where the security is." Therefore, Moyle was "suing [the Respondents] for negligence in not having adequate security, and that this was foreseeable."

In this case, it is unclear whether the questions included in the special verdict form are "so defective that they constitute reversible error." Montalvo, 77 Hawai'i at 292, 884 P.2d at 355. On August 1, 2003, the circuit court denied Respondents' motion for leave to file a third-party complaint against Tupuola. Nonetheless, the circuit court included interrogatories pertaining to Tupuola on the special verdict

form,¹ which Moyle objected to. Question numbers 1 and 3 of the special verdict form asked the jury whether each of the Respondents were "negligent on September 19, 1999[.]" For both of these questions, the jury answered, "no."

Question number 5 asked the following question: "Was plaintiff Richard Moyle negligent on September 19, 1999?" As a follow-up question, question number 6 asked, "Was plaintiff Richard Moyle's negligence a substantial factor in bringing about his damages?" For both of these questions, the jury answered, "yes."

Question number 7 asked, "Was Simi Tupuola's criminal act a substantial factor in bringing about plaintiff's damages?"

For this question, the jury also answered, "yes." Ultimately, the jury allocated responsibility in the following manner: (1) zero percent responsibility for each of the Respondents; (2) five percent responsibility for Moyle; and (3) ninety-five percent responsibility for Tupuola.

In light of the arguments made, the questions asked on the special verdict form, and the manner in which the jury allocated responsibility, one could infer that the jury concluded that the Respondents were not negligent for their lack of security at the Do Re Mi Club, and that Tupuola's act was unforeseeable. See Doe Parents No. 1, 100 Hawai'i at 85, 58 P.3d at 596; see also Pulawa, 112 Hawai'i at 13, 143 P.3d at 1215. One could also infer that the jury concluded that, from a legal

¹ I note that the record is silent as to the reasons behind the circuit court's decision to include Tupuola in the special verdict form.

causation standpoint, responsibility was more appropriately allocated between Tupuola and Moyle. See Doe Parents No. 1, 100 Hawai'i at 85, 58 P.3d at 596; see also Pulawa, 112 Hawai'i at 13, 143 P.3d at 1215.

For these reasons, I believe that Moyle has failed to carry his burden of a "strong showing" necessary to establish an abuse of discretion, see Estencion, 63 Haw. at 267, 625 P.2d at 1043, inasmuch as the interrogatories posed by the circuit court's special verdict form are "adequate to obtain a jury determination of all factual issues essential to the judgment." See Montalvo, 77 Hawai'i at 292, 884 P.2d at 355 (citation and quotation marks omitted); Booker, 65 Haw. at 172, 649 P.2d at 380. Accordingly, I would hold that the ICA did not err by affirming the circuit court's decision to include interrogatories pertaining to Tupuola in the special verdict form.

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