

CONCURRING AND DISSENTING OPINION BY GINOZA, J.

I write separately to address three of the issues raised on appeal by Plaintiffs-Appellants/Cross-Appellees Eustaquio and Carmelita Uy (the Uys). First, for the additional reasons set forth below, I concur with the majority that the Circuit Court of the Second Circuit (circuit court) did not err in its evidentiary rulings at trial regarding homeowners insurance. Second, I respectfully dissent regarding the circuit court's grant of summary judgment for Defendant-Appellee/Cross-Appellant Spencer Homes, Inc. (Spencer Homes) on the Uys's bodily injury claims. Third, I also dissent as to the circuit court's grant of Spencer Homes's post-trial renewed motion for judgment as a matter of law on the Uys's punitive damages claim.

I. Evidentiary Rulings at Trial

I agree with the majority that the circuit court did not err in allowing the Uys to be questioned to some extent regarding their homeowners insurance. I would additionally note, however, that the circuit court had to address this issue because, notwithstanding that the circuit court had granted the Uys's pretrial motion in limine to exclude evidence of homeowners insurance, Carmelita Uy's trial testimony on direct examination referenced insurance and also rendered the availability of insurance a relevant issue. Thus, Carmelita Uy's testimony opened the door to some extent pertaining to homeowners insurance. The circuit court properly balanced the need to address the homeowners insurance in this context.

II. Summary Judgment on the Uys's Bodily Injury Claims

On October 20, 2011, the circuit court granted summary judgment in favor of Spencer Homes on the Uys's bodily injury claims based on Hawaii Revised Statutes (HRS) § 431:10C-306 (2005). In my view, however, there were genuine issues of material fact as to whether HRS § 431:10C-306(e)(2)(C) preserved the potential liability of Spencer Homes for the Uys's bodily injury claims. HRS § 431:10C-306(e)(2)(C) provides:

§431:10C-306 Abolition of tort liability.

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(e) No provision of this article shall be construed to exonerate, or in any manner to limit:

(2) The criminal or civil liability, including special and general damages, of any person who, in the maintenance, operation, or use of any motor vehicle:

(C) Engages in conduct resulting in punitive or exemplary damages[.]

(Emphasis added.)

Given the evidence presented on the summary judgment motion and considering the evidence in the light most favorable to the Uys as the non-moving parties, there were genuine issues of material fact as to whether, in the maintenance, operation, or use of the subject Peterbilt water tanker truck, Spencer Homes engaged in conduct that would result in punitive or exemplary damages.

[Punitive] damages may be awarded in cases where the defendant has acted wantonly or oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations; or where there has been some wilful misconduct or that entire want of care which would raise the presumption of a conscious indifference to consequences.

Masaki v. Gen. Motors Corp., 71 Haw. 1, 11, 780 P.2d 566, 572 (1989) (citation, quotation marks and block format omitted). Punitive damages must be demonstrated by clear and convincing evidence. Ditto v. McCurdy, 86 Hawai'i 84, 92, 947 P.2d 952, 960 (1997). A jury need only find "either willful misconduct or entire want of care, to wit, gross negligence, in order to properly award punitive damages." Id. Gross negligence has been defined as being "reckless and consciously indifferent to the consequences that could arise." Id.

In their Second Amended Complaint, the Uys alleged *inter alia* that Spencer Homes was grossly negligent in failing to secure the water tanker truck by failing to restrict access and by leaving a key in the truck. In opposing Spencer Homes's summary judgment motion, the Uys argued that HRS § 431:10C-

306(e) (2) (C) preserves the civil liability of Spencer Homes because the evidence showed that Spencer Homes knew of the extraordinary dangerousness of the water tanker truck and knew there was a history of vehicle theft at the construction site, but nevertheless failed to repair the known broken door locks on the water tanker truck and left the water tanker truck unlocked, on an unguarded and unfenced construction site, with the keys in the ignition.

In support of their position, the Uys attached to their opposition memorandum the deposition transcripts of David Brown (Brown) and Charles Kulesa (Kulesa), both representatives for Spencer Homes. Brown performed maintenance and repairs on Spencer Homes's equipment, while Kulesa was a project manager and supervisor for Spencer Homes. The Uys also attached to their opposition memorandum police reports from the Maui County Police Department reflecting investigations into three vehicle thefts from Spencer Homes's job site between August 2005 and March 2007. Moreover, it was undisputed that the key to the water tanker truck was in the ignition when the truck was taken in December 2007.

Given the evidence adduced by the Uys, despite three vehicle thefts from around the job site and Spencer Homes's knowledge that the 52,000 lbs Peterbilt water tanker truck was a dangerous vehicle that should only be operated by trained employees, there were genuine issues of material fact whether Spencer Homes had a clear policy to regulate access to keys or to instruct employees not to leave the key overnight in an unlocked vehicle on an unattended site located near a residential neighborhood. Brown acknowledged that not all vehicles were kept locked, while Kulesa stated that Spencer Homes did not have a policy regarding whether doors to heavy equipment should be locked in December 2007. Kulesa testified that Spencer Homes did not monitor whether the tanker doors could lock because "[w]e did not feel that that was a security issue for us." Further, Kulesa's testimony raised a question whether the site had

previously been vandalized and whether it was known that individuals came onto the site when workers were not there.

Viewing the evidence in the light most favorable to the Uys, there were genuine issues of material fact whether Spencer Homes acted with gross negligence, or was reckless and consciously indifferent to the consequences that could arise, in the maintenance, operation, or use of the water tanker truck, such as to trigger HRS § 431:10C-306(e)(2)(C). Thus, based on the applicable *de novo* review, I would conclude that summary judgment on the bodily injury claims in favor of Spencer Homes pursuant to HRS § 431:10C-306 was in error.

Of further note, on July 30, 2012, the circuit court orally denied Spencer Homes's motion in limine seeking to preclude the Uys's punitive damages claim at trial. Hence, punitive damages against Spencer Homes was an issue presented at trial and considered by the jury. Consistent with that, given HRS § 431:10C-306(e)(2)(C), summary judgment should not have been granted on the Uys's bodily injury claims.

III. Judgment as a Matter of Law on the Punitive Damages Claim Against Spencer Homes

Having considered the evidence at trial, the jury awarded the Uys punitive damages against Spencer Homes in the amount of \$12,500. However, Spencer Homes filed a post-trial renewed motion for judgment as a matter of law with regard to the punitive damages award,¹ which the circuit court granted. The Uys contend on appeal that the circuit court erred in granting this motion.

The following standards apply in addressing this issue raised by the Uys:

[I]t is well settled that a trial court's rulings on motions for judgment as a matter of law are reviewed *de novo*. When reviewing a motion for judgment as a matter of law, the evidence and the inferences which may be fairly drawn

¹ The circuit court had previously denied a motion by Spencer Homes seeking to dismiss the Uys's punitive damages claim after the Uys had rested their case during trial.

therefrom must be considered in the light most favorable to the nonmoving party and the motion may be granted only where there can be but one reasonable conclusion as to the proper judgment.

Kramer v. Ellett, 108 Hawai'i 426, 430, 121 P.3d 406, 410 (2005) (emphasis added) (citations, quotation marks and brackets omitted). Moreover,

Verdicts based on conflicting evidence will not be set aside where there is substantial evidence to support the jury's findings. [The Hawai'i Supreme Court has] defined "substantial evidence" as credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion.

Nelson v. Univ. of Hawaii, 97 Hawai'i 376, 393, 38 P.3d 95, 112 (2001) (citation, block format and brackets omitted).

Viewing the evidence adduced at trial in the light most favorable to the Uys, I conclude that there was substantial evidence upon which the jury could have found Spencer Homes to be grossly negligent and thus to support the jury's award of punitive damages. As noted above, "the jury need[] only find . . . entire want of care, to wit, gross negligence, in order to properly award punitive damages,"² and gross negligence has been defined as acting "reckless and consciously indifferent to the consequences that could arise." Ditto, 86 Hawai'i at 92, 947 P.2d at 960.

Despite knowledge that a jeep had been stolen from around the job site three times, that a flat bed truck was stolen from the job site in 2005, and that the Peterbilt water tanker truck was a dangerous piece of heavy equipment when operated by trained drivers, let alone an untrained one, Spencer Homes: decided that unlocked doors on the water tanker truck were not a safety issue and thus did not have a policy regarding the maintenance of door locks or whether the employees were required to lock the doors; did not maintain a written record of who had

² The jury was instructed that "[y]ou may award punitive damages against a particular defendant only if plaintiffs have proved by clear and convincing evidence that the particular defendant acted willfully, wantonly, or with gross negligence. Punitive damages may not be awarded for mere inadvertence, mistake or errors of judgment."

the key to the water tanker truck at any particular time; and did not erect a fence around the stored heavy equipment or hire a guard to monitor the site. As a matter of convenience, Spencer Homes appeared to maintain a policy of leaving the key with whomever last drove the water tanker truck. Further, although there was testimony that Spencer Homes had a safety rule that the water tanker trucks had to be parked, engine off and key removed, the asserted rule was not written or posted anywhere, it was unclear whether or how the rule was communicated to employees, and enforcement of the asserted rule was left up to each individual driver. Finally, as noted above, there was no dispute in the evidence that the key to the water tanker truck was in the ignition when the truck was taken in December 2007. When viewed in a light most favorable to the Uys, there was not but one reasonable conclusion that could be reached regarding the punitive damages claim, and instead there was substantial evidence upon which the jury could base its award of punitive damages. Thus, on *de novo* review, I would conclude that Spencer Homes's renewed motion for judgment as a matter of law on the punitive damages award should not have been granted.

IV. Conclusion

For the reasons set forth above, I therefore concur in part and dissent in part.

Timothy A. King