

CONCURRING OPINION OF BURNS, J.

In Francis v. Lee Enterprises, Inc., 89 Hawai'i 234, 971 P.2d 707 (1999), the fact was that plaintiff-appellant Russ Francis (Francis) had been terminated from his employment on January 20, 1997. Francis sued his former employer in federal court which asked this court: "Does Hawai'i law recognize a tortious breach of contract cause of action in the employment context?"

In an opinion filed on January 21, 1999, this court's answer was, "Hawai'i law does *not* recognize tortious breach of contract actions in the employment context." In my view, that answer was materially misleading. Clearly, the question was asked with reference to January 20, 1997, not January 21, 1999, and the answer reasonably was understood as being an answer pertaining to January 20, 1997, not January 21, 1999. If that was not true, the answer should have so noted.

In light of the decision in the instant case, the answer to the question in the Francis case should have been: "Hawai'i law does not recognize tortious breach of contract actions arising on or after the day this opinion is entered. The question whether this rule applies to actions arising on a day prior to the entry of this opinion shall be determined by application of the rule governing the retroactive application of judicial decisions in civil cases." See Catron v. Tokio Marine Management, Inc., 90 Hawai'i 407, 411, 978 P.2d 845, 849 (1999).

Applying the Catron rule in the instant case, I agree with the decision of the majority.