
NO. 25464

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

FRANCES HILL, Individually and as Special
Administrator for the Estate of David C. Afong, Deceased
Plaintiff-Appellant,

vs.

STATE OF HAWAI'I, Defendant-Appellee,

and

JOHN SMYTHE, GUY HALL, and DOE ENTITIES 1-10, Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-2592)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Plaintiff-Appellant Frances Hill appeals from the October 15, 2002 judgment of the Circuit Court of the First Circuit in favor of the State of Hawai'i (State) and awarding the State \$13,530.51 in costs in this action arising out of the death of Hill's son, David C. Afong.¹ Hill argues that Hawai'i Revised Statutes (HRS) § 662-5 (1993) and HRS § 662-2 (1993) are unconstitutional because she has a constitutional right to a jury trial against the State and to sue the State for punitive damages. Hill also argues that the circuit court: (1) erred by applying the incorrect legal standard for negligence; (2) made erroneous conclusions of law; (3) abused its discretion by

¹ The Honorable Dan T. Kochi presided over this matter.

awarding costs to the State; and (4) made "obvious, significant factual errors."

Upon carefully reviewing the record and briefs submitted, we hold as follows:

- (1) HRS § 662-5 and HRS § 662-2 are not unconstitutional. The doctrine of sovereign immunity derives from the State's inherent power, not the Constitution. Alden v. Maine, 527 U.S. 706, 713 (1999). The State has sovereign immunity except where there has been a clear relinquishment of immunity and the State has consented to be sued. The State has waived immunity to suit only to the extent specified in HRS chapter 661 and 662. Taylor-Rice v. State, 105 Hawai'i 104, 109-110, 94 P.3d 659, 664-665 (2004). The State has the right to limit its waiver of sovereign immunity, and neither HRS § 662-5 or HRS § 662-2 is unconstitutional;
- (2) the legislature did not violate the separation of powers doctrine when it enacted HRS § 662-5 and HRS § 662-2. Any waiver of sovereign immunity is a matter for legislative determination, and the waiver must be unequivocally expressed in the statutory text. Taylor-Rice 105 Hawai'i at 112, 94 P.3d at 667.
- (3) the circuit court correctly ruled that the State owed Afong a duty of reasonable care for his safety. Ajirogi v. State, 59 Haw. 515, 520-21, 583 P.2d 980, 984 (1978) (State's liability for negligence in exercising control over persons

in its custody is judged under the reasonable care standard);

- (4) Hill argues that certain conclusions of law were clearly erroneous. However, Hill does not allege that the court applied the incorrect law. Instead, she argues that the evidence supports facts which contradict the circuit court's findings. As such, this court has reviewed Hill's allegations of factual error. Hill has failed to make the relevant transcripts she cites a part of the record on appeal, contrary to the requirements of Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(b)(3). Consequently, this court could not review those transcripts and could only review those exhibits which were made a part of the record on appeal and which were cited by Hill. These exhibits do not support Hill's allegations. Therefore, the circuit court's findings of fact are not clearly erroneous, such that Hill's argument is without merit;
- (5) The circuit court did not err when it found that Hill failed to prove a causal relationship between the alleged acts and omissions of State employees and Afong's death. Hill did not meet her burden of proving legal causation. See Miyamoto v. Lum, 104 Hawai'i 1, 15, 84 P.3d 509, 523 (2004).
- (6) The circuit court did not abuse its discretion by awarding the State costs pursuant to Hawai'i Rules of Civil Procedure

(HRCF) Rule 68. It is undisputed that the State made an HRCF Rule 68 settlement offer to Hill, which she did not accept, and that the judgment after trial was not more favorable to Hill than the settlement offer. Under these facts, HRCF Rule 68 provides that Hill must pay the costs incurred by the State after the making of the settlement offer;

- (7) This court will not review Hill's argument that the circuit court made factual errors because she failed to include this argument in her points on appeal. HRAP Rule 28(b)(4). Assuming arguendo that Hill included this argument in her points of error, she would still not prevail because she alleged the same factual errors in the circuit court's conclusions of law and none of her allegations was supported by the evidence in the record presented.

IT IS HEREBY ORDERED that the circuit court's final judgment filed is affirmed.

DATED: Honolulu, Hawai'i, January 10, 2005.

On the briefs:

Carl M. Varady
for plaintiff-appellant
Frances Hill

Dorothy Sellers
and Kimberly Tsumoto,
Deputy Attorneys General,
for defendant-appellee
State of Hawai'i