NO. 22760

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

YOLANDA LIBERATO, Individually and as Next Friend for Maria Liberato, and RUDY LIBERATO, Plaintiffs/Counterclaim Defendants-Appellants, v. STATE OF HAWAI'I, Defendant/Counterclaimant-Appellee, and DOUGLAS C. BALACUA, and JOHN DOES 1-10, Defendants

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 96-1839)

MEMORANDUM OPINION
(By: Burns, C.J., Watanabe and Lim, JJ.)

This case started when Plaintiff/Counterclaim Defendant-Appellant Yolanda Liberato (Yolanda), individually and as next friend for Maria Liberato (Maria), and Plaintiff/Counterclaim Defendant-Appellant Rudy Liberato (Rudy) (collectively the Liberatos) sued Defendant/Counterclaimant-Appellee State of Hawai'i (the State) and Defendant Douglas C. Balacua (Douglas) seeking compensation for damages allegedly caused by the State's negligent placement of a foster child in their home.

In this appeal, Yolanda, as next friend for Maria, challenges the circuit court's August 16, 1999 Judgment in favor of the State. More specifically, Yolanda, as next friend for Maria, challenges the circuit court's May 28, 1999

Order Granting Defendant State of Hawai‘i's Motion for Summary Judgment Filed on November 23, 1998.

We affirm.

BACKGROUND

Rudy and Yolanda have four children. Maria is one of them. In the December 6, 1998 Declaration of Yolanda Liberato, Yolanda alleges that "MARIA LIBERATO was born on February 9, 1976. She presently is 22 years old. She has been mentally retarded since birth, and her mental function presently is that of approximately a second grader."

Douglas was born on May 23, 1975. In 1993, his intelligence quotient of 64 placed his intellect "in the Mildly Retarded Range -- below the 1st percentile level."

Douglas was in the foster custody of the State's Department of Human Services (DHS) pursuant to the Child Protective Act, Hawai‘i Revised Statutes (HRS) Chapter 587. Yolanda became acquainted with Douglas when Douglas was in classes and in the Special Olympics with Maria. Douglas had been hospitalized at Castle Hospital and the State Psychiatric Hospital. When Yolanda learned that Douglas was going to be discharged from the hospital, she offered the home of the Liberatos as a foster home for Douglas. On February 2, 1990, DHS placed Douglas in the foster custody of Rudy and Yolanda.

In April 1990, Douglas engaged in sexual intercourse with Maria and caused Maria to become pregnant. An abortion was subsequently performed.[1]

Maria attended special education classes at Castle High School. After Douglas was removed from the Liberatos' home on August 31, 1990, DHS enrolled him in Castle High School and the State's Department of Education refused to move him to another school. DHS also placed Douglas in a care facility located within a few blocks of the Liberatos' home and refused to move him.

On May 2, 1996, the Liberatos filed a Complaint against the State and Douglas alleging that, in addition to Douglas' initial sexual assault on Maria, Douglas physically assaulted Yolanda, set numerous fires in and around the Liberatos' house, and committed a second sexual assault upon Maria.[2]

The Complaint asserted the following grounds for relief: (1) the State's negligence for failing to disclose that Douglas had a history of aggressive sexual behavior,

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[1] The May 2, 1996 Complaint alleges, in relevant part, that "[s]ubsequent to the time when Plaintiff Maria becomes pregnant, Plaintiff Yolanda learned of this fact and incurred medical expenses for a therapeutic abortion for Maria."

[2] The May 2, 1996 Complaint says that the first act was "unpermitted sexual intercourse" and the second act was "a second sexual assault." In the December 6, 1998 Declaration of Yolanda Liberato, Yolanda states that both acts were "sexual intercourse" causing Maria's "injuries."

failing to investigate the appropriateness of placing Douglas in a home where he would be in regular contact with a mentally retarded female child, failing to warn Yolanda and Rudy of any potential danger, failing to provide Rudy and Yolanda with sufficient instruction and guidance, failing to promptly remove Douglas from the Liberato home, refusing to remove Douglas after Rudy and Yolanda complained, and placing Douglas in a home in close proximity to the Liberato home; (2) the negligent and intentional infliction of emotional distress by Douglas upon Maria; (3) the assault and battery of Maria by Douglas; and (4) the State's vicarious liability for the tortious conduct of Douglas.

In its June 4, 1996 answer, the State asserted sovereign immunity, statutory immunity, assumption of a known risk, negligent supervision by Rudy and Yolanda, statute of limitations, laches, waiver and estoppel, failure to mitigate damages, nonliability for discretionary function or duty, doctrine of unclean hands, and the State's lack of control over Douglas.

Together with its answer, the State filed its counterclaim against Rudy and Yolanda for indemnity or contribution.

The Complaint was served on Douglas in Ohio. Default was entered against Douglas on August 21, 1997.

In the State's Motion for Summary Judgment filed on November 23, 1998, the State asserted that the claim against it is governed solely by the State Tort Liability Act (STLA), HRS Chapter 662, and that HRS § 662-4 (1993)[3] imposes a two-year statute of limitations which was exceeded in this case.

In the memorandum in opposition to the State's motion for summary judgment filed November 23, 1998, the Liberatos did not disagree that their claims were barred by the relevant statute of limitations. Yolanda, as next friend for Maria, contended that Maria's claims were not barred by the relevant statute of limitations and presented the following arguments:

1. Maria's claim is not barred because "Maria is mentally retarded and unable to appreciate the connection between what happened to her and the problems that she experiences at the present time."

2. "[T]he doctrine of equitable estoppel could be applied against [the State] in order to prevent manifest injustice."

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[3] Hawai‘i Revised Statutes (HRS) § 662-4 (1993) states as follows:

> **Statute of limitations.** A tort claim against the State shall be forever barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply.

3. HRS § 587-2 (1993) defines "foster custody." HRS § 587-2(3) states that "[a]n authorized agency shall not be liable to third persons for the acts of the child solely by reason of the agency's status as temporary foster custodian or foster custodian of the child." "The clear meaning of the statute is that there were circumstances within the contemplation of the legislature where the State could be held vicariously liable for the tortious acts of foster children." "[T]he statute seems to contemplate liability if the State can be said to be more than a passive custodian of the child."

> While it is not possible to attach liability "solely" upon the State's status as a foster parent, once a Plaintiff has made a showing of additional knowledge that a child poses a danger to those in the area where he is being placed, the State should be responsible for the tortious acts of the minor child without the necessity for a showing that the State was negligent in placing the child in that place.

4. "[W]here there is a disputed issue as to whether a suit is timely brought, summary judgment should not be granted to the defendant."

POINTS ON APPEAL

In this appeal, Yolanda, as next friend for Maria, argues that: (1) the State can be held vicariously liable for the acts of a child in the foster custody of DHS; (2) the applicable statute of limitations does not bar a claim involving the vicarious liability of the State when the claim against the person for whom the State is vicariously liable is

timely; (3) claims against the State under the STLA asserted by a person under disability may be tolled under principles announced in Dunlea v. Dappen, 83 Hawai‘i 28, 924 P.2d 196 (1996); (4) claims against the State by a person under disability may be tolled under equitable principles announced in Filipo v. Chang, 62 Haw. 626, 618 P.2d 295 (1980), when the persons who are the disabled person's natural custodians have a conflict of interest and there is no other person appointed as Guardian of the Person or Guardian of the Property of the person under disability; and (5) summary judgment may not be granted upon an incomplete record that includes hearsay and improperly authenticated documents.

STANDARD OF REVIEW

We review a circuit court's award of summary judgment *de novo* under the same standard applied by the circuit court. Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted).

When making a summary judgment determination, "we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai‘i 76, 80, 947 P.2d 944, 948 (1977) (quoting Maguire v. Hilton Hotels Corp., 79

Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted). "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Amfac, *supra* (citations and internal quotations omitted); *see* Hawai‘i Rules of Civil Procedure (HRCP) Rule 56(c) (1990). "A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

HRCP Rule 56(e) provides, in relevant part, as follows:

> When a motion for summary judgment is made . . . an adverse party may not rest upon the mere allegations of denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Thus, a party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor can the hope of producing the required evidence entitle the party to trial. Henderson v. Professional Coatings Corp., 72 Haw.

387, 401, 819 P.2d 84, 92 (1991) (quoting 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2D § 2727 (2d. ed. 1983)).

> A summary judgment motion "challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he is entitled to prevail . . . because his opponent has no valid claim for relief or defense to the action, as the case may be." He thus has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense and he is entitled to judgment as a matter of law.
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> He "may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent." cf. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed. R. Civ. P. 56 need not support his motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is absence of evidence to support the opponent's claims). "For if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless."

First Hawaiian Bank v. Weeks, 70 Haw. 392, 396-97, 772 P.2d 1187, 1190 (1989) (citations omitted).

DISCUSSION

1.

Vicarious Liability of the State

In relevant part, HRS § 577-3 (1993) states that "[t]he father and mother of unmarried minor children shall jointly and severally be liable in damages for tortious acts committed by their children[.]"

In relevant part, HRS § 587-2 states in its definition of "permanent custody" that "[p]ermanent custody

. . . vests in a permanent custodian, each of the parental and custodial duties and rights of a legal custodian and family member[.]"

The Liberatos argue that the State must be held vicariously liable to third parties for torts committed by a child in the foster custody of the DHS, regardless of wrongdoing on the part of the State. The Liberatos analogize the rights and responsibilities of natural guardians of children and suggest that those rights and responsibilities, including vicarious liability, are transferred to the State in a foster custodial relationship. We disagree.

As previously noted, in its definition of "foster custody," HRS § 587-2 states, in relevant part: "An authorized agency shall not be liable to third persons for the acts of the child solely by reason of the agency's status as temporary foster custodian or foster custodian of the child." This subsection clearly reflects the position that "an authorized agency" cannot be held vicariously liable as "foster custodian of the child." The word "solely" means that "an authorized agency" can be held non-vicariously liable.

2.

State's Liability for Negligent Placement of Douglas

The Liberatos asserted a STLA claim against the State. The STLA, in HRS § 662-4 (1993), states as follows: **"Statute of limitations.** A tort claim against the State shall forever be barred unless action is begun within two years after the claim accrues, except in the case of a medical tort claim when the limitation of action provisions set forth in section 657-7.3 shall apply."

In contrast, the following HRS (1993) sections state, in relevant part, as follows:

> **§ 657-7.3 Medical torts; limitation of actions; time.**
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> . . . .
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> Actions by a minor shall be commenced within six years from the date of the alleged wrongful act except the actions by a minor under the age of ten years shall be commenced within six years or by the minor's tenth birthday, whichever provides a longer period. Such time limitation shall be tolled for any minor for any period during which the parent, guardian, insurer, or health care provider has committed fraud or gross negligence, or has been a party to a collusion in the failure to bring action on behalf of the injured minor for a medical tort. The time limitation shall also be tolled for any period during which the minor's injury or illness alleged to have arisen, in whole or in part, from the alleged wrongful act or omission could not have been discovered through the use of reasonable diligence.
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> **§ 657-13 Infancy, insanity, imprisonment.** If any person entitled to bring any action specified in this part . . . is, at the time the case of action accrued, either:
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> (1) Within the age of eighteen years; or,
>
> (2) Insane; or,

> (3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than the person's natural life;
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> such person shall be at liberty to bring such actions within the respective times limited in this part, after the disability is removed or at any time while the disability exists.
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> **§ 661-5 Limitations on action.** Every claim against the State, cognizable under this chapter,[4] shall be forever barred unless the action is commenced within two years after the claim first accrues; provided that the claims of persons under legal disability shall not be barred if the action is commenced within one year after the disability has ceased.

When assessing the limitations period applicable to tort actions brought against the State under the STLA, the tolling provisions of HRS §§ 657-13 and 661-5 do not apply. Whittington v. State, 72 Haw. 77, 78, 806 P.2d 957, 957-58 (1991). Unlike HRS §§ 657-7.3, 657-13, and 661-5, the STLA statute of limitations does not have a tolling provision.

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[4] HRS Chapter 661 is entitled **"Actions by and against the State."** HRS § 661-1 vests jurisdiction in the circuit or district courts of the State to decide claims arising under the chapter as follows:

> (1) All claims against the State founded upon any statute of the State; or upon any regulation of an executive department; or upon any contract, expressed or implied, with the State, and all claims which may be referred to any such court by the legislature; provided that no action shall be maintained, nor shall any process issue against the State, based on any contract or any act of any state officer which the officer is not authorized to make or do by the laws of the State, nor upon any other cause of action than as herein set forth.
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> (2) All counterclaims, whether liquidated or unliquidated, or other demands whatsoever on the part of the State against any person making claim against the State under this chapter.

Therefore, the Liberatos cannot use Maria's legal disability to toll the STLA statute of limitations.

Under statutes like HRS § 662-4, where the applicable statute of limitations commences running when "the claim accrues," the Hawai‘i Supreme Court has "employed the 'discovery rule,' holding that a cause of action accrues when the plaintiff discovers, or reasonably should have discovered, the elements giving rise to the claim." Dunlea, 83 Hawai‘i at 33, 924 P.2d at 201 (citations omitted). In Dunlea, the Hawai‘i Supreme Court stated, in relevant part, that

> [w]e are persuaded by the reasoning of those courts that, having considered the application of either statutory or judicially created discovery rules to claims of CSA [childhood sexual abuse], have determined that the issue of when a plaintiff discovered, or reasonably should have discovered, that she or he was psychologically injured and that the injury was caused by CSA is a question of fact for the jury.

Id., at 34, 924 P.2d at 202.

In this case, it is the State's burden to show the impact of a statute of limitations. Henry Waterhouse Trust Co. v. Freitas, 33 Haw. 139, 148 (1934). The State did this. It is the Liberatos' burden to show that the application of the discovery rule causes the nonimpact of a statute of limitations that otherwise impacts. Dunlea, *supra* at 36, 924 P.2d at 204 (citing Tyson v. Tyson, 107 Wash.2d 72, 727 P.2d 226, 237 (1986)). Did the Liberatos do this?

Assume, without deciding, that the discovery rule applies when applying the STLA statute of limitations. In a situation involving the "foster custody" of a mentally retarded minor, who is (are) the person (persons) to whom the discovery rule applies? In the circuit court, it was assumed that the discovery rule, if applicable, was applicable to Maria. In that situation, the Liberatos also must prove that Maria reasonably did not discover and was unable to discover the elements giving rise to the claim. The record reveals that the Liberatos failed to meet this burden. At no point did the Liberatos produce such evidence. The Liberatos contend that Maria's mental retardation equates to prima facie evidence of her inability to discover. This argument, however, is nothing more than an allegation unsupported by anything in the record. A party opposing a motion for summary judgment cannot discharge his or her burden by allegations. Henderson, *supra*. The allegations must be appropriately supported by evidence. The Liberatos have not satisfied the requirements to avoid summary judgment. Even if we assume that Maria's mental function, at all times relevant in this case, was "that of approximately a second grader[,]" that fact is not, by itself, substantial evidence of her inability to discover the elements giving rise to the claim. We cannot

take judicial notice that all second graders who are raped are unable to discover the elements giving rise to a claim for damages caused by the rape.

Not considered by the parties is the possibility that it is Maria's parents/guardians whose discovery of the injury and the resulting consequences is at issue. This position manifests some logic in situations where the allegedly injured party suffers from a permanent legal incapacity such that he or she was unable to discover the elements giving rise to the claim.

Assuming this to be the situation in this case, the discovery rule requires the Liberatos to produce evidence showing the elements giving rise to the claim and that Yolanda and Rudy reasonably did not discover one or more of these elements. The Liberatos did not satisfy their burden. It is doubtful that they could considering that, in addition to knowing of the assaults by Douglas on Maria and of Maria's pregnancy and abortion, as evidenced by their participation in the abortion arrangements, Yolanda and Rudy have been residing with Maria before and after the assaults.

Finally, in Filipo, *supra*, the Hawai‘i Supreme Court stated, in relevant part, as follows:

> For 23 years, PWM [Public Welfare Manual] 3241 has been incorporated in the Department's rules and regulations and has

> been relied on to grant assistance to pregnant women who would not otherwise be categorically eligible for AFDC [aid to families of dependent children program] benefits. For the government to now assert the invalidity of PWM 3241 because of non-compliance with HAPA is unconscionable when it is the government's misfeasance and nonfeasance which is responsible for the non-compliance. Government, above all, must be above reproach. Equity and fairness dictate that it should not be permitted to take advantage of its own wrong or mistake.

Id. at 635, 618 P.2d at 300. We conclude that the Filipo equitable estoppel rule is not relevant in this case because the State is not asserting a similar invalidity.

CONCLUSION

Accordingly, we affirm the circuit court's August 16, 1999 Judgment.

DATED: Honolulu, Hawai‘i, December 11, 2000.

On the briefs:

Francis T. O'Brien
for Plaintiffs/Counterclaim
Defendants-Appellants.

Girard D. Lau,
Deputy Attorney General,
for Defendant/
Counterclaimant-Appellee.

Chief Judge

Associate Judge

Associate Judge