

NO. 24158

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAII

FRANK FOO and VERA FOO YOKOI, Plaintiffs-Appellants, v.  
WENDELL FOO and HAWAII ESTATE VENTURES, LTD., a  
California limited partnership, Defendants-  
Appellees, and DOES 1 through 10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT  
(CIV. NO. 99-1722)

MEMORANDUM OPINION

(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiffs-Appellants Frank Foo (Frank) and Vera Foo Yokoi (Vera) (collectively Appellants) appeal from the amended final judgment entered on March 1, 2001, that finalized (1) the November 5, 1999 "Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiffs' Complaint Filed April 28, 1999, and for Sanctions," (2) the February 18, 2000 "Order Granting Defendant's Motion for Summary Judgment Filed on November 19, 1999," and (3) the January 18, 2001 "Order Granting Defendants' Motion for Taxation of Attorneys' Fees Pursuant to HRS § 607-14." We conclude that "(1)" is half-right and half-wrong because none of this case belongs in the civil court and all of it belongs in the probate court. We further conclude that "(2)" and "(3)" are wrong.

## I. BACKGROUND

The following are facts alleged by Appellants.

The property accumulated by Francis K. C. Foo (Francis) and Evelyn S. Foo (Evelyn) during their marriage included parcels of real property located on the islands of O'ahu and Hawai'i. On or before April 15, 1983, Francis and Evelyn implemented their estate plan by each executing reciprocal marital and residuary trusts<sup>1</sup> and conveying real property to the trusts. When Francis died in 1984, Evelyn appointed her oldest son, Defendant-Appellee Wendell Foo (Wendell), as co-trustee of the Evelyn S. Foo Trust, Evelyn became the successor trustee of the Francis K. C. Foo Trust, and Wendell commenced his erroneous belief that he was co-trustee of the Francis K. C. Foo Trust. At various times thereafter, interests in various parcels of real property owned by the Francis K. C. Foo Trust, including the real property involved in this case, were conveyed to the Evelyn S. Foo Trust.

On September 9, 1993, Wendell and Evelyn did the following: (1) they signed, as general partners, the Certificate of Limited Partnership (Certificate) of Defendant-Appellee Hawaii Estate Ventures, Ltd. (HEV), and (2) as the co-trustees of the Evelyn S. Foo Trust, they conveyed the interest<sup>2</sup> of the

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<sup>1</sup> No trust documents are in the record.

<sup>2</sup> The percent of the interest of the Evelyn S. Foo Trust in the real property that was conveyed has not been specified. It appears that the interest was 100%.

Evelyn S. Foo Trust in unimproved real property on the island of Hawai'i, namely "The Gold Coast Property" (33,343 square feet) and "The Auhaukeae Property" (7,096 square feet), to HEV for one thousand dollars (\$1,000.00) per parcel.

Frank alleges he learned of the real property transfers in June of 1996.

On September 27, 1993, (1) the Certificate was filed in the office of the Secretary of State of the State of California, and (2) Evelyn transferred ninety percent (90%) of her interest in HEV to Wendell (two percent (2%) as general partner, and eighty-eight (88%) as limited partner), two percent (2%) to Wendell's wife (as a limited partner), and six percent (6%) to Wendell's children (as limited partners). The reported gift tax value of the ninety-eight percent (98%) transferred was four hundred forty-two thousand, two hundred sixty-nine dollars and ten cents (\$442,269.10).

## II. PROCEDURAL HISTORY

Appellants filed their first civil complaint (First Complaint) in Foo v. Foo, Civil No. 97-1119-03, Circuit Court of the First Circuit, State of Hawai'i, on March 21, 1997. On June 20, 1997, Judge Virginia Lea Crandall granted the defendants' cross-motion to dismiss the First Complaint, ruling that the First Complaint was an action for an accounting by a

trustee that "should have been brought originally before the probate court." Judge Crandall also denied the plaintiffs' motion to transfer action to probate because it was not "appropriate to transfer a civil action to probate court," but gave Appellants leave to file a petition to initiate trust proceedings in probate court.

On September 8, 1997, Appellants filed with the probate court a "Petition for Accounting by Trustees and for Mandatory Mediation" in Foo v. Foo, T. No. 97-0106, Circuit Court of the First Circuit, State of Hawai'i, naming Wendell and Evelyn as Respondents. The request for mediation eventually was withdrawn but the probate proceeding was pending when this appeal was filed.

On November 30, 1997, Evelyn resigned as the trustee for both trusts and Wendell thereby became the sole trustee of both trusts, one by survival and one by succession. Evelyn died on September 13, 1998, and her last will and testament named Wendell as personal representative of her estate. The record does not reveal when Evelyn signed her last will and testament.

On April 28, 1999, Appellants filed a complaint (Second Complaint) in Foo v. Foo, Civil No. 99-1722-04, Circuit Court of the First Circuit, State of Hawai'i, against Wendell and HEV alleging the following causes of action:

6. Plaintiffs . . . allege . . . that at all times mentioned in this complaint, Defendants were the agents and employees of their codefendants, and in doing the things alleged in this complaint were acting within the course and scope of such agency and employment.

. . . .

15. On or before April 15, 1983, Francis K.C. Foo and Evelyn Foo made and entered into a contract and agreement, wherein each of them promised and agreed to and with the other, and in consideration of the promises, representations, and agreement of the other, to create an estate plan. The contract involved creation on that date of mutual, reciprocal wills and trusts. The parties conveyed the bulk of their real property to the said trusts; Plaintiffs are informed and believe that an approximately equal share of the properties was conveyed to each trust. The major features of the trusts were:

A. Upon the death of either spouse, the survivor would set aside, in a separate Marital Trust, assets which qualified for the marital deduction under applicable provisions of the Internal Revenue Code, with income from the Marital Trust payable to the survivor.

B. All other property, along with all assets remaining from the Marital Trust after the death of the survivor, would be transferred to a Residuary Trust. The Residuary Trust was to terminate upon the death of the surviving spouse, with all assets then held by the Residuary Trust to be distributed to Plaintiffs and Defendant Wendell Foo, the surviving issue of Francis K.C. Foo and Evelyn Foo, per stirpes.

16. Following the death of Francis K.C. Foo, Evelyn Foo became the successor trustee of the Francis K.C. Foo Trust. From April 15, 1983, she was the trustee of the Evelyn Foo Trust. Plaintiffs are informed and believe that the two trusts contained most of the accumulated real property formerly held by husband and wife together. In addition, Evelyn Foo became trustee of the Marital Trust provided for in the Francis K.C. Foo Trust for the care of his surviving spouse.

. . . .

21. Through the exercise of his undue influence over Evelyn Foo, and through the misuse of his office of trustee, Wendell Foo caused Evelyn Foo to convey real property that had originally been owned jointly by his parents into the Evelyn Foo trust, and finally directly to him or to entities controlled by him, in defeat of Plaintiffs' expectancy in the properties.

22. One such entity to which Wendell Foo caused trust property to be conveyed is Defendant HEV, a California limited partnership formed in 1993 for the specific purpose of owning Hawaii properties wrongfully conveyed to it from the Foo trusts. . . . Wendell Foo caused properties on the Island of Hawaii worth several million dollars to be conveyed to HEV without consideration.

. . . .

**I. Breach of Contract.**

26. Prior to his death, Francis K.C. Foo performed fully all his obligations under the said contract to provide equally for all three of the Foo children.

27. Plaintiffs are third party beneficiaries of the said contract and have fully performed all obligations required of them under the contract.

28. As a direct and proximate result of the undue influence of Wendell Foo, by means of which Wendell Foo took advantage of her unsoundness of mind, Evelyn Foo failed to perform her obligations under the contract to provide equally for her three children after her death, and instead altered her will and trust instruments, after the death of Francis K.C. Foo, to permit most of the property in her estate to go to Wendell Foo, or to be given away by Wendell Foo to parties not named in the original contract.

29. As a result of the aforesaid actions of Defendant, Plaintiffs have been damaged in an amount to be proven at trial.

**II. Undue Influence.**

30. The allegations contained in paragraphs 1 through 29 are realleged and incorporated as though fully set forth herein.

31. By reason of the relationship of trust and confidence existing between Wendell Foo and Evelyn Foo, and by reason of Evelyn Foo's heightened susceptibility to Wendell Foo's influence, and by reason of Wendell Foo's disposition to use wrongful means to achieve his ends of enriching himself, Wendell Foo was able to and did exert an undue influence on Evelyn Foo in obtaining her signature to various transfers of property which benefit[t]ed him at the expense of Plaintiffs. The undue influence exerted by Wendell Foo was coercive and destroyed the free agency of Evelyn Foo, and it resulted in the substitution of Wendell Foo's will for that of Evelyn Foo.

32. Evelyn Foo's execution of the documents involved in the transfers of said properties was due solely to the deceit and undue influence of Wendell Foo on Evelyn Foo, which amounted to a fraud on the rights of Plaintiffs.

33. As a direct and proximate result of the above actions of Wendell Foo, Plaintiffs have been damaged in an amount to be proven at trial.

**III. Interference With Inheritance Expectancy.**

34. The allegations contained in paragraphs 1 through 33 are realleged and incorporated as though fully set forth herein.

35. Francis K.C. Foo and Evelyn Foo, on many occasions prior to their deaths, informed Plaintiffs that they intended to pass on their estate to all three of their children in equal shares. The estate plan which Francis K.C. Foo and Evelyn Foo created on April 15, 1983, through their execution of mutual and reciprocal wills and trusts, embodied their stated intent. Thereafter, Francis K.C. Foo and Evelyn Foo, and each of them, informed Plaintiffs that all three children had been provided for equally in the estate plan.

36. The above described actions of Wendell Foo were undertaken deliberately and with the intent to interfere with the expectancy by Plaintiffs of their inheritance. Said interference was carried out tortiously by means of duress or undue influence. But for the said interference, Plaintiffs would have received their expectancy with reasonable certainty, and as a consequence of the interference they have suffered damages in an amount to be proven at trial.

#### **IV. Lack of Testamentary Capacity.**

37. The allegations contained in paragraphs 1 through 36 are realleged and incorporated as though fully set forth herein.

38. At the time Evelyn Foo executed the documents for the aforesaid property transfers, . . . [s]he was incapable of transacting business matters and she was not possessed of sufficient mental capacity to make a clear, intelligent, and voluntary disposition of her property.

The Second Complaint requested an order for accounting, a declaration that Appellants are the equitable owners of two-thirds of the real and personal property of the estates of Francis and Evelyn, an imposition of a constructive trust, an order requiring Wendell to convey to Appellants their two-thirds, a judgment for two-thirds of the income from the properties from March 13, 1984, general and special damages, punitive damages, and costs and attorney fees.

Also on April 28, 1999, but in the probate court in T. No. 97-0106, Appellants filed against Wendell an "Amended Petition for Accounting and Distribution by Trustee" (Amended

Petition) alleging that the conveyance of the real properties to HEV was invalid and/or illegal and asking for an accounting, the imposition of a constructive trust, and the assessment of damages, attorney fees and costs. The Amended Petition also alleged that, on November 30, 1996, the assessed value of properties was as follows:

Gold Coast Property	\$2,501,500
Auhaukeae Property	\$ 192,400

On May 25, 1999, in Civil No. 99-1722-04, Appellants' first request for the production of documents and things to Wendell was mailed to the attorney for Wendell and HEV.

On May 28, 1999, in Civil No. 99-1722-04, Wendell and HEV filed "Defendants' Motion to Dismiss Plaintiffs' Complaint Filed April 28, 1999, and for Sanctions." On November 5, 1999, after a hearing on June 30, 1999, Judge Kevin S. C. Chang entered the "Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Plaintiffs' Complaint Filed April 28, 1999, and for Sanctions." This order stated, in relevant part, as follows:

1. Plaintiffs' claims against defendant Wendell Foo contained in the Complaint filed on April 28, 1999, are DISMISSED without prejudice. To the extent that any of the claims are not already presented in the Amended Petition filed on April 28, 199[9] in T. NO. 97-0106, Plaintiffs should consider amendment of their Amended Petition.

2. The balance of Defendants' motion, which seeks dismissal of the complaint against [HEV], is DENIED, Hawai'i Revised Statutes § 560.7-201(A) [sic] and 206.

The Court makes no ruling or determination as to any issue related to consolidation of proceedings or imposition of a stay of proceedings.

On July 19, 1999, Wendell filed his objection to Appellants' request for production of documents and things on the basis that Wendell was no longer a party to the action.

On November 19, 1999, HEV moved for summary judgment, arguing that (1) the Second Complaint did not allege any wrongful acts on the part of HEV, or (2) Counts III and IV have no basis in law. In their opposition filed on February 4, 2000, Appellants stated, in relevant part, as follows: "No depositions have been conducted in this action yet. The first depositions are scheduled for late February and early March, 2000. For that reason, Defendant's Motion for Summary Judgment is premature within the meaning of Rule 56(f), H.R.C.P."

In relevant part, the following was stated at the February 14, 2000 hearing on HEV's motion for summary judgment:

[COUNSEL FOR HEV]: . . .

And all of the transfers to HEV that are the subject of his complaint have been alleged in the second amended petition [in probate court]. In fact they amended their petition after Judge Chang dismissed Wendell Foo. So whatever -- he said, well, whatever you think isn't there you can amend your petition which they did. They amended and have a second amended petition.

. . . [I]t hasn't been articulated to us why they need to have them separately named. And I could understand it if there was some allegation about maybe a wrong that was separate from the trust transfers, you know, something that this partnership had done to their business or to themselves that was other than the trust transfers. But there isn't. It's all about HEV received two properties from the trust property. That's -- that's the whole basis of the allegations against HEV. And there's nothing else.

. . . Your Honor, the problem is if you had a jury deciding these, would they have separate liability against HEV and liability against Wendell Foo when these are the same alleged wrongs? Conceptually that doesn't seem right because there's nothing additional against HEV that they haven't already alleged against Wendell Foo.

. . . .

[COUNSEL FOR APPELLANTS]: It doesn't seem like surplusage to us, Your Honor. . . . [T]his is the only action in which [HEV] is a party. And it's not accurate to say that the only thing they did was to receive the property. They also ratified the wrongful acts of Wendell Foo, and they benefitted from those wrongful acts.

Wendell Foo was the agent for this partnership. A partnership has to act through a human being, a human person. Wendell Foo was the person who acted on behalf of the partnership in these actions of which we're complaining. And since the partnership ratified and benefitted from his wrongful acts, the partnership is liable. That's the theory of the case.

. . . .

[COUNSEL FOR HEV]: Well, Your Honor, I just wonder what's different today than what happened . . . three years ago when Your Honor dismissed and said it was supposed to be in probate court. They named HEV as a defendant in their first civil suit. They were there then. I don't understand what's different now . . . nothing more has happened with respect to HEV.

So we don't quite understand what the separate civil basis of liability is when their opposition makes it clear it's all based on what Wendell Foo did. It's all vicarious liability. If so, then why is it they don't have an adequate remedy going through probate.

And the case law we cited points out when you have a trust or probate matter you're not supposed to be making an end run around it by going into civil court with these, you know, interference with inheritance and expectancy charges and breach of contract. And actually they've named those claims in their second amended petition. They couched them in the same terms.

On February 18, 2000, after the hearing on February 14, 2000, Judge Crandall granted HEV's motion for summary judgment in Civil No. 99-1722-04.

On January 18, 2001, after the hearing on November 14, 2000, and pursuant to HRS § 607-14 (Supp. 2001) (Attorneys' fees in actions in the nature of assumpsit, etc.), Judge Crandall

ordered Appellants to pay the attorney fees incurred by Wendell and HEV in the amount of twenty-nine thousand, two hundred eighty-nine dollars and twenty-eight cents (\$29,289.28).

The final judgment was entered on January 18, 2001. The amended final judgment was entered on March 1, 2001.

### III. APPELLANTS' POINTS ON APPEAL

Reorganized and quoted or obtained from the argument part of the opening brief rather than from the "**STATEMENT OF THE POINT OF ERROR**" part, it appears that Appellants assert the following points on appeal:

1. [T]he properties appear to be transferred to an artificial entity that did not yet exist, and somehow managed to pay for them with \$2,000.00 from a bank account that could not be opened without a filed Certificate or with cash within the control of a limited partnership that did not yet exist. Therefore, this transfer does not appear to have ever happened. **This is perhaps the most important issue of material fact to be adjudicated by a trier of fact.**

If the transfer never legally happened, then the properties are apparently still in the Evelyn Foo Trust. If HEV did nothing at this point it would have done nothing wrong. But that was not the case. HEV has accepted rental income and contracted with third parties to rent or lease property that it did not own. Thus, HEV has embezzled money from the Evelyn Foo Trust.

(Emphasis in the original; record citation omitted.)

2. The defendants violated their duty to disclose to the court that HEV "is not authorized to transact business in Hawaii since it never has . . . registered to transact business in accordance to Haw. Rev. Stat. § 425D-902."

3. "The transfer of property from the Evelyn Foo Trust must be considered a Fraudulent Conveyance because there was no consideration paid to the Evelyn Foo Trust." HEV is Wendell's alter ego and HEV was an accomplice to the fraudulent conveyance.

4. The court erred in dismissing Wendell because, as a general partner of HEV under California law, Wendell bore direct responsibility for HEV's actions, and Wendell's actions as the trustee of the Evelyn S. Foo Trust were separate and different from his actions as a general and limited partner of HEV.

5. "The Trial court made a reversible error by granting the motion [by HEV] for summary judgment before adequate discovery could be conducted."

6. The court erred in awarding attorney fees because Appellants' cause of action was not based in assumpsit.

In their opening brief, Appellants ask:

(1) for a reversal of the order granting summary judgment and a remand to allow adequate discovery;

(2) that Appellants be allowed to amend their Second Complaint to replace the multiple causes of action with the single cause of action of fraudulent conveyance of the real estate from the Evelyn S. Foo Trust to HEV;

(3) that HEV be ordered to comply with the requirement of HRS § 425D-902 (Supp. 2001) that "[b]efore transacting

business in this State, a foreign limited partnership shall register with the director"; and

(4) for a recognition that this case is based upon a fraudulent conveyance, a reversal of the decision that this action is based on assumpsit, and a return of all attorney fees paid by Appellants to Wendell and HEV.

#### IV. DISCUSSION

##### First Question

The first question is whether the court erred when it dismissed the Second Complaint against Wendell. The answer is no. Appellant's case against Wendell belongs in the probate court. Hawai'i's Uniform Probate Code (1993 and Supp. 2002) states, in relevant part, as follows:

**§560:1-301 Territorial application.** Except as otherwise provided in this chapter, this chapter applies to:

. . . .

- (2) The property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State;

. . . .

- (5) Trusts subject to administration in this State.

**§560:1-302 Subject matter jurisdiction.** (a) To the full extent permitted by the Constitution and except as otherwise provided by law, the [probate] court has jurisdiction over all subject matter relating to:

. . . .

- (3) Trusts.

(b) The [probate] court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

. . . .

**§560:7-201 Court; jurisdiction of trusts.** (a) The [probate] court has jurisdiction of proceedings initiated by trustees and interested persons concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. . . .

. . . .

**§560:7-206 Trust proceedings; initiation by notice; necessary parties.** Proceedings under section 560:7-201 are initiated by filing a petition in the court and giving notice pursuant to section 560:1-401 to interested persons.

As noted above, the essential complaint in this case is against Wendell and HEV for Wendell's actions as co-trustee of the Evelyn S. Foo Trust (a) conveying and (b) unduly influencing co-trustee Evelyn to convey the real estate from the Evelyn S. Foo Trust to HEV. This is a subject matter relating to "Trusts" within the contemplation of HRS § 560:1-302(a)(3).

#### Second Question

The second question is whether the court erred when it entered summary judgment in favor of HEV. The answer is yes. For the same reason that the court dismissed the case against Wendell without prejudice, the court should have dismissed the case against HEV without prejudice, and the court erred when it did not.

#### Third Question

The third question is whether the court was authorized to award attorney fees pursuant to HRS § 607-14 (Supp. 2001)

("Attorneys' fees in actions in the nature of assumpsit, etc."). This is a question of law reviewable on appeal under the right/wrong standard. See Leslie v. Estate of Tavares, 93 Hawai'i 1, 994 P.2d 1047 (2000); TSA Intern. Ltd. v. Shimizu Corp., 92 Hawai'i 243, 990 P.2d 713 (1999).

The Second Complaint alleged four causes of action: (a) breach of contract; (b) undue influence; (c) interference with inheritance expectancy; and (d) lack of testamentary capacity. Clearly, the last three do not allege a breach of contract. The question is whether the first alleges a breach of contract like it says it does. The answer is no.

The Second Complaint alleged, in relevant part, as follows:

**I. Breach of Contract.**

26. Prior to his death, Francis K.C. Foo performed fully all his obligations under the said contract to provide equally for all three of the Foo children.

27. Plaintiffs are third party beneficiaries of the said contract and have fully performed all obligations required of them under the contract.

28. As a direct and proximate result of the undue influence of Wendell Foo, by means of which Wendell Foo took advantage of her unsoundness of mind, Evelyn Foo failed to perform her obligations under the contract to provide equally for her three children after her death, and instead altered her will and trust instruments, after the death of Francis K.C. Foo, to permit most of the property in her estate to go to Wendell Foo, or to be given away by Wendell Foo to parties not named in the original contract.

29. As a result of the aforesaid actions of Defendant, Plaintiffs have been damaged in an amount to be proven at trial.

In other words, although the result was an alleged breach of contract between Francis and Evelyn, the alleged unlawful act that caused that breach of contract was Trustee Wendell's breach of trust.

#### CONCLUSION

Accordingly, our decision regarding the March 1, 2001 "Amended Final Judgment in Favor of Defendants Wendell Foo and Hawai'i Estate Ventures, Ltd., and Against Plaintiffs Frank Foo and Vera Foo Yokoi," is as follows:

(1) Regarding the "Order Granting in Part and Denying in Part Defendant's Motion to Dismiss Plaintiffs' Complaint Filed April 28, 1999, and for Sanctions" filed November 5, 1999, we affirm the part that dismissed this action against Wendell without prejudice, we vacate the part that declined to dismiss this action against HEV without prejudice, and we remand for a dismissal of this action against HEV without prejudice.

(2) We reverse the "Order Granting Defendant's Motion for Summary Judgment Filed on November 19, 1999," filed February 18, 2000.

(3) We reverse the "Order Granting Defendants' Motion for Taxation of Attorneys' Fees Pursuant to HRS § 607-14," filed January 18, 2001.

DATED: Honolulu, Hawai'i, January 10, 2003.

On the briefs:

Frank Foo and Vera Foo Yokoi,  
Plaintiffs-Appellants,                    Chief Judge  
*pro se.*

Margery S. Bronster,  
Hilary Benson Gangnes, and                Associate Judge  
Cynthia D. Quinn (Bronster  
Crabtree & Hoshibata)  
for Defendants-Appellees.                Associate Judge