

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 28273

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

CIVIL NO. 97-0448

LEIMOMI L. FRESCH, as Next Friend for HOWARD K. LESLIE, JR.,
Plaintiff-Appellant,

and

LEIMOMI LESLIE FRESCH, Individually, and HOWARD K. LESLIE, SR.,
Plaintiffs-Appellees,

v.

THE ESTATE OF JAMIE TAVARES, Deceased,
Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants

and

CIVIL NO. 98-5468

HOWARD K. LESLIE, JR.,
Plaintiff-Appellant,

and

MEGAN LESLIE, a minor, and MALYSSA LESLIE, a minor,
through their Guardian Ad Litem, MARLENE L. ANDUHA,
Plaintiffs-Appellees,

v.

JEFFREY K. KANUI, as Personal Representative
of the Estate of Jamie K. Tavares, Deceased,
Defendant-Appellee,

and

JOHN DOES 1-30; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; DOE
CORPORATIONS 1-10; and DOE ENTITIES 1-10, Defendants

and

JEFFREY K. KANUI, Personal Representative
of the Estate of Jamie K. Tavares, Deceased,
Third-Party Plaintiff-Appellee,

v.

LEIMOMI L. FRESCH and HOWARD K. LESLIE, SR.,
Third-Party Defendants-Appellees

JOSEPH L. WILDMAN and SIBILLA & WILDMAN,
Intervenors-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT

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SUMMARY DISPOSITION ORDER

(By: Watanabe, Presiding Judge, Foley and Fujise, JJ.)

Plaintiff-Appellant Howard K. Leslie, Jr. (Leslie Jr.) appeals from the Finding of Facts, Conclusions of Law, and Order¹ filed on August 22, 2001 (8/22/01 FOF/COL/Order) in the Circuit Court of the First Circuit (circuit court).²

The circuit court consolidated the following two civil cases that arose out of a December 22, 1996 automobile accident in which Leslie Jr. was seriously injured when his truck was stuck by a vehicle driven by Jamie K. Tavares (Tavares):

(1) Civil No. 97-0448, Leimomi Leslie Fresch (Fresch), individually, and as next friend for Howard K. Leslie, Jr., and Howard K. Leslie, Sr. (Howard, Sr.), Plaintiffs, v. The Estate of Jamie K. Tavares (Estate of Tavares), et al., Defendants; and

(2) Civil No. 98-5468, Megan Leslie, a minor, and Malyssa Leslie, a minor, through their Guardian Ad Litem Marlene L. Anduha, and Howard K. Leslie, Jr., Plaintiffs, v. Jeffrey K. Kanui (Kanui), Personal Representative of The Estate of Jamie K.

¹ Although the circuit court entered a Judgment in this case on November 9, 2001, in the resulting appeal in Hawai'i Supreme Court No. 24553, the supreme court "remand[ed] this matter to the circuit court for further proceedings with instructions to vacate the November 9, 2001 judgment and reinstate Civ. No. 98-5468." Leslie v. Estate v. Tavares, 109 Hawai'i 8, 14, 122 P.3d 803, 809 (2005) [Leslie II]. On remand, the circuit court entered the October 10, 2006 order certifying the 8/22/01 FOF/COL/Order as final for appeal pursuant to Hawai'i Rules of Civil Procedure (HRCP) Rule 54(b). The circuit court did not reduce the October 10, 2006 order and the 8/22/01 FOF/COL/Order to a separate HRCP Rule 54(b)-certified judgment, as the separate document rule requires. See Oppenheimer v. AIG Hawai'i Ins. Co., 77 Hawai'i 88, 93, 881 P.2d 1234, 1239 (1994).

Absent an appealable judgment, this appeal was premature, and this court dismissed the appeal on February 12, 2007 for lack of appellate jurisdiction. Leslie Jr. filed a motion for reconsideration, which this court denied, and Leslie Jr. then filed an application for certiorari on May 11, 2007.

On June 25, 2007, the supreme court granted Leslie Jr.'s application for certiorari, ruling that the 8/22/01 FOF/COL/Order was an appealable order, even though the circuit court had not reduced the 8/22/01 FOF/COL/Order to a separate judgment pursuant to HRCP Rule 58.

² The Honorable Eden Elizabeth Hifo presided.

Tavares, et al., Defendants; and Jeffrey K. Kanui, Personal Representative of the Estate of Jamie K. Tavares, Third-Party Plaintiff, v. Leimomi L. Fresch and Howard K. Leslie, Sr., Third-Party Defendants.

The circuit court granted Joseph L. Wildman (Wildman) and the law firm of Sibilla & Wildman (S&W) (collectively, Intervenor) permission to intervene for the limited purpose of participating in a fairness hearing.

In its 8/22/01 FOF/COL/Order, the circuit court concluded, in relevant part:

(1) Intervenor properly presented evidence and participated in a fairness hearing to determine the fairness of allocations made in a settlement of the suit.

(2) No reallocation of the settlement funds was warranted because the allocation was fair and equitable as to each of the claimants, including Leslie Jr.

(3) Leslie Jr.'s attorneys were not entitled to attorneys' fees.

On appeal, Leslie Jr. argues the following:

(1) The circuit court abused its discretion in granting "Defendants Joseph L. Wildman and Sibilla & Wildman's Motion to Intervene" (Motion to Intervene) filed on November 15, 2000, where no common questions of law or fact existed between Intervenor's alleged defenses in a malpractice action Leslie Jr. brought against them and the fairness hearing, and where Intervenor's participation unduly prejudiced Leslie Jr. Related to this argument is Leslie Jr.'s contention that Conclusion of Law (COL) 3 is wrong.

(2) The circuit court erred as a matter of law in allowing Intervenor to carry the burden of proof of Leslie Jr.'s mother, Fresch, at the fairness hearing. Related to this argument is Leslie Jr.'s contention that COL 3 is wrong.

(3) The circuit court abused its discretion in finding that the settlement allocations are fair.

(a) The court considered Intervenors' "kickback" scheme to avoid the anticipated lien rights of the State of Hawai'i Department of Human Services (DHS) where the scheme was irrelevant to the fairness determination. Related to this argument is Leslie Jr.'s contention that Findings of Fact (FOF) 25 is clearly erroneous and COL 5, wrong.

(b) The court erroneously determined fairness as of November 1997 rather than the dates of the fairness hearing (February 27, and 28, 2001).

(c) The portion of FOF 20 that states Leslie Jr. received \$46,936.41 in settlement proceeds is clearly erroneous because the exact amount of Leslie Jr.'s settlement allocation is unknown.

(d) COL 7 is wrong for the following reasons:

(i) The portion of COL 7 providing that "[a]t the time [the settlement allocation] was reached, [Leslie Jr.] would have been entitled to none of the proceeds because they would all have been claimed by the State [of Hawai'i] or siphoned off to CSEA [Child Support Enforcement Agency]" is wrong because there is nothing to support it and it is contradicted by FOF 31 and a statement made by DHS.

(ii) The portion of COL 7 providing that "[t]he fact that [DHS] mistakenly claimed a much lower lien amount" was of no consequence to the fairness determination because "DHS is standing by its \$47,178.50 asserted lien amount with regard to the \$320,000 here at issue."

(iii) The portion of COL 7 providing that "[Leslie Jr.] actually did net \$46,936.41, more than his fair share" is clearly erroneous because it suggests that Leslie Jr. was entitled to "no settlement proceeds whatsoever."

(iv) COL 7 is based on FOFs 10, 21, 27, 30, 31, 34, and footnote 2 to FOF 15, which are clearly erroneous; FOFs 11, 13, 19, 23, 25, and 26, which are clearly erroneous in part; and COLs 4, 6, and 8, which are wrong.

(e) Leslie Jr. received less in settlement proceeds than his parents, even though his injuries were severe and life-threatening and he is permanently disabled, while his parents claimed only emotional distress and derivative loss. Related to this argument is Leslie Jr.'s contention that FOF 30 is clearly erroneous and COL 4 is wrong.

(f) The "kickback" scheme improperly gave Fresch's and Leslie Sr.'s claims priority over Leslie Jr.'s claims, and the primary plaintiff should be paid in full before plaintiffs holding only derivative claims are entitled to any proceeds or, at the most, derivative claims should be paid at the same percentage rate as the primary claim.

(g) Fresch received more proceeds than Leslie Jr. and received 100% of her claim before Leslie Jr. received 100% of his proceeds, even though Fresch "was supposed to be acting as [Leslie Jr.'s] Next Friend, not as an adversary competing for a share of the settlement proceeds."

(h) The circuit court's FOF 21 is erroneous because Roy Bell III (Bell) also testified in his deposition concerning the settlement allocation to Leslie Jr. that "[i]n light of how the monies were actually distributed," "it turned out not to be fair" to Leslie Jr.

(i) The circuit court abrogated its "duty to insure that any settlement agreement is fair to its ward" by allowing Fresch and Leslie Sr. to keep settlement proceeds to which they were clearly not entitled, at Leslie Jr.'s expense. In support of this argument, Leslie Jr. cites to Leslie v. Estate

of Tavares (Leslie I), 91 Hawai'i 394, 405, 984 P.2d 1220, 1231 (1999).

(4) The circuit court abused its discretion in affirming Intervenor's attorneys' fees, where Leslie Jr. is not contractually liable for the fees out of his portion of the settlement and where the fees are unreasonable. Related to this argument is Leslie Jr.'s contention that FOF 20 is clearly erroneous and COL 7 is wrong.

(5) The circuit court abused its discretion in denying Leslie Jr.'s new counsel's attorney's fees. Related to this argument is Leslie Jr.'s contention that COL 9 is wrong.

(6) All or parts of FOFs 1, 7, 8, 9, 16, and 22 are clearly erroneous.

Upon careful review of the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, as well as the relevant statutory and case law, we resolve Leslie Jr.'s points of error as follows:

(1) The circuit court did not abuse its discretion in granting the Motion to Intervene.

(a) Common questions of law or fact existed between Intervenor's defenses in the malpractice action and the fairness hearing; consequently, COL 3 is not wrong. Hawai'i Rules of Civil Procedure (HRCP) Rule 24(b)(2).

(b) Leslie Jr. did not raise before the circuit court his argument that Intervenor failed to accompany their Motion to Intervene with a pleading "setting forth the claim or defense for which intervention is sought," pursuant to HRCP Rule 24(c), and it is waived. Kau v. City & County of Honolulu, 104 Hawai'i 468, 475 n.6, 92 P.3d 477, 484 n.6 (2004) (internal quotation marks and citation omitted) ("Legal issues not raised in the trial court are ordinarily deemed waived on appeal.").

(c) Leslie Jr. argues that Intervenors failed to present in the Motion to Intervene "'an interest relating to the property or transaction which is the subject' of the 'main action'"; however, that requirement is set forth in HRCF Rule 24(a)(2), which pertains to intervention of right, whereas Intervenors clearly filed their Motion to Intervene pursuant to HRCF Rule 24(b), which pertains to permissive intervention.

(d) Intervenors' participation in the fairness hearing was not unduly prejudicial to Leslie Jr., and COL 3 is not wrong.

(i) Intervenors did not breach their duty of loyalty to Leslie Jr. or violate Hawai'i Rules of Professional Conduct (HRPC) Rules 1.9(c) and 1.6, by intervening in the fairness hearing.

(ii) Intervenors did not defend Fresch's actions at the fairness hearing. Although Intervenors' participation may have had the indirect effect of supporting Fresch's alleged position that the settlement allocation was fair, Intervenors had independent, appropriate reasons for participating in the fairness hearing.

(e) Contrary to Leslie Jr.'s contention, the circuit court did not plainly err by granting the Motion to Intervene on the basis that by participating in the fairness hearing, Intervenors would carry Fresch's burden of proof. As discussed above, Intervenors did not carry Fresch's burden of proof at the hearing.

(2) Although Fresch did not appear at the fairness hearing, the settlement allocation was not by default unfair, and the circuit court retained the discretion to determine whether the allocation was fair to Leslie Jr. See Leslie I, 91 Hawai'i at 404-05, 984 P.2d at 1230-31.

(3) The circuit court did not abuse its discretion by finding that the settlement allocation was fair.

(a) The circuit court did not err by considering Intervenors' "kickback" scheme to avoid DHS's anticipated lien right because the scheme was relevant to the fairness determination. Consequently, FOF 25 is not clearly erroneous and COL 5 is not wrong. Inlandboatmen's Union of the Pac., Hawai'i Region, Marine Div. of Int'l Longshoremen's and Warehousemen's Union v. Sause Bros., Inc., 77 Hawai'i 187, 193, 881 P.2d 1255, 1261 (App. 1994).

(b) The circuit court did not err by considering the CSEA lien against Leslie Jr. in making the fairness determination because CSEA's issuing a lien against and notifying Leslie Jr. of such lien was relevant to show why the parties decided to allocate to Fresch and Leslie Sr. \$50,000 in settlement proceeds to which Leslie Jr. was entitled.

(c) Leslie Jr. argues that the circuit court erroneously determined fairness as of November 1997, rather than the date of the fairness hearing (February 27 and 28, 2001); however, he fails to explain how he was prejudiced by the court's alleged mistake, and we decline to address this point.

(d) Leslie Jr. argues that the portion of FOF 20 that states Leslie Jr. received \$46,936.41 in settlement proceeds is clearly erroneous because the exact amount of Leslie Jr.'s settlement allocation is unknown. Given COL 7, in which the circuit court found that at the time the allocation was made DHS and CSEA would have claimed or siphoned off any settlement allocations Leslie Jr. had been given, we fail to see how this alleged error could have affected Leslie Jr.'s substantial rights.

(e) COL 7 is not wrong.

(i) The first two sentences of COL 7 are not wrong. The first sentence is not wrong because it is supported by the record on appeal. The first and second sentences of COL 7 are not wrong because statements by DHS regarding its lien, made by DHS after the settlement allocation was made, had no bearing on the fairness determination, which concerned the fairness of the allocation at the time the allocation was made.

(ii) The portion of COL 7 providing that "Leslie Jr. actually did net \$46,936.41, more than his fair share" is not clearly erroneous because given the circuit court's holding in another part of COL 7 that "[a]t the time it was reached, [Leslie Jr.] would have been entitled to none of the proceeds because they would all have been claimed by the State or been siphoned off to CSEA," Leslie Jr. would not have been entitled to net any amount of his settlement proceeds.

(iii) FOF 10 is clearly erroneous because Wildman did not at all times believe the DHS lien would exceed hundreds of thousands of dollars, but the error was harmless because it did not affect Leslie Jr.'s substantial rights. Hawaii Rules of Evidence (HRE) Rule 401(a).

(iv) The portion of FOF 25 Leslie Jr. disputes is not clearly erroneous because the FOF as a whole regards Wildman's reasons for devising the settlement allocation the way Wildman did and does not state that at the time of the actual allocation, Wildman expected the DHS lien to exceed the settlement proceeds.

(v) Leslie Jr. argues that FOFs 11 and 23 are clearly erroneous; however he does not argue why they are erroneous, and we decline to address this point. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

(vi) Regardless of whether the portions of FOFs 13 and 19 Leslie Jr. disputes are clearly erroneous, we fail to see how they affected Leslie Jr.'s substantial rights and hold that any error was harmless. HRE Rule 401(a).

(vii) FOF 21 is not clearly erroneous because there is evidence in the record to support it.

(viii) FOF 27 is not clearly erroneous because there is evidence in the record to support it. See State v. Eastman, 81 Hawai'i 131, 139, 913 P.2d 57, 65 (1996) (holding that as "the trier of fact, the judge may draw all reasonable and legitimate inferences and deductions from the evidence").

(vix) Leslie Jr. contends FOF 31 is clearly erroneous because it is contradicted by DHS's statement that it would limit its lien to the amount DHS claimed at the time of the settlement allocation. We do not see how DHS's statement contradicts FOF 31; hence, FOF 31 is not clearly erroneous.

(x) FOF 34 is clearly erroneous because at the fairness hearing, Leslie Jr.'s counsel explained that the workers' compensation case was on appeal to the Labor and Industrial Relations Appeals Board, not the Supreme Court of Hawai'i. Nevertheless, we fail to see how the error affected Leslie Jr.'s substantial rights and hold that it was harmless.

(xi) Although the circuit court, in footnote 2, may have been wrong to characterize the greater sum distributed to Fresch and Leslie Sr. as "slightly" greater, the error was harmless because it could not have affected Leslie Jr.'s substantial rights.

(xii) The part of FOF 26 Leslie Jr. disputes is clearly erroneous because, technically, there is no evidence in the record on appeal that everyone involved in the settlement knew the DHS lien amount exceeded the aggregate insurance policy limits in this case. Nevertheless, the operative fact in this

FOF is that DHS was unaware of the accurate lien amount in October 1997 when DHS stated the amount of \$47,178.50. The error was harmless because it did not affect Leslie Jr.'s substantial rights. HRE Rule 401(a).

(xiii) Regardless of whether COL 8 is wrong, we fail to see how the error could have affected Leslie Jr.'s substantial rights.

(f) Given our holding that COL 7 is not wrong, we need not address Leslie Jr.'s additional points regarding the circuit court's finding that the settlement allocation was fair.

(4) The circuit court did not abuse its discretion in affirming Intervenors' attorneys' fees, and FOF 20 is not clearly erroneous and COL 7 is not wrong.

(i) Regardless of whether Leslie Jr. was not contractually liable for the fees out of his portion of the settlement, the circuit court, in reviewing the contingency fee on remand, determined that the fee was fair. See Leslie I, 91 Hawai'i at 401-03 & 405, 984 P.2d at 1227-29 & 1231.

(ii) Intervenors' fees are not unreasonable. See HRPC Rule 1.5(a).

(5) The circuit court did not abuse its discretion in denying Leslie Jr.'s new counsel attorney's fees and COL 9 is not wrong. Leslie Jr.'s counsel was not successful in obtaining a reallocation of the settlement proceeds. Further, no award of attorney's fees was made in this case. Moreover, Leslie Jr. cites no authority to support an award of attorney's fees to his new counsel. At the fairness hearing, the circuit court merely approved the settlement arrangement, which included Intervenors' contingency fee award.

(6) We decline to address Leslie Jr.'s argument that all or parts of FOFs 1, 7, 8, 9, 16, and 22 are clearly erroneous because the FOFs do not bear directly on the instant appeal.

Therefore,

IT IS HEREBY ORDERED that the Finding of Facts, Conclusions of Law, and Order filed on August 22, 2001 in the Circuit Court of the First Circuit are affirmed.

DATED: Honolulu, Hawai'i, January 14, 2009.

On the briefs:

Frederick W. Rohlfig III
Carl H. Osaki
for Appellant Howard K.
Leslie, Jr.



Presiding Judge

Randall Y.S. Chung
Milton S. Tani
(Matsui Chung)
for Appellee Jeffrey Kanui,
Personal Representative of
Estate of Jamie K. Tavares,
Deceased.



Associate Judge

Jeffrey S. Portnoy
Elijah Yip
(Cades Schutte Fleming & Wright)
for Appellees Joseph L. Wildman
and Sibilla & Wildman



Associate Judge