

NO. 23954

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

KIMBERLY,¹ Plaintiff-Appellee/Cross-Appellant,

vs.

STATE OF HAWAI'I and HARRY TANOUYE, in his individual capacity, Defendants-Appellants/Cross-Appellees,

and

GUY HALL, in his individual capacity, Defendant-Appellee,

and

DANA TAYLOR, in his individual capacity, and
DOE ENTITIES 1-10, Defendants.

EUGENE L. SABADO
CLERK, APPELLATE COURTS
STATE OF HAWAII

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FILED

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 95-0718-03)

MEMORANDUM OPINION

(By: Moon, C.J., Levinson, Nakayama, and Duffy, JJ.;
and Intermediate Court of Appeals Associate
Judge Nakamura, in place of Acoba, J., recused)

¹ The circuit court amended the caption of the instant case to refer to the plaintiff as "Kimberly," and the records read, "Kimberly v. State of Hawai'i et al." On appeal, the notice of entering the instant appeal on the record designates the case as "KIMBERLY, Plaintiff-Appellee v. HARRY TANOUYE, Defendant-Appellant and STATE OF HAWAI'I, GUY HALL, DANA TAYLOR, Defendants." However, the caption on the record on appeal reads, "JANE DOE, Plaintiff-Appellee v. JOHN DOE 3, Defendant-Appellant, and DOE GOVERNMENTAL AGENCY, and JOHN DOE 1." The briefs filed by the parties refer to the individual defendants as "JOHN ROE 1, individually and in his capacity as Director, of DOE GOVERNMENTAL ENTITY; JOHN ROE 2, individually and in his capacity as Adult Corrections Officer and employee of DOE GOVERNMENTAL ENTITY; JOHN ROE 3, individually and in his capacity as an Adult Corrections Officer and employee of DOE GOVERNMENTAL ENTITY; JOHN ROE 4, individually and in his capacity as Food Service Administrator at Oahu Community Correctional Center; JOHN ROE 5, individually and in his capacity as Food Service Officer at Oahu Community Correctional Center and employee of DOE GOVERNMENTAL ENTITY." Pursuant to Hawai'i Rules of Appellate Procedure Rule 12(a) (2000), which states that "an appeal shall be listed with the appellate courts under the title given to the action in the court or agency appealed from with the appellant identified as such[,]" the caption as set forth above is consistent with the designation as ordered by the circuit court. See also *infra* note 2.

The instant case involves the sexual harassment of plaintiff-appellee/cross-appellant Kimberly² [hereinafter, Plaintiff] by an Adult Corrections Officer (ACO) while she was incarcerated at the Oahu Community Correctional Center (OCCC). After her release from incarceration, Plaintiff filed suit in the Circuit Court of the First Circuit against, inter alia, the ACO who harassed her, defendant-appellant/cross-appellee the State of Hawai'i [hereinafter, the State] and individuals involved in the management of OCCC, including defendant-appellant/cross-appellee Harry Tanouye. After a bench trial before the Honorable Sabrina S. McKenna, judgment was entered in favor of Plaintiff. Plaintiff, the State, and Tanouye timely appealed.

On appeal, Plaintiff contends that the trial court erred in: (1) dismissing her 42 U.S.C. § 1983 claim against defendant Guy Hall; (2) denying her request for additional damages; (3) limiting her award of prejudgment interest and sanctions; and (4) sanctioning her for discovery abuses. The

² Plaintiff is a transgendered individual whose self-identity and outward appearance is female. The trial court found that, during her incarceration, Plaintiff "had large female breasts and male genitalia." The trial court consistently referred to Plaintiff in the feminine, and, for consistency, we continue to do so on appeal.

On January 24, 2000, the trial court ordered:

1. The file in this case shall be kept by the Clerk under seal;
2. Trial and all other proceedings shall be conducted without reference being made to plaintiff's last name or other personal identifiers, including, without limitation, address, telephone number, name of place of work, or social security number; and
3. The caption of the case shall be amended to refer to plaintiff's name as "Kimberly."

State claims that the trial court erred in: (1) imposing sanctions against it as a party to the litigation; (2) failing to dismiss Plaintiff's claims based on the statute of limitations; (3) failing to dismiss Plaintiff's claims based on sovereign immunity; (4) holding it liable for the torts of its employees who were protected by qualified immunity; (5) holding it liable for negligent supervision when its agents were immune from liability; (6) holding it jointly and severally liable with its employees; and (7) holding it liable for post-judgment interest. Tanouye contends that the trial court erred in: (1) denying his motions to dismiss Plaintiff's 40 U.S.C. § 1983 claims; (2) awarding Plaintiff punitive damages; and (3) denying his motion to dismiss based on the statute of limitations. Based on the following, we remand the instant case for recalculation of the damages award.

I. BACKGROUND³

From February through June 1993, Plaintiff was incarcerated in Module 18, a male housing unit in the OCCC. During her incarceration, Plaintiff worked in the Food Service Unit, where she helped prepare meals for other inmates and workers.

While Plaintiff was incarcerated, Defendant Dana Taylor worked in Module 18 as an ACO. Tanouye was a Unit Team Manager

³ The supreme court record in the instant case spans 15 volumes. The sealed record of circuit court proceedings consists of, inter alia, 25 volumes, many of which are not paginated, and two boxes of sealed exhibits and transcripts.

(UTM) for three modules in OCCC, including Module 18. During the same period of time, Hall was the acting warden at OCCC, with supervisory authority over prisoners and staff, including Taylor and Tanouye.

A. Allegations of Taylor's Prior Misconduct

Prior to Plaintiff's confinement at OCCC, Taylor had been terminated from his position as an ACO after an administrative committee of the Department of Public Safety (DPS) had found that, while in uniform and away from his post without leave, Taylor had purchased and consumed cocaine and kidnapped and sexually assaulted a prisoner who was on supervised release.⁴ On July 9, 1992, a grievance filed by Taylor was upheld on procedural grounds, and Taylor was reinstated as an ACO.

In a memorandum dated October 29, 1992 [hereinafter, the Tatiana Memo], acting OCCC Deputy Administrator Kenneth Saito was advised by acting OCCC chief of security James Dukes that Taylor had allegedly assaulted and raped a woman⁵ on two separate occasions while off-duty. The Tatiana Memo recommended referring the allegations about Taylor to the DPS's Internal Affairs Office (Internal Affairs) for investigation. However, no referral was made.

⁴ Taylor's termination was effective April 3, 1992.

⁵ The woman's relationship to Taylor is not clear. However, the record indicates that the alleged assaults did not occur at OCCC.

B. Taylor's Misconduct Against Plaintiff

1. **February 6, 1993**

On February 6, 1993, Plaintiff was eating sunflower seeds when Taylor asked for some. After Plaintiff agreed, Taylor looked at Plaintiff's breasts and said, "God damn!" Taylor appeared to reach for the sunflower seeds, but instead squeezed Plaintiff's breast. The trial court found that "Taylor did this without Plaintiff's permission, and in a manner that was harmful and offensive to Plaintiff, causing her feelings of emotional distress, fear, degradation, helplessness and humiliation." Ultimately, Taylor did not take any sunflower seeds from Plaintiff.

2. **February 15, 1993**

On the evening of February 15, 1993, Plaintiff was writing a letter to her attorney when Taylor approached her from behind and caressed her breast. Taylor appeared to leave the area, but returned and again fondled Plaintiff's breast from behind. The trial court found that this incident [hereinafter, the fondling incident] "caused Plaintiff to suffer feelings of serious mental distress, fear, degradation, helplessness, and humiliation." Inmate Dino Medeiros witnessed what had happened and related to Plaintiff that he was willing to testify against Taylor. Plaintiff subsequently filed a grievance reporting the fondling incident.

3. February 25, 1993

On February 25, 1993, after being on vacation for several days, Taylor returned to work in Module 18. While Plaintiff was returning to Module 18 from the Food Services Unit, Taylor made her wait until the other inmates had left the area before allowing Plaintiff to return to her cell. The trial court found that detaining Plaintiff "was a retaliatory move by Taylor against . . . Plaintiff, which again caused her fear."

4. February 27, 1993

On February 27, 1993, when Plaintiff returned to Module 18 from the Food Service Unit, Taylor ordered her and Pitolo, another transgendered inmate, to submit to strip searches. Although normal procedure called for strip searches to be performed in a bathroom with the door closed, Taylor left the door open while Plaintiff disrobed, allowing other inmates to watch. During the search, Taylor and the other inmates cheered, laughed, and whistled at Plaintiff. After the strip search, Taylor ordered Plaintiff confined to her cell. None of the other inmates were confined to their cells. The trial court found that Taylor performed the strip searches "in direct retaliation for [Plaintiff's] initial grievance against him, and was also motivated by his desire to sexually harass her based on her transgendered status."

5. February 28, 1993

On February 28, 1993, while Plaintiff was returning from the Food Service Unit, Taylor directed another ACO to carry out a "squat and cough" search of Plaintiff. Plaintiff was ordered into a bathroom and instructed to disrobe, squat, and cough.⁶ The door to the bathroom was again left open so other inmates could watch. No other inmate was forced to submit to any type of strip search. The trial court found that Taylor's instruction to conduct a "squat and cough" search "was in direct retaliation against . . . Plaintiff for having filed a grievance against him, and was motivated by his desire to sexually harass her based on her transgendered status."

6. March 2, 1993

On March 2, 1993, upon seeing Plaintiff in Module 18, Taylor commented, "Those are some big tits!" Another ACO responded, "They're not so big."

7. May 6, 1993

On May 6, 1993, Plaintiff encountered Taylor while delivering food to Modules 3 and 4. Despite a prior March 22, 1993 order to have no further contact with Plaintiff [hereinafter, the no contact order], Taylor gave Plaintiff an intimidating look, which caused Plaintiff emotional distress.

⁶ A "squat and cough" search is used to dislodge contraband from the vagina, and, under professional correctional standards, is considered ineffectual for inmates with male genitalia.

8. June 3, 1993

On June 3, 1993, despite the no contact order, Taylor appeared in Module 18. Plaintiff indicated that "[s]eeing Taylor again caused [her] serious mental distress."

9. Other Incidents

In its findings of fact, the trial court indicated that, "[o]ther than the incidents mentioned above, there were other occasions in which Plaintiff was confronted by Taylor in and out of Module 18, which caused [her] fear and serious emotional distress."

C. Plaintiff's Correspondence with OCCC Administration

1. February 16, 1993 Grievance Regarding the Fondling Incident

a. initial grievance and investigation by Tanouye

On February 16, 1993, Plaintiff filled out an inmate grievance form, indicating that Taylor had fondled her the previous day. Plaintiff's grievance was assigned to Tanouye for investigation and resolution.

On February 18, 1993, Tanouye interviewed witnesses, including Medeiros, who confirmed Plaintiff's allegations of improper conduct by Taylor. Tanouye attempted, unsuccessfully, to speak with Taylor, but later decided not to obtain a statement from him. Taylor was not reassigned to another module during Tanouye's investigation. Although Tanouye believed Plaintiff's allegations, Tanouye did not pursue any further formal investigation of the matter, deciding on his own to proceed

"informally." Tanouye neither reported the incident to internal affairs nor ordered Taylor to stay away from Plaintiff.

Tanouye did not consider Plaintiff's breasts to be a sexual or private part of her body, and he informed Plaintiff on February 19, 1993 that he considered Taylor's actions to be a minor infraction. Tanouye indicated on Plaintiff's grievance form that Plaintiff's complaint was upheld after investigation and that corrective action was being taken. However, Tanouye did not intend to pursue the matter further.

After meeting with Tanouye, Plaintiff determined "that she was not going to get any help," and "that it was highly unlikely that Tanouye would take any action to keep Taylor away from her." As a result, Plaintiff filed a report with the Honolulu Police Department (HPD). There is no evidence that HPD followed up on Plaintiff's complaint.

On February 22, 1993, Tanouye again met with Plaintiff to discuss her HPD complaint against Taylor. Tanouye attempted to dissuade Plaintiff from pursuing the matter, indicating that Taylor had been counseled. Tanouye also warned Plaintiff of possible repercussions if she continued to pursue the matter. The next day, Tanouye informed OCCC section administrator Miles Murakami, via inter-office memorandum, that he had investigated Plaintiff's grievance and that Taylor had accepted counseling.

On February 26, 1993, Randy Asher, acting OCCC chief of security, criticized Tanouye's handling of Plaintiff's grievance

in an inter-office memorandum to Kenneth Saito, who was the acting warden while Hall was on vacation. Asher stated that an official investigation should have been conducted.

Saito, as acting warden, also criticized Tanouye's informal investigation of the fondling incident in a letter dated March 1, 1993. Saito noted that (1) there was no documentation indicating that Taylor had actually been counseled; (2) at the time Tanouye represented that Taylor had been counseled, Tanouye had not determined the results of the alleged counseling; and (3) although Tanouye had upheld Plaintiff's complaint, there was no investigatory report. Tanouye was directed to follow up on the case and to advise Saito of the course of action taken. However, Saito did not take any immediate action to remove Taylor from Module 18.

b. Tanouye's official report

On March 8, 1993, Tanouye submitted an official written report on Plaintiff's initial grievance regarding the fondling incident. Tanouye indicated that a written statement from Taylor was not taken because Taylor had been on sick leave. However, OCCC records indicate that Taylor had been at work several days between February 16 and March 8, 1993. Tanouye recommended that a statement from Taylor be taken and that he be counseled if Plaintiff's allegations were substantiated.⁷ Tanouye's official

⁷ As noted supra, Tanouye's February 22, 1993 informal report indicated that Plaintiff's grievance had been upheld.

report did not mention Plaintiff's complaints made after her February 16 initial grievance about Taylor.

On March 9, 1993, Tanouye spoke to Taylor regarding the fondling incident. Taylor orally denied fondling Plaintiff's breasts, but refused to make a written statement, indicating that he should have been asked to provide a statement earlier. Taylor was not reprimanded or disciplined for refusing Tanouye's request for a written statement.

On March 15, 1993, Saito, although no longer serving as acting warden, sent an inter-office memorandum to OCCC section administrator Murakami indicating that Tanouye's official report was incomplete because it lacked a written statement from Taylor. Saito recommended that Tanouye be counseled for not taking immediate action on the matter. Murakami suggested to Saito that the matter be referred to Internal Affairs for final disposition.

On March 24, 1993, Hall, who had resumed his role as warden, requested an investigation by Internal Affairs. The investigation request stated:

On 2/15/93, the complainant claims he was physically and sexually harassed by OCCC Adult Corrections Officer III Dana Taylor on two separate occasions. Due to the seriousness of the alleged claim, it is recommended that this case be referred to [Internal Affairs] for investigation.

The Internal Affairs investigation of Plaintiff's initial grievance was completed on August 12, 1993. Internal Affairs found that Plaintiff had been truthful in her allegations and concluded that Taylor had mistreated her on February 15, 1993 (date of the fondling incident).

2. February 27, 1993 Grievance Regarding the Strip Search Incident

On February 27, 1993, Plaintiff filed a grievance reporting the strip search incident. This grievance was received by the sergeant on duty in Module 18 on March 3, 1993. Tanouye was assigned to respond to this grievance, and he informed Plaintiff that it was being investigated. However, no formal investigation was initiated.

3. Letters to Hall

In addition to her formal grievances, Plaintiff wrote directly to Hall about Taylor's misconduct and Tanouye's investigation. On February 24, 1993, after the fondling incident, Plaintiff sent a letter to Hall indicating that: (1) she had been sexually harassed by Taylor; (2) Tanouye expressed his belief that Taylor's conduct was a petty misdemeanor; and (3) nothing appeared to have been done about the situation. Plaintiff also indicated that the fondling incident was not the first time Taylor had harassed her.

On March 1, 1993, Hall's office received a second letter from Plaintiff. Plaintiff indicated that she had not received a response to her February 24, 1993 letter regarding the fondling incident. Plaintiff also explained that she was being subjected to retaliatory and degrading strip searches.

Hall was on vacation when Plaintiff submitted both letters, and he testified that he had not seen either letter and

was not informed that they had been received by his staff.⁸
However, Hall signed a March 18, 1993 letter to Plaintiff
stating,

This is in response to your letter dated February 28, 1993.
Your allegation of harassment by an Adult Corrections
Officer of this facility has been referred for
investigation. Corrective action will be taken if
warranted. If you have any questions and/or concerns,
please contact your assigned Case Manager or Unit Manager.

4. March 19, 1993 Grievance

Plaintiff prepared another grievance form on March 19,
1993 referring to her previous grievances dated February 16
(regarding the fondling incident) and February 27, 1993
(regarding the strip search incident). Plaintiff complained
that, although she had been informed that her allegations were
being investigated, Taylor continued to work in Module 18 with no
indication that any corrective action had been taken.

5. March 20, 1993 Letter to OCCC Administration

On March 20, 1993, Plaintiff wrote a letter to OCCC
administration indicating that she believed Taylor's acts
violated federal criminal statutes. Plaintiff included a copy of
18 U.S.C. 2244 (1986)⁹ with her letter.

⁸ In Hall's absence, Saito, as acting warden, read both letters.

⁹ Section 2244 provides:

(a) Sexual conduct in circumstances where sexual acts are
punished by this chapter. --Whoever, in the special maritime
and territorial jurisdiction of the United States or in a
Federal prison, knowingly engages in or causes sexual
contact with or by another person, if so to do would
violate--

(1) section 2241 of this title had the sexual
contact been a sexual act, shall be fined under this

(continued...)

6. **May 6, 1993 Letter**

On May 6, 1993, Plaintiff wrote a letter to Hall informing him of the intimidating look Taylor had given her while she was delivering food to Modules 3 and 4. A response letter, drafted by Tanouye and signed by Hall, dated May 17, 1993, states, "Unfortunately, ACO Taylor's looks is [sic] not a matter to be rectified. Also, you may rest assured that your prior complaint regarding ACO Taylor is being properly investigated."

D. Plaintiff's Correspondence with Persons Outside of OCCC

1. **Complaint to Hawai'i State Ombudsman**

On March 1, 1993, Plaintiff lodged a complaint by phone with Susan Trent from the Office of Ombudsman of the State of Hawai'i regarding her treatment at OCCC. Trent indicated that she would initiate an investigation of Plaintiff's allegations and wrote to Hall on March 29, 1993 requesting an investigation and report. Prior to Trent's letter to Hall, on March 17, 1993,

⁹(...continued)

title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined not more than \$5,000, imprisoned not more than six months, or both.

(b) In other circumstances. --Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, knowingly engages in sexual contact with another person without that other person's permission shall be fined not more than \$5,000, imprisoned not more than six months, or both.

Plaintiff wrote to Trent because she had not received any response to her complaints. In her letter to Trent, Plaintiff detailed her problems with Taylor.

2. Complaint to Department of Public Safety

On March 8, 1993, Plaintiff sent a letter to George Sumner, DPS Director, describing the fondling incident, and indicating that she was being forced to submit to retaliatory and degrading strip searches.

On March 22, 1993, DPS Correctional Centers Division Administrator Ellena Young signed a letter indicating that, due to the seriousness of Plaintiff's allegations, the matter would be forwarded to Internal Affairs for further investigation.

On March 24, 1993, Eric Penrosa, DPS Deputy Director, requested a formal Internal Affairs investigation regarding Plaintiff's allegations, noting that Taylor had previously been accused of raping another prisoner. Hall submitted an Internal Affairs investigation request, but the request did not detail the events Plaintiff complained of in Plaintiff's prior grievances and letters.

E. Plaintiff's Suit

Plaintiff was released from OCCC on November 18, 1993. Plaintiff's initial complaint¹⁰ was filed in circuit court on March 1, 1995, and her first amended complaint was filed on July

¹⁰ Plaintiff named the State; Sumner; Hall; Taylor; Tanouye; Elton Smith, Food Service Administrator at OCCC; William Chee, Food Service Officer at OCCC; Doe Government Employees; Doe Government Agencies; and Doe defendants.

22, 1996. Plaintiff's case was submitted to the Court Annexed Arbitration Program. On June 3, 1998, the State appealed from the sealed arbitration award and requested a trial de novo.

1. Defendants' Motions for Summary Judgment

Prior to trial, defendants Hall, Tanouye, and the State moved for summary judgment on January 29, 1999. A hearing was held on March 1, 1999 before the Honorable Gail Nakatani. No transcript of the hearing was made part of the record on appeal. On March 4, 1999, the motions court issued a minute order granting in part the defendants' motion.

Although no written order had been filed, Plaintiff moved for reconsideration of the motions court's ruling. Judge Nakatani denied Plaintiff's motion, ruling that "Plaintiff presented no new evidence or arguments which were not previously presented and considered, or which could not have been previously presented; and further that Plaintiff presented no new statements of law."

On June 13, 2000, after the trial before Judge McKenna had been completed, Judge Nakatani entered a written order granting in part the defendants' motion for summary judgment as to the following:

1. Claims for alleged violations of constitutional rights, including claims under 42 U.S.C. § 1983^[11], against

¹¹ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or
(continued...)

the State of Hawai'i, and against Guy Hall and Harry Tanouye, in their official capacities;

2. Claims for punitive damages against the State of Hawai'i;

3. Claims for alleged violations of constitutional rights, including claims under 42 U.S.C. § 1983, and claims for punitive damages against Guy Hall, in his individual capacity. The Court concludes that, as a matter of law, Defendant Hall did not personally participate in the alleged misconduct; Defendant Hall's conduct did not violate clearly established statutory or constitutional rights and Defendant Hall did not act with deliberate indifference.

2. Sanctions Against the State

In the course of arbitration, Plaintiff served a subpoena duces tecum [hereinafter, arbitration subpoena] commanding the custodian of records of DPS to produce:

originals or complete legible copies of all records concerning [Plaintiff] or Dana Lynn Taylor, including, without limitation: ALL DOCUMENTS CONCERNING THE DEPARTMENT OF PUBLIC SAFETY'S INVESTIGATION OF THE ALLEGATIONS OF ABUSE MADE BY [PLAINTIFF] AGAINST DEPARTMENT OF PUBLIC SAFETY EMPLOYEES, INCLUDING DANA LYNN TAYLOR, TAKING PLACE IN 1993; DANA LYNN TAYLOR'S PERSONNEL FILE; ALL DOCUMENTS CONCERNING THE DEPARTMENT OF PUBLIC SAFETY'S INVESTIGATION OF THE ALLEGATIONS OF ILLICIT OR ILLEGAL DRUG USE, SALE, DISTRIBUTION OR OTHER DRUG-RELATED ACTIVITIES OR ASSAULT(S) INVOLVING DANA LYNN TAYLOR

Deputy Attorney General Mark Nomura, on behalf of defendants Tanouye, Hall, and the State, objected to the subpoena. The arbitrator granted Plaintiff's motion to enforce the subpoena, and the arbitrator's order was affirmed by both the arbitration

¹¹(...continued)

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

administrator and the arbitration judge. On April 29, 1998, the State represented to Plaintiff that, in response to the Arbitration Judge's order, it was producing: (1) "Internal Affairs Investigation IAE 93-027," (2) "Personnel File of Dana Taylor," and (3) Department of Public Safety Complaint Form." The record indicates that the State produced additional documents to Plaintiff on May 12, 1998, though the contents of this second production are not clear from the record.

During the subsequent trial de novo, defendants Tanouye and Hall obtained separate counsel. Nomura continued to represent the State. The Honorable Kevin Chang made it clear to the parties that the original discovery cut-off date of January 31, 1999 remained in effect. The original discovery cut-off date was again affirmed by the Honorable Gail Nakatani as between Plaintiff and the State.

However, on December 9, 1999, Plaintiff issued a subpoena [hereinafter, trial subpoena] to the custodian of records of the DPS.¹² It is not clear what, if any, documents were turned over in response to the trial subpoena.

¹² . The subpoena requested, inter alia:

All records concerning former pretrial detainee [Plaintiff] (SSN []; SID []), including, without limitation: ALL DOCUMENTS CONCERNING THE DEPARTMENT OF PUBLIC SAFETY'S INVESTIGATION OF THE ALLEGATIONS OF ABUSE MADE BY [PLAINTIFF] AGAINST DEPARTMENT OF PUBLIC SAFETY EMPLOYEES, INCLUDING DANA LYNN TAYLOR TAKING PLACE IN 1993; ALL DOCUMENTS CONCERNING THE DEPARTMENT OF PUBLIC SAFETY'S INVESTIGATION OF THE ALLEGATIONS OF ILLICIT OR ILLEGAL DRUG USE, SALE, DISTRIBUTION OR OTHER DRUG-RELATED ACTIVITIES OR ASSAULT INVOLVING DANA LYNN TAYLOR.

During trial, which commenced on January 25, 2000, the parties discovered discrepancies between copies of documents submitted by both Plaintiff and the State. On February 2, 2000, after Plaintiff completed her case in chief, it was discovered that Plaintiff's exhibit 15, a grievance by Plaintiff dated February 16, 1993 complaining of sexual harassment by Taylor, was a different version of the same document identified as Tanouye's exhibit C-2. Tanouye's exhibit is complete, while Plaintiff's exhibit lacks (1) Plaintiff's signature indicating her receipt of the response to her grievance and (2) the date the response was allegedly provided to Plaintiff. It was later determined by the trial court that the complete document had been disclosed to Plaintiff during her deposition on February 2, 1999. However, the document had not been produced as part of the State's two productions of documents pursuant to the arbitration subpoena. It was also discovered that the State produced only the first of four pages of the HPD report of Plaintiff's allegation of sexual assault by Taylor. The State, however, had a complete version of the report in its possession.

The trial court questioned why the State apparently failed to produce relevant documents within the scope of the arbitration subpoena and the order of the arbitration judge. The court also ordered the State to review its files for any original documents fairly within the scope of Plaintiff's subpoena. The State informed the court that it had not turned over various

documents, including Plaintiff's institutional file, which contained, inter alia, Plaintiff's medical records. However, the State had provided Plaintiff's medical records to its expert on damages, who used the information to defend against Plaintiff's claims.

The trial court found that the State had improperly withheld documents included within the scope of the arbitration subpoena and the arbitration judge's order, including:

- a. Defendant Taylor's time records;
- b. A copy of [Plaintiff's] "institutional" file, including her medical records, work records and criminal records, which included copies of the DPS strip search policy and the DPS standards of conduct for employees; and
- c. The "correspondence" file of [Plaintiff], which included, among other documents, a handwritten note from Plaintiff to Defendant Tanouye attached to a copy of a federal criminal statute prohibiting sexual harassment of institutionalized persons[;]
- d. Plaintiff's medical records, indicating her visits to the OCCC clinic requesting medication, apparently for insomnia and stress;
- e. Plaintiff's time sheets for her work at the food service unit, which could have corroborated her testimony regarding dates and times she came into contact with and was harassed by Dana Taylor;
- f. Taylor's time sheets, relevant to the same;
- g. The complete HPD report, which included Plaintiff's written statement;
- h. The original and complete Internal Affairs report, which included a written statement from Dana Taylor;
- i. Various versions of Plaintiff's grievance forms, including Defendant Tanouye's Exhibit C-2, which showed the lengthy delay in actually responding to Plaintiff's first grievance, contrary to the defense evidence suggesting a prompt response and resolution.

The trial court stated that the State's conduct "demonstrates at minimum, a reckless disregard for a lawful subpoena, [the arbitration judge's] Order enforcing the Subpoena, and this court's oral orders of February 2, 2000 directing Mr. Nomura to deliver to the court all original documents within his possession

and control." The trial court also found that the State's failure to comply with the subpoena "constitutes a conscious and deliberate attempt to hinder Plaintiff's preparation and presentation of her case."

As sanctions "[b]ased on the gross misconduct of Defendant State of Hawai'i," the trial court: (1) entered default as to liability against the State based on Plaintiff's negligent supervision claim; (2) ordered the State to produce, at its own expense, Court's Exhibits 1, 2, and 3, which are documents within the scope of the arbitration subpoena; (3) ordered the State to pay attorneys' fees in the amount of \$7,500.00 payable to Plaintiff's counsel; and (4) fined Nomura \$150.00 to be paid to a charity chosen by Plaintiff's counsel.

3. Findings of Fact, Conclusions of Law, and Judgment

Ultimately, the trial court concluded, inter alia: (1) the motions court did not err in granting partial summary judgment; (2) Taylor was liable to Plaintiff for \$150,000 in general damages, \$150,000 in punitive damages, and for Plaintiff's reasonable attorney's fees and expert fees for Tony Bair; (3) Plaintiff's claims were not barred by the statute of limitations; (4) qualified immunity did not bar Plaintiff's 42 U.S.C. § 1983 claims against Tanouye; (5) Tanouye was liable to Plaintiff for \$100,000 in general damages for the serious mental distress suffered by Plaintiff from February 12, 1993 through June 1993 and \$10,000 in punitive damages; (6) Tanouye's acts

constituted the tort of negligent infliction of emotional distress (NIED); (7) although Tanouye was liable by a preponderance of the evidence for punitive damages under a § 1983 analysis, Plaintiff failed to prove that Tanouye was motivated by malice or an otherwise improper purpose by clear and convincing evidence, making Tanouye qualifiedly immune from liability to Plaintiff on theories of negligence or NIED; (8) Hall's acts constituted negligence and NIED; (9) Hall was not personally liable to Plaintiff because of his qualified immunity; (10) Plaintiff's negligence claims based on the State's employees were not barred by the intentional tort exception to the State Tort Liability Act; (11) based on the sanctions order, the State was liable in the amount of \$150,000 for Plaintiff's general damages based on the serious mental distress she suffered from February 6, through June 1993; (12) although Tanouye and Hall could not be held personally liable based on negligence and NIED theories, the State was liable for torts committed by them in the amount of \$150,000; (13) the State was also liable for \$150,000 in damages for the negligence of Saito and Murakami, neither of whom were named as defendants; and (14) the State was not liable for Taylor's acts.

In summary, the trial court determined: (1) Taylor and the State were joint tortfeasors bearing 66.667% and 33.333% of the liability, respectively, and jointly and severally liable for \$50,000.00 in general damages for the serious mental distress

suffered by Plaintiff from February 6 through February 18, 1993; (2) Taylor, Tanouye, and the State were joint tortfeasors bearing 50%, 25%, and 25% of the liability, respectively, and jointly and severally liable for \$100,000.00 in general damages for the serious mental distress suffered by Plaintiff from February 19 through June 1993; (3) Tanouye was severally liable for \$10,000.00 in punitive damages; (4) Taylor was severally liable for \$150,000.00 in punitive damages; (5) Taylor and Tanouye were jointly and severally liable for reasonable attorneys' fees, including expert fees for Plaintiff's expert Toni Bair; (6) Taylor, Tanouye, and the State were liable for Plaintiff's court costs; and (7) Plaintiff was liable for Hall's costs. Judgment was entered on June 5, 2000.¹³

With respect to prejudgment interest, the trial court found that a delay for which an award of prejudgment interest would be warranted began on June 3, 1998, the date that the arbitration award was appealed. The trial court awarded prejudgment interest for the period of June 3, 1998 through June 5, 2000 against (1) Taylor and Tanouye, jointly and severally, in the amount of \$20,082.20, representing interest at the rate of 10% per year on the amount of \$100,000.00 and (2) Taylor, severally, for \$10,041.10, representing interest at the rate of 10% per year on the amount of \$50,000.00. The trial court

¹³ On December 11, 2000, an amended judgment was entered. The amended judgment incorporated the original award of June 5, 2000 and added language related to the grant of summary judgment, as well as the amounts for fees and costs.

awarded post-judgment interest against: (1) Taylor and Tanouye, jointly and severally, at the rate of 10% per year on the amount of \$100,000.00; (2) Taylor, severally, at the rate of 10% per year on the amount of \$50,000.00; and (3) the State, severally, at the rate of 4% per year on the amount of \$150,000.00.

II. STANDARDS OF REVIEW

A. Findings of Fact

This court reviews the circuit court's findings of fact under the clearly erroneous standard. Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004) (citation omitted).

B. Conclusions of Law

A circuit court's conclusions of law are reviewed de novo. Paul's Elec. Serv., Inc. v. Befitel, 104 Hawai'i 412, 420, 91 P.3d 494, 502 (2004) (citation omitted).

C. Imposition of Sanctions for Discovery Violations

"This court reviews the circuit court's imposition of sanctions for discovery abuse . . . under the abuse of discretion standard.'" Gonsalves v. Nissan Motor Corp. in Hawai'i, Ltd., 100 Hawai'i 149, 159, 58 P.3d 1196, 1206 (2002) (quoting Fujimoto v. Au, 95 Hawai'i 116, 137, 19 P.3d 699, 720 (2001)).

D. Statutory Interpretation

This court reviews statutes de novo. Ditto v. McCurdy, 102 Hawai'i 518, 521, 78 P.3d 331, 334 (2003) (citation omitted).

E. Summary Judgment

"We review the circuit court's grant or denial of summary judgment de novo." Kahale v. City & County of Honolulu, 104 Hawai'i 341, 344, 90 P.3d 233, 236 (2004) (citation omitted).

[S]ummary 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 judgment as a matter of law. 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. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

Id. (citation omitted).

F. Motion to Alter or Amend a Judgment

"A motion made pursuant to [Hawai'i Rules of Civil Procedure (HRCPP) Rule] 59(e) to alter or amend the judgment is reviewed under the abuse of discretion standard." Shanghai Inv. Co. v. Alteka Co., 92 Hawai'i 482, 492, 993 P.2d 516, 526 (2000) overruled on other grounds Blair v. Ing, 96 Hawai'i 327, 331-32 n.6, 31 P.3d 184, 188-89 n.6 (2001).

III. DISCUSSION

A. Statute of Limitations

On appeal, both Tanouye and the State contend that Plaintiff's claims against them are barred by the applicable statute of limitations. "[T]he moment at which a statute of limitations is triggered is ordinarily a question of fact." Norris v. Six Flags Theme Parks, Inc., 102 Hawai'i 203, 206, 74 P.3d 26, 29 (2003) (citation omitted).

In the instant case, the trial court found:

144. Plaintiff did not have adequate opportunity to consult with civil counsel regarding possible causes of action based on the above-described occurrences while she was incarcerated at OCCC.

145. The court finds that Plaintiff did not know that she had cognizable civil claims against anyone until after she was released from OCCC on November 18, 1993, and had an opportunity to fully discuss what she had endured with civil counsel.

146. The court also finds that Plaintiff had no reason to know that she had cognizable civil claims against anyone until she was released from OCCC on November 18, 1993, and had an opportunity to fully discuss what she had endured with civil counsel.

147. The court finds that Plaintiff should have known she had cognizable civil claims against the defendants by December 31, 1993.

Based on the foregoing, the trial court concluded, inter alia:

29. Because Plaintiff did not know that she had cognizable civil claims against anyone until after her release from OCCC on November 18, 1993, Plaintiff's claims against Tanouye are not barred by the statute of limitations.

30. Because Plaintiff had no reason to know that she had cognizable civil claims against anyone until December 31, 1993, Plaintiff's claims against Tanouye are not barred by the statute of limitations.

31. In the alternative, according to HRS § 657-13 [(1993)¹⁴], if any person entitled to bring any action under HRS § 657-[7] is imprisoned on a criminal charge at the time the cause of action accrued, the statute of limitations is tolled until this disability is removed.

32. HRS § 657-13 tolled the two[-]year statute of limitations on these claims against Tanouye during Plaintiff's incarceration at OCCC, until her release on November 18, 1993.

33. Therefore, if Tanouye's position is accepted as true, Plaintiff's cause of action against him accrued on February 6, 1993, February 15, 1993, or February 27, 1993.

¹⁴ HRS § 657-13 provides:

If any person entitled to bring any action specified in this part (excepting actions against the sheriff, chief of police, or other officers) is, at the time the cause of action accrued, either:

- (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;

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.

34. Analyzing these dates in the light most favorable to Tanouye, in other words, keeping the tolling period as short as possible, the tolling would begin on March 1, 1993, and end on November 18, 1993, for a period of 8 months and 17 days. Subtracting 8 months and 17 days from the total time period between February 6, 1993 (the date of the first incident with Taylor) through March 1, 1995 (the date the original Complaint was filed), the Complaint was clearly filed within the two[-]year statute of limitations.

35. In the alternative, the principles of equitable tolling toll the running of the statute of limitations during Plaintiff's incarceration at OCCC. See Hilao v. Marcos, [103 F.3d 767, 773 (9th Cir. 1996)], and Hawai'i cases cited therein.

36. Therefore, whether under HRS § 657-13 or equitable tolling principles, Plaintiff's claims against Tanouye are also not barred by the applicable statute of limitations.

With respect to the State, the trial court noted that the statute of limitations is set forth in HRS § 662-4 (1993)¹⁵ and that the tolling provision of HRS § 657-13 was inapplicable. However, based on its analysis of the accrual of Plaintiff's claims against Tanouye, the court concluded that Plaintiff's claims were filed within the applicable two-year statute of limitations.

1. Statute of Limitations Applicable to Tanouye

The trial court gave three alternative grounds for its determination that Plaintiff's claims against Tanouye were not barred by the applicable statute of limitations: (1) Plaintiff had no reason to know that she had cognizable civil claims against anyone until December 31, 1993; (2) HRS § 657-13 tolled the applicable statute of limitations until Plaintiff's release on November 19, 1993; and (3) the applicable statute of limitations was tolled based on principles of equitable tolling.

¹⁵ Cited infra.

Tanouye contends on appeal that the trial court erred in determining that Plaintiff's claims against him were not barred by the applicable statute of limitations because: (1) the record demonstrates that Plaintiff knew or had reason to know of her civil claims when she filed her grievances in February 1993; and (2) HRS § 657-13(3) did not toll the statute of limitations because Tanouye was a law enforcement officer as defined by HRS § 710-1000 (1993).

Hawai'i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2001) requires that an opening brief contain:

A concise statement of the points of error set forth in separately numbered paragraphs. Each point shall state: (i) the alleged error committed by the court or agency; (ii) where in the record the alleged error occurred; and (iii) where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency. . . .

Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented.

(Emphasis added). Additionally, "an appellate court is not required to sift through a voluminous record for documentation of a party's contentions." Int'l Bhd. of Elec. Workers, Local 1357 v. Hawaiian Tel. Co., 68 Haw. 316, 333, 713 P.2d 943, 956 (1986). On appeal, Tanouye fails to point out, and we are unable to find, where in the record he presented to the trial court his argument that the exception to tolling under HRS § 657-13 applies to him because he is a law enforcement officer as defined by HRS § 710-1000. Because "issues not properly presented to the circuit court may be deemed waived on appeal," Molinar v. Schweizer, 95 Hawai'i 331, 339, 22 P.3d 978, 986 (2001), and points not

presented in accordance with HRAP Rule 28(b) will be disregarded, we hold that Tanouye waived his argument that tolling under HRS § 657-13 was erroneous.

Additionally, Tanouye does not cite to the trial court's conclusion of law regarding equitable tolling in his statement of points of error, and he presents no argument on the issue. Given that: (1) a judgment by a trial court is presumptively valid, see State v. Makaila, 79 Hawai'i 40, 45, 897 P.2d 967, 972 (1995); (2) the appellant bears the burden of demonstrating error in the record, State v. Hoang, 93 Hawai'i 333, 336, 3 P.3d 499, 502 (2000); and (3) points not argued may be deemed waived, HRAP Rule 28(b)(7) (2000), Tanouye fails to demonstrate that the trial court's conclusion regarding equitable tolling is erroneous. Inasmuch as Tanouye has failed to demonstrate error with respect to two of the trial court's three alternative bases for its ruling regarding the statute of limitations defense, we hold that Tanouye has failed to establish that the trial court erred in determining that Plaintiff's claims were not barred by the applicable statute of limitations.

2. Statute of Limitations Applicable to the State

In its findings of fact, conclusions of law, and order, the trial court concluded that the State was liable based on a respondeat superior¹⁶ theory for the negligent acts of Tanouye,

¹⁶ "Under a theory of respondeat superior, an employer may be liable for the negligent acts of its employees that occur within the scope of their employment." Wong-Leong v. Hawaiian Indep. Refinery, Inc., 76 Hawai'i 433,

(continued...)

Hall, Saito, and Murakami.¹⁷ On appeal, the State contends that the trial court erred in failing to dismiss Plaintiff's tort claims against the State based on the applicable statute of limitations.

HRS § 662-4 establishes a limited waiver to the State's sovereign immunity, see Whittington v. State, 72 Hawai'i 77, 78, 806 P.2d 957 (1991), and provides that "[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." Under HRS § 662-4, a tort claim accrues when the plaintiff discovers or should have discovered the negligent act, the damage, and the causal connection between the two. Hays v. City & County of Honolulu, 81 Hawai'i 391, 392 n.1, 917 P.2d 718, 719 n.1 (1996); Yamaguchi v. Queen's Medical Center, 65 Haw. 84, 90, 648 P.2d 689, 693-94 (1982). A plaintiff need only have factual knowledge of the

¹⁶(...continued)
438, 879 P.2d 538, 543 (1994) (citation omitted). "[T]o recover under the respondeat superior theory, a plaintiff must establish: 1) a negligent act of the employee, in other words, breach of a duty that is the legal cause of plaintiff's injury; and 2) that the negligent act was within the employee's scope of employment." Id.

The analysis of negligence under the theory of respondeat superior should focus completely on the actions of the employee, without consideration of the acts of the employer. A plaintiff need not show any act or fault of the employer when defining the allegedly negligent act in a respondeat superior claim.

Id. at 438-39, 879 P.2d at 543-44 (footnote omitted).

¹⁷ Saito and Murakami were not named as defendants in the instant case.

elements necessary for an actionable claim; legal knowledge of a defendant's negligence is not required. Buck v. Miles, 89 Hawai'i 244, 249-50, 971 P.2d 717, 722-23 (1999) (citing Hays, 81 Hawai'i at 399, 917 P.2d at 726). Additionally, lack of knowledge as to the identity of the proper defendant does not delay the accrual of a claim. Russell v. Attco, Inc., 82 Hawai'i 461, 463-65, 923 P.2d 403, 405-07 (1996).

a. State's liability based on conduct by Tanouye

The trial court found that Tanouye breached his duty of care upon learning of: (1) Plaintiff's initial grievance on or about February 17, 1993; (2) Plaintiff's grievance relating to the strip search on or about March 3, 1993; (3) Sato's concerns regarding Tanouye's investigation of Plaintiff's initial grievance by, at the latest, March 5, 1993; (4) Taylor's March 9, 1993 refusal to provide a written statement; (5) Sato's no contact order issued on March 22, 1993; and (6) Plaintiff's May 6, 1993 letter to Hall regarding an intimidating look from Taylor. Based on its findings, the circuit court concluded:

67. After the veracity of Taylor's sexual assault of Plaintiff on February 15, 1993 [] was confirmed by Tanouye on February 18, 1993, the failure to take any action to keep Taylor away from Plaintiff meant that she was "incarcerated under conditions posing a substantial risk of serious harm."

68. The substantial risk of further serious harm to Plaintiff was obvious. Tanouye knew of and consciously disregarded this excessive risk to Plaintiff's safety. Tanouye was aware of facts from which an inference could be drawn that a substantial risk of harm exist[ed], and Tanouye drew the inference, yet failed to act.

69. There is a sufficient causal connection between Tanouye's wrongful conduct and the constitutional violation.

70. Tanouye is therefore liable to Plaintiff for \$100,000 in general damages for the serious mental distress suffered by Plaintiff from February 19, 1993 through June 1993.

Although the trial court found multiple breaches of the applicable duty of care, the court's conclusions of law focus only on Tanouye's actions in February 1993. Therefore, this court must determine whether Plaintiff's claim based on these actions is barred by the applicable statute of limitations.

With respect to Tanouye's conduct upon learning of Plaintiff's initial grievance, the trial court found that, after the February 19, 1993 meeting, Plaintiff determined "that she was not going to get any help through Tanouye" and "that it was highly unlikely that [he] would take any action to keep Taylor away from her." Additionally, Plaintiff's counsel conceded in closing arguments, "[Y]ou'll see in the documents that in February she first started trying to tell people, [']This is against the law, this is criminal, you can't do this.[']" Thus, Plaintiff learned of Tanouye's inaction by February 19, 1993. With respect to Plaintiff's knowledge of her damages, the trial court determined that Plaintiff was uncomfortable while in Taylor's presence on February 20 and 21, 1993 and that Taylor's actions caused Plaintiff fear on February 25, 1993. The trial court further found that Plaintiff suffered serious mental distress on February 27 and 28, 1993 as a result of the strip search and "squat and cough" search ordered by Taylor. Based on the trial court's findings, Plaintiff's claims based on Tanouye's response to her initial grievance accrued, at the latest, on February 28, 1993. Inasmuch as Plaintiff's complaint was not

filed until March 1, 1995, which is more than 2 years after some of Plaintiff's causes of action accrued, the trial court erred in determining that Plaintiff's claims based on Tanouye's response to her initial grievance was not barred by the applicable statute of limitations. Accordingly, the State cannot be held liable under a respondeat superior theory based on Tanouye's response to Plaintiff's initial grievance. However, because the trial court awarded damages for this time-barred claim and other negligent acts that were not time-barred, we remand the instant case for a determination of the amount of damages resulting only from Tanouye's negligent acts that the trial court found to have occurred after March 1, 1993.

b. State's liability based on conduct by Hall

Based on conduct that occurred before and after March 1, 1993, the trial court concluded that "Hall's actions clearly also constitute negligence and NIED." The trial court found that Hall failed to: (1) properly supervise Taylor; (2) instruct any other supervisor to pay any extra attention to Taylor; (3) speak to Taylor personally; (4) inform Tanouye of Taylor's dangerous propensities; and (5) ensure that his administrators knew to immediately inform him of an allegation of sexual assault of an inmate. Based on the foregoing acts, the trial court determined that, had Hall not failed to act, "Taylor would not have sexually assaulted and harassed Plaintiff[,]" would have "at least stopped Taylor's sexual harassment of Plaintiff after February 16,

1993[,]” and “his administrators . . . would have immediately brought Plaintiff’s February 16, 1993 grievance to his attention.” Although the trial court did not indicate exactly when these negligent acts by Hall took place, the court’s findings clearly indicate that Hall’s acts and Plaintiff’s resulting injuries occurred prior to February 16, 1993, which is more than two years from the date Plaintiff filed her initial complaint. Accordingly, based on HRS § 662-4, the trial court erred in determining that the State was liable for these acts.

The trial court also found that, “[b]y some time in March, 1993, Hall became aware of Plaintiff’s grievance against Taylor” and that “Hall failed to exercise his duties and authority even after being informed of Taylor’s sexual harassment of Plaintiff.” Inasmuch as Plaintiff’s initial complaint was filed on March 1, 1995, the applicable statute of limitations does not bar liability against the State for Hall’s failure to act upon learning of Plaintiff’s grievance in March 1993. Therefore, we remand this case for a determination of Plaintiff’s damages based on Hall’s negligent acts that occurred after March 1, 1993.

c. State’s liability based on conduct by Saito and Murakami

With respect to Saito and Murakami, the trial court found:

271. In late February and early March 1993, Saito was acting warden of OCCC in Hall’s absence. Murakami was Tanouye’s superior.

272. Saito and Murakami knew of Taylor's prior incidents, but also failed to take action. Saito and Murakami, as high level administrators at OCCC, had duties similar to Hall with respect to actions they should have taken based on their knowledge of the prior incidents. Therefore, they also breached their duties, which was a substantial factor in causing the serious mental distress suffered by Plaintiff from February 6, 1993 through June 1993.

273. In addition, Plaintiff's grievances came to Saito's and Murakami's attention by February 24, 1993.

274. Saito and Murakami had duties consistent with those of Tanouye and Hall, as explained above, including the duty to order a separation of Taylor and Plaintiff pending investigation. At minimum, they had a duty to separate Taylor from Plaintiff upon confirmation of the veracity of the February 16, 1993 grievance, which should have taken place by February 25, 1993.

275. Saito's and Murakami's failure to perform their duties were also substantial factors in causing serious mental distress to Plaintiff after February 24, 1993.

The trial court determined that Saito and Murakami breached their duties based on "their knowledge of the prior incidents" and on their actions upon learning of Plaintiff's grievances "by February 25, 1993." Thus, the negligent acts referenced by the trial court occurred more than two years prior to the filing of Plaintiff's initial complaint on March 1, 1995. Therefore, we hold that the trial court erred in concluding that the State was liable for the negligence of Saito and Murakami.

In summary, we remand the instant case with instructions to reassess the State's responsibility for damages based only upon the negligent acts of Tanouye and Hall that the trial court found to have occurred on or after March 1, 1993.

B. Qualified Immunity of the State's Employees

On appeal, the State contends that the trial court erred in holding it liable on Plaintiff's negligent supervision

claim. The State argues that (1) where the State's employee is immune from suit, the State, as the employer, is also immune and (2) Plaintiff failed to state an actionable claim for negligent supervision.

As noted supra, HRAP Rule 28(b) requires that each point of error state "where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the court or agency," and "[p]oints not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented." Additionally, HRS § 641-2 (1993) provides, inter alia, that this court "may correct any error appearing on the record, but need not consider a point which was not presented in the trial court in an appropriate manner."

The State's statement of points of error includes citations to the circuit court's findings of fact and conclusions of law, but does not indicate that this argument was raised below, in violation of HRAP Rule 28(b)(4). Additionally, when the trial court allowed the State to present any defenses to Plaintiff's negligent supervision claim,¹⁸ counsel for the State

¹⁸ The trial court stated:

And so for purposes of the record and purposes of record preservation, what I am going to allow to do -- allow to happen -- despite the Court having entered default against the [S]tate on the issue of negligent supervision, I'm going to allow the [S]tate to argue in its closing argument its defenses to that argument -- to that issue because in the event the Court's order entering default is not upheld, the Court -- the Court would like the appellate courts to know

(continued...)

indicated that it would "submit on our trial brief in which we state that the State of Hawai'i retains sovereign immunity as to claims arising out of an intentional tort. And the evidence is clear in this case that there was an intentional tort committed by Dana Taylor." The defense of sovereign immunity is the only argument presented by the State in response to Plaintiff's negligence claims. Thus, the State's arguments on appeal were not raised before the trial court, despite having an opportunity to do so. Based on the State's statement of points of error and the argument raised before the trial court, we disregard this argument raised for the first time on appeal.

C. State's Limited Waiver of Sovereign Immunity

The State contends that the trial court erred in concluding that "Plaintiff's negligence claims based on the State employees' breaches of independent duties [are] not barred by the intentional tort exception to the State Tort Liability Act." The State argues that "Plaintiff may not avoid the effect of the intentional torts exception by couching her Complaint as one for negligence in failing to prevent the harmful conduct."

HRS § 662-15(4) (1993) provides that the State's waiver of its sovereign immunity for the torts of its employees does not

¹⁸(...continued)

what the Court's ruling would be. And I will rule based on the totality of the evidence. I don't know which way I'm going to rule on that issue. So I will enter an alternate finding my findings and conclusions on that issue also as a part of the merits of the case just in case my findings entering default are not upheld.

apply to “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights[.]” In interpreting the State’s waiver of sovereign immunity, this court has held:

[W]here a plaintiff’s negligence claim against the State seeks to hold the State vicariously liable for a state employee’s “assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights” under the doctrine of respondeat superior, the State is, pursuant to HRS § 662-15(4), immune from the plaintiff’s claim. However, where the plaintiff’s negligence claim seeks to hold the State liable for the conduct of state employees other than the alleged intentional tortfeasor, pursuant to theories of negligent hiring, retention, supervision, or the like, the plaintiff’s claim does not necessarily “arise out of” the hired, retained, or supervised employee’s intentional tort. Rather, if the State knew, or reasonably should have anticipated, that one of its employees would commit an intentional tort against a person to whom the State owed a duty of care, the State is liable for the negligence of those employees who were in a position to take reasonable precautions against the anticipated harm.

Doe Parents No. 1 v. State Dept. of Educ., 100 Hawai‘i 34, 68, 58 P.3d 545, 579 (2002) (citation and brackets omitted) (emphasis added).

In the present case, Plaintiff alleged that the State, through its employees, knew or should have known that Taylor would assault and harass Plaintiff. The State was not held liable for Taylor’s intentional torts, but for the negligent acts of Tanouye, Hall, Saito, and Murakami. Based on this court’s holding in Doe Parents No. 1, the trial court did not err in determining that the State could be held liable for the negligence of the employees who were in a position to take reasonable precautions against the anticipated harm. Therefore,

we hold that the State fails to demonstrate that the trial court reversibly erred.

D. Sanctions Against the State

The State contends that the trial court erred in assessing the following as sanctions for "the gross misconduct of Defendant State of Hawai'i": (1) entering default as to liability against the State on Plaintiff's negligent supervision claim; (2) ordering the State to produce, at its own expense, Court's Exhibits 1, 2, and 3; and (3) ordering the State to pay attorneys' fees in the amount of \$7,500.00. The State contends that the trial court erred in imposing the foregoing sanctions upon it because: (1) the arbitration judge's discovery order was directed to DPS as a third-party witness, rather than to the State as a party; (2) the State, as a party to the litigation, was not required to produce any documents because Plaintiff's request was filed after the discovery cut-off date; (3) Plaintiff's arbitration subpoena was unenforceable due to overbreadth;¹⁹ (4) there is no evidence indicating that the failure to produce the requested documents was the result of bad faith; (5) the sanctions imposed by the trial court were not commensurate with the prejudice suffered by the Plaintiff; and (6) Plaintiff failed to state an actionable claim for negligent supervision.

¹⁹ In its opening brief, the State concedes that this argument was not raised before the trial court.

The State's points of error include citations to the record on appeal. Although some of the material cited may be interpreted as evidence supporting the State's arguments on appeal, the State fails to cite where in the record the arguments advanced on appeal were raised before the trial court, in violation of HRAP Rule 28(b)(4), see also Molinar, 95 Hawai'i at 339, 22 P.3d at 986 (issues not properly presented before the circuit court may be deemed waived on appeal).²⁰ Additionally, the trial court clearly expressed its inclination to enter default against the State on Plaintiff's negligent supervision claim and allowed counsel for the State "however long [he] need[ed] to respond." However, the State failed to raise the arguments advanced on appeal during the hearing on Plaintiff's motion for sanctions or in a timely motion for reconsideration. Therefore, because the State (1) failed to comply with HRAP Rule 28(b)(4) and (2) waived these arguments at the trial level, we hold that the State fails to demonstrate that the trial court abused its discretion in entering its sanctions order.

Although the State fails to demonstrate that the trial court abused its discretion in finding it liable under a theory of negligent supervision as a sanction for litigation misconduct, we note that the trial court awarded damages for Plaintiff's mental distress suffered from February 6 through June 1993.

²⁰ On appeal the State cites, inter alia, its June 15, 2000 motion for reconsideration of the trial court's order granting Plaintiff's motion for sanctions. However, this motion was denied as untimely on August 14, 2000.

However, based on the limited waiver of sovereign immunity expressed in HRS § 662-4, the State is immune from liability for acts occurring before March 1, 1993, two years prior to the filing of Plaintiff's complaint. Therefore, we remand for a determination of Plaintiff's damages resulting from the State's negligent supervision that occurred from March 1, 1993. Additionally, we note that any damages awarded based on Plaintiff's negligent supervision theory must result from employees' acts outside the scope of their employment. See Dairy Road Partners, 92 Hawai'i at 427, 992 P.2d at 122.

E. The State as a Joint Tortfeasor

The State contends that the trial court erred in concluding that it was a joint tortfeasor with (1) Taylor for Plaintiff's damages from February 6 through February 18, 1993 and (2) Taylor and Tanouye for Plaintiff's damages from February 19 through June 1993. Initially, "joint tortfeasors" are defined as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them." HRS § 663-11 (1993).

The definition of "joint tortfeasors" set forth in HRS § 663-11 "is based on liability." Saranillio v. Silva, 78 Hawai'i 1, 10, 889 P.2d 685, 694, reconsideration denied, 78 Hawai'i 421, 895 P.2d 172 (1995). In this connection, "[t]he basis of liability is not relevant, nor is the relationship among those liable for the tort. . . . The point is that both [tortfeasors] are (at least) 'severally' liable for the same injury to the plaintiff." Id. (some emphasis and brackets added and some in original) (citations and internal quotation signals omitted). And a tortfeasor . . . cannot be jointly and/or severally liable with another unless "[t]he person who has been harmed can sue and recover

from both. . . ." Black's Law Dictionary 914 (6th ed. 1990) (emphasis added); see id. at 915 (defining "liable" in relevant part to mean "compellable to make . . . compensation" and "accountable for or chargeable with").

Troyer v. Adams, 102 Hawai'i 399, 402 n.1, 77 P.3d 83, 86 n.1 (2003) (quoting Ozaki v. Ass'n of Apartment Owners of Discovery Bay, 87 Hawai'i 265, 271 n.5, 954 P.2d 644, 650 n.5 (1998)) (alterations in original).

1. The State's Liability for Damages Suffered Between February 6 through February 18, 1993

The trial court determined that the State was jointly and severally liable with Taylor for Plaintiff's general damages for the serious mental distress suffered from February 6 through 18, 1993 in the amount of \$50,000. The trial court concluded that the State's liability stemmed from the negligence of Hall, Saito, and Murakami from February 6, 1993. However, as noted supra, pursuant to HRS § 662-4, Plaintiff's claims against the State based on its employees' acts occurring before March 1, 1993 are barred. Therefore, the trial court erred in concluding that the State was responsible with Taylor "for the general damages of \$50,000 awardable due to the serious mental distress suffered by Plaintiff from February 6, 1993 through February 18, 1993."

Accordingly, we reverse this award.

2. The State's Liability for Damages Between January 19 through June 1993

The trial court ruled that the State was liable with Taylor and Tanouye for Plaintiff's general damages in the amount of \$100,000 for the serious mental distress suffered from

February 19 through June 1993. The trial court concluded that the State was liable based on the negligent acts of Hall, Tanouye, Saito, and Murakami. The State argues that the trial court erred because: (1) the applicable statute of limitations had passed; (2) sovereign immunity barred liability; (3) the State could not be held liable for acts which the employees could not themselves be held liable for due to their qualified immunity; and (4) the State cannot be held liable based on 42 U.S.C. § 1983 claims against state officers.

The trial court determined that the State was liable based on the sanction for litigation misconduct and based on a respondeat superior theory. Thus, the trial court determined that the State was liable for the same injuries to Plaintiff also caused by Taylor and Tanouye. Additionally, as noted previously, the State has failed to demonstrate on appeal that the trial court's determinations were erroneous. Therefore, based on the plain language of HRS § 663-11, the trial court did not err in concluding that Taylor, Tanouye, and the State were jointly and severally liable for Plaintiff's injuries. However, as noted supra, the amount of damages must be reassessed due to the statute of limitations.

F. State's Liability for Post-Judgment Interest

On August 7, 2000, the trial court entered an order regarding interest on the judgment, which awarded post-judgment interest as follows:

- a. Jointly and severally against Dana Taylor and Harry Tanouye as provided by § 478-3, Haw. Rev. Stat., at the rate of 10% per year, on the amount of \$100,000.00, for which joint and several judgment has been rendered against them.
- b. Severally against Dana Taylor as provided by § 478-3, Haw. Rev. Stat., at the rate of 10% per year, on the amount of \$50,000.00, for which joint and several judgment has been rendered against Dana Taylor and the State of Hawai'i.
- c. Severally against the State of Hawai'i as provided by § 662-8, Haw. Rev. Stat., at the rate of 4% per year on the amount of \$150,000.00, for which joint and several judgment has been rendered against the State of Hawai'i, Dana Taylor and Harry Tanouye.

The State contends that (1) an award of interest on the amount of \$150,000.00 is not supported by the trial court's findings; (2) it should be liable for post-judgment interest at the statutory rate of 4% per year based on its pro rata share of the judgment; and (3) any award of post-judgment interest should be "apportioned between Plaintiff and [the defendants]" because Plaintiff asserted affirmative claims in its cross-appeal.

As indicated above, the trial court found that the State was a joint tortfeasor jointly and severally liable with (1) Taylor for \$50,000.00 of Plaintiff's damages suffered from February 6 through February 18, 1993 and (2) Taylor and Tanouye for \$100,000.00 for Plaintiff's damages from February 19 through June 1993. Thus, the trial court's findings support an award on interest "on the amount of \$150,000.00, for which joint and several judgment has been rendered against the State of Hawai'i, Dana Taylor and Harry Tanouye." However, as noted supra, the award of damages must be redetermined on remand based on the applicable statute of limitations.

With respect to the remaining arguments, the State fails to cite any authority supporting its contentions on appeal. Therefore, we hold that the State fails to satisfy its burden of positively showing error by the trial court. See State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003) (citing Territory v. Kabayashi, 25 Haw. 762, 766 (1921)). However, we note that "the legislature intended interest to run under [HRS] § 662-8,²¹ from the date when the judgment is conclusive, either after the judgment on appeal or after the time to appeal from the trial court judgment has expired.'" Taylor-Rice v. State, 105 Hawai'i 104, 112, 94 P.3d 659, 667 (2004) (quoting Littleton v. State, 6 Haw. App. 70, 76, 708 P.2d 829, 833, aff'd, 68 Haw. 220, 708 P.2d 824 (1985)) (emphasis omitted).

G. Tanouye's Motion to Dismiss Plaintiff's 42 U.S.C. § 1983 Claims

Tanouye contends that the trial court erred in denying his motions to dismiss Plaintiff's claims based on 42 U.S.C. § 1983 because the trial court failed to indicate what liberty or property interest was deprived by Tanouye's conduct. Tanouye also argues that the trial court erred in determining that he: (1) had supervisory authority over Taylor; (2) failed to comply

²¹ HRS § 662-8 (1993) governs awards of post-judgment interest against the State and provides:

On all final judgments rendered against the State in actions instituted under this chapter, interest shall be computed at the rate of four per cent a year from the date of judgment up to, but not exceeding, thirty days after the date of approval of any appropriation act providing for the payment of the judgment.

with professional correctional standards; and (3) consciously disregarded a serious risk of harm to Plaintiff.

1. Trial Court's Determination of the Rights at Issue in the Instant Case

Tanouye argues that the trial court "never determined or established what liberty or property interest of [Plaintiff] was at issue. Furthermore, if a liberty or property interest existed in this case, the trial court did not determine how Tanouye deprived [her] of the interest or what was allegedly deprived."

Generally, "[i]n order to maintain a claim under § 1983, [plaintiffs] must be able to prove that (1) a person acting under color of state law, (2) subjected them, or is threatening to subject them, to the deprivation of a right under the United States Constitution or other federal law." Aged Hawaiians v. Hawaiian Homes Comm'n, 78 Hawai'i 192, 205, 891 P.2d 279, 292 (1995) (citation omitted).

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law . . . the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.

Bell v. Wolfish, 441 U.S. 520, 535 (1979) (footnote omitted).

"Because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment . . . we apply the same standards." Frost v. Agnos,

152 F.3d 1124, 1128 (9th Cir. 1998) (citing Redman v. County of San Diego, 942 F.2d 1435, 1441 (9th Cir. 1991)).

[A] prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, "sufficiently serious," a prison official's act or omission must result in the denial of "the minimal civilized measure of life's necessities[.]" For a claim (like the one here) based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." To violate the Cruel and Unusual Punishments Clause, a prison official must have a "sufficient culpable state of mind." In prison-conditions cases that state of mind is one of "deliberate indifference" to inmate health or safety[.]

Farmer v. Brennan, 511 U.S. 825, 834 (1994) (citations omitted).

In the instant case, the trial court concluded, inter alia:

51. As indicated below, the remaining § 1983 claims, "failure to supervise," "deliberate indifference," and "due process," are actually based on the Fourteenth Amendment.

52. Claims by pretrial detainees are analyzed the [sic] Fourteenth Amendment Due Process Clause, rather than the Eight [sic] Amendment (cruel and unusual punishment)

. . . . Because pretrial detainees' rights under the Fourteenth Amendment are comparable to prisoners' rights under the Eighth Amendment, however, we apply the same standards." Frost v. Agnos, 152 F.3d 1124, 1128 (9th Cir. 1998).

53. Therefore, § 1983 claims based on the Eighth Amendment are instructive to § 1983 claims brought by pretrial detainees, such as Plaintiff, based on the Fourteenth Amendment "due process" clause.

. . . .
66. Sexual assault and sexual harassment are "serious harm[s]."

67. After the veracity of Taylor's sexual assault of Plaintiff on February 15, 1993, was confirmed by Tanouye on February 18, 1993, the failure to take any action to keep Taylor away from Plaintiff meant that she was "incarcerated under conditions posing a substantial risk of serious harm."

68. The substantial risk of further serious harm to Plaintiff was obvious. Tanouye knew of and consciously disregarded this excessive risk to Plaintiff's safety. Tanouye was aware of facts from which an inference could be drawn that a substantial risk of harm exists, and Tanouye drew the inference, yet failed to act.

69. There is a sufficient causal connection between Tanouye's wrongful conduct and the constitutional violation.

. . . .

71. In addition, Tanouye acted with reckless and callous indifference to the federally protected rights of Plaintiff.

(Emphasis added.) Thus, the trial court clearly determined that a pretrial detainee "incarcerated under conditions posing a substantial risk of serious harm" is subjected to punishment prior to an adjudication of guilt and, thereby, deprived of her right to due process. Therefore, Tanouye's argument that the trial court did not determine what liberty or property interest was at issue lacks merit.

2. The Trial Court's Finding that Tanouye had Supervisory Authority Over Taylor

Tanouye contends that the trial court erred in denying his motion to dismiss Plaintiff's 42 U.S.C. § 1983 claims because the court erroneously found that he had supervisory authority over Taylor. Tanouye argues that the testimony of Frank and Bair "does not establish or describe with certainty the responsibilities of Tanouye as a UTM at OCCC" and that "there is ample evidence which the trial court neglected to take into account that substantially supports the fact that Tanouye did not have any supervisory role or responsibility over ACO Taylor." Tanouye appears to argue that the trial court clearly erred because other evidence in the record conflicts with the trial court's finding that Tanouye had supervisory authority over Taylor.

Initially, Tanouye's statement of points of error fails to indicate where in the record he raised this argument

before the trial court, in violation of HRAP Rule 28(b)(4). Nevertheless, in examining the trial court's findings, this court must determine whether there is credible evidence of sufficient quality and probative value to support the findings of fact. Bremer, 104 Hawai'i at 51, 85 P.3d at 158 (citation omitted). The mere existence of contrary evidence does not render a finding of the trial court clearly erroneous because "[i]t is well-settled that an appellate court will not pass upon issues dependent upon the credibility of witnesses and the weight of the evidence; this is the province of the trier of fact." In re Jane Doe, Born on June 20, 1995, 95 Hawai'i 183, 190, 20 P.3d 616, 623 (2001) (citations, quotation marks, and ellipsis points omitted). In the instant case, Hall's testimony, which is not challenged on appeal, indicates that Taylor was obligated to obey direct commands from Tanouye because Taylor was subject to Tanouye's command as a UTM.²² Based on unchallenged evidence in the record, Tanouye fails to demonstrate that the trial court's findings regarding Tanouye's authority as a UTM are clearly erroneous.

²² During trial, the following exchange occurred between Plaintiff's counsel and Hall:

Q. [by Plaintiff's counsel] Okay. Isn't it true that Taylor was obligated to obey direct commands from Mr. Tanouye?

A. [Hall] Yes.

Q. And he was obligated to do so because Mr. Tanouye was a unit manager, and Taylor was one of the employees subject to Mr. Tanouye's command; isn't that correct?

A. Yes.

3. The Trial Court's Findings Regarding the Applicable Standard of Care

Tanouye contends that the trial court erred in denying his motion to dismiss Plaintiff's 42 U.S.C. § 1983 claims because the court erroneously determined that Tanouye violated the applicable standard of care. Tanouye argues that evidence presented regarding the American Correctional Association standards "do not apply [because] they are national standards which are generalized and overly broad" and because "OCCC has its own established policies and procedures outlining the grievance process which Tanouye employed." In the alternative, Tanouye asserts that Bair's testimony indicates that Tanouye did not specifically violate any standard of care.

Initially, Tanouye fails to cite any evidence supporting his argument that the American Correctional Association standards are inapplicable in the instant case. Additionally, Bair's testimony regarding professional correctional standards was not premised solely on the American Correctional Association standards. Bair testified that the underlying objectives of prison management -- maintaining a secure, safe, and humane facility -- are professional standards that apply generally and are "in broader use than something merely promulgated by the [American Correctional Association]."

Tanouye appears to contend that Bair's testimony does not constitute sufficient evidence to support the following findings of fact:

62. Also, OCCC's own policies required Tanouye to make an Internal Affairs report. (Plaintiff's Exhibit 63.)

63. Tanouye did not, however, report the facts contained in the grievance to Hall, any other superior, or Internal Affairs. (Hall & Tanouye Testimonies.)

192. Tanouye's failure to comply with professional correctional standards by failing to conduct a thorough, formal investigation, and by failing to immediately issue a temporary no contact order pending investigation, which would have turned into a permanent no contact order upon completion of the investigation, was a substantial factor causing serious mental distress to Plaintiff from February 19, 1993 through June 1993.

193. Professional correctional standards required that Tanouye immediately contact the warden regarding a grievance containing allegations as serious as those within Plaintiff's February 16, 1993 grievance.

211. Professional correctional standards required that Tanouye immediately follow up on this grievance, especially since he had believed the previous grievance to be true.

212. To the extent he had not done so already, professional correctional standards required that Tanouye issue a temporary no contact order or see that such an order get initiated, initiate a formal investigation, report the matter to the warden or other OCCC administrators, and make an Internal Affairs report.

219. Therefore, Tanouye's failure to act upon being informed of Saito's concerns was a substantial factor in causing serious mental distress to Plaintiff after March 5, 1993.

223. Therefore, Tanouye's failure to discipline Taylor for his misconduct at this point was also a substantial factor in causing serious mental distress to Plaintiff after March 9, 1993.

(Boldface emphases in original.)

With respect to findings of fact 62 and 63, the trial court's order clearly indicates that neither finding was based on Bair's testimony. Therefore, to the extent Tanouye argues that these findings are not supported by Bair's testimony, such argument lacks merit.

With respect to the challenged findings regarding Tanouye's failure to conduct a thorough investigation and report the matter to proper authorities, Bair indicated that a "UTM has

a duty to make sure that an internal affairs investigation occurs after corroborating allegations of sexual harassment by an ACO," stating:

[I]f some criminal activity has taken place, the UTM, and it's brought to their attention, has personal immediate responsibility to insure that the proper authorities have been notified; i.e., law enforcement.

It's a dual thing. You do an internal affairs investigation as well as you do law enforcement, especially when the inmate requests law enforcement. But to make sure that your own house is covered, that your own staff are doing what they're supposed to be doing not only by your own mission statement and what you're about as a corrections agency, you have an internal affairs unit. All states do. And that internal affairs unit does basically the same thing that the law enforcement does. They investigate not only criminal activity but other activity as well. It's automatic. Criminal activity allegations, especially when the preliminary investigation indicates that they were founded -- and in this case, that was true and the UTM found that the allegations were in fact true -- it's an automatic.

And the UTM is responsible to insure that takes place. It's not one of those things you delegate; it's not one of those things that you tell somebody else to do and hope they do it. You're the UTM. You're the top dog, if you will. It's your responsibility to insure that it takes place.

Bair also testified that Tanouye was required to perform a thorough investigation of a sexual harassment complaint by an inmate, explaining:

The UTM should not have to be told by Mr. Saito, I believe the chief of security who directed him, to do a thorough investigation. Should not have been told that, should have done that himself in the first place.

But even after he did an investigation initially and didn't even bother to talk with the ACO who [Plaintiff] said had assaulted her when he was at the facility, the very day that he -- the UTM talked with [Plaintiff], and in view of the fact that, you know, he chose not to do that is unbelievable, especially when he found that the charges were sustained, if you will, or found them to be true without even talking to Mr. Taylor or even attempting to.

But even later, when he was told that he must do that, it's a dereliction of his duty. He was given an order by his superiors to conduct this investigation properly and to obtain a statement. The ACO refused to give him a statement, and he just turned around and walked off and said, well, I can't do nothing about it.

Yes, you can. You're the unit team manager. This man works for you. You gave him the direct order. He refused it. If he does not do it, you can't physically take it away from him obviously, but you immediately suspend him. There must be some

accountability. You can't have an ACO telling his boss, I'm not going to do something. You'll have anarchy. You gotta manage your facility; you have to run the prison. To have an ACO say, I won't do it, and then you do nothing about it is unbelievable.

With respect to Tanouye's failure to act, Bair also testified that, when a UTM initially determines that an ACO fondled an inmate without consent,

as a manager, [the UTM has] the responsibility to insure the safety and humane treatment of the inmates. And if in fact a staff member has violated that and by and through their investigation they have determined that, they have no choice. ~~They must intercede and insure that it does not happen again and take corrective action.~~

Based upon our review of the record, we hold that sufficient evidence was adduced to support the trial court's findings of fact regarding the appropriate standard of care.

4. The Trial Court's Finding that Tanouye Disregarded a Serious Risk of Harm to Plaintiff

Tanouye contends that the trial court erred in denying his motion to dismiss Plaintiff's 42 U.S.C. § 1983 claims because Plaintiff did not adduce sufficient evidence to support the trial court's finding that Tanouye knew of and consciously disregarded an excessive risk to Plaintiff's safety. Initially, Tanouye argues that the finding is erroneous because he testified that he did not know Plaintiff was frightened of or in danger from Taylor. However, his contrary testimony does not render the finding clearly erroneous. See In re Jane Doe, Born on June 20, 1995, 95 Hawai'i at 190, 20 P.3d at 623. Additionally, Plaintiff's testimony and exhibits, along with Tanouye's testimony regarding his investigation of Plaintiff's grievances constitutes sufficient evidence that, despite his knowledge of

Taylor's acts against Plaintiff, Tanouye failed to take action, as reflected in the following unchallenged findings of fact:

53. On February 15, 1993, at around 8:00 p.m., Plaintiff was writing a letter regarding her pending criminal charge to her attorney in Module 18, in the lower level. Taylor, who was the Acting Sergeant for Module 18 that night, came downstairs, came behind her, and caressed Plaintiff's breast from behind. Plaintiff was caught off guard, and exclaimed, "Oh my God." Taylor appeared to then be leaving, but unbeknownst to her, came back behind her, and again fondled her breast. He then backed off again. Plaintiff could see that inmate Dino Medeiros was watching what happened. Dino Medeiros told Plaintiff he had seen what had happened, and would be willing to testify against Taylor. This incident also caused Plaintiff to suffer feelings of serious mental distress, fear, degradation, helplessness, and humiliation.

59. Although based on the inmate interviews, Tanouye believed the incident happened as Plaintiff described, Tanouye did not pursue any further formal investigation of the matter, and decid[ed] on his own to proceed "informally."

60. Tanouye decided not to pursue obtaining a statement from Taylor, felt no need to contact the warden or a superior, and felt no need to consider recommending any further action, including obtaining a statement from Taylor or a report to Internal Affairs. Tanouye also did not consider whether to issue a stay-away order pending any investigation, to prevent further harassment or retaliation.

68. Tanouye did not take any further action because he completely minimized the seriousness of Taylor's misconduct. In Tanouye's eyes, this was a mere "male to male" contact, and was totally different from an ACO touching the breasts of a female inmate; Tanouye would have considered the latter to be a serious violation. Since Plaintiff had male genitalia, however, Tanouye did not consider her obviously large, female breasts to be a sexual or private part of her body.

79. Tanouye told Plaintiff that "in his opinion this was just a petty misdemeanor." Tanouye attempted to dissuade Plaintiff from pursuing the HPD complaint on the basis that Taylor had already been counseled and that there might be repercussions to [Plaintiff] if she pursued the matter.

Accordingly, substantial evidence supports the instant findings of fact and, thus, Tanouye fails to demonstrate that the trial court's finding of fact is clearly erroneous.

Tanouye also contends that the following findings of fact are inconsistent:

236. Tanouye knew of and consciously disregarded an excessive risk to Plaintiff's safety. Tanouye was aware of facts from which an inference could be drawn that a substantial risk of serious harm existed, and Tanouye drew the inference, yet failed to act.

240. Although the court finds the above by a preponderance of the evidence, the court does not have a firm belief or conviction that Tanouye's actions were motivated by malice or an otherwise improper purpose; the court does not find it "highly probable" that Tanouye acted in conscious disregard of an excessive risk to Plaintiff's safety, or in a reckless or callously indifferent manner.

In examining allegedly inconsistent findings of fact, this court reviews the findings and conclusions in their entirety and construes them, when possible, to be complete and internally consistent. Iaea v. Iaea, 59 Haw. 648, 650-51, 586 P.2d 1015, 1016-17 (1978) (citations omitted).

Finding of fact 240 notes the differing burdens of proof involved with Plaintiff's claims and explains that Plaintiff proved her allegations by a preponderance, but not clear and convincing evidence. Because of the differing burdens of proof cited by the trial court, this court may read findings 236 and 240 so as to render them completely consistent with one another. The trial court's conclusions of law support this interpretation. The trial court concluded that proof of reckless or callous indifference by a preponderance of the evidence was required for an award of punitive damages under 42 U.S.C. § 1983 and that, to overcome Tanouye's qualified immunity, Plaintiff was

required to prove by clear and convincing evidence²³ that Tanouye's conduct had been motivated by malice and not by an otherwise proper purpose. After noting the different burdens of proof involved in Plaintiff's claims, the trial court ruled that, "although the court has found Tanouye liable by a preponderance of the evidence for punitive damages under a [42 U.C.S.] § 1983 analysis, the court has found that Plaintiff has failed to prove by 'clear and convincing evidence' that Tanouye was motivated by malice or an otherwise improper purpose." Based on the differing burdens of proof cited by the trial court, it was not inconsistent for the court to have found Tanouye liable for § 1983 punitive damages and immune from Plaintiff's negligence claims. Thus, reviewing the court's findings of fact and conclusions of law in their entirety, we hold that Tanouye fails to demonstrate that findings of fact 236 and 240 are inconsistent.

²³ This court has noted that

"clear and convincing" evidence may be defined as an intermediate standard of proof greater than a preponderance of the evidence, but less than proof beyond a reasonable doubt required in criminal cases. It is that degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable.

Masaki v. General Motors Corp., 71 Haw. 1, 15, 780 P.2d 566, 574 (1989) (citations omitted).

H. Tanouye's Motion to Dismiss Plaintiff's Claims for Punitive Damages

Tanouye contends that the trial court erred in denying his motion to dismiss Plaintiff's claim for punitive damages. Specifically, Tanouye argues that "[t]he trial court erred in [conclusions of law] 70, 77, and 154^[24] given the arguments in Parts VI.A., VI.B. and VI.C." Also, although not clear, Tanouye appears to argue that the denial of his motion to dismiss Plaintiff's claim for punitive damages was erroneous based on his perceived inconsistency between findings of fact 236 and 240.

Tanouye's brief does not contain parts labeled VI.A., VI.B., or VI.C. Additionally, based on the analysis supra, Tanouye's argument premised on an alleged inconsistency between findings of fact 236 and 240 lacks merit. Accordingly, Tanouye fails to demonstrate that the trial court erred in denying his motion to dismiss Plaintiff's claim for punitive damages.

I. Motion for Summary Judgment by the State, Hall, and Tanouye

Plaintiff contends that the motions court erred in granting summary judgment in favor of Hall on Plaintiff's

²⁴ The conclusions of law cited by Tanouye state:

70. Tanouye is therefore liable to Plaintiff for \$100,000 in general damages for the serious mental distress suffered by Plaintiff from February 19, 1993 through June 1993. **(See Finding of Fact 288.)**

77. Under the circumstances, the court awards Plaintiff \$10,000 as punitive damages against Tanouye. **(See Finding of Fact 293.)**

154. Defendant Tanouye is solely liable for the punitive damages of \$10,000 awardable against him. **(See Conclusion of Law 77.)**

(Bold emphases in original.)

42 U.S.C. § 1983 claims against Hall in his individual capacity. Plaintiff alleges in her statement of points on appeal that the motions court's conclusion that, "as a matter of law, Defendant Hall did not personally participate in the alleged misconduct; Defendant's Hall's conduct did not violate clearly established statutory or constitutional rights and Defendant did not act with deliberate indifference" was erroneous and the result of discovery fraud. Plaintiff argues that the motions court erroneously: (1) ruled that Plaintiff's rights were not clearly established; (2) "misapprehended the appropriate legal standard to adjudicate Hall's deliberate indifference"; (3) ruled that personal participation was a predicate to liability under Plaintiff's deliberate indifference claim; (4) found that there were no material facts in dispute "regarding whether Hall's actions constituted deliberate indifference subjecting him to liability."

This court has held that the

[a]ppellant has the burden of sustaining his allegations of error against the presumption of correctness and regularity that attend the decision of the lower court. . . . We necessarily approach a case with the assumption that no error has been committed upon the trial and until this assumption has been overcome by a positive showing the prevailing party is entitled to an affirmance.

Ala Moana Boat Owners v. State, 50 Haw. 156, 158, 434 P.2d 516, 518 (1967) (citation and internal quotation marks omitted).

Where a trial court does not refer to any standard of proof, a presumption arises that it applied the correct standard. Crosby

v. State Dept. of Budget & Finance, 76 Hawai'i 332, 342, 876 P.2d 1300, 1310 (1994) (citation omitted).

With respect to Plaintiff's allegation that the motions court's conclusion of law was the result of discovery fraud, Plaintiff's statement of points of error fails to indicate where in the record the alleged error was objected to or the manner in which the alleged error was brought to the attention of the motions court, in violation of HRAP Rule 28(b)b(4). Additionally, no argument regarding the alleged fraud was raised before the motions court in Plaintiff's motion for reconsideration or through any other means, and Plaintiff provides no explanation why such an argument could not have been raised when she became aware of the litigation misconduct during trial. Therefore, Plaintiff has waived these arguments on appeal. However, we also note: (1) based on the plain language of the motions court's order and the lack of a transcript of the hearing on the defendants' motion for summary judgment, Plaintiff fails to demonstrate that the motions court ruled that her rights were not clearly established or applied an incorrect legal standard; (2) because Plaintiff advanced multiple theories based on 42 U.S.C. § 1983, including a claim that her civil rights were violated by an illegal search, Plaintiff fails to demonstrate that the motions court erred in concluding that "Hall did not personally participate in the alleged misconduct" inasmuch as it is undisputed that Hall did not personally participate in any

illegal search; and (3) because an appellate court's review of summary judgment is limited to material considered by the court in ruling on the motion, Ass'n of Apt. Owners of Wailea Elua v. Wailea Resort Co., 100 Hawai'i 97, 108, 58 P.3d 608, 619 (2002), Plaintiff's citation to evidence and testimony presented after the court ruled upon the motion for summary judgment fails to demonstrate error by the motions court.

J. The Trial Court's Orders Affirming the Motions Court's Order Granting Summary Judgment

In the argument section of her amended opening brief, Plaintiff contends that the trial court erred in adhering to the motions court's grant of summary judgment, arguing that the motions court's order was based on an incomplete record as a result of the fraudulently withheld evidence. However, Plaintiff fails to identify which findings of fact or conclusions of law she believes are erroneous, thereby failing to properly raise this argument on appeal. Additionally, Plaintiff fails to indicate where in the record this argument was brought to the attention of the trial court. Therefore, we disregard this argument. See HRAP Rule 28(b)(4).

K. The Trial Court's Findings of Fact Regarding Hall's Qualified Immunity

In the argument section of her brief, Plaintiff contends that the trial court erred in finding,

Although the court finds [that Tanouye's conduct demonstrates conscious disregard of a serious risk of harm to Plaintiff from continued contact with Taylor] by a preponderance of the evidence, the court does not have a firm belief or conviction that Hall's actions were motivated

by malice or an otherwise improper purpose; the court does not find it "highly probable" that Hall acted in conscious disregard of an excessive risk to Plaintiff's safety, or in a reckless or callously indifferent manner.

Plaintiff argues that the trial court's finding is inconsistent with its other findings indicating that Hall (1) failed to comply with professional correctional standards and (2) was liable under Plaintiff's § 1983 claims.

Initially, Plaintiff's argument is not properly raised in her statement of points of error and may be disregarded by this court. Additionally, based on the analysis supra regarding the differing burdens of proof cited by the trial court, Plaintiff fails to demonstrate that the trial court's finding of fact is clearly erroneous.

L. Plaintiff's Motion to Amend the March 31, 2000 Findings of Fact, Conclusions of Law, and Order

Plaintiff contends that the trial court abused its discretion in denying her motion to amend the trial court's March 31, 2000 findings of fact, conclusions of law, and order [hereinafter, HRCF Rule 59 motion], in which Plaintiff requested an additional \$150,000.00 for damages suffered from June 1993 through November 1993. Plaintiff argues that the medical records²⁵ improperly withheld by the State constitute newly discovered evidence regarding the extent of her damages. In her memorandum in support of her HRCF Rule 59 motion, Plaintiff

²⁵ The medical records include physical examination forms, medical history forms, medical admission screening forms, notes from visits to the medical clinic, pharmacy records, medication administration records, and intake screening questionnaires. The documents are dated between September 1992 and November 1993.

stated that her "counsel, Carl M. Varady . . . was not aware of the institutional medical records confirming that [P]laintiff did, in fact, suffer emotional distress through November 18, 1993. Thus, at the conclusion of Dr. Marvit's testimony, Mr. Varady orally limited Plaintiff's claims for damages through June 1993." Plaintiff further explains:

Had [P]laintiff received these records prior to trial, she would not have limited her damage claims solely to the time she was subjected to sexual abuse and intimidation by Taylor. . . . Instead, [P]laintiff would have sought damages for the entire period of her incarceration, as this is the time her wrongfully withheld medical records conclusively prove, through the [S]tate's own doctor, that she suffered from [p]ost [t]raumatic [s]tress [d]isorder.

In the alternative, Plaintiff "asks this court make additur, as a proper remedy for the manifestly unsupported ruling below."

This court has "construed HRCF Rule 59(e) as a vehicle 'to allow the parties to present new evidence and/or arguments that could not have been presented during the earlier adjudicated motion[.]'" Sousaris v. Miller, 92 Hawai'i 505, 513 n.9, 993 P.2d 539, 547 n.9 (2000).

Newly discovered evidence is a ground for the granting of a motion for a new trial under [HRCF] Rule 59, or for relief from judgment under [HRCF] Rule 60. In either case "the movant must have been excusably ignorant of the facts, i.e., the evidence must be such that it was not discoverable by diligent search." In Greenspahn v. Joseph E. Seagram & Sons, 186 F.2d 616, 619 (2d Cir. 1951), it was held that the condition of "due diligence" is not met if the "slightest investigation would have disclosed" the asserted newly discovered evidence to the movant. (Emphasis added.)

Kawauchi v. Tabata, 49 Haw. 160, 198, 413 P.2d 221, 241 (1966) (citation omitted).

For the medical records to constitute newly discovered evidence, Plaintiff must demonstrate that she was excusably

ignorant of the fact that she continued to suffer from emotional distress and that evidence of her continued suffering was not discoverable by diligent search. In other words, Plaintiff must demonstrate that she could not determine her own continued mental distress without the improperly withheld records. This court has noted that

the proper test for determining damages for physical pain and suffering or mental anguish is what the jury considers will reasonably compensate the plaintiff for the pain and suffering or anguish in light of the intensity and extent thereof as disclosed by the evidence, and . . . such determination must be left to the sound discretion of the jury.

Franco v. Fujimoto, 47 Haw. 408, 424, 390 P.2d 740, 750 (1964).

Thus, calculating damages from mental distress is similar to calculating damages from physical pain and suffering.

The nature of pain and suffering is such that no legal yardstick can be fashioned to measure accurately reasonable compensation for it. No one can measure another's pain and suffering; only the person suffering knows how much he is suffering, and even he could not accurately say what would be reasonable compensation for it.

Lauer v. Young Men's Christian Ass'n, 57 Haw. 390, 398-99, 557

P.2d 1334, 1340 (1976) (citation omitted). Additionally, medical testimony is not a prerequisite for recovery for emotional distress. Campbell v. Animal Quarantine Station, 63 Haw. 557, 564, 632 P.2d 1066, 1070 (1981).

Medical proof can be offered to assist in proving the "seriousness" of the claim and the extent of recovery, but should not be a requirement allowing or barring the cause of action. Once the trial court or the jury is satisfied that the distress is "serious," the duration and symptoms of the distress affect the amount of recovery.

Id. at 564, 632 P.2d at 1070-71.

Initially, as noted supra and demonstrated by the trial court's award, Plaintiff could have proved her claim for emotional distress without medical evidence. Nevertheless, Plaintiff offers no explanation of why her counsel was unaware of the medical records or why diligent investigation could not have disclosed the existence of such records inasmuch as Plaintiff was present while the records were being created and her signature appears on some of the forms. Additionally, given that "only the person suffering knows how much [s]he is suffering," Lauer, 57 Haw. at 399, 557 P.2d at 1340, Plaintiff fails to provide a reasonable explanation of how she could be excusably ignorant of the intensity or duration of her own suffering. Based on the foregoing, we hold that Plaintiff failed to demonstrate that the trial court erred in denying Plaintiff's motion to amend the findings of fact, conclusions of law, and order. Further, we also determine that Plaintiff has failed to demonstrate that additur is appropriate in the instant case.

M. Award of Prejudgment Interest

1. **Tanouye**

Plaintiff contends that the trial court abused its discretion by awarding prejudgment interest from the date the arbitration award was appealed. Plaintiff argues that a greater award of prejudgment interest²⁶ is warranted because the

²⁶ In Plaintiff's statement of points on appeal, she argues that the trial court erred in not awarding prejudgment interest "from December 1997, when the discovery abuse began." However, in the argument section of her
(continued...)

litigation misconduct in the instant case "directly benefitted Tanouye prior to the arbitration."

Prejudgment interest is designed "to allow the court to designate the commencement date of interest in order to correct injustice when a judgment is delayed for a long period of time for any reason, including litigation delays." "[T]he purpose of prejudgment interest is to discourage 'recalcitrance and unwarranted delays in cases which should be more speedily resolved.'"

Metcalf v. Voluntary Employees' Benefit Ass'n of Hawai'i, 99

Hawai'i 53, 61, 52 P.3d 823, 831 (2002) (citations omitted). HRS

§ 636-16 (1993) provides that,

[i]n awarding interest in civil cases, the judge is authorized to designate the commencement date to conform with the circumstances of each case, provided that the earliest commencement date in cases arising in tort may be the date when the injury first occurred and in cases arising by breach of contract, it may be the date when the breach first occurred.

Additionally, this court has noted that

it is clearly within the discretion of the circuit court to deny prejudgment interest where appropriate, for example, where: (1) the defendant's conduct did not cause any delay in the proceedings; (2) the plaintiff himself has caused or contributed to the delay in bringing the action to trial; or (3) an extraordinary damage award has already adequately compensated the plaintiff.

Roxas v. Marcos, 89 Hawai'i 91, 153, 969 P.2d 1209, 1271 (1998),

reconsideration denied, 89 Hawai'i 91, 969 P.2d 1209 (1999).

In the instant case, the trial court found "that delay in this matter, for which an award of prejudgment interest would be warranted, occurred beginning on June 3, 1998, the date that the arbitration award was appealed by defendants State of Hawai'i, Guy Hall and Harry Tanouye." Plaintiff fails to

²⁶(...continued)

brief, Plaintiff argues that prejudgment interest should accrue from February 16, 1993, "the date of the initial grievance."

challenge the trial court's finding in the statement of points of error or argument sections of her opening brief. Therefore the court's finding is binding upon this court. Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 458, 40 P.3d 73, 81 (2002). Based on its unchallenged finding of fact, Plaintiff fails to demonstrate that the trial court's order demonstrates an abuse of discretion.²⁷

2. The State

Plaintiff contends that the trial court abused its discretion in denying her request for further sanctions against the State "in an amount equal to 10% per annum applied to \$150,000, for which the State is jointly and severally liable calculated from February 6, 1993 until June 5, 2000."²⁸ Plaintiff argues that "[t]he court's \$7,500 sanction is too meager to provide the type of compensation and discouragement proportional to the [S]tate's misconduct and is contrary to principles of law and practice regarding the proportionality of sanctions."

²⁷ Additionally, we note that Plaintiff fails to challenge the trial court's previous refusal to hold the individual defendants responsible for the State's discovery abuse. During the hearing on Plaintiff's motion for sanctions against the State, the trial court stated:

At this point, I'm not going to take any actions against the individual defendants. Even though I realize that Mr. Nomura was representing all three, I think it would be unfair under the circumstances. I'm not going to do that. I think it's completely fair as to the [S]tate, but not as to the other defendants.

²⁸ Before the trial court, Plaintiff claimed that "it would be proper for the State to pay[] \$110,054.79" However, on appeal Plaintiff argues that \$117,287.67 is an appropriate sanction.

Initially, this court has noted that "the ultimate sanction of dismissal or default judgment" is particularly severe. Stender v. Vincent, 92 Hawai'i 355, 364, 992 P.2d 50, 59 (2000). Given that the trial court awarded default against the State as a sanction for its discovery abuse, Plaintiff's focus on the additional monetary sanction alone seems somewhat disingenuous. We disagree that the entry of default is "too meager" a sanction.

Additionally, HRS § 662-2 (1993) specifically provides that the State "shall not be liable for interest prior to judgment or for punitive damages." With respect to post-judgment interest, HRS § 662-8 provides that "interest shall be computed at the rate of four per cent a year from the date of judgment" Thus, Plaintiff argues, in essence, that the trial court abused its discretion by failing to award interest barred by HRS § 662-2 at a rate inconsistent with HRS § 662-8. However, Plaintiff provides no authority supporting the use of a court's authority to punish litigation misconduct as a means to circumvent the State's sovereign immunity. Therefore, we hold that Plaintiff fails to demonstrate that the trial court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice.

N. Award of Sanctions Against Plaintiff

In her statement of points on appeal, Plaintiff contends: (1) "The court's imposition of sanctions against

[Plaintiff] for opposing a third deposition and resisting the production of her Sex Abuse Treatment Records was erroneous;" (2) "The court's imposition of sanctions against [Plaintiff] for the manner in which she answered interrogatories was erroneous;" and (3) "The court's order refusing to reconsider the sanctions orders was erroneous." In her statement of points on appeal and her argument, Plaintiff cites to two orders by the motions court and one order by the trial court, including: (1) "Order Granting Attorneys' Fees and Costs for Defendant Harry Tanouye's Motion to Compel Discovery and for Sanctions," (2) "Order Granting Defendant Harry Tanouye's (Improperly Identified as 'Harry Tanoye') Motion to Dismiss Complaint for Failure to Answer Interrogatories, or Alternatively, Motion to Compel Answers to Interrogatories and Request for Sanctions," and (3) "Order Denying Defendant Harry Tanouye's Motion to Alter or Amend Judgment."

Plaintiff fails to challenge any findings or conclusions of either the motions court or the trial court. Additionally, with respect to the motions court's orders challenged by the Plaintiff, the hearings resulting in the challenged orders were held on October 22, 1999 and December 1, 1999. The transcripts of these hearings were not made part of the record on appeal.²⁹ Thus, Plaintiff has failed to furnish

²⁹ Although not cited in Plaintiff's statement of points of error or her argument, to the extent Plaintiff's argument may be construed to challenge the motions court's June 23, 2000 "Order Granting in Part, Denying in Part

(continued...)

this court with a sufficient record to positively show any alleged error, Bettencourt v. Bettencourt, 80 Hawai'i 225, 230, 909 P.2d 553, 558 (1995), and, therefore, fails to demonstrate error on appeal.

With respect to the trial court's order denying Tanouye's motion to alter or amend the judgment, this court has noted:

"Generally, the requirements of standing [to appeal] are: (1) the person must first have been a party to the action; (2) the person seeking modification of the order or judgment must have had standing to oppose it in the trial court; and (3) such person must be aggrieved by the ruling," i.e., the person must be "one who is affected or prejudiced by the appealable order."

Kepo'o v. Watson, 87 Hawai'i 91, 95, 952 P.2d 379, 383 (1998) (quoting Waikiki Malia Hotel, Inc. v. Kinkai Properties, Ltd. P'ship, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993)). In the instant case, Plaintiff was not aggrieved by the trial court's denial of Tanouye's motion. Because the trial court's order did not injure Plaintiff's substantial rights, this court lacks authority to reverse, amend, or modify the order from which Plaintiff appealed. HRS § 641-2 (1993).

²⁹(...continued)

Defendant Harry Tanouye's Motion to Compel and Sanctions," we note that the transcript of the May 8, 2000 hearing is not included in the record on appeal.

IV. CONCLUSION

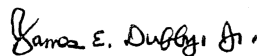
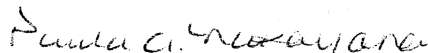
Based on the foregoing, we affirm the June 5, 2000 final judgment except as follows: we reverse that portion of the judgment awarding Plaintiff damages against the State in the amount of \$50,000.00 for the mental distress suffered from February 6 through February 18, 1993. We also vacate that portion of the June 5, 2000 final judgment awarding Plaintiff damages against the State in the amount of \$100,000 for the mental distress suffered from February 19, 1993 through June 1993 (1) attributable to the State on a respondeat superior theory for the acts of Tanouye, Hall, Saito, and Murakami and (2) resulting from the State's negligent supervision of its employees for the acts committed by them outside the scope of their employment and remand this case for (a) a redetermination of Plaintiff's damages for (1) and (2) above, based on conduct occurring on or after March 1, 1993, and (b) entry of an amended final judgment, including the portions of the judgment affirmed on appeal.

DATED: Honolulu, Hawai'i, July 29, 2005.

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