***** NOT FOR PUBLICATION *****

NO. 24671

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

DAVID KAMALU and ROXANNE KAMALU,
Plaintiffs,

and

STATE OF HAWAIʻI,
Defendant-Appellant/Cross-Appellee,

vs.

PAREN, INC. d/b/a Park Engineering,
Defendant-Appellee/Cross-Appellant,

and

HAWAII GEOTECHNICAL GROUP, INC., d/b/a Walter Lum Associates,
Defendant-Appellee.

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STATE OF HAWAII

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 97-4959-12)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ., and Circuit Judge Masuoka, in place of Duffy, J., recused)

The defendant-appellant/cross-appellee the State of Hawaiʻi (hereinafter, "the State") appeals from, and the defendant-appellee/cross-appellant ParEn, Inc. (hereinafter, "ParEn") cross-appeals from, the October 10, 2001 judgment of the circuit court of the first circuit, the Honorable Sabrina S. McKenna presiding.

On appeal, the State contends that the circuit court erred in: (1) finding that ParEn's negligence in not responding to the Louie memo was not a legal cause of the Plaintiffs' injuries; (2) finding that the defendant-appellee Hawaii Geotechnical Group, Inc. (hereinafter, "HGG") was not negligent;

and (3) concluding that ParEn and HGG [hereinafter, collectively, "the Appellees"] had a right of contribution against the State.

In its cross-appeal, ParEn argues that the circuit court erred in finding that ParEn was negligent.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised, we affirm the circuit court's October 10, 2001 judgment for the following reasons:

(1) Legal cause is an indispensable element of liability that requires more than the mere breach of a duty. See Taylor-Rice v. State, 91 Hawai'i 60, 74, 979 P.2d 1086, 1100 (1999). Notwithstanding the circuit court's findings of fact (FOFs) that "ParEn had an obligation and duty to respond to [the] Louie[] [m]emo," the circuit court's determination that any negligence was not a substantial factor in causing the Plaintiffs' injuries was not clearly erroneous.

(2) Inasmuch as the circuit court did not clearly err in finding that the State, and not the Appellees, legally caused the Plaintiffs' injuries, this court will not second-guess the circuit court's findings of fact as to whether ParEn and/or HGG breached their duties of care, nor what those duties may have been.

(3) Notwithstanding the State's, ParEn's, and the circuit court's misplaced presupposition that the success of the Appellees' cross-claims depends upon the State's liability for contribution as a "joint tortfeasor[]" pursuant to HRS §§ 662-2,

663-10.5, -11, and -12 (1993), the State simply cannot be a "joint tortfeasor" if it is the only tortfeasor. Consequently, the real question is whether sovereign immunity bars the Appellees, as subrogees of the Plaintiffs, from recovering reimbursement from the State. The proposition that the legislature intended to retain the State's sovereign immunity against a subrogee in the absence of a direct tort claim finds support in neither the plain language of HRS § 662-2 nor an exhaustive review of its legislative history. See also Lyon & Sons v. N.C. State Bd. of Educ., 76 S.E.2d 553, 559 (N.C. 1953) ("Our Legislature by enacting our Tort Claims Act has established a policy which opens the door to tort claims based on negligence. . . . If the State had desired to exclude the right of subrogation, it would have written such exemption into the Act."). Therefore,

IT IS HEREBY ORDERED that the judgment from which the appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, January 23, 2006.

On the briefs:

Jeffrey H.K. Sia, of Ayabe Chong Nishimoto Sia & Nakamura, for the defendant-appellant/ cross-appellee the State of Hawai'i

Steven K. Hisaka and Frank K. Goto, Jr., for the defendant-appellee/cross-appellant ParEn, Inc. d/b/a Park Engineering

Randall K. Schmitt, of McCorriston Miho Miller Mukai, for the defendant-appellee Hawaii Geotechnical Group, Inc. d/b/a Walter Lum Associates