* * * NOT FOR PUBLICATION * * *

NO. 26338

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

MARITA LEWIS AND HANK OPPENHEIMER, Plaintiffs-Appellees,

vs.

STATE OF HAWAI'I, Defendant-Appellant,

and

JOHN DOES 1-5, JOHN DOE CORPORATIONS 1-5, JOHN DOE PARTNERSHIPS 1-5, ROE NON-PROFIT CORPORATIONS 1-5, AND ROE GOVERNMENTAL AGENCIES 1-5, Defendants

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 02-1-0257)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Defendant-Appellant State of Hawai'i [hereinafter, the State] appeals from the Circuit Court of the Second Circuit's December 18, 2003 final judgment awarding damages in favor of Plaintiffs-Appellees Marita Lewis and Hank Oppenheimer [hereinafter, collectively, Plaintiffs] and against the State in the total amount of $287,777.64.[1] The State contends that the circuit court erred in: (1) denying the State's Hawai'i Rules of Civil Procedure, Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction based on the "discretionary function" exception to the State's waiver of immunity for liability for the torts of its employees set forth in Hawai'i Revised Statutes (HRS) § 662-15(1) (1993), of the State Tort Liability Act (STLA),

[1] The Honorable Joel E. August presided over this bench trial.

HRS chapter 662 (1993);[2] (2) finding that the State had a duty to adequately warn pedestrians of, or protect them from, the dangerous condition on its land created by the unguarded culvert into which Lewis fell; (3) finding that Lewis's negligence was 50% and the State's negligence was 50%; (4) finding that the State's failure to warn of, or protect from, the danger presented by the unguarded culvert, was a substantial factor and a legal cause of Plaintiffs' injuries and damages; (5) sustaining an objection, on relevancy grounds, to testimony regarding the impact of requiring the State Department of Transportation (DOT) to mitigate the hazards of its entire highway system; and (6) awarding Plaintiffs prejudgment interest.

Upon carefully reviewing the record and the briefs submitted by the parties, and having given due consideration to the arguments advocated and the issues raised, we hold as follows:

(1) The circuit court's finding that the State was not immune from suit under the "discretionary function" exception, HRS § 662-15(1), was not clearly erroneous. See State v.

[2] The STLA provides that "[t]he State hereby waives its immunity for liability for the torts of its employees and shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]" HRS § 662-2 (1993). Notwithstanding this general waiver of immunity, the STLA contains an exception for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state officer or employee, whether or not the discretion involved has been abused[.]" HRS § 662-15(1). This portion of section 662-15(1) is generally referred to as the "discretionary function" exception.

Zimring, 52 Haw. 477, 478, 479 P.2d 205, 206 (1970) ("Whether an act of a State officer or employee comes within the discretionary function exception is a question of fact."); Taylor-Rice v. State, 91 Hawai'i 60, 69, 979 P.2d 1086, 1095 (1999) (stating that findings of fact shall not be set aside unless clearly erroneous); State v. Okumura, 78 Hawai'i 383, 392, 894 P.2d 80, 89 (1995) ("A finding of fact is clearly erroneous when (1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." (Citation omitted.)).

In order for the "discretionary function" exception to apply, actions of the State employee(s) must involve the evaluation of broad public policy factors, such as a decision to purchase certain aircraft, a decision to activate an airbase, a decision not to build a prison, or a decision not to reconstruct the Moanalua Stream Bridge. Breed v. Shaner, 57 Haw. 656, 667, 562 P.2d 436, 443 (1977); Julius Rothschild & Co. v. State, 66 Haw. 76, 80-81, 655 P.2d 877, 881 (1982); Taylor-Rice, 91 Hawai'i at 78, 979 P.2d at 1104. In this case, the State's decision to provide a fence, which had the result, intended or not, of preventing a pedestrian from falling into the culvert on the makai side of the Kahana Kai Bridge on Honoapi'ilani Highway in Kahana, Maui, but not to provide such a fence on the mauka side

of the bridge where Lewis fell sixteen and one-half feet into the unguarded culvert, or provide a warning of the danger presented by the unguarded culvert, did not require evaluation of broad public policy factors. The record shows substantial evidence to support the circuit court's finding that this was an operational level decision that did not fall within the "discretionary function" exception;

(2) The circuit court correctly determined that the State had a duty to adequately warn pedestrians of, or protect them from, the dangerous condition on its land created by the unguarded culvert. See Knodle v. Waikiki Gateway Hotel, Inc., 69 Haw. 376, 385, 742 P.2d 377, 383 (1987) ("The existence of a duty owed by the defendant to the plaintiff . . . is entirely a question of law."); Pickard v. City & County of Honolulu, 51 Haw. 134, 135, 452 P.2d 445, 446 (1969) ("[A]n occupier of land has a duty to use reasonable care for the safety of all persons reasonably anticipated to be upon the premises, regardless of the legal status of the individual.").[3]

The circuit court's finding that it was reasonably

[3] Although the circuit court relied on the State's duty to maintain its highways and shoulders thereof, pursuant to HRS § 264-43 (1993) and Anders v. State, 60 Haw. 381, 382, 590 P.2d 564, 567 (1979), we need not consider here whether rights-of-way fall within the ambit of the State's duty to "maintain its highways and shoulders thereof[,]" because the right-of-way in the present case is State-owned land such that the theory of premises liability provides a sufficient grounds for holding that the State had a duty. See Poe v. Hawai'i Labor Relations Bd., 87 Hawai'i 191, 197, 953 P.2d 569, 575 (1998) (explaining that this court "may affirm a judgment of the lower court on any ground in the record that supports affirmance") (citation omitted).

foreseeable that a pedestrian would walk on the unpaved right-of-way at night was not clearly erroneous. See Knodle, 69 Haw. at 385, 742 P.2d at 383 ("Whether there was a breach of duty or not . . . is a question for the trier of fact. For under the prevailing rule duty . . . is bounded by the foreseeable range of danger, and reasonable foreseeability of harm is the very prototype of the question a jury must pass upon in particularizing the standard of conduct in the case before it." (Internal citations, brackets, and quotation marks omitted.)). The record contains substantial evidence to support the circuit court's finding of foreseeability, and hence, its finding that the State breached its duty to adequately warn pedestrians of the dangerous condition on its land created by the unguarded culvert, if it elected not to provide a protective fence on the mauka side of the bridge, such as was provided on the makai side;

(3) The circuit court's finding that Lewis was 50% negligent and the State was 50% negligent was not clearly erroneous. See HRS § 663-31 (1993) ("[T]he court, in a nonjury trial, shall make findings of fact . . . which shall state: . . . (2) The degree of negligence of each party, expressed as a percentage."). There is substantial evidence in the record to support the circuit court's findings that both Lewis and the State were negligent and that the negligence should be apportioned equally;

(4) The circuit court's finding that the State's failure to warn of, or protect from, the danger presented by the unguarded culvert, was a substantial factor and a legal cause of Plaintiffs' injuries and damages, was not clearly erroneous. See Mitchell v. Branch, 45 Haw. 128, 132, 363 P.2d 969, 973 (1961) (noting that, in order to hold the defendant liable for the plaintiff's injuries, the defendant's negligence "need not have been the whole cause or the only factor [in bringing about the harm]. It was enough that his negligence was a substantial factor in causing plaintiff's injuries"); Knodle, 69 Haw. at 385, 742 P.2d at 383 ("The presence of a reasonably close connection between the defendant's conduct and the plaintiff's injury, i.e.[,] 'whether the breach of duty was more likely than not a substantial factor in causing the harm complained of[,] is normally a question for the [trier of fact].'" (Citation and brackets omitted.)). There is substantial evidence in the record to support the circuit court's finding that the State's failure to warn of, or protect from, the danger presented by the unguarded culvert, was a substantial factor in causing Plaintiffs' injuries and damages;

(5) The circuit court did not err in sustaining an objection, on relevancy grounds, to testimony of a State's witness regarding the impact of requiring the State DOT to mitigate the hazards of its entire highway system. See Hawai'i

Rules of Evidence, Rule 401 (defining "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). The testimony sought to be introduced was not relevant as it was not of consequence to the determination of the issues to be decided by the trier of fact in this case, which were site-specific and did not implicate the "entire highway system";

(6) Both parties agreed that the circuit court abused its discretion in granting prejudgment interest. See HRS § 662-2 (stating that the State "shall not be liable for interest prior to judgment"). Therefore,

IT IS HEREBY ORDERED that the circuit court's December 18, 2003 final judgment is reversed in part to reflect that the State is not liable for prejudgment interest and is affirmed in all other respects.

DATED: Honolulu, Hawai'i, **February 16, 2006.**

On the briefs:

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