

NO. 26975

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

WARREN C. CUMMINGS,  
Plaintiff-Appellee/Cross-Appellant,

vs.

STATE OF HAWAI'I,  
Defendant-Appellant/Cross-Appellee,

and

DOE ENTITIES 1-10, Defendants.

E.M. RIMANDO  
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STATE OF HAWAII

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 02-1-1831)

SUMMARY DISPOSITION ORDER

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

Defendant-Appellant/Cross-Appellee the State of Hawai'i [hereinafter, State] appeals, and Plaintiff-Appellee/Cross-Appellant Warren C. Cummings cross-appeals, from the November 3, 2004 final judgment of the Circuit Court of the First Circuit<sup>1</sup> on its findings of fact and conclusions of law and order in which the court: (1) found the State liable for the negligence of its Department of Public Safety (DPS) in the operation and maintenance of its correctional facilities that resulted in an attack at the Halawa Correctional Facility (HCF) by an inmate, Douglas Mook, causing severe personal injury to another inmate, Cummings; (2) found Mook 50%, the State 35%, and Cummings 15% comparatively negligent; and (3) awarded \$126,240.68 in damages

<sup>1</sup> The Honorable Richard W. Pollack presided over this matter.

to Cummings for medical expenses and pain and suffering, and \$1,696.13 in costs. The State contends that: (1) the circuit court clearly erred in finding that (a) Mook's July 22, 1998 Jail Initial Custody Screening Instrument was the "controlling classification instrument[,]"" and as such, (b) "Mook should have been housed in Maximum Custody upon his return from [the Hawai'i State Hospital (HSH),]" and (c) "not placing Mook in maximum custody upon his discharge from treatment violated DPS' [s] own policies and procedures"; (2) the circuit court erred in ruling that the attack on Cummings was reasonably foreseeable by the State; (3) the circuit court erred in ruling that (a) the administrative duties and procedures contained in the DPS employee instructions and policies regarding the custody classification of inmates created a tort duty in favor of Cummings and established a standard of care and (b) the failure to follow those employee policies and instructions gave rise to a claim for relief sounding in negligence; and (4) the circuit court erred in ruling that it had subject matter jurisdiction because the State is exempted from liability by the discretionary function exception of the State Tort Liability Act (STLA), Hawai'i Revised Statutes (HRS) § 662-15(1) (1993). Cummings replies: (1) it is well-settled law that the State owes a duty of care to its prisoners to take reasonable action to protect them against the risk of foreseeable harm; (2) the State owed a

duty of care to Cummings to properly house Mook in order to prevent Mook from harming other inmates; (3) based on Mook's extensive history of unprovoked violence and the knowledge DPS staff had of that history, the circuit court's finding of foreseeability is not clearly erroneous; (4) the circuit court did not clearly err in finding that the State breached its duty of care; and (5) the circuit court correctly ruled that the discretionary function exception does not apply here. Finally, Cummings asserts that the State's appeal is frivolous and moves for sanctions pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 38.

On cross-appeal, Cummings raises the following points of error: (1) the circuit court erred in granting the State's motion for order to apportion liability; (2) the circuit court erred in failing to impose liability on the State for being responsible for the acts of Mook, a ward of the State; (3) the circuit court clearly erred in finding Cummings 15% comparatively negligent; (4) the circuit court abused its discretion by failing to sanction the State for a pattern of egregious discovery violations; and (5) the circuit court abused its discretion in modifying Cummings' taxation of costs. In reply, the State contends: (1) the circuit court properly applied HRS § 663-10.5 (Supp. 2001) to apportion liability to Mook; (2) Cummings waived any claim based on a theory of vicarious liability; (3) the State

is not vicariously liable for Mook's conduct; (4) the circuit court correctly determined that Cummings contributed to the altercation that caused his injuries; (5) the circuit court did not abuse its discretion in resolving the discovery issues; and (6) the circuit court's award of costs was not an abuse of discretion.

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 did not err in ruling that the discretionary function exception, HRS § 662-15(1),<sup>2</sup> did not apply to the instant case because the classification of inmates is an operational level act concerning "routine, everyday matters, not requiring evaluation of broad policy factors" inasmuch as the classification instruments are to be completed by DPS personnel in an objective fashion, using the point system in a mathematical process resulting in a score that determines the custody level of the inmate. See Tseu ex rel. Hobbs v. Jeyte, 88 Hawai'i 85, 88, 962 P.2d 344, 347 (1998) (stating that in deciding whether

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<sup>2</sup> HRS § 662-15 provides in relevant part:

This chapter shall not apply to:  
(1) Any 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[.]

actions of state officials fall within the discretionary function exception, this court must "determine whether the challenged action involves the effectuation of a 'broad public policy[,]' on the one hand, or routine, 'operational level activity[,]' on the other"); Breed v. Shaner, 57 Haw. 656, 666, 562 P.2d 436, 442 (1977) (noting that operational level acts are "those which concern routine, everyday matters, not requiring evaluation of broad policy factors") (quoting Rogers v. State, 51 Haw. 293, 297, 459 P.2d 378, 381 (1969)); Upchurch v. State, 51 Haw. 150, 154, 454 P.2d 112, 115 (1969) ("[I]f the acts of negligence alleged and proven were the failure of employees to carry out their duties as prescribed by the rules, or their failure to exercise due care in the performance of their duties, such acts or omissions would not be exempted and would be actionable under the [STLA]."); cf. Taylor-Rice v. State, 91 Hawai'i 60, 78, 979 P.2d 1086, 1104 (1999) (stating that where "the State's own policy indicated that the guardrails should have been brought into compliance with contemporary engineering standards, . . . . the decision not to improve the guardrail constituted an 'operational level' decision and not a 'broad public policy' decision protected under the 'discretionary function exception'");

(2) The circuit court did not err in ruling that the State, by reason of the special relationship created by its

custody of Cummings, was under a duty to take reasonable action to protect Cummings against unreasonable risk of physical harm. 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, that is, whether such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other -- or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant, is entirely a question of law." (Quotation signals, ellipsis, and citations omitted.)); Ruf v. Honolulu Police Dep't, 89 Hawai'i 315, 320, 972 P.2d 1081, 1086 (1999) (stating that this court reviews a trial court's conclusion of law with regard to the duty of care that a defendant owes to a plaintiff in a negligence action "de novo[,] under the right/wrong standard" of review) (citations omitted); Pulawa v. GTE Hawaiian Tel., 112 Hawai'i 3, 13, 143 P.3d 1205, 1215 (2006) ("[I]n the context of determining the existence and scope of a duty, foreseeability is a question of law for the court to resolve." (Citations omitted.)); Haworth v. State, 60 Haw. 557, 563-64, 592 P.2d 820, 824-25 (1979) ("It is well settled that a state, by reason of the special relationship created by its custody of a prisoner, is under a duty to the prisoner to take reasonable action to protect the prisoner against unreasonable risk of physical harm. The

duty arises out of the deprivation by the state of the prisoner's normal opportunities to protect himself, particularly through avoidance of places or situations which involve risk.");

(3) There is substantial evidence in the record to support the circuit court's finding that Mook's attack on Cummings was reasonably foreseeable, including: (1) Mook's Initial Custody Instrument classified him as maximum custody, based on his extensive history of violence, including his assault on Adult Correction Officer (ACO) Craig Massey in 1997 and his threats against ACO Alan Wong and Unit Team Manager Milton Kotsuba in July 1998; (2) numerous court-ordered examiners, whose reports were forwarded to Oahu Community Correctional Center (OCCC) and HCF, reported that Mook's violence and mental illness continued throughout his stay at HSH including kicking and punching the nurses station in May 1999 and slapping another patient in June 1999; and (3) upon Mook's arrival at OCCC during the warden-to-warden transfer, Sgt. Antonio placed him in solitary confinement because Mook was known to be extremely violent and prone to erratic behavior, and Sgt. Anotonio did not want to allow Mook back into the general population even after being assured, incorrectly, that Mook had been cleared to be there. See Pulawa, 112 Hawai'i at 13, 143 P.3d at 1215 (stating that foreseeability in the context of breach is a question of fact); Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai'i

34, 82, 58 P.3d 545, 593 (2002) ("The test of what is reasonably foreseeable is not one of a balance of probabilities. That the danger will more probably than otherwise not be encountered on a particular occasion does not dispense with the exercise of care. The test is whether there is some probability of harm sufficiently serious that a reasonable and prudent person would take precautions to avoid it." (Brackets, quotation marks, and citations omitted.));

(4) There is substantial evidence in the record to support the circuit court's finding that the State breached its duty of care because the State failed to exercise reasonable care to protect Cummings from the reasonably foreseeable attack of Mook by failing to properly house Mook in maximum custody. See Doe Parents No. 1, 100 Hawai'i at 82, 58 P.3d at 593 ("Whether there was a breach of duty or not, i.e., whether there was a failure on the defendant's part to exercise reasonable care, is a question for the trier of fact." (Quoting Knodle, 69 Haw. at 386, 742 P.2d at 383.) (Brackets omitted.)). Given Mook's extensive history of violence of which DPS employees knew or, in the exercise of reasonable care, should have known, the circuit court did not clearly err in finding that it was not reasonable for DPS employees to ignore the inmate classification system and (a) allow Mook to remain in HCF's medium security module upon his return from HSH, (b) transfer Mook to OCCC in the warden-to-



warden transfers, and (c) allow Mook to remain in OCCC's medium security module upon his transfer thereto. See Taylor-Rice, 91 Hawai'i at 69, 979 P.2d at 1095 (stating that findings of facts 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.)). Contrary to the State's assertions, it was not reasonable for DPS employees to assume that (a) Mook was "cured" of his mental illnesses and propensity towards violence upon his return from HSH and (b) the determination that Mook was "fit to proceed" meant that he was no longer violent and dangerous. See HRS § 704-403 (1993) (stating by implication that a person is "fit to proceed" if the person has the "capacity to understand the proceedings against the person" and can "assist in the person's own defense");<sup>3</sup>

(5) Sanctions against the State are not warranted here. See HRAP Rule 38 ("If a Hawai'i appellate court determines that

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<sup>3</sup> Inasmuch as the State did not contest the circuit court's determination that the State's failure to exercise reasonable care to prevent harm from occurring to Cummings was a substantial factor in bringing about Cummings' injuries, any objections thereto are waived. See HRAP Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded[.]"); HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

an appeal decided by it was frivolous, it may, after a separately filed motion or notice from the appellate court and reasonable opportunity to respond, award damages, including reasonable attorneys' fees and costs, to the appellee."); Canalez v. Bob's Appliance Serv. Ctr., Inc., 89 Hawai'i 292, 300, 972 P.2d 295, 303 (1999) (defining a frivolous claim as "a claim so manifestly and palpably without merit, so as to indicate bad faith on the pleader's part such that argument to the court was not required") (quoting Coll v. McCarthy, 72 Haw. 20, 29, 804 P.2d 881, 887 (1991));

(6) The circuit court did not err in interpreting HRS § 663-10.5<sup>4</sup> and granting the State's motion for order to apportion liability. See State v. Levi, 102 Hawai'i 282, 285, 75 P.3d 1173, 1176 (2003) (stating that statutory interpretation is "a question of law reviewable de novo") (quoting State v. Arceo, 84 Hawai'i 1, 10, 928 P.2d 843, 852 (1996)).

First, the State and Mook are joint tortfeasors. See HRS § 663-11 (1993) ("'[J]oint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury

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<sup>4</sup> HRS § 663-10.5, entitled "Government entity as a tortfeasor; abolition of joint and several liability," provides:

Notwithstanding sections 663-11 to 663-13, 663-16, 663-17, and section 663-31, in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity.

(Emphasis added.)

to person or property, whether or not judgment has been recovered against all or some of them."); Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 422, 5 P.3d 407, 412 (2000) ("A party is liable within the meaning of section 663-11 if the injured person could have recovered damages in a direct action against that party, had the injured person chosen to pursue such an action." (Citation omitted.)).

Second, the plain language of the statute does not require the State to file a claim against Mook to have liability apportioned to him. See Hawai'i Pub. Employment Relations Bd. v. United Pub. Workers, 66 Haw. 461, 469-70, 667 P.2d 783, 789 (1983) ("Statutory construction . . . does not authorize the interpolation of conditions into a statute -- additional terms -- not found in the statute considered as a whole." (Citation omitted.)).

Finally, apportioning Mook's liability pursuant to HRS § 663-10.5 did not violate Cummings' constitutional right to due process inasmuch as the statute is rationally related to the legitimate state interest of insulating the State from being accountable to plaintiffs for more than that percentage share of the damages attributable to the State.<sup>5</sup> See In re Applications

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<sup>5</sup> Cummings has not alleged that he was deprived of notice or of an opportunity to be heard as needed to sustain a procedural due process claim, see KNG Corp. v. Kim, 107 Hawai'i 73, 80, 110 P.3d 397, 404 (2005) ("The basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner before governmental deprivation of a significant property interest." (Citation omitted.)); nor  
(continued...)

of Herrick and Irish, 82 Hawai'i 329, 349, 922 P.2d 942, 962 (1996) ("To establish an 'as applied' violation of substantive due process, an aggrieved person must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (Citation omitted.)); Doe Parents No. 1, 100 Hawai'i at 87, 58 P.3d at 598 ("The legislative intent underlying HRS § 663-10.5 was clearly to insulate governmental entities . . . from being held accountable to plaintiffs for more than the degree of fault associated with its employee's tortious contribution to the plaintiff's injury[.]"); cf. Plumb v. Fourth Jud. Dist. Court, 927 P.2d 1011, 1016 (Mont. 1996) (reaffirming that "apportionment of liability among those responsible for a person's damage is a legitimate government concern") (citing Newville v. State, 883 P.2d 793, 803 (Mont. 1994)); Haff v. Hettich, 593 N.W.2d 383, 390 (N.D. 1999) (stating that it is a "legitimate legislative goal" to "apportion[] responsibility for damages based upon fault"); Smiley v. Corrigan, 638 N.W.2d 151, 154 n.7 (Mich. Ct. App. 2002) (stating by implication that holding defendants accountable only for damages in proportion to

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<sup>5</sup>(...continued)  
has Cummings demonstrated that he was deprived of a fundamental right protected by substantive due process, see Ek v. Boqqs, 102 Hawai'i 289, 297, 75 P.3d 1180, 1188 (2003) ("Substantive due process has been defined as that which protects those fundamental rights and liberties which are implicit in the concept of ordered liberty." (Internal quotation signals, ellipsis, citations, and brackets omitted.)). As such, these arguments will not be addressed further herein.

their percentage of fault is a legitimate state interest and finding "no logical basis to conclude that evidence regarding the culpability of all tortfeasors involved in an incident[, including non-parties, would] render the jury's verdict less accurate") (citation omitted);

(7) The circuit court did not err in failing to impose liability on the State for being responsible for the acts of Mook. See Taylor-Rice, 105 Hawai'i at 109-10, 94 P.3d at 664-65 ("[T]he State's liability is limited by its sovereign immunity, except where there has been a 'clear relinquishment' of immunity and the State has consented to be sued. This court has noted that the State has waived immunity to suit only to the extent as specified in HRS chapters 661 and 662." (Citations omitted.)); HRS § 662-2 (1993) ("The 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[.]" (Emphasis added.));

(8) Notwithstanding Cummings' assertions that he did not contribute at all to Mook's attack, there is substantial evidence in the record to support the circuit court's finding that Cummings was 15% comparatively negligent. See Okumura, 78 Hawai'i at 392, 894 P.2d at 89 ("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.); Geldert v. State, 3 Haw. App. 259, 266, 649 P.2d 1165, 1170 (1982) (stating that "[a]n appellate court 'should exercise considerable restraint in reviewing the conclusion of the fact-finder'" on the subject of negligence and comparative negligence) (citation omitted);

(9) The circuit court did not abuse its discretion in resolving the discovery issues inasmuch as, notwithstanding the delays and difficulties caused by the State's untimely production of certain documents, there is no indication that the State intentionally withheld documents and it cannot be said that the State accrued any significant benefit from, or that Cummings was ultimately prejudiced by, the State's conduct. See Lester v. Rapp, 85 Hawai'i 238, 241, 942 P.2d 502, 505 (1997) ("We review the grant or denial of . . . sanctions for abusive litigation practices under the abuse of discretion standard." (Citations omitted.)); Office of Hawaiian Affairs v. State, 110 Hawai'i 338, 351, 133 P.3d 767, 780 (2006) ("[A]n abuse of discretion occurs where the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." (Quoting Ranger Ins. Co. v. Hinshaw, 103 Hawai'i 26, 30, 79 P.3d 119, 123 (2003).)); Kawamata Farms, Inc. v. United Agri Products, 86 Hawai'i 214,

242-43, 948 P.2d 1055, 1083-84 (1997) (noting that this court reviews cases of alleged discovery violations with three factors in mind: (a) "the offending party's culpability, if any, in destroying or withholding discoverable evidence that the opposing party had formally requested through discovery"; (b) "whether the opposing party suffered any resulting prejudice as a result of the offending party's destroying or withholding the discoverable evidence"; and (c) "the inequity that would occur in allowing the offending party to accrue a benefit from its conduct") (citing Richardson v. Sport Shinko (Waikiki Corp.), 76 Hawai'i 494, 507, 880 P.2d 169, 182 (1994));

(10) The circuit court did not clearly exceed the bounds of reason or disregard rules or principles of law or practice to the substantial detriment of Cummings in denying his mediation costs. See Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 456, 32 P.3d 52, 100 (2001) ("An award or denial of costs is reviewed under the abuse of discretion standard." (Citation omitted.)); Wong v. Takeuchi, 88 Hawai'i 46, 54, 961 P.2d 611, 619 (1998) ("Although the trial court has discretion in the matter of allowing or disallowing costs, that discretion should be exercised sparingly when the requested expenses are not specifically allowed by statute or precedent." (Quoting Tradewinds Hotel, Inc. v. Cochran, 8 Haw. App. 256, 271, 799 P.2d 60, 68-69 (1990).));

(11) The circuit court did not abuse its discretion in denying Cummings' taxation of transcript costs. See id.;<sup>6</sup>

(12) The circuit court did not abuse its discretion in reducing Cummings' costs for in-house copying charges from \$0.25 per copy to \$0.10 per copy. See id. at 53, 961 P.2d at 618 (stating that the burden of proving the correctness of a particular cost request shifts to the party claiming it after objections have been filed to the specific item);

(13) The circuit court did not abuse its discretion in denying Cummings' request for trial exhibits, photographs, and trial binders. See id. at 55, 961 P.2d at 619 ("As a general rule, routine expenses related to operating a law practice are not taxable costs."); id. at 54, 961 P.2d at 619 ("Although the trial court has discretion in the matter of allowing or disallowing costs, that discretion should be exercised sparingly

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<sup>6</sup> To the extent that the circuit court interpreted HRS § 607-9 (1993) and the case law to mean that the court did not have discretion to award costs not enumerated in the statute, the circuit court erred. See Schefke, 96 Hawai'i at 459, 32 P.3d at 103 ("HRS § 607-9 gives courts discretion in determining what costs should be awarded."); Wong, 88 Hawai'i at 54, 961 P.2d at 619 (stating by implication that courts have discretion to award costs not enumerated by statute or case law). It is well established, however, that "an appellate court may affirm a judgment of the lower court on any ground in the record which supports affirmance[.]" Enos v. Pac. Transfer & Warehouse, Inc., 79 Hawai'i 452, 459, 903 P.2d 1273, 1280 (1995) (citation and brackets omitted); see also Kawamata Farms, 86 Hawai'i at 247, 948 P.2d at 1088 ("[W]here the circuit court's decision is correct, its conclusion will not be disturbed on the ground that it gave the wrong reason for its ruling." (Quoting Reyes v. Kuboyama, 76 Hawai'i 137, 140, 870 P.2d 1281, 1284 (1994).)). Here, the circuit court's decision does not warrant vacatur inasmuch as this court has stated that "[a]lthough the trial court has discretion in the matter of allowing or disallowing costs, that discretion should be exercised sparingly when the requested expenses are not specifically allowed by statute or precedent[.]" Wong, 88 Hawai'i at 54, at 961 P.2d at 619 (quoting Tradewinds, 8 Haw. App. at 271, 799 P.2d at 68-69), and neither HRS § 607-9 nor case law authorizes the cost of copies of trial transcripts.



when the requested expenses are not specifically allowed by statute or precedent." (Quoting Tradewinds, 8 Haw. App. at 271, 799 P.2d at 68-69.);

(14) The circuit court did not abuse its discretion in denying Cummings' request for parking costs. See id. (allowing parking costs as part of intrastate travel expenses requested in conjunction with interisland travel); id. ("Although the trial court has discretion in the matter of allowing or disallowing costs, that discretion should be exercised sparingly when the requested expenses are not specifically allowed by statute or precedent." (Quoting Tradewinds, 8 Haw. App. at 271, 799 P.2d at 68-69.)). Therefore,

IT IS HEREBY ORDERED that the circuit court's November 3, 2004 final judgment is affirmed, but for the reasons stated herein.

DATED: Honolulu, Hawai'i, December 29, 2006

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