

NOT FOR PUBLICATION

NO. 23466

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAI'I

STEPHANIE ANN FELIPE, a Minor, et al., Plaintiffs-Appellants,
v. STATE FARM INSURANCE COMPANY, Defendant-Appellee,
and
VICTOR NORMAN, et al., Defendants

APPEAL FROM THE FIFTH CIRCUIT COURT
(CIVIL NO. 94-0276)

MEMORANDUM OPINION

(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Plaintiffs-Appellants Stephanie Ann Felipe, a Minor, Sheri Lyn Ventura Felipe, a Minor, and Karie Larissa Ventura Felipe, a Minor, through their Co-Guardians Francis Felipe and Albert Ventura; the Estate of Andy Lucero Felipe (aka Fernandico Lucero Felipe), Deceased, through Co-Special Administrators Frances Felipe and Angel Felipe, Sr.; the Estate of Yolanda Elanor Felipe, Deceased, through Co-Representatives Frances Felipe and Albert Ventura; and Frances Felipe, individually, (collectively, the Felipes) appeal from the First Amended Final Judgment filed on May 2, 2000 in the Circuit Court of the Fifth Circuit (circuit court).¹

On appeal, the Felipes contend the circuit court erred in granting summary judgment in favor of State Farm Insurance

¹ The Honorable George M. Masuoka presided.

Company (State Farm) because there were genuine issues of material fact regarding State Farm's liability for a fatal vehicular collision that occurred on the Island of Kaua'i on February 12, 1993 (the Accident). The Felipes allege that at the time of the Accident, Ki Nakamura aka Kim Nakamura (Nakamura), doing business as Pacific Retaining and Salvage Company (PRS), and State Farm were engaged in a joint venture and the Accident occurred during the course of the joint venture's business. In the alternative, the Felipes allege that PRS was acting as an agent for State Farm, thereby making State Farm liable for the negligent actions of PRS. The Felipes also argue that if PRS was not a partner or agent of State Farm, then State Farm was liable for the Accident because it had negligently hired PRS as an independent contractor. We affirm.

I. BACKGROUND

In September of 1992, hurricane Iniki struck the Island of Kaua'i, leaving destroyed homes and useless infrastructures. State Farm sent adjusters to Kaua'i to handle claims of its insureds. On December 3, 1992, State Farm contracted with PRS to conduct salvage operations for State Farm from October 20, 1992 through December 31, 1993. The contract was signed by Nakamura for PRS. The contract stated in part that PRS "will provide salvage operations as directed by State Farm for all 100% of the State Farm policy holders on the island of Kauai." PRS was to

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haul away and dispose of or remove and store electrical items and appliances, furniture, and fixtures that State Farm deemed worthy or unworthy of salvage. The contract stated that "[p]roceeds from the sale of any salvaged items will be split 50% to [State Farm] and 50% to [PRS] after sale or shipping and sale cost expenses." Handwritten at the bottom of the contract was the following: "Agreement is 50-50 without any charge for pick-up."

PRS had also contracted with Transamerica Insurance Group and HIG to provide salvage services. PRS had bought and picked up generators from Allstate Insurance Company. PRS had also been engaged in salvage operations at the Hale Nani Hotel.

State Farm did not provide PRS with hauling or salvage equipment, did not inspect PRS's equipment, and did not know how PRS was transporting goods. State Farm representatives would "tag" items deemed salvageable and complete a salvage disposition form for pick-up by PRS at a State Farm office. Nakamura told PRS's employees which vehicles to take on each job. Items picked up by PRS would be transported to its home base at Kilohana, which consisted of a warehouse and a tent that served as a showroom floor, where the items would be cleaned, fixed, and displayed for public sale.

On the morning of February 12, 1993, Victor Norman (Norman) was told by Nakamura that before the 3:00 p.m. sale was to begin that afternoon, Norman and Juan Ortiz (Ortiz) were to

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get the lowboy trailer from the bottom of the road on which Nakamura lived and bring the trailer back to Kilohana for the salvage business. The trailer was owned by Len Wheatley.

Nakamura, Norman, and Ortiz went to a location and picked up furniture, which was loaded into a van. They then proceeded to Nakamura's house to pick up the lowboy trailer. The trailer was attached to a GMC truck, which had blown a head gasket. Nakamura, Norman and Ortiz lifted the trailer off the broken GMC truck and put it onto the black Nissan truck. However, the trailer had a ball hitch and the Nissan truck had a "military" hitch, and these two hitches were not compatible. Norman stood on top of the trailer tongue and jumped up and down to force the hitch into place.

Norman drove the Nissan with the trailer attached, and Ortiz, driving the van with the furniture, followed behind Norman. While Norman was driving the Nissan and hauling the trailer to Kilohana, the trailer became unhitched from the Nissan, hit a guardrail, and went into oncoming traffic; the trailer hitch then went through the windshield of the vehicle belonging to Andy and Yolanda Felipe. Yolanda and Andy Felipe died from injuries received in the Accident, and their daughter Karie was injured.

On September 1, 1994, the Felipes filed a complaint against State Farm, Transamerica Insurance Group, Allstate

Insurance Company, PSR, Nakamura, and other individual defendants.² On January 12, 1996, after extensive discovery, State Farm filed a Motion for Summary Judgment, which was granted by the circuit court on March 29, 1996. On April 26, 1996, a "Judgment in Favor of Defendant State Farm Insurance Company" was filed.

On December 12, 1996, a default judgment was entered in favor of the Felipes and against Nakamura and PRS. On January 10, 1997, the Felipes appealed the order granting summary judgment in favor of State Farm. On March 20, 1997, the Felipes' appeal was dismissed based on lack of jurisdiction for failure to adjudicate all claims against all parties. On July 11, 1997, a Final Judgment was entered, adjudicating all claims against all parties. On August 5, 1997, the Felipes again appealed the order granting summary judgment in favor of State Farm. On October 16, 1997, the Felipes' appeal was dismissed again for lack of jurisdiction. On May 2, 2000, the circuit court entered a First Amended Final Judgment. On May 25, 2000, the Felipes timely filed this appeal.

II. STANDARD OF REVIEW

We begin our review of the judgments by examining the pertinent procedural rule, HRCP [Hawai'i Rules of Civil Procedure] 56. Thereunder, "a party against whom a claim,

² The Felipes dismissed these individual defendants either by notice of dismissal or by stipulation for dismissal. Various cross-claims were filed by the defendants; these cross-claims were subsequently dismissed by either the parties or the circuit court.

counterclaim, or cross-claim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." HRCP 56(b). "The judgment sought shall be rendered forthwith by the court hearing the motion if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted by the opposing parties, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." HRCP 56(c). And "the standard to be applied by the appellate court in reviewing the award of summary judgment is identical to that applicable to the trial court's consideration of the motion. Silver v. George, 64 Haw. 503, 644 P.2d 955 (1982)." Munoz v. Yuen, 66 Haw. 603, 605, 670 P.2d 825, 287 (1983).

First Hawaiian Bank v. Weeks, 70 Hawai'i 392, 396, 772 P.2d 1187, 1190 (1989) (brackets in original and ellipsis omitted).

III. DISCUSSION

Extensive discovery was conducted in this case in the form of written interrogatories, production of documents, and oral depositions. The Felipes have never contended that discovery was insufficient. Numerous exhibits obtained through discovery were submitted in support and in opposition to State Farm's Motion for Summary Judgment.

At the time of the Accident, the trailer was being taken to Kilohano "for the salvage business." Nakamura and PRS had salvage operations with Transamerica Insurance Group, HIG, and Hale Nani Hotel. State Farm was not involved in any of these other salvage operations. There is no evidence that the operation of the trailer on the day in question was on behalf of salvage business for State Farm.

In Weeks, the Hawai'i Supreme Court discussed the burden of demonstrating entitlement to summary judgment:

A summary judgment motion "challenges the very existence or legal sufficiency of the claim or defense to which it is addressed. In effect the moving party takes the position that he is entitled to prevail because his opponent has no valid claim for relief or defense to the action, as the case may be." 10 Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2711, at 555-56 (1983) (footnote omitted). He thus has the burden of demonstrating that there is no genuine issue as to any material fact relative to the claim or defense and he is entitled to judgment as a matter of law. 10A Wright, Miller & Kane, supra, § 2727, at 121.

He "may discharge his burden by demonstrating that if the case went to trial there would be no competent evidence to support a judgment for his opponent." Id. at 130 (footnote omitted);² cf. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) (One moving for summary judgment under Fed.R.Civ.P. 56 need not support his motion with affidavits or similar materials that negate his opponent's claims, but need only point out to the district court that there is absence of evidence to support the opponent's claims). For "if no evidence could be mustered to sustain the nonmoving party's position, a trial would be useless." 10A Wright, Miller & Kane, supra, at 130.

²HRCP 56(e) provides in part that

supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Weeks, 70 Hawai'i at 396-97, 772 P.2 at 1190 (brackets and ellipses in original omitted).

The Felipes could not muster the evidence to sustain their position that the trailer was being operated on behalf of State Farm. All of the Felipes' various causes of action against State Farm are based on this premise. Because there was no evidence the trailer was being operated on behalf of State Farm,

a trial would have been useless. Therefore, the circuit court was correct in granting State Farm's Motion for Summary Judgment.

IV. CONCLUSION

The First Amended Final Judgment filed on May 2, 2000 in the Circuit Court of the Fifth Circuit is affirmed.

DATED: Honolulu, Hawai'i, February 24, 2005.

William W. Saunders, Jr. (Bickerton Saunders & Dang) (with him on the briefs: Jeoffrey L. Robinson (Robinson, Phillips & Calcagnie), Henry J. Hannigan and Douglas D. Ehresman (Hannigan & Ehresman)), for plaintiffs-appellants.	Acting Chief Judge
John T. Komeiji (with him on the briefs: Curtis C. Kim) for defendant-appellee State Farm Insurance Company.	Associate Judge