

NOT FOR PUBLICATION

NO. 25892

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

RICHARD LEE, Plaintiff-Appellant, v. TRANSAMERICA
OCCIDENTAL LIFE INSURANCE COMPANY a foreign
corporation; MICHAEL LEONARD McCLAIN; DAVID PAOLI,
individually and as personal representative of the
Felicia McClain Estate; MATTHEW THIEL; FIRST
INTERSTATE BANK OF COMMERCE, individually and as
trustees of the Felicia McClain Special Needs
Trust, Defendants-Appellees, JOHN DOES 1-10; JANE
DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS
1-10; DOE UNINCORPORATED ASSOCIATIONS 1-10; and
DOE GOVERNMENTAL ENTITIES, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(Civ. No. 00-1-2897)

SUMMARY DISPOSITION ORDER

(By: Burns, C.J., Lim and Fujise, JJ.)

Plaintiff-Appellant Richard Lee (Lee) appeals from the Final Judgment in Favor of Defendant-Appellee Transamerica Occidental Life Insurance Company (Transamerica) entered on June 3, 2003 in the Circuit Court of the First Circuit (circuit court). After careful review of the issues raised and the arguments made by the parties, as well as the record of the proceedings before the circuit court and the relevant case law, we resolve Lee's challenge to the grant of summary judgment in favor of Transamerica and the award of \$10,436.50 in attorneys' fees to Transamerica as follows:

K. HANAKAHO
CLERK OF THE INTERMEDIATE COURT OF APPEALS
STATE OF HAWAII

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Upon review of the record before us, it appears the circuit court¹ correctly granted summary judgment in Transamerica's favor. Documents were presented that established (1) the existence of the "Full and Final Release and Settlement Agreement" (Settlement Agreement) resolving Felicia McClain's civil lawsuit which provided that payments could be made through Transamerica and to Felicia McClain's estate to be held in trust; (2) the existence of the Felicia McClain Special Needs Trust (Trust) and the terms of that Trust, which, *inter alia*, called for the dissolution of the Trust upon her death; and (3) that the July 3, 2000 payment was made by Transamerica to David Paoli (Paoli), as personal representative of Felicia McClain's estate. Lee maintains and Transamerica concedes that Felicia has died. Pursuant to the terms of the Settlement Agreement and the terms of the Trust read together, Transamerica made the July 3, 2000 payment to Paoli as personal representative of Felicia McClain's estate. Transamerica was not authorized, under the terms of the Settlement Agreement or the Trust, to make the payment to anyone else.

Lee also challenges the \$10,436.50 award of attorneys' fees to Transamerica. Transamerica based its request for attorneys' fees on Hawaii Revised Statutes § 607-14 (Supp. 2005).

¹ The Honorable Sabrina S. McKenna presided.

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However, not all the claims against Transamerica sounded in contract. The circuit court made no apportionment between claims based on tort and contract concepts. As a result, "we cannot effectively review whether the circuit court abused its discretion in awarding attorneys' fees as it did." Price v. AIG Hawai'i Ins. Co., 107 Hawai'i 106, 113, 111 P.3d 1, 8 (2005). See also, TSA Int'l., Ltd. v. Shimizu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 734 (1999) (citing Selvage v. J.J. Johnson & Assocs., 910 P.2d 1252, 1266 (Utah Ct. App. 1996)) and Schulz v. Honsador, 67 Haw. 433, 436, 690 P.2d 279, 281 (1984) (overruled on other grounds by Blair v. Ing, 96 Hawai'i 327, 331 n.6, 31 P.3d 184, 188 n.6 (2001)).

Based on the foregoing authority, the attorneys' fees award in the instant case must be vacated and the case remanded for a redetermination of those fees. In the course of that redetermination/apportionment, Transamerica must specify the issues worked upon during the hours that are claimed. A determination of Lee's argument on appeal that the amount of attorneys' fees awarded was unreasonable, is therefore premature.

Therefore,

IT IS HEREBY ORDERED that the "Final Judgment in Favor of Defendant Transamerica Occidental Life Insurance Company" entered on June 2, 2005, is affirmed except with regard to the award of attorneys' fees. The matter is remanded for a determination of those attorneys' fees that are attributable

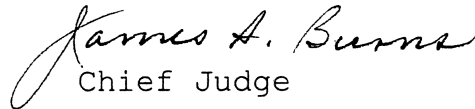
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Transamerica's defense of Lee's claims that are in the nature of assumpsit and for a determination that those fees were reasonable.

DATED: Honolulu, Hawai'i, April 10, 2006.

On the briefs:

Paul D. Hicks²
for Plaintiff-Appellant.


Chief Judge

Bruce H. Wakuzawa and
Peter S. Knapman,
(Alston Hunt Floyd & Ing),
for Defendant-Appellee.



Associate Judge


Associate Judge

² Paul D. Hicks was suspended from the practice of law for a period of three years effective February 21, 2006.