

NO. 25848

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

LYDIA TSUGAWA and GLENN TSUGAWA, Plaintiffs-Appellants,

vs.

STATE OF HAWAI'I, a governmental entity,
Defendant-Appellee,

and

JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATION 1-10;
DOE PARTNERSHIPS 1-10; ROE "NON-PROFIT" CORPORATIONS 1-10;
and ROE GOVERNMENTAL ENTITIES 1-10, Defendants.

EM. RIMANDO
CLERK, APPELLATE COURTS
STATE OF HAWAI'I

2005 JUN 15 AM 10:44

FILED

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 01-1-3344)

SUMMARY DISPOSITION ORDER

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

Plaintiffs-appellants Lydia Tsugawa (Lydia) and Glenn Tsugawa (Glenn) [hereinafter collectively, the plaintiffs] appeal from the Circuit Court of the First Circuit's May 7, 2003 final judgment.¹ As points of error, the plaintiffs argue that the circuit court erred in granting summary judgment in favor of defendant-appellee State of Hawai'i (the State) and denying the plaintiffs' motion for reconsideration and/or estoppel.

The main issue on appeal is whether the plaintiffs are barred from recovering from the State because Lydia signed a document that purported to release the State from any liability

¹ The Honorable Dexter D. Del Rosario presided over this matter.

for negligent conduct. 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 conclude that the circuit court correctly granted summary judgment in favor of the State. Although exculpatory clauses are generally disfavored, see Fujimoto v. Au, 95 Hawai'i 116, 155-56, 19 P.3d 699, 738-39 (2001), a principle we reaffirm today, the exculpatory clause at issue in this case does not violate a statute, does not implicate a substantial public interest, and is not the result of unequal bargaining power between Season's Best and Lydia. Therefore, under the facts of this case, both Lydia's claims and Glenn's derivative claims are barred by the exculpatory clause.² Additionally, although the plaintiffs argue that the waiver referred only to the Department of Education (DOE), not the State, such that their claims against the State may proceed, the plaintiffs have not presented specific evidence demonstrating that the sidewalk in question was in control of an entity other than the DOE. The plaintiffs' mere allegations that control of the sidewalk rests elsewhere are insufficient to defeat the State's motion for summary judgment. See Hawai'i

² Furthermore, to the extent that the plaintiffs' complaint asserted a non-derivative cause of action on behalf of Glenn, the circuit court's grant of summary judgment is affirmed because the plaintiffs' opening brief fails to raise any argument as to why the circuit court erred in granting summary judgment as to this independent claim. See Hawai'i Rules of Appellate Procedure Rule 28(b)(7) ("Points not argued may be deemed waived.").

Rules of Civil Procedure (HRCP) Rule 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."). The plaintiffs' remaining arguments -- that the exculpatory clause is invalid because Lydia did not know what she was signing and that the State should be estopped from raising the exculpatory clause as a defense -- are similarly without merit. Therefore,

IT IS HEREBY ORDERED that the circuit court's May 7, 2003 final judgment is affirmed.

DATED: Honolulu, Hawai'i, June 15, 2005.

On the briefs:

Roy K.S. Chang and
Harvey M. Demetrakopoulos
(of Shim & Chang) for
plaintiffs-appellants
Lydia Tsugawa and Glenn
Tsugawa

Douglas H. Knowlton and
James S. Kawashima for
defendant-appellee
State of Hawai'i

