
NO. 22078

IN THE SUPREME COURT OF THE STATE OF HAWAII

ROBERT A. LUKE, Plaintiff-Appellee,

vs.

ASSOCIATION OF APARTMENT OWNERS OF
RIDGECREST, Defendant-Appellant,

and

ASSOCIATION OF APARTMENT OWNERS OF
VALLEYVIEW (MELEMANU WOODLANDS); JOHN V.
GIBSON, and ASSOCIATION OF APARTMENT OWNERS
OF VALLEY REC CENTER (MELEMANU WOODLANDS),
Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 95-0492)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J.; Levinson, J.; Circuit Judge Marks, in place of Acoba, J., who is unavailable; Circuit Judge Sakamoto, assigned by reason of vacancy; and Intermediate Court of Appeals Chief Judge Burns, in place of Nakayama, J., recused, concurring separately)

Following a jury trial, defendant-appellant Association of Apartment Owners of Ridgecrest (Ridgecrest) appeals from the November 16, 1998 amended final judgment of the Circuit Court of the First Circuit, the Honorable James Aiona, Jr. presiding, awarding the amount of \$358,279.67 in favor of plaintiff-appellee Robert A. Luke and against Ridgecrest for breach of contract, tortious breach of contract, and punitive damages. Briefly stated, this case arises out of Luke's termination of employment

as manager for two condominium associations and a community recreation center in 1995.¹

On appeal, Ridgecrest argues that: (1) the trial court (a) failed to properly instruct the jury on the requirements for ratification of the November 19, 1998 employment contract between Ridgecrest and Luke (the Contract), as well as Luke's duties to Ridgecrest, and (b) prejudicially limited Ridgecrest's cross-examination of Luke; and (2) the jury's award for lost income, accumulated vacation, sick leave, compensatory pay, emotional distress, and punitive damages was contrary to law.

Upon carefully reviewing the record and the briefs submitted by the parties and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Ridgecrest's arguments as follows.

First, the jury instruction on ratification was consistent with the law, see Maui Finance Co. v. Han, 34 Haw. 226, 230 (Terr. 1937) (holding that "an affirmance of an unauthorized transaction may be inferred from a failure to repudiate it"), and was not overly broad, prejudicially insufficient, erroneous, inconsistent or misleading. See Barcai v. Betwee, 98 Hawai'i 470, 483, 50 P.3d 946, 959 (2002) (citations omitted). In addition, there was substantial evidence

¹ In addition to Ridgecrest, Luke also sued the following defendants: (1) Association of Apartment Owners of Valleyview (Valleyview); (2) John V. Gibson, Valleyview's treasurer; and (3) Association of Apartment Owners of Valley Recreation Center, all of whom settled with Luke prior to trial. A stipulated dismissal as to all named defendants, except Ridgecrest, was filed in December 1997.

to support the jury's determination that Ridgecrest knew of the Contract, retained the benefits of the Contract for over six years before Luke was terminated, took no action to reject it, and, thus, ratified the Contract. See McKeague v. Freitas, 40 Haw. 108, 116 (Terr. 1953) (citation omitted).

Second, the evidence demonstrated that: (1) there was an established practice to pay out accumulated vacation time at the time Luke was terminated; and (2) the Contract expressly limited the number of hours Luke was required to work per week, allowed for the accumulation of unused sick leave, and provided a right to be paid for overtime for attending Board meetings in the form of compensatory time. The jury instructions, as given, with regard to accumulated vacation, sick leave, and compensatory time were proper, and the jury's award for such damages was not contrary to law. See United Truck Rental Equip. Leasing, 84 Hawai'i 86, 93, 929 P.2d 99, 106 (App. 1996) (citations omitted).

Third, we decline Ridgecrest's request that this court retroactively apply the holding in Francis v. Lee Enterprises, 89 Hawai'i 234, 971 P.2d 707 (1999) (abrogating tortious breach of contract actions). Francis was published on January 21, 1999, over thirteen months after the jury trial was concluded in this case and two months after the trial court's November 16, 1998 amended final judgment was entered. Prior to Francis, Dold was the controlling law in this jurisdiction, and Luke could not have foreseen that a claim for tortious breach of contract would be

abolished by this court. Moreover, Francis came to us via certified question from the United States District Court for the District of Hawai'i, specifically asking, "Does Hawai'i law recognize a tortious breach of contract cause of action in the employment context?" We answered the question in the negative, and the case was returned to the federal district court for trial. Thus, the parties, including the plaintiff, had the opportunity to adjust their trial positions prospectively in light of our opinion.

In the present case, Luke had alleged a cause of action for intentional infliction of emotional distress, which survived summary judgment. At trial, however, he elected to pursue the then-valid tortious breach of contract claim. The jury determined that Ridgecrest breached its employment contract with Luke and did so in a "willful or reckless manner."² Consequently, the jury's award of general (emotional distress) and punitive damages was consistent with the law at that time. The retroactive application of Francis to this case would unfairly prejudice Luke, whose reasonable reliance on Dold and Chung led him to forego his intentional infliction of emotional distress claim at trial and pursue his tortious breach of contract claim.

² Specifically, the jury answered "yes" to "Question No. 5: Did RIDGECREST breach the contract or promise when it terminated [Luke]?" and "Question No. 6: Was [Luke's] contract breached in a willful or reckless manner resulting in emotional distress?" on the special verdict form. (Underscoring in original.)

In addition, we conclude that there was substantial evidence to support the jury's determination that Ridgecrest's conduct immediately prior and subsequent to Luke's termination rose to the level of wilful, wanton, or reckless conduct, warranting the imposition of emotional distress and punitive damages. For example: (1) Board member Elliot Kawahara's deliberate misrepresentations and repeated reassurances to Luke that (a) Luke was not going to lose his job, (b) the Board had not even discussed Luke's job, and (c) Luke should not worry about it; (2) Board President Angela Aspinwall's belief that Luke's Contract was "ridiculous" and a "joke"; (3) Aspinwall's apparent callous attitude regarding Luke's separation-compensation, i.e., arbitrarily calculating amounts due to Luke for accumulated vacation, sick leave, and compensatory time, as well as a deliberate refusal to fully compensate Luke for compensatory time because she believed the amount "was generous"; (4) Aspinwall's view of Luke's post-termination correspondence as "entertaining" and amusing; and (5) the circumstances surrounding Aspinwall's appointment as temporary manager to replace Luke, evincing improper motives on the part of the Board in firing Luke.

Further, based on the evidence presented to the jury, we cannot say that the amount of punitive damages awarded by the jury was excessive. The jury's award was not contrary to law and the record does not indicate that the jurors were influenced by

their passions or prejudice in assessing punitive damages against Ridgecrest. See Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 436, 32 P.3d 52, 80 (2001) (citations omitted).

Fourth, because the trial court had the right to exercise its discretion over the mode and order of the trial pursuant to Hawai'i Rules of Evidence (HRE) Rule 611 (1993)³, we hold that the trial court did not abuse its discretion in limiting Ridgecrest's cross-examination of Luke during trial.

Finally, Ridgecrest makes several other arguments in its opening brief that it either failed to raise as a point of error or failed to preserve for appeal.⁴ Thus, pursuant to Hawai'i Rules of Appellate Procedure (HRAP) Rule 28 (stating "points not presented in accordance with this section will be

³ HRE Rule 611 states in relevant part:

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

⁴ Briefly, the arguments refer to: (1) the trial court's exclusion of evidence regarding a Board member's state of mind when considering Luke's termination (not raised as a point of error); (2) the trial court's jury instruction regarding Ridgecrest's reliance on advice of counsel as not excusing a breach of contract, which was given as modified by agreement (not preserved for appeal/waived; not raised as a point of error); and (3) the trial court's allowing Luke's counsel to hold back all of his arguments regarding the imposition of punitive damages until rebuttal argument (not raised as a point of error; failed to move for mistrial or raise the issue after summation).

disregarded"), Ridgecrest has waived these arguments on appeal. Accordingly,

IT IS HEREBY ORDERED that the November 16, 1998 amended final judgment from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, June 13, 2003.

On the briefs:

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