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NO. 28668

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

AUDREY THEISEN LEE, Plaintiff-Appellant,  
v.  
COUNTY OF HAWAI'I, JOHN DOES 1-10, JANE DOES 1-10,  
DOE CORPORATION 1-10, DOE PARTNERSHIPS 1-10,  
DOE NONPROFIT CORPORATIONS 1-10 AND  
DOE GOVERNMENTAL ENTITIES 1-10, Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT  
(CIVIL NO. 06-1-110)

MEMORANDUM OPINION

(By: Nakamura, Chief Judge, Fujise, and Reifurth, JJ.)

Plaintiff-Appellant Audrey Theisen Lee (Lee) appeals from the judgment in favor of Defendant-Appellee County of Hawai'i (County) that was filed by the Circuit Court of the Third Circuit (circuit court).<sup>1/</sup> The judgment incorporated the contents of the circuit court's prior orders 1) granting the County's motion to dismiss Lee's complaint with leave to file a motion to amend complaint; 2) denying Lee's motion to amend her complaint; and 3) denying Lee's motion for reconsideration of the "order denying [Lee's] right to redress."

On appeal, Lee contends that the circuit court erred in ruling that she failed to state a claim against the County upon

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<sup>1/</sup> The Honorable Glenn S. Hara presided.

which relief can be granted and in dismissing her complaint. We conclude that circuit court properly dismissed Lee's original complaint, but that it erred in denying Lee's motion to amend her complaint because Lee was entitled to amend her complaint as a matter of right. Accordingly, we vacate the circuit court's judgment and remand for further proceedings.

BACKGROUND

I.<sup>2/</sup>

This case arises out of Lee's dissatisfaction with the failure of the County to prosecute her husband, Soo Jang Lee (Soo Jang), for abuse of a family or household member for an incident that occurred on May 21, 2003 (May 2003 incident). Lee alleged that on May 21, 2003, she got into an argument with Soo Jang; that he refused to stop the van he was driving; and that she was injured when she exited the moving van with her seventeen-month-old son. Lee went to the Hilo Medical Center's emergency room on the following day, May 22, 2003, where she was treated and then released.

Lee was interviewed on May 22, 2003, at the Hilo Medical Center by Hawai'i Police Department Officer Brian Prudencio (Officer Prudencio). In his police report, Officer Prudencio notes that during this interview, Lee indicated that while attempting to remove her infant son from a vehicle, she slipped on wet grass and fell, possibly spraining her ankle and injuring her back. Officer Prudencio's report states that on May 24, 2003, he received a letter from Lee which indicated that during the May 2003 incident, she had actually been injured while attempting to exit the vehicle as her husband drove the vehicle and that the vehicle ran over her foot as she fell to the ground. The report notes that Lee also indicated being struck by her husband.

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<sup>2/</sup> This section is based on Lee's complaint and the exhibits attached to Lee's complaint.

Officer Prudencio's report further refers to a subsequent interview with Lee in which Lee indicated that during the May 2003 incident, Soo Jang had slapped her face three or four times, and that she is hoping her husband changes his violent tendencies and verbal abuse toward her. The report states that during this interview, Lee indicated that she did not want to pursue any prosecution against her husband. The record reflects that on June 22, 2003, Lee signed a "Waiver of Prosecution and Withdrawal of Complaint" in which she stated that she did not wish to pursue prosecution against Soo Jang and that she "release[d] the County of Hawaii and the Hawaii Police Department from any liability incurred from this case."

By letter dated March 10, 2004, signed by Deputy Prosecuting Attorney (DPA) Maryann J. Holiz-Davis, the County's Office of the Prosecuting Attorney (Prosecutor's Office) notified Lee that it was closing the case because there was insufficient evidence to prove beyond a reasonable doubt the charge of abuse of a family or household member against Soo Jang for the May 2003 incident. By letter dated June 2, 2004, signed by DPA Michael Kagami, the Prosecutor's Office notified Lee that after speaking with her and reviewing the police reports and her medical records, DPA Kagami and another individual agreed with the earlier assessment that there was insufficient evidence to pursue criminal prosecution of Soo Jang for the May 2003 incident.

II.

On March 31, 2006, Lee filed a complaint in the circuit court against the County and Doe individuals, corporations, partnerships, nonprofit corporations, and governmental entities. The complaint alleged, among other things, that Officer Prudencio included false, misleading, and inaccurate information in his police report regarding the information provided by Lee; that Officer Prudencio and the Hawai'i Police Department (Police

Department)<sup>3/</sup> acted improperly and negligently in investigating the case; that the Prosecutor's Office acted improperly and negligently in declining to charge Soo Jang for the May 2003 incident; and that the County Police Commission (Police Commission) was negligent in failing to investigate and sustain Lee's allegations against the Police Department. The complaint asserted three causes of action for 1) misconduct, 2) "spoliation,"<sup>4/</sup> and 3) negligent infliction of emotional distress (NIED).

The County did not answer the complaint but instead filed a motion to dismiss Lee's complaint. In its motion to dismiss, the County alleged that 1) the statute of limitations barred any action by Lee against the County; and 2) the complaint failed "to clearly state the nature of the causes of action against the County upon which Lee may obtain relief." In support of its motion, the County cited Hawai'i Rules of Civil Procedure (HRCPP) Rule 12(b)(6) (2000), which the County argued "allows dismissal of a complaint for the failure to state a claim upon which relief can be granted." The circuit court held a hearing on the County's motion to dismiss Lee's complaint. The circuit court subsequently issued a written order granting the County's motion to dismiss Lee's complaint on the ground that "[Lee] has failed to state a basis for a claim of relief against the County." The circuit court's order further provided that Lee had thirty days from the date of the hearing on the County's motion to dismiss in which to file a motion to amend her complaint "to state proper claims."

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<sup>3/</sup> Lee refers to the Hawai'i Police Department as the "Hilo Police Department" in her complaint.

<sup>4/</sup> Based on the allegations in her complaint, it appears that Lee intended to claim "spoliation," which is defined in Black's Law Dictionary 1437 (8th ed. 2004) as "[t]he intentional destruction, mutilation, alteration, or concealment of evidence," instead of "spoliation." We will treat Lee's complaint as having alleged a cause of action for spoliation.

Lee filed a motion to amend her complaint<sup>5/</sup> and subsequently submitted a proposed amended complaint, which included causes of action for 1) misconduct, 2) negligence, 3) defamation of character, and 4) NIED. The circuit court denied Lee's motion to amend her complaint on the ground that Lee "has still failed to state a basis for a claim of relief against the County."

Lee filed a notice of appeal from the circuit court's order denying Lee's motion to amend her complaint. This court subsequently dismissed that appeal due to the lack of a final, appealable judgment. Lee then filed a "Motion for Reconsideration of Order Deny [sic] Plaintiff's Right to Redress" in the circuit court. The circuit court denied this motion by order filed on July 2, 2007. On that same date, the circuit court issued its final judgment in favor of the County.

#### DISCUSSION

##### I.

The circuit court dismissed Lee's complaint for failure to state a claim upon which relief can be granted, pursuant to HRCF Rule 12(b)(6). The circuit court denied Lee's motion to amend her complaint on the ground that the proposed amended complaint "still" failed to state a claim upon which relief can be granted.

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief. [This court] must therefore view a plaintiff's complaint in a light most favorable to him or her in order to determine whether the allegations contained therein could warrant relief under any alternative theory. For this reason, in reviewing a circuit court's order dismissing a complaint[, this court's] consideration is strictly limited to the allegations of the complaint, and [this court] must deem those allegations to be true.

In re Estate of Rogers, 103 Hawai'i 275, 280-81, 81 P.3d 1190,

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<sup>5/</sup> Lee's motion to amend her complaint was filed before the circuit court's written order granting the County's motion to dismiss was filed and within the time period permitted by the written order.

1195-96 (2003) (citations, brackets, and ellipsis omitted) (emphasis in original).

This court has stated that an HRCP Rule 12(b)(6) "dismissal is warranted only if the claim is clearly without any merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim." Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 215, 664 P.2d 745, 749 (1983) (internal quotation marks and citation omitted). In addition, "in weighing the allegations of the complaint as against a motion to dismiss, the court is not required to accept conclusory allegations on the legal effect of the events alleged." Marsland v. Pang, 5 Haw. App. 463, 474, 701 P.2d 175, 186 (1985). We review the trial court's ruling on a motion to dismiss *de novo*. Wright v. Home Depot U.S.A., Inc., 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006).

Under HRCP Rule 15(a) (2000), "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . ." When amendment is not permitted as a matter of course, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

Lee appeared pro se in the circuit court. Pleadings prepared by pro se litigants like Lee "should be interpreted liberally." Dupree v. Hiraga, 121 Hawai'i 297, 314, 219 P.3d 1084, 1101 (2009).

## II.

Lee argues that the circuit court erred in dismissing her complaint for failure to state a claim upon which relief can be granted. The genesis of Lee's complaint was the refusal of the Prosecutor's Office to pursue charges against Soo Jang for the May 2003 incident, which Lee attributed in part to the failure of Officer Prudencio and the Police Department to

properly investigate her allegations. In her original complaint, Lee asserted causes of action for (1) misconduct, (2) spoliation, and (3) NIED. We conclude that the circuit court did not err in dismissing Lee's original complaint.

A.

Lee cites no authority for the proposition that Hawai'i recognizes "misconduct" as a separate, actionable tort, and we are unable to find any. The County liberally construes Lee's "misconduct" cause of action as founded on negligence. In order to bring a claim founded on negligence, the plaintiff must establish that the defendant breached a duty to the plaintiff recognized by the law. Dairy Road Partners v. Island Ins. Co., 92 Hawai'i 398, 419, 992 P.2d 93, 114 (2000) (citations omitted).

Here, Lee's original complaint fails to allege a breach by the County of a duty owed to Lee that is recognized by the law. In holding that the city was not liable for prosecutors' failure to pursue a criminal complaint against an alleged sex offender who later murdered plaintiffs' daughter, the Hawai'i Supreme Court stated, "[g]enerally, a defendant is not responsible for (that is, he has no duty to control) the behavior of a third person unless there is a 'special relationship' between the defendant and either the third person who may threaten harm or the party who is the victim of the harm." Seibel v. City and County of Honolulu, 61 Haw. 253, 257, 602 P.2d 532, 536 (1979) (citing Restatement (Second) of Torts § 315 (1965)<sup>5/</sup>). The supreme court has also concluded that "the failure of the police to provide protection is ordinarily not actionable." Freitas v. City and County of Honolulu, 58 Haw.

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<sup>5/</sup> Restatement (Second) of Torts § 315 provides:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

587, 590, 574 P.2d 529, 532 (1978) (citation omitted). An exception to this rule is "where police action has increased the risk of harm and there is negligence in providing protection against the enhanced danger." Id.

Lee's complaint provides no basis for concluding that there was a "special relationship" that created a duty to Lee on the part of the Prosecutor's Office or the Police Department with respect to the investigation of her allegations or the prosecution of her husband. Nor does the complaint allege that any action by the Police Department increased the risk of harm to Lee which the Police Department negligently failed to provide protection against. See id. (holding that the city was not liable for police officer's failure to arrest man who later shot the plaintiffs); Ruf v. Honolulu Police Dep't, 89 Hawai'i 315, 322-30, 972 P.2d 1081, 1088-96 (1999) (citing public policy of ensuring arrestee is not subject to unnecessary detention in holding that police department could not be held liable for negligent release of arrestee who later raped and murdered plaintiffs' child). In addition, Lee's complaint does not allege any special relationship creating a duty to Lee on the part of the Police Commission. Accordingly, the circuit court did not err in dismissing Lee's "misconduct" cause of action for failure to state a valid claim.

B.

In her cause of action for spoliation, Lee alleged that the Police Department's failure to take photographs of her injuries and the crime scene and to look for physical evidence "result[ed] in a loss of evidence needed to prosecute [Lee's] claims arising from the incident."

In Matsuura v. E.I. du Pont de Nemours and Co., 102 Hawai'i 149, 168, 73 P.3d 687, 706 (2003), the Hawai'i Supreme Court left unanswered the question of whether Hawai'i law would recognize the tort of "spoliation of evidence." However, the



court offered the following guidance regarding that tort:

The few jurisdictions that recognize a cause of action for intentional spoliation . . . of evidence require a showing of the following elements: (1) the existence of a potential lawsuit; (2) the defendant's knowledge of the potential lawsuit; (3) the intentional destruction of evidence designed to disrupt or defeat the potential lawsuit; (4) disruption of the potential lawsuit; (5) a causal relationship between the act of spoliation and the inability to prove the lawsuit; and (6) damages.

For a claim of negligent spoliation of evidence, jurisdictions generally require that the plaintiff prove: (1) the existence of a potential civil action; (2) a legal or contractual duty to preserve evidence that is relevant to the potential civil action; (3) destruction of that evidence; (4) significant impairment in the ability to prove the lawsuit; (5) a causal relationship between the destruction of evidence and the inability to prove the lawsuit, and (6) damages.

Id. at 166-67, 73 P.3d at 704-05 (citations omitted). Assuming arguendo that Hawai'i would recognize a cause of action for spoliation, Lee's original complaint lacks allegations necessary to support a claim of intentional or negligent spoliation. Lee only alleges that the County failed to obtain evidence, not that it intentionally or negligently destroyed evidence. Thus, even if this jurisdiction were to recognize tort claims for the spoliation of evidence, the allegations contained in Lee's original complaint would not entitle her to relief.

C.

The third cause of action in Lee's original complaint was for NIED. A claim for NIED "is nothing more than a negligence claim in which the alleged actual injury is wholly psychic and is analyzed utilizing ordinary negligence principles." Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai'i 34, 69, 58 P.3d 545, 580 (2002) (internal quotation marks and citation omitted). "[A] prerequisite to any negligence action is the existence of a duty owed by the defendant to the plaintiff[] that requires the defendant to conform to a certain standard of conduct for the protection of the plaintiff against unreasonable risks. Id. at 71, 58 P.3d at 582 (internal quotation marks, brackets, and citations omitted).

As previously noted, Lee has failed to allege facts establishing any duty owed to her by the County in connection with its decision not to arrest or prosecute Soo Jang based on the May 2003 incident. See Ruf, 89 Hawai'i at 322-30, 972 P.2d at 1088-96 (concluding that imposing a duty on the police to the public regarding the release of detainees would be contrary to public policy because it would pressure police to err on the side of excessive detention). This failure is fatal to Lee's NIED claim.

III.

We conclude that the circuit court erred when it denied Lee's motion to amend her complaint because under HRCP Rule 15(a), Lee had the right to amend her complaint once "as a matter of course."<sup>7/</sup> HRCP 15(a) provides in pertinent part:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The County did not file an answer to Lee's original complaint. The County's motion to dismiss Lee's original complaint pursuant to HRCP Rule 12(b)(6) is not a "responsive pleading" within the meaning of HRCP Rule 15(a). Ellis v. Crockett, 51 Haw. 45, 60, 451 P.2d 814, 824 (1969). "Therefore, the mere service of [the County's] motion for dismissal cannot terminate the right to amend." Id.

The County did not file any responsive pleading to Lee's original complaint before Lee filed her motion to amend her complaint.<sup>8/</sup> Thus, when Lee filed her motion to amend her complaint, leave of the circuit court was not necessary. Lee was

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<sup>7/</sup> In her proposed amended complaint, Lee incorporated the allegations contained in the original complaint and included additional allegations.

<sup>8/</sup> In its answering brief, the County indicates that at the hearing on the County's motion to dismiss Lee's original complaint, Lee orally moved that she be allowed to file an amended complaint. The record shows that Lee filed her written motion to amend her complaint before the circuit court issued its written order granting the County's motion to dismiss.

entitled to amend her original complaint as a matter of right under HRCF Rule 15(a), and the circuit court had no discretion to refuse Lee's motion. Ellis, 51 Haw. at 60, 451 P.2d at 824 (holding under similar circumstances that the trial judge had no discretion to refuse plaintiffs' request to amend their complaint even though the judge had orally granted defendants' HRCF Rule 12(b)(6) motion to dismiss). Accordingly, the circuit court erred in denying Lee's motion to amend her complaint.

We cannot say that this error was harmless. Even if Lee's proposed amended complaint failed to state a claim upon which relief could be granted, Lee could have sought to further amend her complaint, by leave of court, under HRCF Rule 15(a). The circuit court's error in denying Lee's motion to amend her original complaint impaired Lee's ability to pursue amendment of her complaint. We decline to speculate on what course this litigation would have taken had the circuit court properly permitted Lee to amend her original complaint. See id. at 59, 451 P.2d at 823.

CONCLUSION

For the foregoing reasons, we vacate the July 2, 2007, judgment of the circuit court, and we remand the case for further proceedings consistent with this Memorandum Opinion.

DATED: Honolulu, Hawai'i, October 28, 2010.

On the briefs:

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