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IN THE SUPREME COURT OF THE STATE OF HAWAI'I

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ALVIN F. JARDINE, III,  
Petitioner-Appellant,

vs.

STATE OF HAWAI'I,  
Respondent-Appellee.

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SCAP-23-0000460

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CAAP-23-0000460; CASE NO. 2SP161000056)

SEPTEMBER 27, 2024

CONCURRING AND DISSENTING OPINION BY DEVENS, J.

I concur in Sections IV.A, IV.B and IV.C of the majority opinion to the extent that the majority holds that Hawai'i Revised Statutes (HRS) § 661B-1 (2016) does not require that an order vacating or reversing a petitioner's conviction state the words "actually innocent" in order for a petitioner to have an actionable claim for relief under HRS chapter 661B, but

that the court's order should set forth facts supporting the petitioner's actual innocence. Further, I concur in the holding that in a HRS chapter 661B compensation action, a petitioner must prove by a preponderance of the evidence that they are "actually innocent" of the crimes at issue. However, I respectfully dissent from Sections IV.B.1 and 2, vacating the circuit court's granting of the State's motion for summary judgment and remanding the case "because there is still a genuine issue of material fact as to whether Jardine is 'actually innocent[.]'" I would vacate the circuit court's granting of the State's motion for summary judgment and grant summary judgment in favor of Petitioner Alvin F. Jardine, III.

Here, Jardine met his initial burden of demonstrating the absence of a genuine issue of material fact as to his actual innocence of the offenses for which he was incarcerated for approximately twenty years of a thirty-five-year sentence. The State failed to present a genuine issue of material fact as to Jardine's actual innocence or otherwise refute, challenge, or contest the evidence of actual innocence presented by Jardine in support of his motion. Thus, given the state of the record and the admitted evidence, there is no genuine issue of any material fact as to Jardine's "actual innocence" and summary judgment should be granted in Jardine's favor.

On appeal, the denial of a motion for summary judgment is reviewed de novo and a court ruling on a motion for summary judgment must view the evidence in the light most favorable to the non-moving party. Kanahele v. State, 154 Hawai'i 190, 201, 549 P.3d 275, 286 (2024) (citing Ralston v. Yim, 129 Hawai'i 46, 55-56, 292 P.3d 1276, 1285-86 (2013)). The moving party has the initial burden of showing the absence of a genuine issue of material fact which would entitle the moving party to judgment as a matter of law. Ralston, 129 Hawai'i at 55-56, 292 P.3d at 1285-86. This burden can also be carried by showing that if the case went to trial, there is no competent evidence to support a judgment in favor of the non-moving party. Id. at 59-60, 292 P.3d at 1289-90 (citing Exotics Hawaii-Kona, Inc. v. E.I. Du Pont De Nemours & Co., 116 Hawai'i 277, 301, 172 P.3d 1021, 1045 (2007)). However, once the moving party satisfies their initial burden, "the burden shift[s] to the non[-]moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Id. at 56-57, 292 P.3d at 1286-87 (quoting French v. Hawaii Pizza Hut, Inc., 105 Hawai'i 462, 470, 99 P.3d 1046, 1054 (2004)).

If the non-moving party does not sufficiently respond, summary judgment will be entered against them. See Hawai'i Rules

of Civil Procedure (HRCP) Rule 56(e) (eff. 2000) ("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. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.").<sup>1</sup> This court has recited the "well-settled legal principles governing motions for summary judgment" specifically, that:

[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 or she is entitled to prevail because his or her opponent has no valid claim for relief or defense to the action. Accordingly, the moving party has the initial burden of identifying those portions of the record demonstrating the absence of a genuine issue of material fact. The moving party may discharge his or her burden by demonstrating that, if the case went to trial, there would be no competent evidence to support a judgment for his or her opponent. Cf. Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (a party moving for summary judgment under Federal Rules of Civil Procedure Rule 56 need not support his or her motion with affidavits or similar materials that negate his or her opponent's claims, but need only point out that there is [an] absence of evidence to support the opponent's claims). For if no evidence could be mustered to sustain the non[-]moving party's position, a trial would be useless.

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<sup>1</sup> I also recognize that "merely asserting that the non-moving party has not come forward with evidence to support its claims is not enough." Ralston, 129 Hawai'i at 59, 292 P.3d at 1289 (internal quotations and citations omitted). However, that is not the case here where Jardine met his initial burden of showing the absence of a genuine issue of material fact as to his actual innocence.

Exotics Hawaii-Kona, 116 Hawai'i at 301, 172 P.3d at 1045

(cleaned up).

In sum, this court's case law indicates that a summary judgment movant may satisfy his or her initial burden of production by either (1) presenting evidence negating an element of the non-movant's claim, or (2) demonstrating that the non-movant will be unable to carry his or her burden of proof at trial.

Ralston, 129 Hawai'i at 60, 292 P.3d at 1290.

Jardine contends that the circuit court erroneously denied his motion for summary judgment seeking a finding of actual innocence "as there were no genuine issues as to any material fact[.]" In his motion, Jardine averred that he was "actually innocent" of the offenses for which he was charged, convicted, and incarcerated. Jardine further asserted in his motion that he unequivocally "did not commit these crimes" and was "wrongfully convicted" and imprisoned for twenty years for "crimes he did not commit." As the circuit court acknowledged in Jardine's Hawai'i Rules of Penal Procedure (HRPP) Rule 40 proceeding, the primary issue in the original case was the identification of the perpetrator of the crime. Significantly, in support of his motion Jardine presented trial transcripts, testimony that he had never seen the Complainant before and did not "even know who she [was]," an FBI report noting the items recovered as evidence from the scene including a tablecloth, a laboratory report, an affidavit from a DNA expert, and DNA

testing results that conclusively excluded Jardine as being the contributor of the male DNA found on the tablecloth recovered by the police.

A motion for summary judgment proceeding gives each side the opportunity to present evidence. Jardine presented factual evidence to prove his actual innocence. In response to Jardine's motion, the State did not submit a single affidavit, declaration, exhibit, or anything of material relevance to controvert or counter the evidence of actual innocence presented by Jardine. Nor did the State argue that it had competent evidence or could otherwise develop competent evidence to support a judgment in its favor.

In presenting an actionable claim under HRS chapter 661B, the relevant elements Jardine had to allege and prove are: (1) he was convicted of one or more crimes under our laws; (2) he was sentenced to a term of imprisonment and served all or part of the sentence; and (3) his judgment of conviction was reversed or vacated because the petitioner was actually innocent of the crimes. HRS §§ 661B-1, 661B-3. It is undisputed that Jardine was convicted of several crimes and served a part of his sentence that was subsequently vacated by the circuit court in a HRPP Rule 40 proceeding.

Jardine was tried three different times on the charges. The first two trials resulted in hung juries that were

declared mistrials. The jury in the third trial was initially deadlocked but later convicted Jardine. Jardine maintained his innocence in all three trials.

The Complainant testified to the sexual assault and stated that her perpetrator "had his shorts off, and he took me over and sat me on his lap on the papa[-]san chair" which had been covered by a tablecloth. The police recovered the tablecloth, which the Complainant testified had been draped over the papa-san chair when the perpetrator sat in the chair. The circuit court's Findings of Fact and Conclusions of Law in the HRPP Rule 40 proceeding, which was attached to Jardine's motion for summary judgment, reflected the Complainant's description that the perpetrator was "bare-chested and sweaty," and had "sat naked" in the papa-san chair covered by the tablecloth. The police collected DNA specimens from the tablecloth, and other recovered items of evidence, which contained blood and other bodily fluids. At the time, DNA testing was not sufficiently advanced to accurately test the specimens recovered by the police.

In his motion for summary judgment, relying on recently developed DNA evidence, Jardine asserted that "new DNA evidence proves [he] is actually innocent." In support of his claim of "actual innocence," Jardine attached a declaration provided under the penalty of perjury, stating in part, "I was

in the custody of the State and being held for a crime for which I was actually innocent," and that "[o]n the night of the [i]ncident, I was with friends and family, including Trina Jardine, Michelle Okimoto, Rickey Calderwood and Rolene Ishimura, all of whom confirmed Mr. Jardine was with them during the attack on [the Complainant]." Jardine also included over 150 pages of exhibits with his motion that buttressed his claim of "actual innocence," including trial transcripts, exculpatory DNA evidence that included testing results/reports, an affidavit from DNA expert Dr. David Haymer who explained the advancements in modern DNA testing and that current testing methods are "highly likely to resolve an issue not resolved by previous analysis in 1991," and the circuit court's findings in the HRPP Rule 40 proceeding determining that the "primary issue in the original case and the instant issue, is the identification of the perpetrator of the crime" and that the new DNA testing evidence "conclusively excludes Mr. Jardine as the contributor of the male DNA found on evidence (the tablecloth) recovered from the crime scene."

The State did not object to the foundation or authenticity of Jardine's evidence of actual innocence, nor did it refute any of this evidence offered in support of Jardine's motion for summary judgment. The State also did not challenge the accuracy or credibility of the DNA testing.



After Jardine successfully had his conviction vacated based on the new DNA evidence, rather than re-try Jardine, the prosecutor dismissed the charges against Jardine with prejudice.

In opposing Jardine's motion for summary judgment, the State acknowledged that Jardine was asserting "he is 'actually innocent' of crimes for which he had been convicted." However, the State inexplicably did not attach any affidavits, declarations or exhibits to its opposition, failed to object to the relevance or admissibility of any of Jardine's evidence, and thus offered nothing to refute or challenge the factual evidence of "actual innocence" offered by the Petitioner. Instead, the State's response pursued a path focused primarily on confronting Jardine's legal arguments based on res judicata and collateral estoppel rather than contesting Jardine's factual evidence of innocence to raise a genuine issue of material fact as to his "actual innocence." Jardine's reply memorandum highlighted the State's sidetracked response and stated, "Respondent's Opposition fails to present admissible evidence related to the issues raised in Petitioner's Motion for Summary Judgment." Jardine's Opening Brief pointed to the State's omission and duly noted that the material facts of "actual innocence" established in his motion for summary judgment "were not contested by the State[.]" Jardine correctly asserts that "the State was required to come forward with some evidentiary matters to

support its position, and by failing to present any specific evidence of discrepancies or contradiction among Mr. Jardine's statements, the State failed to raise any genuine issue of material fact." Contesting the merits of Jardine's legal arguments is not the same as challenging the factual evidence he presented. Separate and apart from the legal arguments, Jardine also based his innocence on the evidentiary record, and asserted that the "new DNA evidence proves Mr. Jardine is actually innocent[.]"

The majority contends that the DNA recovered from the papa-san chair could have been left by someone other than the perpetrator, consistent with the inferences and reasoning expressed by the circuit court. While that is a fair inference given the DNA test results, it does nothing but point to another perpetrator and not to Jardine. According to the court's findings in the HRPP Rule 40 proceeding, the "bare chested and sweaty" perpetrator "sat naked" in the papa-san chair. The Complainant's testimony placed the perpetrator with "his shorts off" squarely in the papa-san chair covered by the tablecloth, while Complainant sat on the perpetrator's lap. Thus, the DNA recovered from the tablecloth may in fact be the DNA of the true perpetrator; however, this evidence clearly excludes Jardine.

The State did not offer any evidence controverting Jardine's claim of actual innocence. The State also did not

assert or offer any evidence to support an affirmative defense. Jardine was not required to conclusively prove his innocence. Rather, he was only required to prove his innocence by a preponderance of the evidence. HRS § 661B-3. Thus, he only needed to offer evidence "sufficient to tip the scale slightly in his or her favor." Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989) (emphasis added) (quotations and citation omitted). In failing to contest the evidence presented by Jardine, the State failed to meet its burden of showing there was a genuine issue of material fact as to Jardine's actual innocence. As HRCP Rule 56(e) states, if an "adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Given the evidence in the record before us on appeal, summary judgment should be granted in favor of Jardine on the issue of his "actual innocence."

I would therefore vacate the circuit court's July 25, 2023 Findings of Fact and Conclusions of Law and Order, specifically its denial of Jardine's May 22, 2023 motion for summary judgment, and enter summary judgment in favor of Petitioner Alvin F. Jardine, III.

/s/ Vladimir P. Devens

