***** NOT FOR PUBLICATION *****

NO. 25501

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

WILLIAM A. MERCK, individually and
on behalf of others similarly situated,
Plaintiff-Appellant,

vs.

WESTERN INSURANCE SERVICE, INC.,
an Idaho corporation, dba W.I.S./SECURITY PLUS,
Defendant-Appellee,

and

WINDWARD AUTO SALES, INC., a Hawaiʻi
corporation; THEODORE T. NOBRIGA, aka Troy Nobriga;
BANK OF HAWAII; JOHN DOES 1-5 and DOE ENTITIES 1-5,
Defendants.

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-0651)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, and Duffy JJ.;
with Acoba, J., concurring separately)

Plaintiff-appellant William A. Merck appeals from the first circuit court's July 24, 2002 final judgment.[1] As points of error, Merck contends that the circuit court erred when it: (1) granted summary judgment in favor of defendant-appellee Western Insurance Service, Inc. (WIS); (2) denied Merck's motion for summary judgment; and (3) granted WIS's motion for costs and fees.

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

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: (1) vacate the circuit court's July 24, 2002 judgment and November 18, 2002 order granting WIS's motion for fees and costs; and (2) remand to the circuit court with instructions to (a) dismiss Merck's Hawai‘i Revised Statutes (HRS) chapter 481A claim, and (b) enter a new judgment in favor of WIS as to all other claims set forth in Merck's complaint. We address each of Merck's arguments in turn.

A. Motions For Summary Judgment

1. Merck's HRS chapter 480 claims

First, Merck argues that WIS's sale of the Security Plus System constitutes an unfair and deceptive trade practice pursuant to HRS chapter 480 because the System is actually insurance, rather than a warranty. [Hereinafter, Merck's argument that the Security Plus System violates HRS chapter 480 because the Security Plus System is actually insurance shall be referred to as "Merck's insurance argument."] Second, Merck argues that the Security Plus System was "substantially worthless and of no value to [Merck] and any of the other members of the class," and argues in his opening brief that this constitutes an unfair and deceptive trade practice. [Hereinafter, Merck's

argument that the Security Plus System violates HRS chapter 480 because the System was not worth $169 shall be referred to as "Merck's unfair price argument."]

We hold that the circuit court correctly granted summary judgment as to Merck's insurance argument because there is no evidence that Merck was injured by WIS or the Security Plus System. Although Merck believes that auto-theft deterrent systems should be regulated by Hawaii's Insurance Commissioner (something the legislature has since done, as discussed in the following subsection), Merck cannot obtain this relief via HRS chapter 480 because there is no evidence that he was injured by the allegedly unfair and deceptive trade practice -- a requirement of an HRS chapter 480 suit. See HRS § 480-13 (1993 & Supp. 2004) (providing that "[a]ny consumer who is injured by any unfair or deceptive act or practice forbidden or declared unlawful by section 480-2" may sue for damages or bring proceedings to enjoin the unlawful practice (emphasis added)).

We further hold that the circuit court correctly granted summary judgment as to Merck's unfair price claim. As an initial matter, Merck has standing to bring this claim: at the time he filed his suit against the various defendants, Merck had put down a $300 deposit and had traded in his car. Some portion of that $300, even if it was only a small amount, went towards

the purchase of the (allegedly overpriced) Security Plus System. De minimis damages are sufficient to sustain an action under HRS chapter 480. See Wiginton v. Pac. Credit Corp., 2 Haw. App. 435, 444, 634 P.2d 111, 118-19 (1981). Furthermore, even if the sale of the van was contingent on Merck's ability to qualify for financing, as WIS contends, Merck did not need to complete the sale to be entitled to protection under HRS chapter 480. Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai‘i 309, 316, 47 P.3d 1222, 1229 (2002). Nevertheless, WIS is still entitled to summary judgment as to this claim. According to Merck and WIS, WIS received only $20.50 for each Security Plus System sold. Merck has never argued that this $20.50 figure was exorbitant, and there is nothing to suggest that WIS's sale of window decals and a warranty/insurance policy worth up to $2,500 for $20.50 is so unfair as to trigger the protections of HRS chapter 480. See Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai‘i 213, 228, 11 P.3d 1, 16 (2000) ("[A] practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." (Citations, internal quotation signals, and block quote formatting omitted.)). Whether a practice qualifies as "immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" is generally a question of fact, Kukui

Nuts of Hawaii Inc. v. R. Baird & Co., Inc., 7 Haw. App. 598, 612, 789 P.2d 501, 511 (1990) ("The question of whether an unfair or deceptive trade practice exists is a question of fact."); nevertheless, no reasonable finder of fact would conclude that WIS's sale of the Security Plus system for $20.50 violated HRS chapter 480. Therefore, the circuit court correctly granted summary judgment as to this claim as well.

2. Merck's HRS chapter 481A claim

Merck's claim for injunctive relief based on HRS chapter 481A is moot. Effective January 1, 2003, HRS chapter 481R (entitled "Vehicle Protection Product Warrantors) requires, inter alia, that "warrantors" of "vehicle protection products" register with the Insurance Commissioner, but exempts those warrantors from Hawaii's insurance laws. HRS § 481R-4 (Supp. 2004). HRS § 481R-1 (Supp. 2004) defines "vehicle protection product" as follows:

> "Vehicle protection product" means a product or system, which includes a written warranty, that is:
> (1) Installed or applied to a vehicle; and
> (2) Designed to prevent loss or damage to a vehicle from a specific cause.

HRS § 481R-1 also defines "warrantor" as "a person named under the terms of a vehicle protection product warranty as the contractual obligor to the consumer." Although HRS chapter 481R applies only to those vehicle protection products purchased on or after January 1, 2003 (and therefore does not apply to Merck's

Security Plus System), see 2002 Haw. Sess. L. Act 237, § 4 at 943, HRS chapter 481R obviates the need for an injunction because the legislature has clarified the status of these types of products. In other words, no injunction is necessary and Merck's claim is moot. Furthermore, the possibility that a plaintiff could recover costs or fees is insufficient to prevent a claim from being rendered moot. See, e.g., Ott v. Boston Edison Co., 602 N.E.2d 566, 568 (Mass. 1992) ("A potential claim for attorneys' fees standing alone does not justify deciding a moot case."); Speer v. Presbyterian Children's Home & Serv. Agency, 847 S.W.2d 227, 229-30 (Tex. 1993) ("[The plaintiff], who seeks only injunctive and declaratory relief, can never show her entitlement to such relief. . . . Because . . . injunctive and declaratory relief are unavailable, [the plaintiff] could never be a prevailing party entitled to such relief . . . and is thus not entitled to recover her attorneys fees and costs."). Therefore, the possibility that Merck could have obtained costs and/or fees pursuant to HRS § 481A-3 had he succeeded on that claim is not enough to save his claim from being rendered moot.

Rather than simply affirming the circuit court's grant of summary judgment in favor of WIS as to this particular claim, however, we instruct the circuit court on remand to dismiss Merck's HRS chapter 481A claim. This will "preclude possible

unjust or unforeseen effects and collateral estoppel." Finberg v. Sullivan, 658 F.2d 93, 95 & n.2, 96 (3d Cir. 1981) (citations omitted). See also Aircall of Hawaii, Inc. v. Home Props., Inc., 6 Haw. App. 593, 595, 733 P.2d 1231, 1232-33 (1987) (stating that "the imposition of issue preclusion where appellate review has been frustrated due to mootness is obviously unfair" and adopting "the federal practice of having the appellate court 'vacate the judgment of the trial court and direct dismissal of the case[]'" (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4433 at 316 (1981))).

3. Merck's HRS chapter 431 claims

Merck's complaint appears to seek relief pursuant to various provisions within HRS chapter 431, the Hawai‘i Insurance Code. However, in his opening brief, Merck does not appear to present any arguments as to the viability of his claims under any of these statutes. Although this court reviews the circuit court's grant of summary judgment de novo, the appellant is still required to present arguments as to why the circuit court erred. HRAP Rule 28(b)(7) ("Points not argued may be deemed waived."); Weinberg v. Mauch, 78 Hawai‘i 40, 49, 890 P.2d 277, 286 (1995) ("[T]he [appellants] do not present an argument as to why the trial court erred by granting [summary judgment]. The [appellants], therefore, have not properly presented this issue

on appeal, and it is not subject to review by this court."). Consequently, the circuit court properly granted summary judgment in favor of WIS to the extent that Merck's complaint set forth claims for relief pursuant to HRS chapter 431.

B. Motion For Fees And Costs

We vacate the circuit court's November 18, 2002 order granting WIS attorneys' fees and costs because the circuit court's order was untimely.

The circuit court entered its final judgment in favor of WIS on July 24, 2002. On July 31, 2002, WIS filed a motion for attorneys' fees and costs. According to HRAP Rule 4, entitled "Appeals--When Taken," the circuit court had 90 days in which to grant WIS's motion:

> (3) Time to Appeal Affected by Post-Judgment Motions. If, not later than 10 days after entry of judgment, any party files a motion that seeks to reconsider, vacate, or alter the judgment, or seeks attorney's fees or costs, the time for filing the notice of appeal is extended until 30 days after entry of an order disposing of the motion; provided, that the failure to dispose of any motion by order entered upon the record within 90 days after the date the motion was filed shall constitute a denial of the motion.
>
> The notice of appeal shall be deemed to appeal disposition of all post-judgment motions that are filed within 10 days after entry of judgment.
>
> The 90-day period shall be computed as provided in Rule 26.

(Emphasis added.) WIS's motion for costs and attorneys' fees was filed within ten days of the circuit court's entry of judgment; therefore, the circuit court had 90 days -- until October 29, 2002 -- to enter an order on the record granting WIS's motion.

The circuit court did not enter an order on the record by that date; the circuit court did, however, enter a written order granting WIS's motion on November 18, 2002. Therefore, according to the plain language of HRAP Rule 4, the circuit court's order was untimely. WIS's arguments to the contrary -- that HRAP Rule 4 does not divest the circuit court of jurisdiction to rule on motions past the 90-day deadline and that Merck should be estopped from presenting an HRAP Rule 4 defense -- are without merit.

C. Other Points Of Error

Merck's notice of appeal also states that Merck appeals from the following: (1) the circuit court's order denying Merck's motion for a permanent injunction; (2) the circuit court's order denying Merck's motion for leave to amend complaint; and (3) "all other orders adverse to [Merck]." However, Merck does not list any of these points in his opening brief and presents no arguments as to why the circuit court erred. Therefore, these points are also deemed waived on appeal. HRAP Rule 28(b)(7). Therefore,

IT IS HEREBY ORDERED that the circuit court's July 24, 2002 judgment and November 18, 2002 order granting WIS's motion for fees and costs are vacated, and this case is remanded to the circuit court with instructions to (a) dismiss Merck's HRS

chapter 481A claim, and (b) enter a new judgment in favor of WIS in all other respects.

DATED: Honolulu, Hawai‘i, February 9, 2005.

On the briefs:

Charles S. Lotsof
for plaintiff-appellant
William A. Merck, individually
and on behalf of others
similarly situated

Craig K. Shikuma
and Kenneth M. Nakasone
(of Kobayashi, Sugita &
Goda) for defendant-appellee
Western Insurance Service,
Inc.

CONCURRING OPINION BY ACOBA, J.

I concur in the result.