

NO. 22693

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

MOLOKAI ADVERTISER-NEWS, a sole proprietorship of George Peabody, and GEORGE PEABODY, Plaintiffs-Appellees v. EDIE ANDERSON, GERRY ANDERSON, and THE NEW REGIME PRESS, INC., a Hawaii corporation, dba THE DISPATCH, Defendants-Appellants, and JOHN DOES 1-5, JANE DOES 1-5, DOE CORPORATIONS 1-5, DOE PARTNERSHIPS 1-5, and DOE GOVERNMENTAL ENTITIES 1-5, Defendants

APPEAL FROM THE SECOND CIRCUIT COURT
(CIV. NO. 97-0586(1))

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendants-Appellants Edie Anderson, Gerry Anderson (Anderson), and The New Regime Press, Inc., doing business as The Dispatch (collectively Defendants-Appellants), appeal the circuit court's June 17, 1999 Judgment in favor of Plaintiffs-Appellees Molokai Advertiser-News (MAN) and George Peabody (Peabody) (collectively Plaintiffs-Appellees).

The June 17, 1999 Judgment ordered Defendants-Appellants to pay the following to Plaintiffs-Appellees:

AMOUNT \$1,000.00¹
ATTORNEYS FEES \$10,330.25
COSTS OF COURT \$455.30
INTEREST at 10% per annum from the date of
May 20, 1999 on \$11,785.55 at \$3.29 /day

TOTAL JUDGMENT (less interest) . . \$11,785.55

(Footnote added.)

We vacate and remand with instructions.

BACKGROUND

Defendants-Appellants and Plaintiffs-Appellees each publish and distribute a free weekly newspaper on Moloka'i. Defendants-Appellants publish and distribute "The Dispatch" while Plaintiffs-Appellees publish and distribute the "MAN." The two newspapers compete against each other for advertising revenue and each publisher works hard at increasing circulation.

In 1994, Defendants-Appellants published a notice in their paper announcing the purchase of a number of newspaper racks in which to store and display The Dispatch. The notice

¹ Hawai'i Revised Statutes (HRS) § 480-13(a) (1993) states, in relevant part, as follows:

[A]ny person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

- (1) May sue for damages sustained by the person, and, if the judgment is for the plaintiff, the plaintiff shall be awarded a sum not less than \$1,000 or greater, and reasonable attorneys fees together with the costs of suit[.]

stated that any newspaper, other than The Dispatch, found in the racks would be removed and taken to The Dispatch offices.

In 1996, several witnesses observed Anderson removing large stacks of copies of the MAN from distribution locations around Moloka'i. One witness reported observing Anderson throwing copies of the MAN in the trash. In their defense, Defendants-Appellants alleged that the copies of the MAN that had been removed had been removed from The Dispatch's newspaper racks.

On August 25, 1997, Plaintiffs-Appellees filed their First Amended Verified Complaint (Amended Complaint) against Defendants-Appellants in which they alleged, in relevant part, that:

8. In the course of that competition Defendants conspired among themselves and with others to drive Plaintiffs out of business by seizing and removing Plaintiff's [sic] newspapers from certain locations and replacing them with Defendants' newspapers.

9. Defendants' conduct above described has permanently deprived Plaintiff [sic] of such seized merchandise.

. . . .

12. Defendants' conduct above described is an unfair and deceptive business practice pursuant to Chapter 480 Hawaii Revised Statutes.

The Amended Complaint sought general damages, special damages, attorney fees, costs, and interest, and that "[a]n order be issued, pursuant to HRS, [sic] § 480-13, enjoining the Defendants from continuing the unfair methods of competition and unfair or deceptive acts[,] specifically the theft and replacement of Plaintiff's [sic] newspapers by Defendants[.]"

On August 10, 1998, Plaintiffs-Appellees filed a "Notice of Limitation of Claims," withdrawing all of their damage claims except for alleged "economic injury arising from the loss of value of the newspapers on the occasions that they were taken."

As noted by Plaintiffs-Appellees in Plaintiff[s'] Trial Memorandum filed on December 21, 1998,

Plaintiffs filed their lawsuit against defendants seeking common law and statutory damages for the unfair business practices of defendant in taking stacks of plaintiffs['] newspaper from various distribution sites on the island of Molokai and replacing them with copies of defendants['] newspaper.

. . . .

To the extent that the statutes apply to this case plaintiffs seek the minimum \$1,000.00 in damages from defendant and its reasonable attorneys fees to prosecute this action. Plaintiffs seek the same damages for their common law claims.

A jury-waived trial was held on December 21, 1998. The circuit court's Findings of Fact, Conclusions of Law and Order were filed on May 20, 1999.² In its Findings of Fact (FSofF), the circuit court found, in relevant part, that Peabody did not place copies of the MAN in newspaper racks owned by The Dispatch, and, when copies of the MAN were found missing, a stack of The Dispatch would be found in their place. The FSofF also found, in relevant part, as follows:

² The Order of the circuit court's May 20, 1999 Findings of Fact, Conclusions of Law and Order states as follows:

Judgment shall be entered in favor of plaintiffs and against defendants in the amount of \$1,000.00 plus reasonable attorneys fees in the amount of \$10,330.25 and costs in the amount of \$455.30 for a total fees and costs of \$10,785.55 with statutory interest of 10% per annum.

15) Ms. Susan Carothers is the owner of the Airport Bar and Grill at the Moloka'i Airport.

16) On July 18, 1996, she . . . observed Gerry Anderson walk out of the Cook House Restaurant with a stack of the MAN and put them into his car. . . .

17) Ms. Carothers confronted Mr. Anderson and told him that he could not take those newspapers, of Mr. Peabody, because they were not his and it was not right. Mr. Anderson told her that he could take them and then drove off. . . .

. . . .

20) Sometime in November, 1998, Mr. Anderson approached Ms. Carothers at her business at the Moloka'i Airport and asked her to withdraw her affidavit.

21) On several occasions Ms. Carothers observed Mr. Anderson to pick up stacks of the MAN from the hotel lobby of the Kaluakoi Resort and replace them with his own newspaper. He took them from a wooden shelf where other newspapers were placed.

. . . .

24) Ms. Linda Hoskinson . . . was a sales representative for Friendly Isle Tours on Moloka'i. . . .

25) On Ms. Hoskinson's tour desk were copies of the MAN which she kept there for distribution.

26) On January 7, 1994, Ms. Hoskinson saw a man pick up a stack of 15 or 20 copies of the MAN off of her desk and toss them into the wastebasket. He replaced them with copies of the Dispatch. She ran after him and confronted him about throwing the MAN away. He identified himself as Mr. Anderson the owner of the Dispatch. She retrieved the papers from the wastebasket and returned them to the travel desk.

The Conclusions of Law (CsOL) state, in relevant part,
as follows:

1) [Hawai'i Revised Statutes] Chapter 480 applies to both consumers and competing business, Kukui Nuts of Hawaii, Inc. v. R. Baird & Co., Inc., 7 Haw.App. 598, 610, 789 P.2d 501, 510 (Hawai'i App. 1990).

2) It is an unfair and deceptive trade practice for defendant Gerry Anderson to remove stacks of plaintiffs' newspaper, the MAN, from its distribution sites.

3) It is an unfair and deceptive trade practice for defendant Gerry Anderson to remove stacks of plaintiffs' newspaper, the MAN, from its distribution sites and replace them with copies of The Dispatch.

. . . .

8) The removal of the MAN newspapers from its distribution sites by defendant Gerry Anderson caused damages to the plaintiffs.

9) Pursuant to Hawai'i Revised Statutes § 430-13(a) [sic] plaintiffs are entitled to the minimum damages of \$1,000.00, plus reasonable attorneys fees and costs of suit.

POINTS ON APPEAL

The following are the questions on appeal:

1. Is COL no. 1 wrong? Do the facts provide Plaintiffs-Appellees with statutory standing to assert an action for unfair and deceptive business practice or unfair competition pursuant to HRS Chapter 480?

2. Are CsOL nos. 2 and 3 wrong? Did the conduct of Defendants-Appellants constitute an unfair and deceptive trade practice?

3. Is COL no. 8 wrong? Is there evidence that Plaintiffs-Appellees suffered "economic injury arising from the loss of value of the newspapers on the occasions that they were taken[?]"

4. Is COL no. 9 wrong? Did the circuit court err in awarding damages, attorney fees, and costs to Plaintiffs-Appellees?

STANDARD OF REVIEW

Hawai'i appellate courts review conclusions of law *de novo*, under the right/wrong standard. See Associates Fin. Services Co. of Hawai'i, Inc. v. Mijo, 87 Hawai'i 19, 28, 950 P.2d 1219, 1228 (1998). "Under the right/wrong standard, this court

'examine[s] the facts and answer[s] the question without being required to give any weight to the trial court's answer to it.'" Estate of Marcos, 88 Hawai'i 153, 963 P.2d 1129 (1998) (citation omitted). Robert's Hawai'i School Bus, Inc. v. Laupahoehoe Transportation Co., Inc., 91 Hawai'i 224, 239, 982 P.2d 853, 868 (1999).

DISCUSSION

A.

Standing to Assert Claims Under HRS Chapter 480 (1993)

1. Unfair and Deceptive Business Practices

Defendants-Appellants contend that COL no. 1 is wrong because, when the alleged cause of action arose, HRS Chapter 480 permitted only a "consumer" to bring an action based on unfair or deceptive acts or practices and none of the Plaintiffs-Appellees is a "consumer" within the meaning of HRS Chapter 480.

In response, Plaintiffs-Appellees cite Kukui Nuts of Hawai'i, Inc. v. R. Baird & Co., Inc., 7 Haw. App. 598, 789 P.2d 501, 510 (1990), in support of their position that HRS Chapter 480 applies to both consumers and competing businesses. Kukui, however, interprets and applies HRS § 480-2 (1985). In 1987, the legislature amended HRS § 480-2 to exclude competing businesses, leaving only claims brought by "a consumer, the attorney general or the director of the office of consumer protection[.]" Robert's, 91 Hawai'i at 251, 982 P.2d at 880. The cause of

action alleged in this case on appeal occurred after the 1987 amendment.

In its entirety, HRS § 480-2 (1985) stated as follows: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful."

In contrast, HRS § 480-2 (1993) states, in relevant part, as follows:

Unfair competition, practices, declared unlawful.

(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

. . . .

(d) No person other than a consumer, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices declared unlawful by this section.

HRS § 480-13(a)(1) (1985) stated, in relevant part, as follows: "Any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter . . . [m]ay sue for damages sustained by the person[.]"

In contrast, HRS § 480-13 (1993)³ states, in relevant part, as follows:

Suits by persons injured; amount of recovery, injunctions.

(a) Except as provided in subsections (b) and (c), any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by this chapter:

(1) May sue for damages sustained by the person,
. . . .

³ Although HRS § 480-13(a)(1) (1993) does not expressly say so, the HRS § 480-2(d) restriction is applicable. Therefore, HRS § 480-13(a)(1) implicitly also says: "(a) Except as provided in HRS § 480-2(d)[.]" See footnote 4 infra.

. . . .

(b) Any consumer who is injured by an unlawful or deceptive act or practice forbidden or declared unlawful by section 480-2:

(1) May sue for damages sustained by the consumer[.]

HRS § 480-1 (1993) defines "consumer" as "a natural person who, primarily for personal, family, or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

The legislative history of HRS § 480-2 (1993) clearly indicates that the purpose of limiting standing to a "[c]onsumer" was to "preclud[e] [the clause's] application to private disputes between businessmen." Senate Standing Committee Report No. 1056 reprinted in 1987 Hawai'i Senate Journal at 1345; Conference Committee Report No. 104 reprinted in 1987 Hawai'i House Journal at 1053.

The publication and distribution of the MAN is a business. Peabody conducts business as the owner and publisher of the MAN. There is no evidence that one or more of Plaintiffs-Appellees is a "[c]onsumer" as defined in HRS § 480-1 (1993). This lack of evidence is fatal to the claim asserted by Plaintiffs-Appellees.

Nor can Peabody qualify as a "[c]onsumer" in his individual capacity. The legislative history of § 480-2 clearly indicates that the purpose of defining the word "[c]onsumer" as

"[a] natural person . . . who commits money, property, or services in a personal investment" was to protect "people who had invested in bogus financial schemes," not to protect shareholders whose corporations had been harmed by deceptive practices of a business competitor. See House Standing Committee Report No. 716-90, reprinted in 1990 House Journal at 1113 (explaining why the word "personal" was placed before the word "investment"). It logically follows that allowing suits by business owners or shareholders when the business itself is barred from bringing suit would defeat the purpose of the standing limitation expressed in HRS § 480-2(d). Paulson v. Bromar, 775 F. Supp. 1329, 1339 (D. Haw. 1991).

Plaintiffs-Appellees assert their cause of action as business competitors of The Dispatch, not as consumers. Therefore, Plaintiffs-Appellees lack standing to assert a claim of unfair and deceptive trade practice under HRS § 480-2.

2. Unfair Competition

Although the circuit court neglected this alternative theory, Defendants-Appellants' also assert that Plaintiffs-Appellees lack standing to pursue a cause of action for unfair methods of competition.

The Hawai'i Supreme Court expressly held HRS §§ 480-2 and 480-13 devoid of any private right of action for unfair methods of competition. Robert's, 91 Hawai'i at 251, 982 P.2d at

880. In so holding, the supreme court noted the importance of interpreting HRS § 480-2 in such a way as to "avoid constructions . . . which might chill competition, rather than foster it." Id., at 252, 982 P.2d at 881. The court held that permitting businesses to bring suits against their competitors for unfair methods of competition would fail to promote the policy considerations at stake. It concluded that suits based on unfair methods of competition are best left to the Fair Business Practices Department of the Attorney General.⁴

B.

Common Law Claim

As noted above, Plaintiffs-Appellees sought "common law . . . damages for the . . . practices of defendant in taking stacks of plaintiffs['] newspaper from various distribution sites on the island of Molokai[.]" Although COL no. 8 is a substantial start, the circuit court did not decide this alternative common law claim asserted by Plaintiffs-Appellees. On remand, it must do so.

⁴ Although HRS § 480-13(a)(1) (1993) provides that "any person who is injured in the person's business or property by reason of anything forbidden or declared unlawful by [chapter 480]: (1) May sue for damages sustained by the person . . . ," the Hawai'i Supreme Court concluded that the legislature did not intend to extend HRS § 480-13 to claims for unfair methods of competition. Robert's Hawai'i School Bus v. Laupahoehoe, 91 Hawai'i 224, 250-51, 982 P.2d 853, 879 (1999).

CONCLUSION

Accordingly, we vacate the circuit court's (a) June 17, 1999 Judgment and (b) the following of its May 20, 1999 Findings of Fact, Conclusions of Law and Order: the Order and all of the Conclusions of Law, except Conclusion of Law no. 8. We remand for (1) dismissal of the HRS Chapter 480 claims and (2) for additional findings, conclusions, and a judgment with respect to the alternative common law claim asserted by Plaintiffs-Appellees.

DATED: Honolulu, Hawai'i, November 29, 2000.

On the briefs:

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| Francis M. Nakamoto and Diane W. Wong (Ayabe, Chong, Nishimoto, Sia & Nakamura, of counsel) for Defendants-Appellants. | Chief Judge |
| | Associate Judge |
| Steven Booth Songstad for Plaintiffs-Appellees. | |
| | Associate Judge |