NOT FOR PUBLICATION

NO. 23848

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

CHARLES W. DAVIS AND EVELYN DAVIS, Plaintiffs-Appellants, v. ASSOCIATION OF APARTMENT OWNERS OF KONA PLAZA, a Condominium Association; GERALD LARSON; PARADISE MANAGEMENT CORPORATION, a Hawaii corporation; MICHAEL CETRARO; and ROBERT M. DENNIS; Defendants-Appellees, and HERBERT HUBER; GARY BENEDICT; KIM WHITMAN; DONALD DICKINSON; JUANITA WESTGARD; RICHARD ALGER; WATTIE MAY HEDEMANN and RICHARD KRUPA; Defendants.

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIV. NO. 00-1-56K)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim and Foley, JJ.)

Charles W. Davis (Davis) and Evelyn Davis (collectively, Plaintiffs) appeal the October 26, 2000 Final Judgment entered in the circuit court of the third circuit, the Honorable Ronald Ibarra, judge presiding, on orders granting summary judgment in favor of Defendants-Appellees Association of Apartment Owners of Kona Plaza (the Association), Gerald Larson (Larson) and Paradise Management Corporation (PMC), and Michael Cetraro (Cetraro) and Robert M. Dennis (Dennis), respectively, on a March 15, 2000 complaint brought by the Plaintiffs, whilom apartment owners at the Kona Plaza condominium project (the Project) in downtown Kailua-Kona on the Big Island.

Davis filed his notice of appeal *pro se* and also on behalf of Evelyn Davis. Because Davis was not an attorney licensed to practice in the State of Hawaiʻi, he was not

permitted to file a notice of appeal on behalf of Evelyn Davis:

> It is true, of course, that natural persons who may be unfamiliar with rules of law and the practice of courts are permitted . . . to appear *pro se* in our courts. It is equally true, nevertheless, that such natural persons are not permitted to act as "attorneys" and represent other natural persons in *their* causes.

Oahu Plumbing & Sheet Metal, Ltd. v. Kona Constr., Inc., 60 Haw. 372, 376-77, 590 P.2d 570, 573 (1979) (citations omitted; italics in the original). We therefore affirm as to Evelyn Davis.[1] For the following reasons, we affirm as to Davis as well.

I. Background.

On November 14, 1995, Plaintiffs filed a complaint (the Old Complaint) commencing a previous action in the third circuit involving the Project (Civil No. 95-297K). The Old Complaint named as defendants the Association; PMC, the property manager for the Association; and the directors of the Association then in office, Herbert Huber, Gary Benedict, Kim Whitman, Donald Dickinson and Juanita Westgaard (collectively the Former Directors), and charged that the defendants "have committed and are continuing to commit waste on [the Project] and other torts related thereto."

Plaintiffs alleged in the Old Complaint that they were resident owners of units 403 and 404 of the Project. They acquired their units in March 1988. Plaintiffs conducted a mail-

[1] We observe that Charles W. Davis also filed the complaint and all ensuing pleadings below *pro se* and on behalf of Evelyn Davis.

order business out of their residence that supplied books -- some "rare, unusual and out-of-print" -- to customers worldwide. Starting in November 1988, Plaintiffs rented storage space from the Association to store inventory for their business. Sometime in 1992, due to "age, physical condition and financial situation," Plaintiffs decided to close their business and sell their units, but discovered that many realtors were unwilling to list their property and that lending institutions were reluctant to provide mortgage financing for units at the Project. Plaintiffs also discovered that the likely sales price for their units was "substantially less" than "comparable units in other condominium projects in the area." Plaintiffs attributed these problems to "the fact that [the Project] is well-known in the local community as having a [sic] unfavorable reputation due to poor management, and the fact of obvious, visible physical deterioration of the structure of [the Project]."

Responsibility for maintenance of the common areas of the Project lay with the Association, which contracted with PMC to carry out this responsibility. Problems at the Project alleged in the Old Complaint included water infiltration, which caused damage to the Project, both saliently superficial and insidiously structural; and "frequent severe flooding" in the basement of the Project, where the parking and storage areas are located. The flooding damaged business and personal property the

Plaintiffs had stored in the basement. Also mentioned was the practice of turning off the "common element" of air conditioning during certain hours each day, in order to save money. Plaintiffs repeatedly asked the defendants to rectify these problems, but were rudely rebuffed each time. Plaintiffs charged that the Association only cosmetically addressed the water infiltration problem, and that its refusal to apply effective remedy was "willful and negligent[.]" In an attempt to mitigate their damages and convince the defendants to take their complaints seriously, Plaintiffs stopped paying maintenance and utility fees to the Association. As a result, the Association filed a foreclosure action against the Plaintiffs (the Foreclosure Action). Plaintiffs claimed the defendants brought the Foreclosure Action in order to "oppress and harass Plaintiffs into selling [their units] at a 'fire-sale' price, so that Defendants would no longer be subject to Plaintiffs' attempts to bring Defendants' actions to the attention of the proper authorities[.]"

Upon the foregoing allegations, Plaintiffs stated numerous causes of action in the Old Complaint: (1) waste, (2) breach of fiduciary duty, (3) negligence, (4) violation of Hawaii Revised Statutes (HRS) ch. 514A (1993 & Supp 2002) (the "Condominium Property Act"), (5) unfair and deceptive trade practices under HRS § 480-13 (1993 & Supp. 2002), (6) intentional

infliction of emotional distress, (7) punitive damages, and (8) injunctive relief.

On July 22, 1997, the court entered a final judgment on summary judgments, in favor of the defendants on all claims Plaintiffs asserted in the Old Complaint. Plaintiffs did not appeal this final judgment.

On March 15, 2000, Plaintiffs commenced this action (Civil No. 00-01-0056K) with another complaint in the third circuit involving the Project (the New Complaint). The New Complaint named the same defendants sued in the Old Complaint (the Association, PMC and the Former Directors), and added defendants Larson, president of PMC; Richard Alger (Alger); Wattie Mae Handemann (Handemann); Richard Krupa (Krupa); and Cetraro and Dennis. The New Complaint made it clear that the Former Directors were being sued in their former capacity as directors of the Association, and that Alger, Handemann, Krupa, Cetraro and Dennis (collectively, the Current Directors) were being sued as the current directors of the Association.

To a very large extent, the New Complaint was the Old Complaint. With the exception of the omission of a cause of action for injunctive relief, the New Complaint stated the same causes of action raised in the Old Complaint: (1) waste, (2) breach of fiduciary duty, (3) negligence, (4) violation of HRS ch. 514A, (5) unfair and deceptive trade practices under HRS

§ 480-13, (6) intentional infliction of emotional distress, and (7) punitive damages. In addition, the bulk of the substantive allegations in the New Complaint corresponded precisely to those in the Old Complaint. To illustrate, the following are substantively-matching pairs of paragraphs from the fifty-nine paragraph New Complaint and the forty-eight paragraph Old Complaint, respectively, many of which are identical or virtually verbatim twins: (1:1), (2:2), (4:3), (5:6), (6:4), (8:5), (17:7), (20:8), (22:9), (24:11), (25:12), (26:13), (27:14), (28:15), (29:16), (30:17), (32:18), (33:19), (34:20), (35:21), (37:23), (38:24), (39:25), (43:28), (44:29), (46:31), (47:32), (49:34), (50:35), (52:37), (53:38), (54:39), (55:40), (56:41), (57:42) and (59:44).

The New Complaint contained only three substantive allegations not found in the Old Complaint. First, the New Complaint charged that Larson and PMC mismanaged the financial, record-keeping, bookkeeping, governance, maintenance, litigation and contracting functions of the Association, and did so fraudulently and covertly in order to misappropriate and convert funds of the Association and to conceal their malfeasance.

Second, the New Complaint claimed that the defendants removed Davis from the Association's board of directors without due process or proper notice. Plaintiffs alleged that, while Davis was a director, "[h]is requests to inspect books and

records and to question and review various policies and practices were consistently rebuffed or rejected by Defendants, and [he] was the target of threats and intimidation."

Third, the New Complaint alleged that the defendants committed a "breach of fiduciary duty" by removing "old and rare books" belonging to the Plaintiffs from the common area of the Project where the books were stored and converting the books or their sales proceeds. Plaintiffs averred that Davis had previously seen the defendants tampering with the books and had instructed them not to touch the books.

In the course of litigation on the New Complaint, the Former Directors,[2] along with Current Directors Alger, Handemann and Krupa, were dismissed as defendants for want of service. Thereafter, the only Current Directors remaining as defendants under the New Complaint were Cetraro and Dennis.

The Association filed a motion for summary judgment on July 31, 2000. Cetraro and Dennis followed suit on August 2, 2000. PMC and Larson filed a joinder in the Association's motion for summary judgment on August 11, 2000. On August 17, 2000, the Association joined in the motion for summary judgment filed by Cetraro and Dennis.

The court held a hearing on both motions for summary judgment on August 21, 2000. On September 19, 2000, the court

[2] On April 27, 2000, a suggestion of death upon the record -- of Herbert Huber on or about November 27, 1996 -- was filed.

filed an order granting the motion brought by Cetraro and Dennis. On September 26, 2000, the court filed an order granting the Association's motion for summary judgment, as well as the joinder in the motion filed by PMC and Larson. The court based the latter order on the doctrines of *res judicata* and collateral estoppel, and on the applicable statutes of limitations. The court entered its final judgment on the New Complaint on October 26, 2000, in favor of all defendants on all claims made by the Plaintiffs. Davis filed a timely notice of appeal on October 27, 2000.

II. Standard of Review.

We review *de novo* a circuit court's grant or denial of a motion for summary judgment. Hawaii Cmty. Fed. Credit Union v. Keka, 94 Hawai'i 213, 221, 11 P.3d 1, 9 (2000). Accordingly,

> [o]n appeal, an order of summary judgment is reviewed under the same standard applied by the circuit courts. Summary judgment is proper where the moving party demonstrates that there are no genuine issues of material fact and it is entitled to a judgment as a matter of law. In other words, summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law.

Pancakes of Hawaii, Inc. v. Pomare Props. Corp., 85 Hawai'i 286, 291, 944 P.2d 83, 88 (App. 1997) (citation and block quote format omitted). See also Hawai'i Rules of Civil Procedure (HRCP) Rule 56(c).

III. Discussion.

It is a well-pedigreed principle that *res judicata* bars subsequent relitigation of an action if

> three questions [can be] answered in the affirmative: First, was the issue decided in the prior adjudication identical with the one presented in the action in question? Second, was there a final judgment on the merits? And third, was the party against whom the plea of *res judicata* is asserted a party or in privity with a party to the prior adjudication?

State v. Magoon, 75 Haw. 164, 190-91, 858 P.2d 712, 725 (1993) (brackets, citation and internal quotation marks omitted). See also Aloha Unlimited, Inc. v. Coughlin, 79 Hawai‘i 527, 537, 904 P.2d 541, 551 (App. 1995) ("Under the doctrine of *res judicata*, the concept of privity is merely a word used to say that the relationship between the one who is a party of record and another is close enough to include that other within the res ajudicata [sic]." (Citation, internal quotation marks, original brackets and ellipsis omitted.)). Further, *res judicata*

> precludes the relitigation, not only of the claims that were actually litigated in the first action, but also of all grounds of claim and defense that might have been properly litigated in the first action but were not litigated or decided.

Magoon, 75 Haw. at 190, 858 P.2d at 725 (brackets, citations and internal quotation marks and block quote format omitted). See also Coughlin, 79 Hawai‘i at 537, 904 P.2d at 551.

Clearly, the New Complaint was *res judicata* as to the Association and PMC, to the major extent that its allegations were identical to those previously stated in the Old Complaint

against the Association, PMC and the Former Directors. Magoon, 75 Haw. at 190-91, 858 P.2d at 725; Coughlin, 79 Hawai‘i at 536, 904 P.2d at 550. These same allegations against Cetraro and Dennis were also *res judicata*. Cetraro and Dennis were sued in the New Complaint merely because they succeeded the Former Directors as Current Directors, and the New Complaint made no allegations that were specific to Cetraro and Dennis and not based solely on their successor status. Indeed, it was not disputed that Cetraro and Dennis first became directors long after the Plaintiffs had lost their units in the Project to foreclosure. See discussion, infra. Hence, the privity proviso of the doctrine of *res judicata* applied. Magoon, 75 Haw. at 191, 858 P.2d at 725 (holding that *res judicata* binds a party whose predecessors in interest were parties to a previous action in which identical real property issues were finally decided). By the same token, the same allegations against Larson were also *res judicata*, because the New Complaint made it clear they were mere alter ego allegations vis ´a vis PMC:

> 9. Defendant PMC was the managing agent of Kona Plaza since on or about 1979. [Larson] and PMC acted in conspiracy as alleged herein, and PMC was a sham for [Larson's] wrongful conduct as alleged herein.

Coughlin, 79 Hawai‘i at 537, 904 P.2d at 551 ("[plaintiff's] own pleadings demonstrate" that defendant, which was a sole proprietorship or wholly-owned corporation of a counterclaim defendant in a previous action finally decided, was bound by the

previous action because it was in privity with the counterclaim defendant for purposes of *res judicata*).

Only the three new allegations we have identified in the New Complaint remain for our consideration. Of these allegations, Davis's grievance regarding his removal as a director of the Association was, again, *res judicata*, for it was not disputed below that Davis was deposed on November 1, 1989, such that claims related thereto "might have been properly litigated" under the November 14, 1995 Old Complaint. Magoon, 75 Haw. at 190, 858 P.2d at 725 (citations, internal quotation marks and block quote format omitted). See also Coughlin, 79 Hawai‘i at 537, 904 P.2d at 551.

The other two new allegations made in the New Complaint -- (1) mismanagement, misappropriation and conversion of Association business and assets by PMC and Larson; and (2) conversion by the defendants of rare books belonging to the Plaintiffs -- were barred by the applicable statutes of limitations. As Davis acknowledges, the New Complaint "arises from plaintiffs' ownership of a unit in the Kona Plaza Condominiums in downtown Kailua-Kona, Hawai[‘]i County." However, a decree of foreclosure was filed in the Foreclosure Action on August 9, 1993, and thereupon, as the decree provided, the court commissioner appointed in the decree assumed "all equitable and legal title" to the Plaintiffs' units in the

Project pending foreclosure sale. See also The First Trust Co. of Hilo, Ltd. v. Reinhardt, 3 Haw. App. 589, 592, 655 P.2d 891, 893 (1982) ("In judicial sales, the court is the vendor." (Citation omitted.)). Thereupon as well, all actionable wrongdoing on the part of the defendants abated and accrued vis ´a vis Davis, Blair v. Ing, 95 Hawai'i 247, 264, 21 P.3d 452, 469 (2001) (under "the traditional 'occurrence rule,' . . . the accrual of the statute of limitations begins when the negligent act occurs or the contract is breached"), for even if we concede Davis's argument on appeal that the wrongdoing by PMC and Larson is a continuing tort countenanced by the Association, any duty any of the defendants owed to Davis ended when foreclosure extinguished Davis's ownership interest in the Project. See Anderson v. State, 88 Hawai'i 241, 247, 965 P.2d 783, 789 (App. 1998) ("A continuing tort sufficient to toll a statute of limitations is occasioned by continual unlawful acts, not by continual ill effects from an original violation, and for there to be a continuing tort there must be a continuing duty." (Citation and block quote format omitted; emphasis supplied.)).

Hence, the last to run of the conceivably applicable statutes of limitations ran six years after the decree of foreclosure was entered, or in 1999. See HRS § 657-1(4) (1993) (six-year statute of limitations for "[p]ersonal actions of any nature whatsoever not specifically covered by the laws of the

State"); Au v. Au, 63 Haw. 210, 217, 626 P.2d 173, 179 (1981) ("the relevant [six-year] limitations period for fraudulent representation is governed by HRS § 657-1(4)"); HRS § 657-1(1) (1993) (six-year statute of limitations for "[a]ctions for the recovery of any debt founded upon any contract, obligation, or liability"); Au, 63 Haw. at 219, 626 P.2d at 180 (contract claims are governed by the six-year limitations period of HRS § 657-1(1)); HRS § 657-7 (1993) (two-year statute of limitations for "[a]ctions for the recovery of compensation for damage or injury to persons or property"); Russell v. Attco, Inc., 82 Hawai'i 461, 462, 923 P.2d 403, 404 (1996) ("[HRS] § 657-7 (1993) . . . prescribes the two-year statute of limitations applicable to tort actions" (footnote omitted)); HRS § 480-24(a) (1993) ("action to enforce a cause of action arising under this chapter shall be barred unless commenced within four years after the cause of action accrues").

Davis argued below, and asserts on appeal, that the defendants cannot avail themselves of the applicable statutes of limitations, because "there was also an ongoing pattern of concealment which has never ceased." We disagree. Tolling by virtue of concealment of a cause of action by a defendant[3] is not

[3] Hawaii Revised Statutes § 657-20 (1993) provides:

> If any person who is liable to any of the actions mentioned in this part or section 663-3, fraudulently conceals the existence of the cause of action or the

(continued...)

available where the plaintiff nonetheless knew of the wrongdoing. "If there is a known cause of action there can be no fraudulent concealment[.]" Au, 63 Haw. at 216, 626 P.2d at 178 (citation, block quote format and original emphasis omitted). Here, the alleged mismanagement at the Project and concealment thereof by the defendants were known to Davis even before he filed his Old Complaint in 1995 -- indeed, Davis alleged in his Old Complaint that the Foreclosure Action was one device the defendants had used to thwart "Plaintiff's attempts to bring Defendants' actions to the attention of the proper authorities[.]"

In his opening brief, Davis also brandishes several words of unexplained legal significance, such as "equitable tolling," "equitable estoppel" and "manifest injustice." However, because Davis did not raise these issues below, and because the issues are not "of great public importance[,]" we will not attempt to parse or consider them on appeal. State Farm Mut. Auto. Ins. Co. v. Dacanay, 87 Hawai'i 136, 145 n.14, 952 P.2d 893, 902 n.14 (App. 1998).

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[3](...continued)

> identity of any person who is liable for the claim from the knowledge of the person entitled to bring the action, the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered, the existence of the cause of action or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

See also Au v. Au, 63 Haw. 210, 215, 626 P.2d 173, 178 (1981) ("Fraudulent concealment involves the actions taken by a liable party to conceal a known cause of action.").

IV. Conclusion.

We conclude the court did not err in granting the motions for summary judgment. Therefore, the October 26, 2000 final judgment of the court recumbent thereon is affirmed.

DATED: Honolulu, Hawaii, September 30, 2003.

On the briefs:

Charles W. Davis and Evelyn Davis, plaintiffs-appellants, *pro se*. — Acting Chief Judge

Sidney K. Ayabe and Rodney K. Nishida, for defendant-appellee, Association of Apartment Owners of Kona Plaza. — Associate Judge

Eric T. W. Kim and Arthur H. Kuwahara, for defendants-appellees Gerald Larson and Paradise Management Corporation. — Associate Judge

Lissa H. Andrews and Eric T. Krening, for defendants-appellees, Michael Cetraro and Robert M. Dennis.