

NO. 26151

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, *ex rel*, BRUCE R. KNAPP,  
*Qui Tam* Plaintiff/Cross-Appellee,

and

BEVERLY J. PERRY, on behalf of herself and all  
others similarly situated, Class Action Plaintiff-  
Appellant/Cross-Appellee,

vs.

THE AES CORPORATION and AES HAWAII, INC  
Defendants-Appellees/Cross-Appellants,

and

HAWAIIAN ELECTRIC COMPANY, INC. and HAWAIIAN  
ELECTRIC INDUSTRIES, INC., Defendants-  
Appellees/Cross-Appellees.

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STATE OF HAWAII  
APPELLATE COURTS  
L.M. RIMANDO

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 01-1-3487-12)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Acoba, and Duffy, JJ.; Circuit  
Judge Cardoza, in place of Nakayama, J., recused)

The instant case arises out of the alleged misconduct between a regulated public utility supplying electricity and an independent electric power producer that resulted in the construction of an "unnecessary" and "costly" electricity generating plant. As a result of the construction of the electricity generating plant, consumers on the island of O'ahu, including the State of Hawai'i (State), allegedly pay "unnecessary" and "inflated" prices for electricity. A complaint

was filed by Bruce R. Knapp,<sup>1</sup> as a qui tam plaintiff, asserting a claim for violations of the State False Claims Act, HRS § 661-21, et seq., against defendants-appellees Hawaiian Electric Company, Inc. (HECO) and Hawaiian Electric Industries, Inc. (HEI) and defendants-appellees/cross-appellants AES Hawaii, Inc. (AES-HI) and The AES Corporation (AES) [hereinafter, collectively, Appellees]. Subsequently, plaintiff-appellant Beverly J. Perry, a consumer of electricity, on behalf of herself and all others similarly situated, along with Knapp, filed a first amended complaint against Appellees. Therein, Perry asserted the following three claims: (1) violations of HRS § 480-2 (1993) (relating to unfair and deceptive acts and practices); (2) unjust enrichment/restitution; and (3) fraud. Sometime thereafter, HECO and HEI filed a motion to dismiss the first amended complaint. The Circuit Court of the First Circuit, the Honorable Eden Elizabeth Hifo presiding, entered an order, dismissing Perry's three claims on the basis that they were barred by the applicable statutes of limitations.

Perry appeals from the circuit court's September 17, 2003 judgment entered in favor of Appellees. On appeal, Perry argues that the circuit court erred in dismissing the first amended complaint based on the statute of limitations and the doctrine of primary jurisdiction. AES and AES-HI cross-appeal, challenging the circuit court's denial of their motion to dismiss

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<sup>1</sup> Knapp is not a party to the instant appeal.

the first amended complaint. Essentially, AES and AES-HI contend that there are two additional bases to affirm the circuit court's judgment.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the parties' contentions as follows.

(1) Perry contends that the circuit court erred in dismissing her HRS § 480-2 claim based on the applicable statute of limitations.<sup>2</sup> Perry argues -- allegedly for the first time on appeal -- that the circuit court failed to consider the policies underlying an HRS § 480-2 claim. Perry also asserts that the circuit court erred in not applying "the clear language, context, and intent" of HRS §§ 480-2, -3.1 (1993), and -24(a). Specifically, Perry apparently "argues" that both HRS §§ 480-3.1 and -24(a) contain essentially similar language, i.e., that "violation of HRS § 480-2 continues daily until corrected."

HECO and HEI point out that Perry's contention that the circuit court should have considered the policies underlying an HRS § 480-2 claim is raised for the first time on appeal.<sup>3</sup> Nevertheless, HECO and HEI argue that "the plain and unambiguous statute of limitations provisions in HRS § 480-24(a) cannot be disregarded in favor of policy considerations underlying an HRS

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<sup>2</sup> On appeal, Perry does not challenge the circuit court's dismissal of her unjust enrichment/restitution and fraud claims.

<sup>3</sup> On March 19, 2004, AES-HI and AES filed a joinder in HECO and HEI's opening brief.

§ 480-2 claim." In addition, HECO and HEI contend that Perry's reliance on HRS § 480-3.1 -- also raised for the first time on appeal -- is misplaced because section 480-3.1 governs the "civil penalty" that may only be imposed "in a civil action brought by the attorney general or the director of the office of consumer protection on behalf of the state." As such, HECO and HEI argue that Perry "lacks standing to enforce the remedies provided in HRS § 480-3.1."

Ordinarily, "failure to raise or properly preserve issues at the trial level would be deemed waived." Enoka v. AIG Hawai'i Ins. Co., 109 Hawai'i 537, 546, 128 P.3d 850, 859 (2006) (internal quotation marks and citation omitted). As previously stated, HECO and HEI maintain that Perry never raised her "HRS § 480-2 policy argument" and "HRS § 480-3.1 argument" at the trial level. In opposition to HECO and HEI's motion to dismiss, Perry primarily argued that the "continuing violation exception" contained in HRS § 480-24 applies to the facts of this case. Perry also contended that "[w]ell-established and fully-justified public policy will not permit claims arising from [Appellees'] continuous unlawful conduct to be time-barred." Perry does not respond to HECO and HEI's contention that she raised her arguments for the first time on appeal.

It is clear that Perry did not raise her "HRS § 480-2 policy argument" and "HRS § 480-3.1 argument" at the trial level. However, we have previously stated that, "[a]lthough we are not required to consider [an appellant's] contention made for the

first time on appeal, we will briefly address this issue to negate any belief that a meritorious claim exists against [the appellee]." Coll v. McCarthy, 72 Haw. 20, 26, 804 P.2d 881, 886 (1991). As such, we briefly address Perry's contentions to negate any belief that a meritorious argument exists.

Perry contends that, "pursuant to HRS § 480-2(b), the appellate courts are directed to give due consideration to decisions of the federal courts in interpreting HRS § 480-2." Perry cites to Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67 (1934), for the proposition that, in interpreting the federal counterpart to HRS § 480-2, i.e., 15 U.S.C. § 45, Congress intended that proceedings in the public interest be actionable "without regard to any statute of limitations." HECO and HEI contend that Perry "fails to note that 15 U.S.C. § 45, the federal counterpart to HRS § 480-2, does not contain a statute of limitations provision similar to that found in HRS § 480-24(a)." In response, Perry concedes that "[t]he FTCA [(15 U.S.C. § 45)] does not have a statute of limitation provision comparable to HRS § 480-24(a)[.]" Consequently, inasmuch as "there is no federal counterpart to section 480-24(a)," Anzai v. Chevron Corp., 168 F. Supp. 2d 1180, 1185 (D. Haw. 2001), Perry's reliance on Algoma Lumber Co. is misplaced. Thus, Perry's "HRS § 480-2 policy argument" is without merit.

Perry appears to argue that, pursuant to the latter part of HRS § 480-3.1, i.e., "[e]ach day that a violation of section 480-2 occurs shall be a separate violation[.]" the

statute of limitations was tolled under the circumstances of this case. By its plain language, HRS § 480-3.1 governs the civil penalty that "shall be collected in a civil action brought by the attorney general or the director of the office of consumer protection on behalf of the State." Inasmuch as Perry is not the attorney general nor the director of the office of consumer protection, section 480-3.1 is simply inapplicable to Perry. As such, Perry's "HRS § 480-3.1 argument" is without merit.

Because Perry fails to present any other argument with respect to the circuit court's dismissal of her HRS § 480-2 claim,<sup>4</sup> we hold that the circuit court did not err in dismissing Perry's HRS § 480-2 based on the four-year statute of limitations contained in HRS § 480-24(a).

(2) Perry next contends that the circuit court erred in dismissing the claims contained in the first amended complaint based on the doctrine of primary jurisdiction. Perry argues that

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<sup>4</sup> Perry fails to present any argument with respect to the circuit court's rejection of the applicability of the "continuing violation" exception contained in HRS § 480-24(a) and the common law continuing tort doctrine to this case. As such, Perry's contention with respect to the continuing violation exception contained in HRS § 480-24(a) and the common law continuing tort doctrine is deemed waived. See HRAP Rule 28(b)(7) (2003) ("Points not argued may be deemed waived.").

Furthermore, Perry does not present any argument with respect to the dates utilized by HECO and HEI in their memorandum in support of their motion to dismiss in order to conclude that Perry "knew or should have known of the operative facts underlying [her] current claims anywhere from 1988 to 1994, or [seven to thirteen] years before [she] commenced the instant action." Presumably, the circuit court used these dates in order to rule that the four-year statute of limitations contained in HRS § 480-24(a) barred Perry's HRS § 480-2 claim. In her reply brief, Perry simply concludes that the "[c]ircuit [c]ourt erroneously construed the four year period of limitations from the record and files at that time." However, even in her reply brief, Perry fails to present any argument as to why her HRS § 480-2 claim is not barred by the four-year statute of limitations. As such, Perry's contention that the circuit court "erroneously construed" HRS § 480-2 "from the record and files at that time" is deemed waived. See HRAP Rule 28(b)(7).

her HRS § 480-2 claim "is outside the scope of authority and jurisdiction of the PUC." HECO and HEI contend that the circuit court did not dismiss Perry's HRS § 480-2 claim based on the doctrine of primary jurisdiction, but rather, the circuit court dismissed her HRS § 480-2 claim, as well as her other claims, based solely on the applicable statute of limitations. HECO and HEI point out that the circuit court dismissed only Knapp's remaining qui tam claims based on the doctrine of primary jurisdiction, and, therefore, Perry was not aggrieved by the circuit court's ruling. As such, HECO and HEI maintain that Perry lacks standing to challenge the circuit court's ruling based on the doctrine of primary jurisdiction.

"Generally, the requirements of standing to appeal are: (1) the person must first have been a party to the action; (2) the person seeking modification of the order or judgment must have had standing to oppose it in the trial court; and (3) such person must be aggrieved by the ruling, i.e., the person must be one who is affected or prejudiced by the appealable order." Keпо'о v. Watson, 87 Hawai'i 91, 95, 952 P.2d 379, 383 (1998) (citing Waikiki Malia Hotel, Inc. v. Kinkai Prop., Ltd. P'ship, 75 Haw. 370, 393, 862 P.2d 1048, 1061 (1993)) (internal quotation marks and brackets omitted).

In the instant case, although Perry was a party to the action, she did not have standing in the circuit court to oppose the May 16, 2003 order determining that the doctrine of primary jurisdiction applied to Knapp's qui tam claims nor was she

affected or prejudiced by that order. As previously stated, Perry asserted only three claims in the first amended complaint: (1) violations of HRS § 480-2; (2) unjust enrichment/restitution; and (3) fraud. On February 20, 2003, the circuit court orally dismissed all three of Perry's claims based on the applicable statutes of limitations. The circuit court subsequently entered its written order on April 22, 2003, dismissing all three of Perry's claims based on the applicable statutes of limitations. As such, Perry no longer had any viable claims in the instant action. Approximately one month later, on May 16, 2003, the circuit court entered an order, ruling that the doctrine of primary jurisdiction applies to Knapp's remaining qui tam claims. Because the circuit court had already dismissed Perry's claims, Perry did not have standing to oppose the circuit court's ruling on May 16, 2003. Moreover, Perry was not aggrieved by the May 16, 2003 ruling inasmuch as the circuit court did not consider whether the doctrine of primary jurisdiction applied to Perry's HRS § 480-2 claim. Accordingly, we hold that Perry lacks standing to challenge the circuit court's ruling regarding the doctrine of primary jurisdiction.

(3) On cross appeal, AES-HI and AES contend that there are two additional grounds to affirm the circuit court's judgment. Specifically, AES-HI and AES allege that the circuit court's judgment can also be affirmed on the bases of preemption and exhaustion. However, AES-HI and AES state that, "[i]f the circuit court's dismissal based on statute of limitations and



primary jurisdiction is affirmed, then this cross-appeal is unnecessary." Based on the above discussion, the cross appeal is essentially moot. We, therefore, need not address the issues raised in AES-HI and AES's cross appeal. Therefore,

IT IS HEREBY ORDERED that the circuit court's September 17, 2003 judgment is affirmed.

DATED: Honolulu, Hawai'i, May 31, 2006.

On the briefs:

Lloyd Y. Asato, for class action plaintiff-appellant/cross-appellee Beverly J. Perry, on behalf of herself and all other similarly situated

Peter W. Olson (of Cades Schutte) and Rick Richmond, *pro hac vice* (of Kirkland & Ellis, Los Angeles, CA), for defendants-appellees/cross-appellants The AES Corporation and AES Hawaii, Inc.

James Kawashima, J. Douglas Ing, Gregory Y. P. Tom, and Brian A. Kang (of Watanabe Ing Kawashima & Komeiji), for defendants-appellees/cross-appellees Hawaiian Electric Company, Inc. and Hawaiian Electric Industries, Inc.

