IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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BERT VILLON and MARK APANA, Plaintiffs,

vs.

MARRIOTT HOTEL SERVICES, INC.,
dba WAILEA MARRIOTT RESORT, Defendant.

RENELDO RODRIGUEZ and JOHNSON BASLER, on behalf of themselves and all others similarly situated, Plaintiffs,

vs.

STARWOOD HOTELS & RESORTS WORLDWIDE, INC.,
dba WESTIN MAUI RESORT & SPA, Defendant.

SCCQ-11-0000747

CERTIFIED QUESTION FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI
(CIV. NOS. 08-00529 LEK-RLP and 09-00016 LEK-RLP)

JULY 15, 2013

RECKTENWALD, C.J., NAKAYAMA, AND MCKENNA, JJ.,
WITH ACOBA, J., CONCURRING AND DISSENTING SEPARATELY,
WITH WHOM CIRCUIT JUDGE CHAN, IN PLACE OF DUFFY, J., RECUSED,
JOINS

OPINION OF THE COURT BY MCKENNA, J.

I. Introduction

The United States District Court for the District of Hawaii[1] ("District Court") certified the following question[2] to this court:

> May food or beverage service employees of a hotel or restaurant bring a claim against their employer based on an alleged violation of Haw. Rev. Stat. § 481B-14 by invoking Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11 and without invoking Haw. Rev. Stat. §§ 480-2 or 480-13?

The instant certified question picks up where our opinion on a related certified question in Davis v. Four Seasons Hotel, Ltd., 122 Hawaiʻi 423, 428 n.12, 228 P.3d 303, 308 n.12 (2010) left off: "Employees also contend that Employees can enforce HRS § 481B-14 through HRS §§ 388-6, 10, and 11. However, this argument will not be addressed because it is beyond the scope of the

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[1] The Honorable Leslie E. Kobayashi, United States District Judge, presided.

[2] The District Court had also certified the following two questions to this court:

> 2. If food or beverage service employees of a hotel or restaurant are entitled to enforce Haw. Rev. Stat. [§] 481B-14 through Haw. Rev. Stat. §§ 388-6, 388-10, and 388-11, what statute of limitations applies?
> 3. May food and beverage service employees of a hotel or restaurant bring a claim under Haw. Rev. Stat. § 480-2(e) for an alleged violation of Haw. Rev. Stat. § 481B-14, where those employees have alleged that their employer's conduct has caused them injury that resulted from an unfair method of competition?

This court issued an Order on Certified Question, ordering, "without conclusively determining whether this court will answer question #1," (the instant question) that only that question is amenable to answer pursuant to Hawaiʻi Rules of Appellate Procedure Rule 13 (2011), as it "concerns the law of Hawaiʻi that is determinative of the plaintiffs' cause and that there is no clear controlling precedent in the Hawaiʻi judicial decisions." Therefore, questions 2 and 3 are not before this court.

certified question." The parties fully briefed their positions, and we also granted leave to file amicus briefs to Four Seasons Hotel, Ltd. ("Four Seasons amicus") and Raymond Gurrobat, Loretta Chong, Marti Smith, Jonalen Kelekoma, and Darren Miyasato ("Gurrobat amici"). The amici curiae have also fully briefed this court.

We now answer the certified question in the affirmative and hold that when a hotel or restaurant applying a service charge for the sale of food or beverage services allegedly violates HRS § 481B-14 (2008) (1) by not distributing the full service charge directly to its employees as "tip income" (in other words, as "wages and tips of employees"), and (2) by failing to disclose this practice to the purchaser of the services, the employees may bring an action under HRS §§ 388-6 (1993), -10 (1993 & Supp. 1999), and -11 (1993 & Supp. 1999) to enforce the employees' rights and seek remedies.

II. Background

The factual background relevant to a certified question proceeding "is based primarily upon the information certified to this court by the district court, as well as the allegations contained within [the plaintiffs' complaint]." Davis, 122 Hawaiʻi at 425, 228 P.3d at 305 (citing TMJ Hawaii, Inc. v. Nippon Trust Bank, 113 Hawaiʻi 373, 374, 153 P.3d 444, 445

(2007)(relying upon the information certified to the court by the district court and the facts set forth in the plaintiff's amended complaint).

In its Certified Questions to the Hawai'i Supreme Court from the United States District Court for the District of Hawai'i in Civ. No. 08-00529 LEK-RLP and Civ. No. 09-0016 LEK-RLP ("Certified Questions"), the District Court stated that Bert Villon and Mark Apana's ("Villon Plaintiffs") Amended Class Action Complaint and Reneldo Rodriguez, Johnson Basler, on behalf of themselves and all others similarly situated's ("Rodriguez Plaintiffs") Second Amended Complaint were before it pursuant to diversity jurisdiction in accordance with the Class Action Fairness Act. In the Villon Plaintiffs' Amended Class Action Complaint, they alleged the following facts:

> 6. For banquets, events, meetings and in other instances, the defendant [Marriott Hotel Services, Inc., dba Wailea Marriott Resort ("Marriott" or "Marriott Defendant")] adds a preset service charge to customers' bills for food and beverage provided at the hotel.
> 7. However, the defendant does not remit the total proceeds of the service charge as tip income to the employees who serve the food and beverages.
> 8. Instead, the defendant has a policy and practice of retaining for itself a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages).
> 9. The defendant does not disclose to the hotel's customers that the service charges are not remitted in full to the employees who serve the food and beverages.
> 10. For this reason, customers are misled into believing that the entire service charge imposed by defendant is being distributed to the employees who served them food or beverage when, in fact, a smaller percentage is being remitted to the servers. As a result, customers who would otherwise be inclined to leave an additional gratuity for such servers frequently do not do so because they

> erroneously believe that the servers are receiving the entire service charge imposed by the hotel.

Marriott does not dispute that Plaintiffs did not receive 100% of service charges and that this fact was not disclosed to consumers.

It appears that, at the time the District Court filed its Certified Questions, the Rodriguez Plaintiffs had filed a Third Amended Complaint, which alleged the following facts, similar to those alleged in the Villon Plaintiffs' Amended Class Action Complaint:

> 6. For banquets, events, meetings, and in its restaurant and in other instances, the defendant [Starwood Hotels & Resorts Worldwide, Inc., dba Westin Maui Resort & Spa ("Starwood" or "Starwood Defendant")] adds a preset service charge of approximately 20% to customers' bills for food and beverage provided at the hotel.
> 7. However, the defendant does not remit the total proceeds of the service charge as tip income to the employees who serve the food and beverages.
> 8. Instead, the defendant has a policy and practice of retaining for itself a portion of these service charges (or using it to pay managers or other non-tipped employees who do not serve food and beverages).
> 9. The defendant does not adequately disclose to the hotel and restaurant's customers that the service charges are not remitted in full to the employees who serve the food and beverages.
> 10. For this reason, customers are misled into believing that the entire service charge imposed by defendant is being distributed to the employees who served them food or beverage when, in fact, a smaller percentage is being remitted to the servers. As a result, customers who would otherwise be inclined to leave an additional gratuity for such servers frequently do not do so because they erroneously believe that the servers are receiving the entire service charge imposed by the hotel, or they believe that in light of the 20% service charge that no other gratuity should be paid.
> . . . .
> 13. The defendant's failure to remit the entire service charge to its employees as tip income or to disclose to its customers that the service charges [sic] is not remitted in full to its employees as tip income has resulted in the plaintiffs' loss of tip income. Plaintiffs have lost tip

> income both by not receiving the total proceeds of service charges that are legally their tip income, as well as by not receiving tip income that customers would otherwise likely leave if they were not led to believe that the wait staff was already receiving a generous gratuity (i.e.[,] the service charge on the bills).

Starwood does not dispute that Plaintiffs did not receive 100% of the service charges and that this fact was not disclosed to consumers.

Both the Villon Plaintiffs' Amended Class Action Complaint and the Rodriguez Plaintiffs' Third Amended Complaint allege the following as Count V:

> As a result of the defendant's unlawful failure to remit the entire proceeds of food and beverage service charges to the food and beverage servers, the plaintiffs have been deprived of income which constitutes wages, which is actionable under Hawaii Revised Statutes Section[s] 388-6, 10, and 11. Pursuant to those statutes, the plaintiffs hereby bring a claim of unpaid wages, including liquidated damages, interest, and attorneys' fees.

Procedurally, the certified questions arose upon the entry of the following orders in the District Court: (1) Order Administratively Terminating, Without Prejudice, Plaintiffs' Motion for Summary Judgment and Defendant's Motion to Dismiss Amended Class Action Complaint, Filed June 28, 2010, filed September 8, 2010, in Civil No. 08-00529 LEK-RLP (Villon & Apana v. Marriott Hotel Services, Inc., DBA Wailea Marriott Hotel); and (2) Order Granting Defendant's Motion to Certify Questions of Hawaiʻi State Law to the Hawaiʻi Supreme Court and Administratively Terminating, Without Prejudice, Plaintiffs' Motion for Class Certification, Plaintiffs' Motion for Partial

Summary Judgment, and Defendant's Motion for Summary Judgment, filed September 8, 2010, in Civil No. 09-00016 LEK-RLP (Rodriquez & Basler v. Starwood Hotels & Resorts Worldwide, Inc., DBA Westin Maui Resort & Spa).

III. Standard of Review

A question of law presented by a certified question is reviewable de novo under the right/wrong standard of review. Francis v. Lee Enters., 89 Hawai'i 234, 236, 971 P.2d 707, 709 (1999)(citation omitted).

IV. Discussion

A. Plain Language

Plaintiffs argue that the language of the relevant statutes, Hawai'i Revised Statutes ("HRS") §§ 481B-14, 388-1 (1993), 388-6, 388-10, and 388-11, is plain and unambiguous. "[T]he fundamental starting point for statutory interpretation is the language of the statute itself. . . . And where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning." Richardson v. City & County of Honolulu, 76 Hawai'i 46, 63, 868 P.2d 1193, 1210 (1994)(citation omitted). The plain language of HRS § 481B-14 supports the Plaintiffs' contention that undisclosed and unpaid service charges are "tips," "wages," and "compensation." HRS § 481B-14 provides:

> Hotel or restaurant service charge; disposition. Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or clearly disclose to the purchaser of the services that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

First, the statute provides that hotels and restaurants "shall distribute the service charge directly to its employees as tip income." (Emphasis added). In the alternative, HRS § 481B-14 permits hotels and restaurants to use service charges to "pay for costs or expenses other than wages and tips of employees," provided that hotels and restaurants "clearly disclose to the purchaser of the services" that this is being done. (Emphasis added). Thus, 100% of the service charge is considered to be "wages and tips of employees." Therefore, when a hotel or restaurant distributes less than 100% of a service charge directly to its employees without disclosing this fact to the purchaser, the portion withheld constitutes "tip income," synonymously phrased within HRS § 481B-14 as "wages and tips of employees."

The plain language of Chapter 388 also supports the Plaintiffs' contention that HRS §481B-14 is enforceable through HRS §§ 388-6, -10, and -11. Moreover, the provisions of Chapter 388 regarding withholding wages appear to apply, as HRS § 388-1 defines "wages" as follows:

> compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece,

> commission, or other basis of calculation. It shall include the reasonable cost, as determined by the director under chapter 387, to the employer of furnishing an employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by the employer to the employer's employee but shall not include tips or gratuities of any kind, provided that for the purposes of section 388-6, "wages" shall include tips or gratuities of any kind.

(Emphasis added). Thus, for the purpose of enforcement under HRS § 388-6 in the instant proceeding, "wages" includes service charges as "tips or gratuities of any kind,"[3] because HRS § 481B-14 defines service charges as "tip income" and "wages and tips of employees." HRS § 388-6 is entitled "Withholding of wages," and prohibits an employer from "retain[ing] . . . any part or portion of any compensation earned by the employee except where required by federal or state statute or by court process or when such . . . retentions are authorized in writing by the employee. . . ." Service charges must be "compensation earned" by the employee, because they are levied upon the consumer based upon "labor or

[3] The parties point out that this court has already addressed whether a certain type of service charge (hotel porterage fees) could constitute "gratuities of any kind" in Heatherly v. Hilton Hawaiian Village Joint Venture, 78 Hawaiʻi 351, 893 P.2d 779 (1995). In Heatherly, plaintiffs (hotel bellhops) challenged the circuit court's grant of summary judgment in favor of the hotel on the issue of whether porterage fees counted towards the employer's tip credit in determining the bellhops' minimum wage. 78 Hawaiʻi at 352, 893 P.2d at 780. Heatherly, however, is not helpful in determining whether service charges under HRS § 481B-14 are "gratuities of any kind" for two reasons. First, the Heatherly case predates the enactment of HRS § 481B-14 and is thus not helpful in interpreting that statute. Second, the Heatherly case held only, "The trade meaning of 'gratuities of any kind' is clearly a 'fact' that is material to whether the Hotels are entitled to summary judgment," and remanded the case to the circuit court for a determination of whether "porterage fees are a kind of gratuity or wages within the meaning of HRS chapter 387." 78 Hawaiʻi at 355, 359, 893 P.2d at 783, 787.

services rendered by an employee," usually in lieu of a traditional tip. HRS § 388-1.

Under HRS § 388-10, a violation of HRS § 388-6 subjects the employer to a civil penalty of twice the unpaid wages, plus interest:

> Any employer who fails to pay wages in accordance with this chapter without equitable justification shall be liable to the employee, in addition to the wages legally proven to be due, for a sum equal to the amount of unpaid wages and interest at a rate of six per cent per year from the date that the wages were due.

HRS § 388-11(a) gives employees standing to recover unpaid wages, and HRS § 388-11(c) further provides for an award of costs and attorneys' fees to prevailing employees:

> (a) Action by an employee to recover unpaid wages may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of oneself or themselves, or the employee or employees may designate an agent or representative to maintain the action.
> . . . .
> (c) The court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow interest of six per cent per year from the date the wages were due, costs of action, including costs of fees of any nature, and reasonable attorney's fees, to be paid by the defendant. . . .

It is true that HRS § 387-1 (1993) defines "wages" to exclude "tips or gratuities" of any kind, but that is solely for the purpose of calculating the "tip credit" under HRS § 387-2 (1993 & Supp. 2005), not for the purposes of allowing employers

to withhold "service charges," "wages and tips of employees," and "tip income," from employees under HRS § 388-6.[4]

Hawaiʻi Administrative Rules ("HAR") Rule § 12-20-1 is the Department of Labor and Industrial Relations ("DLIR") regulation implementing HRS § 387-1. It defines "tip" to exclude "[c]ompulsory or negotiated service charges," again, for the purpose of calculating the "tip credit" under HRS § 387-2, as follows:

> "Tip" means a sum of money determined solely by a customer and given in recognition of service performed by an employee who retains it as a gift or gratuity. It may be paid in cash, bank check, or other negotiable instrument payable at par as well as amounts transferred by employer to employee by direction of the credit customer who designates amounts to be added to the customer's bill as tips. Compulsory or negotiated service charges and special gifts in forms other than described above are not counted as tips.

HAR § 12-20-1 is over 30 years old; it became effective on October 2, 1981, nearly 20 years before HRS § 481B-14 was enacted. As such, it does not reflect the change HRS § 481B-14

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[4] HRS § 387-1 defines "wage" to mean, with emphasis added, the following:

> legal tender of the United States or checks on banks convertible into cash on demand at full face value thereof and in addition thereto the reasonable cost as determined by the department, to the employer of furnishing an employee with board, lodging, or other facilities if such board, lodging, or other facilities are customarily furnished by such employer to the employer's employees. Except for the purposes of the last sentence of section 387-2, "wage" shall not include tips or gratuities of any kind.

In turn, the last sentence of HRS § 387-2 (a statutory section setting forth Hawaiʻi's "tip credit") states:

> The hourly wage of a tipped employee may be deemed to be increased on account of tips if the employee is paid not less than 25 cents below the applicable minimum wage by the employee's employer and the combined amount the employee receives from the employee's employer and in tips is at least 50 cents more than the applicable minimum wage.

made to the definition of wages. Moreover, the plain language of HRS § 481B-14 expressly equates 100% of a "service charge" with "tip income" and "wages and tips of employees." To the extent HRS § 481B-14 has redefined service charges, HAR 12-20-1's exclusion of service charges under its definition of "tips" is "not entitled to deference if the interpretation is plainly erroneous and inconsistent with both the letter and intent of the statutory mandate." Haole v. State, 111 Hawai'i 144, 150, 140 P.3d 377, 383 (2006)(citations omitted). Further, the DLIR has never defined "gratuities of any kind," which is a category broad enough to encompass service charges. Therefore, the DLIR's regulations do not serve as a helpful aid in understanding HRS § 481B-14.

Marriott argues that the undisclosed amount of a service charge is not compensation earned but a "liquidated penalty," which "bears no relation to actual damages, if any, incurred by the employees." However, this argument speaks more to the remedy (HRS § 388-10, entitled "Penalties") rather than the right; an undisclosed and unpaid portion of a service charge is still a withheld tip or wage, actionable under Chapter 388. In sum, the plain language of HRS § 481B-14 and Chapter 388 indicates that a service charge is "compensation earned" as "tip income" or "wages

and tips of employees." Therefore, an alleged violation of HRS § 481B-14 is enforceable through Chapter 388.

B. Legislative History of HRS § 481B-14

Although resort to legislative history is not necessary when the plain language of a statute is clear, the legislative history of HRS § 481B-14 has been put at issue in these proceedings, and an examination of that history reveals that enforcement of HRS § 481B-14 through Chapter 388 was not an "absurd result" that the legislature could not have intended. See Survivors of Medeiros v. Maui Land & Pineapple Co., 66 Haw. 290, 297, 660 P.2d 1316, 1321 (1983)(observing that the plain language rule does not preclude this court from examining the legislative history to "adequately discern the underlying policy which the legislature seeks to promulgate and . . . to determine if a literal construction would produce an absurd or unjust result, inconsistent with the policies of the statute").

HRS § 481B-14 was enacted by Act 16 of the 2000 Legislative Session. 2000 Haw. Sess. Laws Act 16, at 21-22. The legislature's stated purpose in enacting the statute was as follows:

> SECTION 1. The legislature finds that Hawaii's hotel and restaurant employees may not be receiving tips or gratuities during the course of their employment from patrons because patrons believe their tips or gratuities are being included in the service charge and being passed on to the employees.
>
> The purpose of this Act is to require hotels and restaurants that apply a service charge for food or beverage

> services, not distributed to employees as tip income, to advise customers that the service charge is being used to pay for costs or expenses other than wages and tips of employees.

Id. The legislature's express findings evince a twofold concern: first, that patrons may not know that service charges may be "used to pay for costs or expenses other than wages and tips of employees"; and second, that employees "may not be receiving tips or gratuities" from these service charges. Id. This dual focus reflects the legislative evolution of H.B. 2123, the bill that eventually became Act 16.

When it was first introduced in the House, H.B. 2123, which was entitled "A BILL FOR AN ACT RELATING TO WAGES AND TIPS OF EMPLOYEES," sought only to "protect employees who receive or may receive tips or gratuities during the course of their employment from having these amounts withheld or credited to their employers." H.B. 2123, 20th Leg., Reg. Sess. (2000). H.B. 2123 proposed to amend the definition of "tips" in HRS § 387-1 to mean "gratuities in the form of money paid by a customer or added to a customer's charge either voluntarily or as a service charge by the employer." Id. The bill also proposed deleting the tip credit in HRS § 387-2. Id. It also proposed clarifying HRS § 388-1's definition of "wages" to exclude tips for all purposes. Id. Lastly, H.B. 2123 proposed to amend HRS § 388-6 so that

employers would be prohibited from withholding tips and service charges in addition to wages. Id.

H.B. 2123 was first heard by the House Committee on Labor and Employment. Although the Marriott and Starwood Defendants and the Four Seasons amicus focus on DLIR Director Lorraine Akiba's testimony that H.B. 2123 would create confusion between federal and state law, she actually testified that only a portion of the bill (the deletion of the tip credit) would create an inconsistency between federal and state tip credit provisions. Akiba also testified that including service charges in the definition of tips would conflict with HAR § 12-20-1. As explained, supra, HRS § 481B-14 trumps HAR § 12-20-1.

The ILWU's position was that tips belong to employees. For that reason only, they opposed the inclusion of service charges as "tips," because they were aware of the hotels and restaurants' practice of keeping a portion of the service charges and did not want that portion attributed to employees for withholding and income tax purposes. The Marriott and Starwood Defendants view the ILWU's testimony as supporting their argument that service charges should not be treated as tips, but a closer examination reveals that the ILWU did not want employees taxed on portions of service charges that employers kept. The ILWU also made the

contradictory point that "tips" should be considered "wages" because union dues are based on wages.

The House Committee on Labor and Employment was swayed mostly by the testimony concerning confusion over the changes to the tip credit statute. Rather than persist in its attempts to change that provision, it changed its focus and concluded "that the problem lies with consumers who may not leave tips for the service employees, mistakenly thinking that the service charge they paid were tips so they did not leave additional tips for the service employees." H. Stand. Comm. Rep. 479-00, in 2000 House Journal, at 1155. Thus, H.B. 2123's original focus on employees was expanded to include concern for uninformed consumers. The House Committee on Labor and Employment then deleted the contents of the original H.B. 2123 and inserted the following, as H.B. 2123 H.D. 1:

> A BILL FOR AN ACT RELATING TO WAGES AND TIPS OF EMPLOYEES.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:
>
> SECTION 1. The legislature finds that Hawaii's hotel and restaurant employees may not be receiving tips or gratuities during the course of their employment from patrons because patrons believe their tips or gratuities are being included in the service charge and being passed on to the employees.
>
> The purpose of this Act is to advise customers that the service charge is being used to pay for costs or expenses other than wages and tips of employees.
>
> SECTION 2. Section 481B, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:
>
> "§481B- Service charge. Any hotel or restaurant applying a service charge for the sale of food or beverage services shall distribute the service charge to its employees or else clearly disclose to the purchaser of such

> services that the service charge is being used to pay for costs or expenses other than wages and tips of employees."
>
> SECTION 3. New statutory material is underscored.
>
> SECTION 4. This Act shall take effect upon its approval.

H.B. 2123, H.D. 1, 20th Leg., Reg. Sess. (2000). The bill went to its second and last House referral, the House Finance Committee, for hearing. Only Anthony Rutledge and other members of Local 5 submitted testimony, and each of them argued that service charges belong wholly to the employee; alternatively, if a portion of the service charge is retained by the employer, the employer must disclose that fact to consumers, who often mistakenly assume that the entire service charge goes to employees.

The House Finance Committee drafted a brief Standing Committee Report indicating that the purpose of the bill was to "prevent unfair and deceptive business practices by requiring hotels or restaurants that apply a service charge for the sale of food or beverage, to disclose to the purchaser that the service charge is being used to pay for costs or expenses other than wages and tips or employees, if the employer does not distribute the service charge to its employees." H. Stand. Comm. Rep. No. 854-00, in 2000 House Journal, at 1298.

The House Finance Committee went on to make what it called "technical, nonsubstantive amendments for purposes of clarity and style" to the bill, id., and drafted H.B. 2123 H.D. 2, which read

as follows, with the changes between H.B. 2123 H.D. 1 and H.D. 2 indicated in Ramseyer format:

> A BILL FOR AN ACT RELATING TO WAGES AND TIPS OF EMPLOYEES.
>
> BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:
>
> SECTION 1. The legislature finds that Hawaii's hotel and restaurant employees may not be receiving tips or gratuities during the course of their employment from patrons because patrons believe their tips or gratuities are being included in the service charge and being passed on to the employees.
>
> The purpose of this Act is to require hotels and restaurants that apply a service charge for food or beverage services, not distributed to employees as tip income, to advise customers that the service charge is being used for pay for costs or expenses other than wages and tips of employees.
>
> SECTION 2. Section 481B, Hawaii Revised Statutes, is amended by adding a new section to be appropriately designated and to read as follows:
>
> "§481B- . Service charge. Any hotel or restaurant that applies a service charge for the sale of food or beverage services shall distribute the service charge directly to its employees as tip income or [~~else~~] clearly disclose to the purchaser of the services that [~~such~~] the service charge is being used to pay for costs or expenses other than wages and tips of employees."
>
> SECTION 3. New statutory material is underscored.
>
> SECTION 4. This Act shall take effect upon its approval.

H.B. 2123, H.D. 2, 20th Leg., Reg. Sess. (2000). The legislature considered the addition of the phrase "as tip income" to be "technical [and] nonsubstantive," probably because, as discussed supra, the phrase appears merely to serve as the equivalent to "wages and tips of employees." The phrase "as tip income" does not, as Marriott argues, render HRS § 481B-14 ambiguous.

H.B. 2123 H.D.2 passed Third Reading in the House and was transmitted to the Senate, which referred the bill to the Senate Committee on Commerce and Consumer Protection. 2000 Senate

Journal, at 301. Local 5 testimony again emphasized that consumers mistakenly assume the entire service charge is paid to employees. DLIR Director Akiba testified in support of the bill, pointing out, "[I]n reference to the term 'tip income' on page 1, line 17, the department would consider the distribution of service charges as 'wages', and not as 'tips' for tip credit purposes under Chapter 387, HRS, Hawaii Wage and Hour Law, and §12-20-1, Hawaii Administrative Rules."

The Senate Committee on Commerce and Consumer Protection's Committee Report reflected a truly dual purpose (employee wage protection and consumer protection) for H.B. 2123 H.D. 2 towards the end of its path through the legislature as follows:

> The purpose of this measure is to enhance consumer protection with respect to service charges imposed by hotels and restaurants on the sale of food and beverages.
> . . . .
> Your Committee finds that it is generally understood that service charges applied to the sale of food and beverages by hotels and restaurants are levied in lieu of a voluntary gratuity, and are distributed to the employees providing the service. Therefore, most consumers do not tip for services over and above the amounts they pay as a service charge.
> Your Committee further finds that, contrary to the above understanding, moneys collected as service charges are not always distributed to the employees as gratuities and are sometimes used to pay the employer's administrative costs. Therefore, the employee does not receive the money intended as a gratuity by the customer, and the customer is misled into believing that the employee has been rewarded for providing good service.
> This measure is intended to prevent consumers from being misled about the application of moneys they pay as service charges by requiring under the Unfair and Deceptive Practices Act that a hotel or restaurant distribute moneys paid by customers as service charges directly to its employees as tip income, or disclose to the consumer that the service charge is being used to pay for the employer's costs or expenses, other than wages and tips. . . .

S. Stand. Comm. Rep. No. 3077, in 2000 Senate Journal, at 1286-87. The bill passed Second Reading. 2000 Senate Journal, at 390. H.B. 2123 H.D.2 passed Third Reading, 2000 Senate Journal, at 410, and was later signed into law as Act 16. 2000 Haw. Sess. Laws Act 16, at 21-22.

Throughout H.B. 2123's journey through the legislature, the concern for employees was never abandoned, even when H.B. 2123 was gutted and replaced between H.B. 2123 and H.B. 2123 H.D.1. We have previously recognized that "the legislative history of H.B. 2123 indicates that the legislature was concerned that when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted." Davis, 122 Hawai'i at 434, 228 P.3d at 314 (emphasis added). The dual focus can also be viewed as a cause-and-effect relationship: the cause (non-disclosure to consumers) has an effect (employees receiving a smaller gratuity than the customer intended). The legislature sought to prevent or mitigate the effect by removing the cause.

Due to the legislature's continued focus on employees' receiving wages and tips, enforcement of a violation of HRS § 481B-14 through Chapter 388 would not be an absurd result that the legislature could not have intended, as the Plaintiffs argue.

C. Reading HRS § 481B-14 and Chapter 388 in Pari Materia

Alternatively, HRS § 481B-14 and Chapter 388 can be read in pari materia. "Laws in pari materia, or upon the same subject matter, shall be construed with reference to each other. What is clear is one statute may be called in aid to explain what is doubtful in another." HRS § 1-16 (2009). The subject matter of Chapter 388 is "Payment of Wages and Other Compensation." The subject matter of HRS § 388-6 is "Withholding of wages," the subject matter of HRS § 388-10 is "Penalties," and the subject matter of HRS § 388-11 is "Employees[']s remedies." Although the title of HRS § 481B-14 is "Hotel or restaurant service charge; disposition," the text of the statute concerns the subject matter "tip income" and "wages and tips of employees." Further, the subject matter of HRS § 481B-14, as it was advancing through the legislature as H.B. 2123, was reflected in its title, "RELATING TO WAGES AND TIPS OF EMPLOYEES."

The title of the bill during the legislative process is, as the Gurrobat amici argue, "constitutionally significant," because according to the Hawai'i Constitution, Article 3, Section 14, "Each law shall embrace but one subject, which shall be expressed in its title." Legislative compliance with this section of the Hawai'i Constitution is "mandatory and a violation thereof would render an enactment nugatory." Schwab v. Ariyoshi, 58 Haw. 25,

31, 564 P.2d 135, 139 (1977). As the Gurrobat amici argue, however, this court should strive to avoid invalidating statutes as unconstitutional whenever a constitutional reading is possible. Further, "[E]very enactment of the legislature is presumptively constitutional," and "to nullify it on the grounds that it was enacted in violation of the subject-title requirements of the State Constitution, the infraction should be plain, clear, manifest, and unmistakable." 58 Haw. at 31, 564 P.2d at 139. An infraction rising to this level is one in which "the title tend[s] to mislead or deceive the people or the [law-making body] as to the purpose or effect of the legislation, or to conceal or obscure the same[.]" Territory v. Dondero, 21 Haw. 19, 25 (Haw. Terr. 1912).

As discussed supra, Section IV.B, the title of H.B. 2123, "RELATING TO WAGES AND TIPS OF EMPLOYEES," reflected the legislature's concern for employee compensation, even as the focus of the bill was expanded to provide for prevention of withholding of service charges through consumer disclosure. Thus, under Schwab and Dondero, the title of H.B. 2123 was sufficient to embrace the subject of the bill as it evolved in the legislature; it was not misleading, deceptive, or obscure in connection to the subject matter of H.B. 2123 in its final iteration.

The Marriott and Starwood Defendants downplay the significance of the title. Marriott argues that the title of H.B. 2123 could not change during the legislative process but "does refer to both consumers and employees" in any event. This argument goes more toward whether the statute was validly enacted (and no party argues that it was not), rather than whether the title of H.B. 2123 assists us in reading HRS § 481B-14 and Chapter 388 in pari materia.

Starwood argues that the title of H.B. 2123 "is but a remnant of the original bill" and not "evidence that [HRS § 481B-14] may be enforced through Chapter 388." Schwab makes clear, however, that the title of a bill cannot be considered just a "remnant" of the legislative process; as bills evolve, the title must continue to embrace the subject of the bill, or the bill is nugatory under the Hawaiʻi Constitution. Therefore, the legislature could not have validly deleted H.B. 2123's original contents without the replacement content continuing to bear some relation to the title.

Starwood also quotes Poe v. Haw. Labor Rels. Bd., 97 Hawaiʻi 528, 540, 40 P.3d 930, 942 (2002) for the proposition that "the title, policy declarations, and purpose sections of a statute are 'not substantive law,' [and] cannot 'limit or expand the express terms of the operative statutory provisions.'" This quotation is

not found in Poe. Rather, Poe held, "[P]olicy declarations in statutes, while useful in gleaning the purpose of the statute, are not, of themselves a substantive part of the law which can limit or expand upon the operative terms of the operative statutory provisions." 97 Hawai'i at 540, 40 P.3d at 942. Poe did not discuss titles of bills, and is therefore not applicable on that point.

The Marriott and Starwood Defendants also argue that Davis already held that the title of H.B. 2123 is "not dispositive." Davis made that point only as to whether the title of H.B. 2123 was dispositive on the issue of employee standing under Chapter 480. The full quote states: "[A]lthough we believe the title is instructive in that it appears to reflect the legislature's concern that employees may not always be receiving the service charges imposed by their employers, we do not believe it is dispositive of the issue of whether the legislature intended to afford Employees standing to sue for HRS § 481B-14 violations." 122 Hawai'i at 433 n.17, 228 P.3d at 313 n.17. Moreover, this quotation supports the Plaintiffs' point that the subject matter of HRS § 481B-14 is wages and tips of employees, in that this court has already considered the title of H.B. 2123 "to reflect the legislature's concern that employees may not always be

receiving the service charges imposed by their employers." Id. (emphasis added).

Lastly, both the Marriott and Starwood Defendants argue that, under State v. Mata, 71 Haw. 319, 782 P.2d 1122 (1990), HRS § 481B-14 and Chapter 388 cannot be read in pari materia. Mata, however, is distinguishable. In that case, a defendant argued that the definition of "under the influence" found in the chapter regulating the sale of liquor and liquor establishments should be imported into the statutory offense of driving under the influence of alcohol under HRS § 291-4. 71 Haw. at 330, 789 P.2d at 1128. We disagreed, holding, "HRS Chapter 281 regulates the sale of liquor and liquor establishments. HRS Chapter 291 regulates traffic violations. The chapters serve different purposes and are not in pari materia." Id. In the instant proceedings, however, HRS § 481B-14 and Chapter 388 are in pari materia, because both deal with the same subject matter: "tip income" and "wages and tips of employees" in HRS § 481B-14 and "Payment of Wages and Other Compensation" in Chapter 388.

Because HRS § 481B-14 can be read in pari materia with Chapter 388, there exists a relationship among these statutory provisions supporting Plaintiffs' contention that HRS § 481B-14 violations can be enforced through Chapter 388.

D. Exclusivity of Remedies

In spite of the plain language, legislative history, and in pari materia reading, the Marriott and Starwood Defendants insist that the exclusive remedy for a violation of HRS § 481B-14 lies within the consumer protection chapters (HRS Chapters 480 and 481B). They cite Davis for the following proposition: "[T]he legislative history of H.B. 2123 indicates that the legislature was concerned that when a hotel or restaurant withholds a service charge without disclosing to consumers that it is doing so, both employees and consumers can be negatively impacted. The legislature chose to address that concern by requiring disclosure and by authorizing enforcement of that requirement under HRS chapter 480." 122 Hawai'i at 434, 228 P.3d at 314 (emphasis added). However, Davis left unanswered the question of whether violations of HRS § 481B-14 are also enforceable through Chapter 388. See 122 Hawai'i at 428 n.12, 228 P.3d at 308 n.12. ("Employees also contend that Employees can enforce HRS § 481B-14 through HRS §§ 388-6, 10, and 11. However, this argument will not be addressed because it is beyond the scope of the certified question.")

The plain language of Chapters 480 and 481B does not indicate that remedies therein are exclusive. The legislature knows how to craft an exclusivity provision. See, e.g., HRS §

103D-704 (2012)("**Exclusivity of remedies.** The procedures and remedies provided for in this part, and the rules adopted by the policy board, shall be the exclusive means available for persons aggrieved in connection with the solicitation or award of a contract, a suspension or debarment proceeding, or in connection with a contract controversy, to resolve their claims or differences. . . ."). No such exclusivity provision appears in the relevant enforcement statutes in the consumer protection area. HRS § 481B-4 (2008) provides, "Remedies. Any person who violates this chapter shall be deemed to have engaged in an unfair method of competition and unfair or deceptive act or practice in the conduct of any trade or commerce within the meaning of section 480-2." HRS § 480-2(e) (2008), in turn, allows "[a]ny person [to] bring an action based on unfair methods of competition declared unlawful by this section." Contrary to the Marriott and Starwood Defendants and Four Seasons amicus' argument, nothing in these statutes states that Chapter 480 remedies are exclusive.

The Marriott and Starwood Defendants also argue that the legislature's decision to shift H.B. 2123's focus from a bill proposing amendments to Chapters 387 and 388 to a bill proposing to add a new section within Chapter 481B indicates the legislature's intent that the remedy under the consumer

protection chapters be exclusive. However, nothing in the legislative history of H.B. 2123 limits or even discusses remedies. Further, the Marriott and Starwood Defendants have provided no case law or other authority holding that the mere placement of a law within one chapter of the HRS implies the exclusion of remedies found in other chapters.

On the other hand, the Gurrobat amici have cited Zator v. State Farm Mut. Auto Ins. Co., 69 Haw. 594, 597, 752 P.2d 1073, 1075 (1988) for the proposition that this court "cannot presume that the legislature intended a discriminatory and illogical policy" that a statute located in one chapter of the HRS should not apply to a statute located in another chapter of the HRS. In that case, on a question certified to us by the United States Court of Appeals for the Ninth Circuit, we applied the tolling provision from the chapter on statutes of limitations (Chapter 657) to the no-fault limitations period set forth in the chapter governing motor vehicle accident reparations (then Chapter 294). 69 Haw. at 595, 597, 752 P.2d at 1074, 1075. This was because HRS § 294-36 was "silent as to whether it is tolled if the person entitled to bring the suit is rendered insane on account of the accident," but the "general tolling provisions for statutes of limitations set forth in HRS § 657-13 provides for tolling of the

statute in cases of insanity." 69 Hawai'i at 597, 752 P.2d at 1075.

We considered there to be an ambiguity in the law, which we resolved by construing the two statutes in pari materia, ascertaining legislative intent, and looking to the policies behind the statutes. Id. We concluded that the legislature could not have intended "a discriminatory and illogical policy" of allowing the tolling of the general statute of limitations for insane plaintiffs but disallowing the tolling of the no-fault statute of limitations. Id. We also favorably cited another case, Hun v. Center Properties, 63 Haw. 273, 626 P.2d 182 (1982), in which we held that HRS § 657-13 tolled the wrongful death statute of limitations found in another chapter (Chapter 663) because "the two-year statute of limitations period merely affects the remedy and not the right of action." Similarly in this case, allowing enforcement under Chapter 388 affects the remedy, not the right set forth in HRS § 481B-14.

It bears noting that the Plaintiffs argue that HRS § 480-13(d) (2008) provides that the remedies in Chapter 480 are "cumulative." That statutory sub-section reads in whole, however, "The remedies provided in this section are cumulative and may be brought in one action." (Emphasis added). "This section" refers to HRS § 480-13(d), not statutes outside of that

section, and is of no help to Plaintiffs. Further, the Plaintiffs have cited E. Star Inc., S.A. v. Union Bldg. Materials Corp., 6 Haw. App. 125, 142, 712 P.2d 1148, 1159 (1985) to support their argument that Chapter 480 remedies are cumulative, but that case held only that Chapter 480 remedies "do not supersede common law fraud claims based on deception in the course of trade and commerce," which are remedies very different from those under Chapter 388. Although Chapter 480's remedies are not expressly "cumulative," and although case law has yet to establish that they include Chapter 388 remedies, the bottom line is that Chapter 480 remedies are not "exclusive" either; therefore, nothing in the statutory plain language or legislative history of HRS § 481B-14 precludes enforcement of HRS § 481B-14 violations through Chapter 388.

V. Conclusion

For the foregoing reasons, we answer the certified question in the affirmative. When a hotel or restaurant applying a service charge for the sale of food or beverage services allegedly violates HRS § 481B-14 by (1) not distributing the full service charge directly to its employees as "tip income" (in other words, as "wages and tips of employees"), and by (2) failing to disclose this practice to the purchaser of the services, the employees may bring an action under HRS §§ 388-6,

-10, and -11 to enforce the employees' rights and seek remedies.

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