

CONCURRING OPINION BY GINOZA, J.

I concur with the majority opinion, but write separately with respect to Mountain Thunder Coffee Plantation Int'l Inc., Trent Bateman, and Lisa Bateman's (collectively **Mountain Thunder**) counterclaim against Kona's Best Natural Coffee LLC (**Kona's Best**) for tortious interference with prospective business advantage (**TIPBA**). On this claim, Kona's Best argues that the Circuit Court of the Third Circuit (**circuit court**) erred in denying Kona's Best's renewed post-verdict motion for judgment as a matter of law (**JMOL**). See Hawai'i Rules of Civil Procedure Rule 50(b). Ultimately, I agree with the majority that the circuit court should have granted Kona's Best's renewed JMOL motion, but I reach this conclusion for reasons different than the majority opinion.

During the jury trial, Kona's Best moved for JMOL on a number of Mountain Thunder's counterclaims and third-party claims. Regarding Mountain Thunder's counterclaim for TIPBA, the circuit court denied this initial JMOL motion and thus the TIPBA claim, among others, went to the jury for consideration. The jury issued a Special Verdict which, *inter alia*, awarded \$198,347 to Mountain Thunder for the TIPBA claim.

After the jury's verdict, Kona's Best filed the renewed JMOL motion on various issues. With regard to Mountain Thunder's counterclaim for TIPBA, the circuit court denied Kona's Best's renewed JMOL motion.

On appeal, Kona's Best seeks review as to its renewed post-verdict JMOL motion on the TIPBA counterclaim.

A trial court's ruling on a motion for judgment as a matter of law is reviewed *de novo*. A [motion for judgment as a matter of law] may be granted only when after disregarding conflicting evidence, giving to the non-moving party's evidence all the value to which it is legally entitled, and indulging every legitimate inference which may be drawn from the evidence in the non-moving party's favor, it can be said that there is no evidence to support a jury verdict in his or her favor.

Ray v. Kapiolani Med. Specialists, 125 Hawai'i 253, 261, 259 P.3d 569, 577 (2011) (citations and quotation marks omitted).

"[G]enerally, a renewed motion for judgment as a matter of law cannot assert a ground that was not included in the original motion." Kamaka v. Goodsill Anderson Quinn & Stifel, 117 Hawai'i 92, 117, 176 P.3d 91, 116 (2008) (citation omitted). Moreover, the failure to request that the jury be instructed on a legal issue, or the failure to object to a jury instruction, forfeits the legal argument for purposes of a post-verdict JMOL motion. See Hometown Folks, LLC v. S & B Wilson, Inc., 643 F.3d 520, 528 (6th Cir. 2011); Ford v. County of Grande Traverse, 535 F.3d 483, 493-94 (6th Cir. 2008); Conseco Finance Servicing Corp. v. North American Mortgage Co., 381 F.3d 811, 822 n.7 (8th Cir. 2004) (stating that, due to its failure to request a jury instruction on its legal theory, the defendant "forfeited its argument to the extent that it was not forfeited by the failure to assert those grounds in their Rule 50(a) motion").

As noted in Mountain Thunder's answering brief on appeal, Kona's Best did not present the "competitor's privilege" argument to the jury. The record indicates there was no request for an instruction on competitor's privilege, none was given, and thus the jury did not consider this purported defense to Mountain Thunder's TIPBA counterclaim. Rather, Kona's Best argued competitor's privilege for the first time in its post-verdict renewed JMOL motion. Given these circumstances, I conclude that Kona's Best waived the competitor's privilege argument and cannot assert it as a basis for overturning the jury's verdict.

Given the above, I would consider only, under the applicable JMOL standard and indulging every legitimate inference which may be drawn from the evidence in favor of non-movant Mountain Thunder, whether there is evidence to support the necessary findings for a TIPBA claim. The elements for a TIPBA claim are:

- (1) the existence of a valid business relationship or a prospective advantage or expectancy sufficiently definite, specific, and capable of acceptance in the sense that there is a reasonable probability of it maturing into a future economic benefit to the plaintiff; (2) knowledge of the relationship, advantage, or expectancy by the defendant; (3) a purposeful intent to interfere with the relationship, advantage, or expectancy; (4) legal causation between the

act of interference and the impairment of the relationship, advantage, or expectancy; and (5) actual damages.

Haw. Med. Ass'n v. Haw. Med. Serv. Ass'n, 113 Hawai'i 77, 116, 148 P.3d 1179, 1218 (2006) (citation omitted). Kona's Best contends that Mountain Thunder failed to prove the last two elements -- causation and damages. In my view, there is evidence to support the jury's verdict as to causation, but not damages.

As to causation, Mountain Thunder presented evidence of causation between acts of interference by Kona's Best and the impairment of Mountain Thunder's relationship with Hawaii Coffee Company (Hawaii Coffee). There is abundant evidence that Mountain Thunder provided Kona's Best with extensive information about its coffee business, including in a May 2007 statement by Trent and Lisa Bateman (the Batemans) to Kona's Best's attorney, which was given before a court reporter. In this statement the Batemans explained, among other things, Mountain Thunder's operation of growing and purchasing raw Kona coffee cherry, its processing of coffee cherry into bags of roasted coffee, that eighty percent of Mountain Thunder's acquisition of coffee cherry was financed by Hawaii Coffee, and that Hawaii Coffee used Mountain Thunder's services as a licensed mill to obtain certified coffee from Kona. At the time of the statement, Kona's Best was new to the coffee business.

Mountain Thunder also presented evidence of an expectation that its business information would be kept confidential and, importantly, would not be used for purposes other than a potential transaction between Kona's Best and Mountain Thunder. The evidence includes: an unsigned confidentiality agreement, which Lisa Bateman testified was signed by Trent Bateman and Brent Hight during a meeting in March 2007; and two Letters of Intent prepared by Kona's Best, in June and August of 2007, regarding Kona's Best's intent to purchase Mountain Thunder, which gave Kona's Best access to Mountain Thunder's business information and provided that all information accessed would be used by Kona's Best "solely for the purpose of analyzing the Business and the Assets and will be treated on a

confidential basis."

After negotiations broke down between Kona's Best and Mountain Thunder, Kona's Best entered into a contract with Hawaii Coffee in July 2008, under which Hawaii Coffee would purchase Kona coffee beans from Kona's Best. Moreover, Marin Artukovich, who represented Kona's Best at the time, testified that he was instructed to tell Hawaii Coffee that Kona's Best would not enter into the contract if Hawaii Coffee continued to do business with Mountain Thunder. Although the reason is disputed, Hawaii Coffee eventually stopped doing business with Mountain Thunder. Given the above, there is evidence to support the jury's finding as to causation on the TIPBA counterclaim.

As to damages, however, there does not appear to be evidence to support actual damages of \$198,347. On this issue, both Kona's Best and Mountain Thunder cite to Omura v. American River Investors, 78 Hawai'i 416, 418, 894 P.2d 113, 115 (App. 1995), which states in relevant part that "[w]hile lost profits do not necessarily have to be determined with mathematical certainty, the extent of loss must be shown with reasonable certainty and cannot be based upon mere speculation or guess." (Citations and quotation marks omitted.) Mountain Thunder asserts generally that the evidence shows its relationship with Hawaii Coffee was undermined by Kona's Best, but with regard to establishing actual damages, Mountain Thunder primarily relies on the expert testimony of Dr. Thomas Loudat. Mountain Thunder points to Dr. Loudat's trial testimony that the net income loss to Mountain Thunder due to the company's "interaction" with Michael Roberts of Kona's Best was \$4.9 million. However, Dr. Loudat did not express any opinion as to damages sustained by Mountain Thunder due to Kona's Best interfering with the relationship between Mountain Thunder and Hawaii Coffee. Instead, Dr. Loudat testified he was not asked to point out a specific act that caused a specific damage.

Mountain Thunder also appears to rely on the amounts that Kona's Best purportedly offered during negotiations to purchase Mountain Thunder. However, these amounts, ranging from

\$2 million to \$3 million, are related to the purchase of Mountain Thunder's entire business operation, and do not provide any indication as to actual damages sustained by Mountain Thunder from Kona's Best impairing the relationship between Mountain Thunder and Hawaii Coffee. There is no basis to relate the amount of the purported purchase prices to the amount of \$198,347 awarded by the jury on Mountain Thunder's TIPBA counterclaim.

In my view, therefore, there is no evidence as to the actual damages sustained by Mountain Thunder with regard to its TIPBA counterclaim, and Kona's Best's renewed post-verdict JMOL motion should have been granted on this basis.

For these reasons, I respectfully concur.

Tim M. King