FOR PUBLICATION

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

RAYMOND FALCON, d/b/a D & C FISH MARKET
Plaintiff/Appellant,

v.

WILLIAM HENRY McCUE and TASI TOURS & TRANSPORTATION, INC.,
Defendants/Appellees.

Supreme Court Appeal No. 04-001-GA
Civil Action No. 01-0250-A

OPINION

Cite as: *Falcon v. McCue*, 2005 MP 7

Argued and submitted on Wednesday, July 14, 2004
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice.

MANGLONA, Associate Justice:

¶ 1 Raymond Falcon ("Falcon") appeals the trial court's December 23, 2003 Judgment and June 17, 2003 *Order Granting Defendants' Motion for Summary Judgment as to Lost Profits Claim*, which found: (1) Falcon's commercial fishing business illegal and, therefore, ineligible to recover for lost profits, and (2) Falcon did not have standing to sue for his employees' lost wages. We AFFIRM.

I.

A. Factual Background

¶ 2 The commercial use of gill nets in the waters of the Commonwealth of the Northern Mariana Islands ("Commonwealth") has been banned since the early 1990s. On January 15, 1991, the Department of Natural Resources, Division of Fish and Wildlife, adopted amended Fishery Regulations. 12 Com. Reg. 7,364 (Sept. 15, 1990) *adopted at* 13 Com. Reg. 7,553 (Jan. 15, 1991) ("Fishery Regulations"). These regulations specifically state: "[t]he commercial use of gill nets shall be prohibited in the waters of the Commonwealth." Fishery Regulations § 40.3(d)(6). The length of all gill nets used for recreational or subsistence purposes is restricted to "300 feet in total length." *Id.* at § 40.3(d)(7)(a).

¶ 3 On January 3, 2000, the Division of Fish and Wildlife issued Falcon a commercial gill net fishing license despite the existing ban on the commercial use of such nets. Falcon's four employees applied for and were granted commercial gill net fishing licenses in

early July 2000. Now fully licensed, Falcon commenced with the operation of his gill net fishing enterprise off the island of Saipan.

¶ 4 On July 13, 2000, Falcon's four employees sailed to Tanapag Harbor where they began their work as commercial fishermen, setting out a 2,000-foot long section of gill net. Later that day, the Defendant, William Henry McCue ("McCue"), who was employed as the captain of a vessel operating in Tanapag Harbor, came across an unattended gill net. As McCue began to pull in the gill net from the harbor, several of Falcon's employees told him not to pull in the net because it belonged to Falcon. McCue continued to remove the net from the harbor while one of Falcon's employees cut the portion of net still in the water, severing approximately 500 feet from the 2,000 foot-long net. Falcon's employees then confronted McCue, who allegedly told the employees that Falcon would have to pay him if they wanted the net returned.

¶ 5 As a direct result of this incident, Falcon asserts that he has been forced out of business and has suffered damages including $139,000 in lost profits.

¶ 6 On August 18, 2000, through the adoption of the Non-Commercial Fish and Wildlife Regulations, 22 Com. Reg. 17,165 *adopted at* 22 Com. Reg. 17,360, the prohibition of gill net fishing was extended from commercial ventures to every kind of gill net fishing, including non-commercial use of such nets. *Id.* at Part 5, § 20.3

B. Procedural Background

¶ 7 Falcon filed a Complaint against McCue and Tasi Tours & Transportation, Inc. ("Tasi") in negligence on June 27, 2001, seeking four distinct types of recovery: (1) dam-

ages for harm caused to his fishing net, (2) lost "income," (3) unpaid wages owed to his employees, and (4) damages for "mental distress."

¶ 8 McCue and Tasi answered the Complaint and then filed their own motion on February 19, 2003, seeking summary judgment on the Complaint in its entirety. McCue and Tasi argued that: (1) lost profits cannot be recovered for illegal activities and that commercial gill net fishing was illegal pursuant to the Fishery Regulations, (2) Falcon cannot claim lost profits when his business was losing money, (3) Falcon cannot claim damages for lost wages due his employees, (4) Falcon cannot claim damages for mental distress, and (5) the gill net suffered no loss in value.

¶ 9 On March 19, 2003, Falcon filed an opposition to the motion for summary judgment attaching two letters from Richard Seman ("Seman"), Division of Fish and Wildlife Director. He argued that: (1) Seman had granted an exemption from the law prohibiting gill net fishing, (2) the regulations were not properly noticed, (3) his company was in fact turning a profit, (4) he is obligated to collect wages for his employees in the lawsuit, (5) he may collect for mental distress, and (6) the use of his gill net was not illegal.

¶ 10 On March 26, 2003, McCue and Tasi moved to strike Seman's letters pursuant to Rule 56(e) of the Commonwealth Rules of Civil Procedure, which limit admissions at summary judgment hearings to affidavits made under oath.

¶ 11 On this same date, McCue and Tasi filed a reply memorandum that specifically noted Falcon's failure to dispute the legal proposition that a business cannot recover lost profits when those profits would ultimately be derived from an illegal activity, or that a mistake in issuing a license does not make an illegal activity lawful.

¶ 12 On March 28, 2003, Falcon filed an opposition to the motion to strike the Seman letters. McCue and Tasi filed a reply to Falcon's response on April 1, 2003. The trial court held a hearing on the matter on April 2, 2003.

¶ 13 On April 29, 2003, Presiding Judge Robert C. Naraja issued an *Order Granting Defendants' Motion to Strike Exhibits in Summary Judgment Opposition; Continuing Defendants' Motion for Summary Judgment as to the Lost Profits Issue; Granting in Part and Denying in Part Defendants' Motion for Summary Judgment; and Continuing the Bench Trial*. The order granted the motion to strike the Seman letters pursuant to Commonwealth Rule of Civil Procedure 56(e), but granted a continuance of the lost profits issue in order to permit Falcon the opportunity to obtain affidavits, depositions, or other discovery on the issue. In addition, the order granted summary judgment as to the worker's wage claims, ruling that Falcon did not have standing to assert those claims on his employees' behalf. Furthermore, the trial court ruled that Falcon couldn't recover emotional distress damages as part of his negligence claim because the destruction of personal property does not provide an adequate basis to claim such damages. The trial court, however, did allow Falcon to alternatively claim mental distress for the negligent infliction of emotional distress. Finally, the trial court ruled that the incident had devalued the gill net, but also found that although the gill net could no longer be used for commercial fishing, it still had some potential value for alternative uses.

¶ 14 On May 19, 2003, with no objection from McCue or Tasi, Falcon submitted the sworn affidavits of Seman and Thomas Pangelinan ("Pangelinan"), the Department of Land and Natural Resources Secretary. Pangelinan stated that he knew nothing about the case. Seman admitted: his agency had issued a commercial gill net fishing license to Fal-

con on January 3, 2000; that on August 18, 2000, the agency adopted a new regulation that made all gill net fishing illegal; and that he decided not to enforce the new regulations against the current holders of gill net fishing licenses until such licenses expired at the end of the year.

¶ 15 Based on this new evidence, McCue and Tasi filed *Defendants' Memorandum in Support of Summary Judgment* on June 4, 2003. In this second memorandum, McCue and Tasi argued that Falcon had not proven that the Fishery Regulations were improperly promulgated or that Seman had granted Falcon or his employees an exemption from those regulations.

¶ 16 On June 12, 2003, the trial court again heard arguments concerning the lost profits issue of the summary judgment motion. Falcon's sole argument was that the exemption made his conduct lawful. On June 17, 2003, Presiding Judge Naraja issued an *Order Granting Defendants' Motion for Summary Judgment as to Lost Profits Claim*. The trial court ruled that the parties agreed that the law does not permit recovery for lost profits from illegal activities and Falcon had not been granted a valid exemption because there was no publication of an exemption as a regulation under the Administrative Procedures Act. Furthermore, the trial court concluded that the commercial gill net fishing licenses were granted without proper authorization, and thus were void *ab initio*. Because Falcon cannot recover lost profits from illegal fishing, the trial court granted McCue and Tasi judgment on the lost profits claim.

¶ 17 On October 14, 2003, the trial court granted McCue and Tasi's August 15, 2003, motion in limine to exclude all evidence of mental or emotional distress at trial. In addition,

the parties settled the claim specific to the damage of the gill net. Final disposition of these issues is not part of this appeal.

¶ 18 The parties stipulated to a Judgment and it was entered as to the Complaint in its entirety on December 23, 2003. Falcon filed a timely notice of appeal on January 20, 2004.

II.

¶ 19 This Court has jurisdiction over this appeal pursuant to 1 CMC § 3102(a) and Article IV, Section 3 of the Commonwealth Constitution. Both issues before the Court raise questions of law. This Court applies the standard of *de novo* review to questions of law. *Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

III.

¶ 20 The two issues before the Court on appeal are as follows: (1) Whether the trial court erred in ruling that Falcon could not recover anticipatory lost profits when those profits originate from an illegal business practice; and (2) whether the trial court erred in finding that Falcon did not have standing to sue for wages his former employees had allegedly lost because no wages were ever paid and thus Falcon suffered no injury.

A. Recovery for Anticipatory Lost Profits Derived from an Illegal Business Activity

¶ 21 As a preliminary matter, we must determine whether this issue is being raised for the first time on appeal. If so, we may decline to decide the issue.

¶ 22 Falcon asserts that this issue was raised in the initial *Memorandum of Points and Authorities in Support of Motion for Summary Judgment*, filed on February 19, 2003, citing the section entitled "Lost profits cannot be recovered for illegal activities." McCue and Tasi, however, assert that when Falcon filed his opposition to the motion for summary judgment on March 19, 2003, he never argued against the cited caselaw standing for the

proposition that lost profits are not recoverable for illegal business activities. Furthermore, during both the April 2, 2003, and June 10, 2003, hearings held on the summary judgment motion, the trial court specifically noted that Falcon presented only one argument, that he had an exemption from the regulations.[1] In fact, the trial court twice went on the record establishing counsel had conceded the basic legal principle that lost profits are not recoverable for illegal business activities.[2]

¶ 23 The record before us indicates that McCue and Tasi anticipated the issue would be raised in the lower court and attempted to settle the issue in the summary judgment motion. Specifically, they stated: "[i]f we assume that Capt. McCue was responsible for the damage to Falcon's net, the question arises whether Falcon can recover lost profits when those profits would have been derived from an illegal activity. The answer is clearly 'no.'" *Memorandum of Points and Authorities in Support of Motion for Summary Judgment* at 5, filed on February 19, 2003.

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[1] The trial court's *Order Granting Defendants' Motion for Summary Judgment as to Lost Profits Claim* states: "Plaintiff's second argument is that he had been granted an exemption from the Fishery Regulations by Director Seman. He cites 2 CMC § 5104(b)(7)(F) as authority for the Director to grant exemptions. *This was Plaintiff's sole argument at both hearings.*" *Falcon v. McCue*, Civ. No. 01-0250 (N.M.I. Super. Ct. June 17, 2003) ([Unpublished] *Order Granting Defendants' Motion for Summary Judgment as to Lost Profits Claim* at 3) (emphasis added).

[2] The trial court had previously addressed this matter in its first order concerning this motion when it noted that Falcon had conceded this issue: "[a] basic legal principle *conceded by both parties* is that the law does not permit recovery for lost profits from illegal activities." *Falcon v. McCue*, Civ. No. 01-0250 (N.M.I. Super. Ct. April 29, 2003) ([Unpublished] *Order Granting Defendants' Motion to Strike Exhibits in Summary Judgment Opposition; Continuing Defendants' Motion for Summary Judgment as to the Lost Profits Issue; Granting in Part and Denying in Part Defendants' Motion for Summary Judgment; and Continuing the Bench Trial* at 5) (citation omitted). The trial court reiterated this statement in a later order: "*The parties agree* that the law does not permit recovery for lost profits from illegal activities." *Falcon v. McCue*, Civ. No. 01-0250 (N.M.I. Super. Ct. June 17, 2003) ([Unpublished] *Order Granting Defendants' Motion for Summary Judgment as to Lost Profits Claim* at 3) (citation omitted, emphasis added).

¶ 24 In his reply brief, Falcon directs the Court to the following language in an attempt to demonstrate that he did raise the issue of whether he could legally recover lost profits despite the fact that his business was in violation of the law:

> Therefore, it is clear that the plaintiff's claims and recovery are not limited to mere lost profits. Other harms are destruction of his property. Harm to his ability to pay for his obligation to his employees such as wages. Harm to himself in that he suffered mental distress. And he is entitled to punitive damages. Harm to his earning capacity until the present time and also in the future, which the defendants did not take into consideration in their motion for summary judgment.

Reply Brief of Appellant at 4 (*quoting Opposition to Plaintiff's Motion for Summary Judgment*, filed March 19, 2003).[3]

¶ 25 Although lost profits are mentioned, the fact that those lost profits came from an illegal activity is not addressed. Falcon asks the Court to accept the notion that he "clearly assumed the defendants' argument that the plaintiff could not recover because his business was in violation of law," despite the fact that counsel devotes a large portion of his brief to arguing that Falcon's business was legal. *Reply Brief of Appellant* at 4.[4] Counsel may in fact have a good faith belief that he did assert this issue in the trial court, but the record is devoid of any solid evidence of this assertion. In fact, as put forth above, the record supports a contrary finding, and we, therefore, find that Falcon raises the issue of

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[3] The text quoted in the *Reply Brief of Appellant* did not match the original text of the *Opposition to Plaintiff's Motion for Summary Judgment* verbatim. Language from the original source was used to resolve any ambiguities.

[4] Falcon attempts to address the fact that he conceded the issue of lost profits at trial. He states:

> The defendants also argue that plaintiff's counsel conceded that the law does not permit recovery for lost profits from illegal activities. The judge below stated it so. But my recollection is that the judge asked me during oral argument if based on *Gillmor v. Wright*, 850 P2d 431, 438 (Utah 1993), I would agree that the law does not permit recovery for lost profits from illegal activities. To which I responded "yes." But the court did not ask me whether there are other jurisdictions which hold otherwise.

Reply Brief of Appellant at 5. It is troubling that counsel did not feel that he needed to put that fact before the Court in his own argument. He clearly answered the question in a way that reflected he was conceding the point.

whether anticipatory lost profits can be recovered when derived from an illegal business activity for the first time on appeal.

¶ 26 In *Reyes v. Reyes*, we ruled that one may not usually raise an issue for the first time on appeal. 2004 MP 1 ¶ 87. The only exceptions to this rule are:

> (1) that a new theory or issue arose, during the pendency of the appeal, due to a change in the law; (2) the issue is legal and does not rely on a factual record; or (3) 'plain error occurred and an injustice might otherwise result' if the appellate court does not consider the issue.

Bolalin v. Guam Publ'ns, Inc., 4 N.M.I. 176, 181 (1994) (*quoting Hwang Jae Corp. v. Marianas Trading and Dev. Corp.*, 4 N.M.I. 142, 145 (1994)).

¶ 27 Factors one and three clearly do not apply. We also find that Falcon fails to establish an exception under factor two, despite the fact that he contends his argument is "purely legal" in nature. Application of exception two requires us to examine the facts of the dispute to analyze whether the tort that McCue and Tasi allegedly committed was the proximate result of the fisherman's illegal acts (commercial gill net fishing and fishing with an oversize gill net).[5] Additional legal authority also supports the contention that a

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[5] Falcon's brief contains the following argument:

> In the instant case, the injury of the plaintiff is not the proximate cause of his illegal act, assuming that his act was illegal. There he was putting his gill net safely in the waters. Then came Defendant McCue who saw the gill net. His boat did not stumble or crash on it and destroy it. No, he saw it and went to it and pulled it together with the fish caught therein. And when accosted by the employees of the plaintiff and informed that the net belonged to the plaintiff, he continued to pull the net causing it to be cut in half and threatened not to return it unless plaintiff came and paid him some money . . . . *Thus, the plaintiff's injury was not caused by his illegal act. It was caused by Defendant McCue's sole tortious act.*

Opening Brief of Appellant at 9 (emphasis added).

factual analysis of this issue would be required of this Court, and thus no exception should apply.[6]

¶ 28 For all the reasons put forth above, we find that Falcon raises for the first time on appeal the issue of whether anticipatory lost profits can be recovered when derived from an illegal business activity. In addition, we find that none of the three exceptions are applicable. Therefore we decline to decide the issue.

B. Whether Falcon Has Standing to Sue for Employees' Wages

¶ 29 Falcon argues he has standing to sue McCue and Tasi for wages he is still obligated to pay his four former employees under their employment contracts because McCue and Tasi's conduct directly ruined his business and resulted in him incurring a $44,000 debt to his employees. In addition, he argues these employees "in effect" assigned to him their right to sue McCue and Tasi, but offers no evidence of this. Falcon then contends that the employees cannot waive their rights to sue McCue and Tasi because the CNMI Minimum

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[6] In *Cushnie v. Bank of Guam*, 4 N.M.I. 198 (1994), Cushnie argued at summary judgment that the bank's collection of a promissory note was barred as a result of prior litigation in the district court. On appeal, he raised a new issue, arguing that it was wrong for the bank to exercise a non-judicial remedy to collect on the note. The situation in *Cushnie* is the same in this case because had the issue been properly raised below, Defendants would have been given an opportunity to develop a full record on the issue of proximate cause.

In *Santos v. Public School System*, 2002 MP 12, (holding Workers Compensation regulation providing that employees on travel status are covered on a 24-hour basis applies in wrongful death claim could not be raised for the first time on appeal under exception for an issue which is purely one of law), we ruled that where it is argued that a purely legal issue is being raised for the first time on appeal and the Court finds it is necessary to refer to the record, it is irrelevant that the facts are already in the record:

> [W]e will consider an argument raised for the first time on appeal when the issue is purely one of law that does not rely on any factual record. *Id.* Such is not the case here. The applicability of WCCRR § 3.102 to this case hinges on factual determinations, which must be made, such as: Susana (1) was an employee of an employer in the Commonwealth; (2) was traveling on behalf of her employer; and (3) was injured or died. *Although the requisite facts were either found by the court or admitted by the parties, we will not consider the issue unless it does not rely on any factual record.*

Santos v. Pub. Sch. Sys., 2002 MP 12 ¶ 11 (footnote omitted, emphasis added). In fact it was Attorney Yana who attempted to raise the issue for the first time on appeal in *Santos*.

Agulto v. Northern Marianas Inv. Group, Ltd., 4 N.M.I. 7 (1993) is another case where this Court did not allow Mr. Yana to raise an issue for the first time on appeal.

Wage and Hour Act, 4 CMC §§9211, *et seq.*, mirrors the Fair Labor Standard Act, 29 U.S.C. §§ 201, *et seq.*, which prevents employees from waiving their right to wages under the Minimum Wages Act.[7]

¶ 30 Next, Falcon argues that the trial court's finding that he did not owe his employees their wages was in error because it took one line of Falcon's deposition out of context and then refused to accept his explanation for it (the fact that he had entered an agreement with his employees to not sue him for their wages).

¶ 31 Finally, Falcon cites the definition of standing from *Flast v. Cohen*, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968), to support the legal proposition that because Falcon has a legal obligation to pay his employees their wages totaling $44,000, he has a personal stake in the outcome of this case, and thus has standing to sue.[8]

¶ 32 We find that Falcon does not have standing to sue on behalf of himself or his employees.[9] First, Falcon must allege and show that he personally has been injured. If Falcon cannot establish standing from "all materials of record, the compliant must be dismissed." *Warth v. Seldin*, 422 U.S. 490, 502, 95 S. Ct. 2197, 2207, 45 L. Ed. 2d 343, 356 (1975). From the record before us, we can establish the following: (1) Falcon admitted in his deposition that he did not owe his employees their wages, and (2) Falcon has

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[7] Falcon cites *Atlantic Co. v. Broughton*: "[t]hough settlements in accord and satisfaction are favored in law, they may not be sanctioned and enforced when they contravene and tend to nullify the letter and spirit of an Act of Congress." 146 F.2d 480, 482 (5th Cir. 1944). This case is irrelevant because Falcon offers no proof that the employees ever waived their right to sue.

[8] "[T]he emphasis in standing problems is on whether the party invoking federal court jurisdiction has 'a personal stake in the outcome of the controversy,' and whether the dispute touches upon 'the legal relations of parties having adverse legal interests.'" *Flast v. Cohen*, 392 U.S. 83, 101, 88 S. Ct. 1942, 1953, 20 L. Ed. 2d 947, 962 (1968) (citations omitted).

[9] Standing is a jurisdictional issue; it is a question of law, reviewable *de novo*. *Commonwealth v. Anglo*, 1999 MP 6 ¶ 3, 5 N.M.I. 228, 229 (*citing Mafnas v. Commonwealth*, 2 N.M.I. 248, 256 (1991)).

yet to pay his employees any wages for the time period in question. These facts alone refute Falcon's injury claim.

¶ 33 Legal authority also refutes Falcon's standing argument. First, it has been held that "[n]egligence without injury is not actionable." *Wood v. Parker*, 901 S.W.2d 374, 381 (Tenn. Ct. App. 1995). Further, a breach of contract causing only speculative harm or threat of future harm is generally not sufficient to create an actionable claim for damages.[10] *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1016 (8th Cir. 2001). Finally, Falcon's employees cannot sue McCue and Tasi for wages owed to them by Falcon. *See Eshleman v. Union Stock Yards Co.*, 70 A. 899 (Pa. 1908); *see also Warth*, 422 U.S. at 499, 95 S. Ct. at 2205, 45 L. Ed. 2d at 355 (holding that a party "cannot rest his claim to relief on the legal rights or interests of third parties"); *Sec'y of State of Md. v. Joseph H. Munson Co*., 467 U.S. 947, 972, 104 S. Ct. 2839, 2855, 81 L. Ed. 2d 786 (1984) (same).

¶ 34 Standing is "a concept utilized to determine if a party is sufficiently affected so as to insure that a justiciable controversy is presented to the court." *Anglo*, 1999 MP 6 ¶ 8, 5 N.M.I. at 230. "The essential element of standing is that a plaintiff personally has suffered either actual injury or threat of injury as a result of the defendant's conduct." *Id.* "Moreover, the plaintiff must show that the injury fairly can be traced to the challenged action and is likely to be redressed by a favorable decision." *Id.* (quotations omitted).

¶ 35 We find that Falcon has not been personally injured and lacks the requisite requirements to establish standing. He never paid his employees after the incident, and he admits that he does not currently owe them wages. Any litigation concerning lost wages

[10] Even if Falcon's employees wanted to sue him in the future under the Fair Labor Standards Act, they would be unable to do so because the statute of limitations has already run on their claims. 29 U.S.C. § 255.

must take place between Falcon and his employees, not between Falcon's employees and McCue and Tasi through Falcon.

IV.

¶ 36 We conclude that Falcon raises for the first time on appeal the issue of whether anticipatory lost profits can be recovered for an illegal business activity. Because the issue does not qualify under any of the three exceptions, we decline to address it. We also conclude that Falcon does not have standing to assert on his own behalf or his employees' behalf a claim for future lost wages. The trial court's December 23, 2003 Judgment and June 17, 2003 Order are hereby AFFIRMED.

SO ORDERED this 24th day of May 2005.

/s/_____
MIGUEL S. DEMAPAN, Chief Justice

/s/_____
ALEXANDRO C. CASTRO, Associate Justice

/s/_____
JOHN A. MANGLONA, Associate Justice