2013 WL 10545865 (Hawai'i App.) (Appellate Brief)
Intermediate Court of Appeals of Hawai'i.

Gene WONG, Plaintiff-Appellant/, Cross-Appellee,
v.
HAWAIIAN AIRLINES, INC., Defendant-Appellee/Cross-Defendant.

No. 13-0000703.
November 22, 2013.

Civil No. 11-1-2459
Appeal from the
1) Order Granting Defendant Hawaiian Airlines, Inc.'s Motion for
Summary Judgment, Filed January 29, 2013, filed herein on April 10, 2013
2) Final Judgment, filed herein on June 7, 2013
First Circuit Court
Honorable Karl K. Sakamoto Judge

Gene Wong's Answering Brief On the Cross-Appeal By Hawaiian Airlines, Inc.

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*1 I. COUNTER-STATEMENT OF THE CASE

A. Nature of the Case

This is a lawsuit by Gene Wong against his former employer, Hawaiian Airlines, Inc. (hereafter, "Defendant" or "Hawaiian") upon two tort claims and one statutory claim under the Unfair Trade Practice Act, HRS § 480-2 and -13 (UDAP claim) **(39 ROA 21-26).** [This represents an abbreviation for the PDF version of the Record on Appeal, being Volume 39 at the indicated page. Similar abbreviations will be used to refer to the Record on Appeal as the first volume of the RoA is Volume 39; the second volume is 41; and the third volume is 43.] Wong's two tort claims were for negligence and negligent misrepresentation **(39 ROA 21-26).** The third claim is commonly referred to as a "UDAP" claim **(39 ROA 21-26).**

B. Course and Disposition of the Proceedings in the Circuit Court. On October 18, 2011, Gene Wong (hereafter, "Wong") filed his three-claim complaint against Hawaiian, seeking monetary damages, costs, and attorney's fees against Hawaiian based upon the tort claims of negligence, negligent misrepresentation, and a UDAP claim. His central theory of recovery was that Hawaiian's agent was negligent in 2010 advising Wong that he could join Medicare Part B coverage without incurring a penalty because it had been done by Hawaiian former employees. In reality, because Wong had become first eligible for Medicare Part B in May of 2001, he now had a 100% increase in his Medicare Part B premium **(39 ROA 21-26).** Wong claimed damages of about $287,000 plus prejudgment interest at ten percent (10%) per annum from March 1, 2010 on the two negligence claims

(Id. at 23-24). On the UDAP claim, Wong alleged that he is an elder, being over 75 years of age, and also is entitled to treble damages plus attorney's fees and costs **(Id. at 24-26).**

On November 7, 2011, Hawaiian filed their Answer to the Complaint, claiming 21 defenses and seeking dismissal of the complaint and entry of a cost award and ***2** attorney's fees against Wong (**39 ROA 33-38**). Not waiting for any discovery, Hawaiian filed their first motion for summary judgment on June 7, 2012 (**39 ROA 68-152**). In that motion, Hawaiian argued that Wong's damages were speculative, that Hawaiian owed no duty to Plaintiff to provide him with accurate medical plan and Medicare information, and that Wong lacked any standing to bring his UDAP claim (**39 ROA 68-152**).

On July 10, 2012, Wong filed his memorandum in opposition to Defendant's motion for summary judgment (**39 ROA 158-309**), arguing and setting forth facts to prove that Wong's damages are not speculative, Hawaiian owed Wong a duty to provide him with accurate medical plan and Medicare information, and finally that Wong did have standing to bring his UDAP claim (**39 ROA 158-309**).

Defendant filed a reply memorandum on July 17, 2012 (**39 ROA 322-350**), and the matter came on for hearing, resulting in an order denying without prejudice Hawaiian's motion for summary judgment on August 10, 2012 (**39 ROA 358-360**).

Extensive discovery was then commenced by Hawaiian which precipitated Wong's motion for a protective order on the discovery on November 23, 2012 (**39 ROA 395-460**). Wong wanted the protective order to stop Hawaiian from trying to discover insurance and financial information about Wong and his wife who was not even a party to the case (**39 ROA 436-440**). Hawaiian wanted their tax returns even though Wong was not seeking the additional income-related monthly adjustment amount on the Medicare Part B premium; and, hence, no tax return information was needed and became totally irrelevant (***Id.* at 439-440**). On December 11, 2012, Hawaiian filed its opposition to the motion for protective order (**39 ROA 576-663**).

On January 8, 2013, Judge Sakamoto's order was filed, denying Wong's motion for protective order (**39 ROA 697-698**).

***3** On January 29, 2013, Defendant filed its second motion for summary judgment **(39 ROA 761-856),** this time contending that Defendant's erroneous advice to Wong occurred while Hawaiian was not engaged in the trade or commerce and, therefore the UDAP claim must be denied. Defendant also claimed the negligence claims were preempted by ERISA (Employee Retirement Income Security Program) and other federal labor laws **(39 ROA 761-856).**

On February 25, 2013, Wong filed his memorandum opposing the second motion for summary judgment (41 ROA 10-172). It appears that the Circuit Court clerk scanned that opposition twice, and the second part of it appears in 41 ROA 173-335.

On February 28, 2013, Wong filed a motion to compel discovery from the Defendants, and sought attorney's fees for such motion (**41 ROA 348-474).** The motion was set for hearing on March 21, 2013 but never heard nor decided because on March 1, 2013, Hawaiian filed a rely memo supporting its motion for summary judgment **(41 ROA 488-499).** Then, on March 18, 2013, the Court filed its order granting in part the Defendant's second motion for summary judgment filed January 29, 2013 **(41 ROA 722-723).** On April 10, 2013, the Court filed another order, this time granting Defendants' motion for summary judgment in full **(41 ROA 775-776).**

On April 17, 2013, Hawaiian filed a notice of taxation of costs **(41 ROA 779-792),** to which Wong objected **(41 ROA 793-797).** Apparently the Clerk never acted on the notice of taxation of costs, and so Hawaiian then filed a motion for taxation of costs on May 6, 2013 **(43 ROA 5-152).** Three days later, on May 9, 2013, Wong filed his notice of appeal to this Court **(43 ROA 154-158).** On May 21, 2013, Wong filed an opposition to the motion to tax costs **(43 ROA 159-375).** Naturally, the Defendant filed a reply memo on the taxation of costs motion on May 24, 2013, this time attaching numerous additional documents and proof in response to Wong's opposition **(43 ROA 376-458).**

***4** Out of order, the final judgment in this case was filed on June 7, 2013 **(43 ROA 459-460).** A week later, on June 14, 2013, the Court filed the order granting Hawaiian's motion for taxation of costs of $11,885.30 **(43 ROA 461-462).**

On June 26, 2013, Wong filed his amended notice of appeal **(43 ROA 465-466);** and on that same date, the Defendant filed it's notice of cross-appeal **(Id. at 467-472).**

C. Material Facts

Gene Wong was employed by Hawaiian as an airline pilot and was federally mandated to retire when he reached age 60 **(39 ROA 183).** In 2001, when he turned 65 and became eligible for Medicare Part B coverage, Daun Ito, Defendant's Director of Employee Benefits and Compensation, informed Wong that he did not need to take Medicare Part B because Defendant would provide him with his primary medical insurance through Defendant's existing and current active pilot's HMSA group insurance program and that if he wanted to take Medicare Part B, he could switch without penalty at a later date. ***(Id.).*** In May of 2001, Wong's Medicare Part B premium would have cost him $50 a month if he had chosen to accept that coverage (Id.). In reliance upon the information given by Defendant's Director of Employee Benefits and Compensation, Wong did not complete the necessary forms to accept Medicare Part B from 2001 through March of 2010 ***(Id. at 184).*** On March 1, 2010, Wong learned from Daun to, Defendant's Director of Employee Benefits and Compensation, that she gave him incorrect information about the enrollment penalty or surcharge for the Medicare Part B coverage ***(Id.).*** As a result of Defendant's misinformation given Wong by Daun Ito, Wong's penalty or surcharge for Medicare Part B coverage will be at least 100% per month of the current Medicare Part B premium which he calculated to be in the future totaling about $287,000 ***(Id. at 184).***

Wong was concerned about his health care insurance because: (1) If Defendant files again for bankruptcy as it did in 1993 and 2003, Defendant's health care plan could be avoided ***(Id. at 184);*** (2) Defendant never fully funded its retirement plan and stopped ***5** buying the promised annuity for retirees ***(Id. at 185);*** Defendant is expanding its routes which, if the airline business turns sour, could cause another bankruptcy ***(Id. at 185-186).***

The March 1, 2010 letter from Daun Ito as Senior Director of Employee Benefits & Compensation for Defendant admitted that she gave him wrong information about avoiding the late-enrollment penalty ***(Id. at 252).*** That incorrect information was given to him when Wong turned 65 ***(Id. at 252).*** The letter admitted that Wong was told at some point in time that if his plan were cancelled, Hawaiian would be able to provide him with necessary information to avoid a late-enrollment penalty ***(Id. at 252).***

Wong tried to avoid litigation about the misinformation from Defendant by his attorney's July 1, 2011 letter ***(Id. at 193-194).*** Defendant declined that opportunity and refused to compensate Wong ***(Id. at 198).***

Daun Ito (Ito) did not attend seminars to improve her knowledge about the travel industry management and has not studied the rules about Medicare and never did **(41 ROA 17).** Medicare is a benefit not administered by the Defendant, and Ito never had the Medicare booklet ***(Id. at 18).*** Ito never attended seminars about Medicare administration ***(Id. at 18).*** In the past, Ito had signed forms for Medicare application for people that were applying for Medicare, and she did so more than 20 times ***(Id. at 19).*** Ito recalls telling retired pilots that they need not apply for Medicare Parts A and B because the company does not require them to sign up for that as the HMSA plan continues without Medicare interaction ***(Id. at 19).*** Daun Ito admitted that her function for the Defendant company is a business function, not a social event ***(Id. at 19).*** Ito learned from Wong that he could not get the late-enrollment penalty waived ***(Id. at 20).*** The company does not have a procedure where they meet with retirees before they retire and tell them their options with respect to Medicare Part B and the company health insurance policy ***(Id. at 20).*** Ito believes that her letter to Wong was true, that ***6** she provided incorrect information regarding Medicare to Wong ***(Id. at 21).*** She admitted that if she could change her statement today in the letter, she would not have written the letter ***(Id. at 21).*** Between 2001 and 2010, Ito knew about the Medicare late-enrollment penalty for Part B ***(Id. at 21).*** Ms. Ito admitted that her advice to Gene Wong was not correct ***(Id. at 22).*** When she discussed Medicare Part B late-enrollment problem with Wong, she was acting on behalf of Defendant ***(Id. at 22).*** Ito does not know whether Wong is covered by the collective bargaining agreement (CBA) now that he is retired ***(Id. at 22).*** Defendant spends about -2,000,000 per month on medical benefits for employees,

paying HMSA, Kaiser, and Prem ***(Id. at 22).*** According to Ito, Wong would be a consumer when he buys services from the doctor or gets a prescription ***(Id. at 22).*** Medicare Part B coverage is not part of Defendant's health insurance plan (Id. at 23). Defendant does not provide any information to retirees about coordinating Medicare Part B with the company's health insurance plan and never has to Ito's knowledge ***(Id. at 23).***

Gene Wong has not been a member of the Air Line Pilots Association (ALPA) union since retiring in 1996 (**41 ROA 36**). As a result of being retired, Wong is not represented by the union (***Id.***) When Daun Ito gave Wong the wrong advice about the late-enrollment penalty for Medicare, that was not about Defendant's medical insurance plan through HMSA (***Id.***) Wong had Defendant's telephone number when he retired in 1996, and he called Daun Ito many times and talked with her about questions he had about the late-enrollment penalty for Medicare Part B because of the Medicare documents he received told him to contact his former employer's human resource department (***Id. at 37***). Wong called Daun Ito because of his Medicare Part B questions, and she gave him the wrong advice upon which he relied to his detriment (***Id. at 37***).

The record facts about Gene Wong being a "consumer" are based upon his investing about $100 more per month for his Medicare Part B premium, or a total of about $1,200 ***7** a year **[39 ROA 166].** He spent $75 for trips to the Social Security office in Kapolei **[39 ROA 187].** Clearly, Medicare is a medical insurance plan [39 ROA 206-218]. The record also contains additional documentation supporting Wong's damage claim of about $214,822 without calculating inflation factors as of the hearing on the first motion for summary judgment **[39 ROA 221-231].** The record contains another calculation for Wong's damages of $286,846 in Wong's opposition to the first summary judgment motion **[39 ROA 195-196].** Wong was eligible for Medicare Part B coverage in 2001 when he turned age 65 **[39 ROA 183].** He did not complete the necessary forms to accept Medicare Part B insurance coverage from 2001 through March of 2010 because of the wrong information that he was given by Defendant's Director of Employee Benefits and Compensation **[Id., at 184].** On March 1, 2010, Wong learned from Daun Ito, Defendant's Director of Employee Benefits and Compensation, that she gave him incorrect information about avoiding the enrollment late penalty for Medicare Part B coverage **[Id., at 184].** As a result, Wong is subject to a late enrollment penalty surcharge of 100% per month over the current Medicare Part B premium which he calculated to be about $287,000 **[Id., at 184].**

D. Introduction and Statement of the Case Controverted by Cross-Appellee Gene Wong

There is no provision in the Hawaii Rules of Appellate Procedure (HRAP) Rule 28 for any introduction. Therefore, Gene Wong objects to the so-called introduction in the Opening Brief of Hawaii on pp. 1 and 2. Moreover, Hawaiian's Statement of the Case on pp. 2-7 does not comply with HRAP Rule 28(b). Accordingly, Wong controverts and objects to Hawaiian's Opening Brief Statement of the Case and asserts that Wong's Statement of the Case correctly complies with said HRAP Rule 28(b). Moreover, since Hawaiian purportedly appealed from the denial of its motion for summary judgment on August 10, 2012 as set forth in Appendix 1 to Hawaiian's Opening Brief on the cross-appeal, the record at that hearing is what is pertinent and appropriate to be asserted on the claimed cross-appeal because that is the record that the Circuit Court had at the time of the hearing on July 20, 2012. Hawaiian's recitation of all the discovery that ***8** occurred after that time did not exist in the record before Judge Sakamoto on July 20, 2012 and, therefore, should be disregarded to the extent that it seeks to interject additional facts that were not before Judge Sakamoto on July 20, 2012. Hawaiian is contending that Judge Sakamoto committed two errors, in that his decision on August 10, 2012: (1) Wong was not injured at the start of the case; and (2) Wong lacked standing as a consumer under HRS § 480-1. In the Circuit Court, Hawaiian's motion sought summary judgment on these arguments: First, Wong had no damages because his damages were speculative; and Second, Hawaiian argued that Wong lacked standing to sue under HRS § 480-13(b) **[39 ROA 68-152].** Now, Hawaiian is arguing on appeal that the Circuit Court erred in finding that there were genuine issues of material fact as to Wong's damages in the form of increased Medicare Part B premiums **[OB at 7].** Now, on appeal, contrary to what Hawaiian argued at the trial level, Hawaiian is now arguing that the trial court erred in deciding that Wong was a consumer because he purchased goods or services **[OB at 8].** The pertinent part of Hawaiian's argument on its first motion for summary judgment on the issue of damages is found in **39 ROA 78-88,** claiming that Wong's damages are nothing more than speculation and may not be recovered. In Hawaiian's Reply filed July 17, 2012 on its first motion for summary judgment [39 ROA 322-350], Hawaiian argued at pp. 324-325 that his increased Medicare premium was an improper attempt to manufacture damages.

In Hawaiian's first motion for summary judgment, it claimed that Wong's unfair or deceptive practice claim failed as a matter of law because Wong lacked standing to assert his claim under HRS § 480-13(b) because he could not "establish that he committed money, property or services in a personal investment" **[39 ROA 91-94].** In its Reply, Hawaiian argued that Wong lacked standing because he never made a personal investment in the Medicare premium and really his damages were self-inflicted **[39 ROA 331-332].** That argument was made on July 17, 2012. Now, on appeal, Hawaiian is changing its argument in its Points of Error and arguments as will be detailed in the rest of this brief.

***9 II. COUNTER-STATEMENT OF POINTS OF ERROR**

Hawaiian's purported Points of Error does not comply with HRAP Rule 28(b)(4) in the following respects: (1) Failing to state where in the record the alleged error was objected to or in the manner in which the alleged error was brought to the attention of the trial court; and (2) Arguing how and why the Court erred rather than simply stating what the error was and where it was in the record.

III. COUNTER-STATEMENT OF STANDARDS OF REVIEW

A. Again, Hawaiian fails to comply with HRAP Rule 28(b)(5) by failing to state which of the errors to which the particular standard of review applies on that cross-appeal. Accordingly, Wong will now list the appropriate standards of review.

B. The issue of standing is a legal issue, reviewed *de novo. AlohaCare vs. Ito,* 126 Haw. 326, 341, 271 P.3d 621, 636 (2012). This standard applies to both of Hawaiian's claimed errors.

C. Statutory interpretation is a question of law, reviewed *de novo. AlohaCare vs. Ito, supra.* This standard applies to both of Hawaiian's claimed errors.

D. Denial of summary judgment based on factual issues is not appealable under the Morgan rule. *Bhakta vs. County of Maui,* 109 Haw. 198, 209-211, 124 P.3d 943, 954-956 (2005); and *Thomas vs. Kidani,* 126 Haw. 125, 128-129, 267 P.3d 1230, 1233-1234 (2011). This standard applies to both of Hawaiian's claimed errors.

E. The trial court's decision granting summary judgment is reviewed de novo. *Thomas vs. Kidani, supra,* 126 Haw. at 128, 267 P.3d at 1233. This standard applies to both of Hawaiian's claimed errors.

***10** F. Where a trial court makes a correct decision but gave a wrong reason, the decision on appeal must be affirmed. *City and County of Honolulu vs. Hsiung,* 109 Haw. 159, 175, 124 P.3d 434, 450 (2005). This standard applies to both of Hawaiian's claimed errors.

G. Findings of Fact are reviewed on appeal for clearly erroneous standard of review. *Curtis vs. Dorn,* 123 Haw. 301, 306, 234 P.3d 683, 688 (2010). This standard applies to both of Hawaiian's claimed points of error.

IV. ARGUMENTS

A. Gene Wong was damaged and suffered injury based upon his future increase in his Medicare Part B double premium. Therefore, the Circuit Court did not commit any error denying Hawaiian's first motion for summary judgment.

The Circuit Court found, in pertinent part in the August 10, 2012 order on the issue of damages:

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"1. At this point, the Court believes that there are genuine issues of material fact as to Plaintiff's damages in the form of increased Medicare Part B premiums that he is incurring. Exhibit 5, page 1, reflects a $99.90 late fund surcharge for his filing for Medicare Part B." [**39 ROA 359**]

The record on appeal proves that Hawaiian argued that Wong's enrollment in Medicare was an improper attempt to manufacture damages [**39 ROA 324-329**] from its motion according to its Reply memorandum filed July 17, 2012. However, the original memorandum filed June 7, 2012 argued that Wong's damages for late enrollment penalties are speculative [**39 ROA 79-85**].

The Circuit Court found there were genuine issues of material fact on that issue and, therefore, denied without prejudice the first motion for summary judgment [**39 ROA 358-360**]. Since that is a factual issue under the Morgan rule, Wong argues ***11** that decision is not reviewable on this appeal. *Bhakta vs. County of Maui, supra;* and *Thomas vs. Kidani, supra.* Moreover, at that hearing, Wong's July 10, 2012 opposition [**39 ROA 158-309**] proved that he had, in fact, been damaged and that his damages were not speculative. His evidence established that in 2001 when Gene Wong became 65 and first became eligible for Medicare Part B, his premium for such coverage would have cost him $50 a month had he chosen to accept the plan. As of July of 2012, the standard premium for Medicare Part B was $99.90, and the late-filing surcharge for that was another $99.90, or double the amount [**39 ROA 166**]. At that time, Gene Wong's evidence calculated that projected cost of that increased Medicare Part B coverage would be about $287,000 plus an inflation adjustment and 10% interest from March 1, 2010 [**39 ROA 167**]. Since Gene Wong is an **elder** as defined under HRS § 480-13(b)(1), he was entitled to an award of not less than $5,000 or treble damages, whichever is greater, plus attorney's fees and costs [**39 ROA 167**]. HRS § 480-13.5 also applies because Wong is an **elder**, so the Court can impose a civil monetary penalty of not exceeding $10,000.

Contrary to Hawaiian's Opening Brief on the cross-appeal, now Hawaiian is arguing that Gene Wong lacked standing to bring the case because he suffered no damages [**OB at 9-21**]. In truth, Wong's injuries are not self-inflicted but caused by Hawaiian's information to Wong about eliminating the late enrollment penalty for Medicare Part B. Wong believed Daun Ito's statements and did not enroll. His premium doubled to equivalent of $100 a month, so for a 12-month period that is $1,200. Then, for a 25-year period, that is at least $60,000. His damages are not self-inflicted and not illusory. His damages were not caused by the federal employee but by Hawaiian's employee. Therefore, there is no waiver available under the federal case cited by Hawaiian at **OB 12,** *McGowan vs. Shalala,* 135 F.3d 531, 533 (7th Cir., 1998). Here, there was no error by the U.S.A. official, only Daun Ito on behalf of Hawaiian.

***12** Hawaiian's argument at p. 13 is wrong. In reality, by enrolling in Medicare Part B, Wong was actually lessening or mitigating his damages which inured to the benefit of Hawaiian Airlines.

Hawaiian's reliance upon *Clapper vs. Amnesty International USA,* 133 S.Ct. 1138 (2013), is misplaced in this case and does not even appear cited in the table of authorities for a correct page on which it appears. Hawaiian cited *Clapper* **OB, p.1.** In Clapper, the respondents who brought the action for a declaration that the provisions of Foreign Intelligence Surveillance Act allowing individuals to be under surveillance were attorneys and human rights labor, legal and media organizations. They weren't former employees of an a U.S. airline. That case is factually and legally distinguishable from this case. Wong established what his actual out-of-pocket damages were at the rate of $1,200 a year and, therefore, at least $5,000 under HRS § 480-2 and - 13, and also his damages for his other tort claims for negligence and negligent misrepresentation. Hawaiian's use of Clapper is worthless in this case and proves how ephemeral Hawaiian's arguments are about Gene Wong's damages and lack of standing.

Hawaiian's reliance upon *Sierra Club vs. Hawaiian Tourism Authority,* 100 Haw. 242, 250, 59 P.3d 877, 885 (2002), on the test for standing was met because Wong's damages were established at the beginning of the suit rather than at the end of the litigation. The trial court correctly found that he had been damaged in the form of increased Medicare Part B premiums to the tune of about $100 a month for the surcharge for his late filing for Medicare Part B. If he had delayed longer, the late enrollment penalty would have increased ten percent per year, so he was actually helping Hawaiian by enrolling in Medicare Part B.

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Hawaiian's reliance on *McGowan vs. Shalala, supra,* at **OB 12** for the proposition that there was no benefit to Wong to have Medicare Part B coverage is really misplaced because that case actually supports Wong's proof that only a federal employee is the basis to waive the late enrollment fee. Here, there was no error by a federal employee, ***13** only Hawaiian's error by information and advice from Daun Ito which Hawaiian has not contested factually that she gave him wrong information and advice about late enrollment penalties for Medicare Part B, saying that if he did incur it, she could get it waived or relief from that late enrollment penalty.

Hawaiian's reliance upon *Hawaii's Thousand Friends vs. Anderson,* 70 Haw. 276, 284, 768 P.2d 1293, 1299-1300 (1989), about Wong's damages being self-inflicted is again misplaced at best. Moreover, Hawaiian omitted from its quote the following sentence at p. 284: "We abhor the use of courtrooms as political forums to vindicate individual value preferences." As earlier argued, Wong's damages are not self-inflicted. He delayed enrolling in Medicare Part B based exclusively on what Hawaiian's agent told him, that if he later enrolled and incurred a penalty, the company could get it waived or removed. Wong relied upon that representation to his detriment of at least $1,200 a year. Hawaiian's argument on p. 16 about Wong's damages being highly speculative is internally inconsistent and speculative itself. Wong proved that Hawaiian had previously taken bankruptcy and that it may do so in the future, and what if Hawaiian sells its assets and business to another airline and then the retired employees no longer have any protection under the Airline Pilots Association (ALPA) contract. By enrolling in the Medicare Part B program, Wong added to his medical care insurance coverage in that the Hawaiian policy would be secondary and the Medicare Part B became primary coverage, thereby saving him added expense for his out-of-pocket medical expenses. Wong's declaration appears in the record at **39 ROA 183-190,** proving that now he has Medicare, that is primary to the HMSA benefits. In addition, Wong learned that HMSA is not really an insurance company but is only a mutual benefit society which also caused him to file for Medicare Part B **[39 ROA 185].** Wong also claimed out-of-pocket expenses of $75 for trips to the Social Security office in Kapolei to resolve the Medicare Part B premium penalty issues **[39 ROA 187].** *Per Zanakis-Pico vs. Cutter Dodge, Inc.,* 98 Haw. 309, 319-322, 47 P.3d 1222, 1232-1235 (2002), even $3 - $5 for gasoline was sufficient damages for a UDAP claim. Wong is no longer in the ALPA union, and so if Hawaiian goes into bankruptcy and their health plan is not funded by Hawaiian, ***14** Wong would have to get into Medicare Part B and did so to protect his own economic interests as an investment in trying to save paying his own care instead of having the luxury of an insurance company to pay for it. Wong also proved that with Hawaiian Airlines' great expansion recently, he fears that Hawaiian is going into another financial period which will end in a bankruptcy proceeding and/or other financial downturn **[Id., at 188-189].** Wong attached an **Exhibit 12** to his declaration, listing the U. S. airlines that have filed for bankruptcy since 1989 **[Id., at 189].** He also attached Exhibit 13 to his declaration proving that the price-to-earnings ratio of Hawaiian Airlines is weak comparatively with three other airlines [Id., at 189]. Wong also proved that his father lived to be age 104 **[Id., at 189].**

Hawaiian's **OB** argument at 17 that maybe Wong will die and end this standing issue is a very poor argument. Here, Wong was trying to protect his own assets against big medical expenses, and Hawaiian is now hoping that he dies early to end the matter. This also triggers application of HRS § 480-13.5 for injuries to **elders**.

At **OB p. 18,** Hawaiian has a one-page footnote, No. 9, which is single spaced, contrary to the spacing requirements of HRAP. Why such a long footnote was necessary is not clear because the opening brief ends on p. 30, and Hawaiian was allowed 35 pages for the opening brief. Hawaiian cited at least two cases in that FN 9, p. 18, about attorney's fees not being UDAP damages because HRS § 480-13 allows for attorney's fees. However, one of those cases, *Chun vs. Park,* 51 Haw.501, 462 P.2d 905 (1970), was not a UDAP case but a negligence case holding that the plaintiff should not have been awarded attorney's fees as damages or costs. (Note: Hawaiian missed the correct page number in Chun, citing p. 462 instead of 501.) At Hawaiian's **OB, pp. 8 § 17,** it relies upon *Bova vs. City of Medford,* 564 P.3d 1093 (9th Cir., 2009), for the proposition that Wong lacks standing. That case really decided that the issue was not ripe for decision, so dismissed. Here, this case will be on appeal for at least four more years, so not at all like Bova. At **OB, p. 19,** Hawaiian's argument is wrong because actually Wong cut the damages by enrolling and did not end the damages. His enrollment just ***15** enabled the trier-of-fact to decide what his damages are. Clearly, the quantity of damages is not an issue for summary judgment. The only factual issue on summary judgment is whether there are genuine issue of material fact as to Wong's damages. The Court decided that correctly, that there were, and therefore the motion was denied. When Hawaiian argues at **OB, p. 20** that Wong could have requested that the Secretary of the Department of Health

and Human Services could have adjusted the enrollment period based on errors, that is again referring to errors of the federal employees, not an error of Hawaiian's employee. Therefore, Hawaiian's argument is all wrong about that. *McGowan vs. Shalala,* supra. It is not clear from **OB, p. 21** whether Hawaiian is now saying that it assumed the position of the federal government when Daun Ito gave Wong the wrong information and advice about avoiding the late enrollment penalty for Medicare Part B. If that is the case, that Hawaiian is now the federal government, that is indeed a novel and unsupported argument contrary to the law and the facts. Again, Hawaiian's reliance at **OB, P. 21** upon *Fields vs. Sullivan,* 789 F.Supp. 739, (W.D. VA., 1992), is misplaced in that Hawaiian is now claiming that Wong could get relief from the U.S.A. based on the federal employee's wrong advice. Surely, Hawaiian is not claiming to be a federal government employee or an instrumentality of the federal government. Therefore, its argument about Wong getting a waiver or relief from the federal government is absurd and frivolous.

Accordingly, Wong proved his damages with enough adequate evidence to withstand the motion for summary judgment; and, therefore, the Circuit Court did not err in finding that there were genuine issues of material fact on Wong's damages for the late enrollment in the Medicare Part B **[39 ROA 359].**

***16 B. Wong had standing as a consumer under HRS § 480-1 where he wanted to get Medicare Part B but Hawaiian's misrepresentations cost Wong double the premium for late enrollment, requiring him now to invest more money in Medicare Part B premium for late enrollment.**

Hawaiian's eight-page argument criticizing the Circuit Court's decision in which the Court found that Wong was a "consumer within the ambit of Chapter 480 as it constitutes purchasing goods or services." True, Wong argued that he was committing money in a personal investment in accordance with the definition of a consumer under HRS §480-1. The legislature defined "consumer" as follows:

> "'Consumer' means a natural person who primarily for personal, family or household purposes, purchases, attempts to purchase, or is solicited to purchase goods or services or who commits money, property, or services in a personal investment."

Therefore, Wong argued and continues to argue that he is a consumer under that statute and the UDAP statutes when he was investing in health insurance in Medicare Part B where he pays an enrollment fee plus the 100% penalty that was caused by Hawaiian's wrong information and advice. According to *Hunt vs. First Insurance,* 82 Haw. 363, 373, 922 P.2d 976, 986 (1996), decided that Hunt was not a consumer because she did not allege that she bought or attempted to buy goods or services from First Insurance or that she committed money, property, or services in a personal investment, therefore, she lacked standing to bring the private cause of action under HRS § 480-13 which we have been referring to as a UDAP claim, abbreviation for unfair deceptive act or practice. Here, Wong invested his own funds in protecting his capital against being depleted by health care costs not covered by health insurance either by the Defendant's plan or Medicare Part B. Thus, he is a consumer within the meaning of the foregoing definition. This proposition is confirmed by *Cieri vs. Leticia Query Realty, Inc.,* 80 Haw. 54, 67-68, 905 P.2d 29, 42-43 (1995). Certainly Wong was investing in trying to protect his own funds from being depleted by health care costs. If investing in real estate in Hawaii makes the plaintiff a consumer, then certainly investing money in health insurance to preserve his home and cash from depletion from high medical ***17** expenses in his senior years qualifies as investing money. Therefore, he is a consumer. The record will reflect that Wong is certainly a senior, being now 77 years of age. The Court can judicially notice that medical expenses increase with age, and that is one reason why Medicare exists and why the Defendant wanted to provide medical insurance for retired pilots. That is no different than the *Cieri* case where the court held that Plaintiff was investing in real estate.

Interestingly, Hawaiian forgot to discuss the case of *Zanakis-Pico vs. Cutter Dodge,* 98 Haw. 309, 316, 47 P.3d 1222, 1229 (2002), because a sale is not needed as a "prerequisite to a consumer recovering damages under HRS § 480-13 based on injuries stemming from violations of HRS § 480-2" (a UDAP claim). The cases of *Hough vs. Pacific Insurance Company, Ltd.,* 83 Haw. 457, 927 P.2d 858 (1996), held, *inter alia,* that a worker had no UDAP claim against the workers' comp insurer because

he was not a consumer of that insurance. This, therefore, implies that if he were a customer and bought insurance, he would be a consumer and, therefore, could possibly have a UDAP claim. *In Flores vs. Rawlings Company, LLC,* 117 Haw. 153, 166, 177 P.3d 341, 354 (2008), members of medical benefit plan by HMSA were held to be consumers under our UDAP statutes in connection with a loan receipt or loan agreement transaction that could have been enforced by HMSA because the loan agreement created obligation and so the court said that could be considered a form of payment for the health care that the plaintiffs' received. Accordingly, plaintiffs in that case were held to be consumers and engaged in a consumer transaction. The same result obtains here, whether it is called committing money in a personal investment or for attempting to purchase or solicited to purchase goods for services. The trial court's decision was correct. *City and County of Honolulu vs. Hsiung, supra.*

According to *State vs. Hawaii Market Center, Inc.,* 52 Haw. 642, 648-649, 485 P.2d 105, 109 (1971), the test of the definition of an investment contract was held as follows:
"Therefore, we hold that for the purposes of the Hawaii Uniform Securities Act (Modified) an investment contract is created whenever:

***18** (1) An offeree furnishes initial value to an offeror, and

(2) a portion of this initial value is subjected to the risks of the enterprise, and

(3) the furnishing of the initial value is induced by the offeror's promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise."

Here, when Wong was given the wrong information and delayed entering the Medicare Part B insurance program, the transaction fits the investment contract definition as committing money in a personal investment in Medicare Part B insurance.

Surely an annuity contract is an investment per *Mahi vs. Variable Annuity Life Insurance Company,* 129 Haw. 427, 2013 WL 2301791, at 2 (ICA). If an annuity is an investment, clearly health insurance under Medicare Part B is an investment because Wong was investing capital to protect against his potential economic loss so that the carrier, not the insured Wong, pays for the loss, thereby preserving the insured's assets. Therefore, Wong was committing money in a personal investment per Cieri, supra.

According to HRS § 490:2-105(1), goods is defined as follows:
"'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities, (Article 8), and things in action. ***"

Therefore, Wong argues that the health insurance plan with Medicare was an investment contract per *Hawaii Market Center, supra.*

***19** According to *Everson vs. State,* 122 Haw. 402, 416-421, 228 P.3d 282, 297-301 (2010), a health benefit plan for the state retirees was coordinated and supplemented with Medicare. The question then becomes, what is Medicare? According to *Turecamo vs. CIR,* 554 F.2d 564, 571-575 (2nd Cir., 1997), Medicare passed in 1965 is a comprehensive and coordinated federal health insurance program and medical care for the aged. Part B provides essentially the same health insurance protection as a private insurers per the following at p. 571:

> "This subchapter was passed into law for the specific purpose of providing a coordinated and comprehensive approach to federal health insurance and medical care for the aged. Subchapter XVIII consists of one common definitional part, Part C, 42 U.S.C. § 1395 x-1395 pp and two substantive parts, Part A, 42 U.S.C.

> §§ 1395c to 1395i-2, and Part B, 42 U.S.C. §§ 1395j-1395w, which together provide essentially the same health insurance protection as is furnished by comprehensive medical insurance plans underwritten by private insurers."

According to 42 U.S.C. § 1395r, the Medicare Part B premiums are calculated based upon the statutory language which is very lengthy, convoluted, and complicated. That lengthy statute from Westlaw is nine pages long and defines all of the conditions upon which monthly premiums are to be calculated for Medicare Part B.

Clearly, Medicare is an insurance contract. HRS § 431:10A-301. HRS § 431:1-102 makes it clear that the business of insurance is affected by the public interest, requiring the persons to be actuated by good faith and abstain from deception, and practice honesty and equity in all insurance matters. HRS § 431:1-201 defines "insurance" as follows: "(a) Insurance is a contract whereby one undertakes to indemnify another to pay a specified amount upon determinable contingencies." HRS § 431:1-215 defines the transaction of insurance business in the State of Hawaii. HRS § 431:1-202 defines an "insurer" as follows: "Insurer means every person engaged in the business of making contracts of insurance and includes reciprocal or interinsurance exchanges. HRS § 431:1-205 defines accident and health or sickness insurance. The insurance division under the supervision of the Insurance Commissioner is within the Department of Commerce and Consumer Affairs. HRS § 431:2-101 and -102. HRS § 431:6-103 ***20** lists the eligible investments that domestic insurers may make, as defined by the terms of HRS § 431:6-101. According to HRS § 435H-1, an "Insurer" "means any person or entity that issues a policy of accident and health or sickness insurance subject to article 10A of chapter 431, or chapters 432 or 432D." HRS § 435 H-2 describes the establishment of the Hawaii health insurance exchanges and defines the purpose thereof.

Wong also argues that, alternatively, health insurance under Medicare Part B is a product, so becomes "goods" under the UCC definition and an asset per the Indiana case of *Bingley vs. Bingley,* 935 N.W.2d 152 (Ind., 2010), holding the husband's health insurance benefits were a marital asset. Judge Sakamoto was correct when he held that Wong was investing in goods under Medicare Part B coverage. Clearly, Wong was and is a consumer with respect to buying Medicare Part B health insurance. He was investing in such insurance, and that is an asset, therefore, constitutes goods under the UCC definition.

The Court can also use the definitions of "deceptive trade practices" contained in HRS § 481A-3 which says, in pertinent part, coordinated as follows:
"(a) A person engages in a deceptive trade practice when, in the course of the person's business, vocation or occupation, the person: ***(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(b) In order to prevail in an action under this chapter, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

(c) This section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this State."

According to Star *Markets Ltd. vs. Texaco, Inc.,* 945 F.Supp. 1344 (D. Haw., 1996), the same acts involved in the transaction can be both a UDAP and an unfair competition claim. ***21** *Jenkins vs. Commonwealth Land Title Insurance Company,* 95 F.3d 791 (9th Cir., 1996), held, inter alia, that the plaintiff stated a UDAP claim against the title insurance company for a defective title report in a real estate transaction.

At **OB, p. 22,** it relies upon McElroy, M.D., Inc. vs. Maryl Group, Inc., 107 Haw. 423, 114 P.3d 929 (2005), for the proposition that Wong is not a consumer. McElroy, Inc. was a corporation and, therefore, not a person, and the two other plaintiffs were only guarantors of the lease and officers of the corporation. That is not the case here. Here, Wong was trying to invest in health insurance to protect his capital against high medical expenses not covered by health insurance in his retirement years as an **elder**. Cieri vs. Leticia Query Realty, Inc. has already been discussed, cited by Hawaiian at **OB 22-23.** Wong certainly falls

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within the definition of "consumer" because he was investing in protecting his retirement funds against being depleted by high medical expenses and getting nervous that HMSA was not going to cover him fully, and certainly not if Hawaiian went out of business or was sold. Next, at **OB, p. 23,** Hawaiian cites Pele Defense Fund vs. Paty, 73 Haw. 578, 837 P.2d 1247 (1992), for the proposition that a plaintiff needs injury to have standing. Our highest court held that the plaintiff did, in fact, have standing because of the following definition at 73 Haw. 593, 837 P.2d at 1257:
"A plaintiff has suffered injury in fact when (1) he or she has suffered an actual or threatened injury as a result of defendant's wrongful conduct, (2) the injury is fairly traceable to the defendant's actions, and (3) a favorable decision would likely provide relief for plaintiff's injury. (citations omitted) ***

We found that the injury arising out of the misrepresentation was a personalized injury, not suffered by the group in general. Id. Each HTF member would have relied differently on the alleged misrepresentation and would have suffered different injuries, necessitating different remedies."

Accordingly, the Paty case decided that public members had standing to bring that action, just as, in this case, Wong has standing as a consumer to sue Hawaiian. ***22** It is not clear why in FN 12 at **OB, p. 26,** Hawaiian cited Gonsalves vs. First Insurance Company of Hawaii, 55 Haw. 155, 516 P.2d 720 (1973). That case decided that the insurance policy was not vague nor misleading to make the document deceptive and, therefore, the trial court correctly dismissed the UDAP case. Reliance upon Bostrom vs. County of San Bernardino, 42 Cal. Rptr. 2d 669, 675 (1995), is for one sentence in a 14-page decision for the proposition that summary judgment could not be granted on a ground not raised by the pleading. The application of that case to this case is obscure. Hawaiian's motion for summary judgment was denied. Therefore, Defendant's reliance on Lopez vs. Baca, 120 Cal. Rptr. 2d 281 (2002) is wrong. At **OB, p. 27,** Defendant cites Civil Service Employees Insurance Company vs. Superior Court of City and County of San Francisco, 584 P.2d 497 (Cal.S.Ct., 1978), relying upon dicta only at p. 505 out of a ten-page opinion. That case was not about getting advice or information on health insurance. It was cited for the purpose of proving that insurance in California is not "goods" nor "service" within the meaning of California Consumer Legal Remedies Act. Even the Defendant's case of Fairbanks vs. Superior Court, 205 P.3d 201 (Cal.S.Ct., 2009), recognized that the prior case involving the Superior Court in San Francisco was mere dictum. 205 P.3d at 203. The Fairbanks case decided that the California statute defining what was covered under the California Consumer Legal Remedies Act in Cal. Civil Code §1761 definition did not include life insurance. That California statute specifically defines "goods" and "services" in separate paragraphs and defines "consumer" in subparagraph (d), as follows: "Consumer' means an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family or household purposes."

Obviously, that definition of "consumer" does not include Hawaii's definition of "consumer" including one committing money, property, or services in a personal investment. Similarly, in the Defendant's cited case of Wilder vs. Aetna Life & Casualty Insurance Company, 433 A.2d 309 (Vt., 1981), cited at **OB, p. 27,** argument that insurance is not goods or services, again involved a statute defining "consumer" as ***23** buying only goods or services, not like our statute defining a "consumer" as one who commits money in a personal investment. See Vermont Statutes Annotated, § 2451a.

On the contrary, at least four states have decided that the sale of insurance is a sale of goods, services, or property. *Showpiece Homes Corporation vs. Assurance Company of America,* 38 P.3d 47 (Colo., 2001), answered four certified questions from the Federal District Court in Colorado, deciding specifically that insurance encompasses the sale of goods, services, or property under the Colorado Consumer Protection Act, and that said Act applies to the insurer's post-sale unfair or bad faith conduct. The Colorado case further referred to the Massachusetts Supreme Court, in that "insurance" constituted services and, therefore, subject to the Consumer Protection Acts. Also, the Colorado case relied upon the Kentucky Supreme Court for the proposition that an insurance policy involves the delivery of financial services. *Stevens vs. Motorits Mutual Insurance Co.,* 759 S.W.2d 819, 821 (Ky., 1988). Accordingly, the Colorado case, contrary to Wilder, supra, decided that the sale of insurance could be classified as a sale of goods, services, or property and, therefore, subject to the Colorado Consumer Protection Act.

To the same effect is *Dairyland County Mutual Insurance Company of Texas vs. Harrison,* 578 S.W.2d 186 (Tex. App. 14th Dist., 1979), held, inter alia, that the auto insurance policy is a service under the Texas Consumer Protection Act contrary to the California decision. The Texas Code defined "consumer" as "an individual... who seeks or acquires by purchase or lease, any goods or services." The court then held that the automobile insurance policies were within the coverage of the Texas Deceptive Trade Practices - Consumer Protection Act. Even where the employer bought the group health insurance plan, the employee was a consumer under the Texas Deceptive Trade Practice -Consumer Protection Act in the employee's statutory claim against the insurance agent. *Kennedy vs. Sale,* 689 S.W.2d 890 (Tx., 1985).

***24** Accordingly, it is respectfully submitted that the trial court did not commit any error in deciding that Gene Wong was a consumer within the terms and meaning of the UDAP statutes. Hawaiian's case law and argument do not require a different result. Clearly, Gene Wong was a consumer regardless of whether he was buying goods, services, or committing money, property, or services in a personal investment.

V. RELEVANT PARTS OF CONSTITUTION, STATUES, AND RULES

A. 42 U.S.C. § 1395j. Establishment of supplementary medical insurance program for aged and disabled

"There is hereby established a voluntary insurance program to provide medical insurance benefits in accordance with the provisions of this part for aged and disabled individuals who elect to enroll under such program, to be financed from premium payments by enrollees together with contributions from funds appropriated by the Federal Government."

B. HRS § 431:10A-301. Definitions

For purposes of this part: * * *

"'Medicare' means the Health Insurance for the Aged Act, Title XVIII of the Social Security Amendment of 1965, as then constituted or later amended."

C. HRS § 431:1-205. Accident and health or sickness insurance defined

"Accident and health or sickness insurance, also referred to as disability insurance, is insurance against bodily injury, disablement, or death by accident, or accidental means, or the expense thereof; against disablement or expense resulting from sickness; and every insurance appertaining thereto, including health and medical insurance."

*25 VI. CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that Hawaiian's appeal should be dismissed and Gene Wong recover his costs on this frivolous appeal, and attorney's fees pursuant to HRS § 480-13 and HRAP Rule 38.

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