2013 WL 10545863 (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.
September 13, 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

**Plaintiff-Appellant, Cross-Appellee Gene Wong's Opening Brief**

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## *1 I. 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 ROA21-26).** 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).** [See **Appendix 1** for full text of that order.]

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).** [See **Appendix 2** for the full text of that order.] On April 10, 2013, the Court filed another order, this time granting Defendants' motion for summary judgment in full **(41 ROA 775-776)** [See **Appendix 3** for full text of that order].

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).** [See **Appendix 4** for the full text of that order] 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).** [See **Appendix 5** for the full text of that order.]

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 Ito, 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 ***5** avoided **(Id. at 184);** (2) Defendant never fully funded its retirement plan and stopped 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 ***6** health insurance policy **(Id. at 20).** Ito believes that her letter to Wong was true, that 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 Premera (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).***

***7** Without disputing the above facts, Defendant argued the CBA controls and, therefore, the Railway Labor Act (RLA) and ERISA preempt this case based upon one sentence contained in the various ALPA contracts that are in the record **(39 ROA 817).** That provision provides, in pertinent part:

"The Company shall continue to provide the medical, dental, drug, and vision coverage in effect as of the date of retirement for pilots granted Disability Retirement or who are on Normal Retirement and such pilots' spouse, until age sixty-five (65) at which time the Company shall provide coverage which, when coordinated with Medicare benefits, shall continue the benefits to which the pilot would have been entitled had s/he not retired." **(39 ROA 817).**

The same or similar type language appeared in the ALPA contracts ***(Id. at 811, 823, 829, and 836).***

Wong submitted numerous facts in opposition to the Defendant's May 6, 2013 motion for taxing costs against him **(43 ROA 159-375),** demonstrating that the claimed costs are excessive and not reasonably necessary in this case and that, therefore, at most, the Defendant's costs should not exceed $5,000 **(43 ROA 159-168)** (Appendix 11).

## II. STATEMENT OF POINTS OF ERROR

A. The Circuit Court committed reversible error granting Hawaiian's motion for summary judgment on both of Wong's negligence tort claims and UDAP claim.

1. The order filed March 18, 2013 granted Defendant's motion for summary judgment on the two negligence claims because they were preempted by ERISA, and the UDAP claim was dismissed because the alleged unfair or deceptive act was not in Defendant's trade or commerce **(41 ROA 722-723).** [See **Appendix 2** for full text of that order.]

***8** 2. The second order was filed April 10, 2013 granting the summary judgment motion on Wong's negligence and negligent misrepresentation claims against Hawaiian as preempted by the Railway Labor Act (RLA) **(41 ROA 775-776).** [See **Appendix 3** for full text of that order.]

3. Wong opposed the Defendant's motions for summary judgment, arguing that material facts existed and were disputed and the law was in Wong's favor; therefore, the motions should be denied **(41 ROA 10-172 & 39 ROA 158-309).**

4. Defendant's first motion for summary judgment was denied without prejudice **(39 ROA 358-360).** [See **Appendix 1** for full text of that document.]

B. The Circuit Court committed reversible error granting Defendant's May 6, 2013 motion for taxation of costs and filing judgment on June 7, 2013.

1. The order granting the motion was filed June 14, 2013 granting Defendant's cost motion **(43 ROA 461-462).** [See **Appendix 5** for full text of that document.]

2. The final judgment dismissing all of Wong's claims against Hawaiian and taxing costs against him totaling $11,855.30 was filed June 7, 2013 **(43 ROA 459-460).** [See **Appendix 4** for full text of that judgment.]

3. Wong opposed taxing costs against him **(41 ROA 793-797 & 43 ROA 159-375).**

***9** C. The Circuit Court committed reversible error filing the final judgment dismissing all of Wong's claims against Hawaiian and taxing costs against Wong of $11,855.30. (See Appendix 4 for full text of the judgment.)

1. The judgment was filed June 7, 2013 **(43 ROA 459-460).**

2. Wong opposed such judgment and argued against it when he opposed the summary judgment motion and the motion for costs **(39 ROA 158-309; 41 ROA 10-172; 41 ROA 793-797;** and **43 ROA 159-375).**

## III. STANDARDS OF REVIEW

A. Summary judgment awards in Circuit Court are reviewed on appeal de novo. *Ralston vs. Yim*, 128 Haw. 42, 43-44, 292 P.3d 584, 585-586 (2012).

### "I. Standard of Review

'An appellate court **reviews** an award of **summary judgment** *de novo* under the same standard applied by the circuit court." *Thomas v. Kidani, 126 Hawai'i 125, 127-28, 267 P.3d 1230, 1232-33 (2011)* (citations omitted). The standard for granting a motion for summary judgment is settled:

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties. The evidence must be viewed in the light most favorable to the non-moving party. In other words, we must view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion.

*Tri-S Corp. v. W. World Ins. Co., 110 Hawaii 473, 487, 135 P.3d 82, 96 (2006)* (citations and brackets omitted).

***10 **586 *44** This court has further explained the burdens of the moving and non-moving parties on summary judgment as follows:

The burden is on the party moving for summary judgment (moving party) to show the absence of any genuine issue as to all material facts, which, under applicable principles of substantive law, entitles the moving party to judgment as a matter of law. This burden has two components.

First, the moving party has the burden of producing support for its claim that: (1) no genuine issue of material fact exists with respect to the essential elements of the claim or defense which the motion seeks to establish or which the motion questions; and (2) based on the undisputed facts, it is entitled to summary judgment as a matter of law. Only when the moving party satisfies its initial burden of production does the burden shift to the non-moving party to respond to the motion for summary judgment and demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial.

Second, the moving party bears the ultimate burden of persuasion. This burden always remains with the moving party and requires the moving party to convince the court that no genuine issue of material fact exists and that the moving part is entitled to summary judgment as a matter of law.

*Id. at 488, 135 P.3d at 97.*"'

This standard of review applies to Points of Error A and C.

B. Orders and judgments taxing costs are reviewed on appeal as a question of law under the right/wrong standard of review on deciding whether the costs were unreasonable and generally reviewed for **abuse** of discretion. *Fisher vs. Grove Farm Company, Inc.*, 123 Haw. 82, 95, 230 P.3d 382, 395 (2009). This standard of review applies to Point of Error B.

C. The construction and legal effect given to a contract is a question of law which includes deciding whether a contract is ambiguous becomes a legal question, freely reviewable. *Yogi vs. HMSA,* 124 Haw. 172, 174, 238 P.3d 699, 701 (2010). This standard of review applies to Points of Error A - C.

***11** D. Taxable costs award will be vacated where the Circuit Court judgment is vacated and remanded on appeal. *Ralston vs. Yim, supra,* 128 Haw. at 51-52, 282 P.3d 593-594 (2012); and *Dale M. Ex Rel Alice M. vs. Board of Education of Bradley-Bourbonnais High School District No.* 307, 237 F.3d 813, 815 (7th Cir., 2001). This standard of review applies to Points of Error B & C.

E. Constitutional issues are reviewed on appeal under the right/wrong standard of review. *Kelly vs. 1250 Oceanside Partners,* 111 Haw. 205, 221, 140 P.3d 985, 1001 (2006). This standard applies to Points of Error A - C.

## IV. ARGUMENTS

### A. The Circuit Court committed reversible error granting summary judgment for Defendant on Wong's negligence claims based on ERISA preemption.

Reduced to the legal and factual issue, the central issue in this part of the argument is whether a former employee's suit against the former employer for negligence and negligent misrepresentation about whether the former employee could avoid the late-enrollment penalty for Medicare Part B was preempted by ERISA. The answer is “no” because of the following arguments supported by abundant legal authority, cited hereinbelow.

The state tort claims of negligence and negligent misrepresentation do not regulate an ERISA plan such as the Defendant's health care plan with HMSA and others for retiree benefit. The elements of a negligent misrepresentation claim are based upon the *Restatement, Second, Torts,* § 552, per *Bronster vs. U. S. Steel Corporation,* 82 Haw. 32, 41, 919 P.2d 294, 303 (1996). Those elements are outlined as follows:
1. One who, in the course of his or her business, profession, or employment, or in any other transaction in which that person has a pecuniary interest, supplies ***12** false information for the guidance of others in their business transactions is subject to liability for economic loss caused them by their justifiable reliance upon that information if the plaintiff fails to exercise reasonable care or competence in obtaining or communicating the information.

2. The liability is limited to the loss suffered by the plaintiff for whose benefit and guidance the defendant intended to supply the information or knows the recipient intends to supply it and, through reliance upon it in the transaction, defendant intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

3. The liability of one under a public duty to give the information extends to the loss suffered by the plaintiff for whose benefit the duty was created in any transactions in which it was intended to protect them.

Therefore, the duty alleged in this case against Defendant was to exercise reasonable care or competence in obtaining or communicating the information for Wong's guidance in his business transactions. Bronster, (Id.). Accord; *First Marblehead Corp. vs. House,* 473 F.3d 1, 9-11, (1st Cir., 2006).

The standard rule of negligence liability requires a breach of duty, causation, and damages for a simple negligence claim. *Bidar vs. Amfac, Inc., 66 Haw.* 547, 551-557, 669 P.2d 154, 158-161 (1983). Whether duty exists is a legal issue and whether it is breached is a factual issue. *Bidar, supra.*

Wong argues that there is no state law that is superceded by the ERISA laws in this case, surely not those state law tort claims under common law recognized by our case law in Hawaii, so therefore, how does 29 U.S.C. § 1144(a) preempt the state common law claims for negligence and negligent misrepresentation? The answer is, it does not, and in fact, it specifically states in pertinent parts in 29 U.S.C. § 1144(b)(2)(A) that ***13** "except as otherwise provided in subparagraph (B)," nothing in this subchapter shall be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or security. See also, 29 U.S.C. § 1144(b)(5)(A) which provides: "Except as provided in subparagraph (B), subsection (a) of this section shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51)." Here, the Medicare premium was the question, not benefits being provided or claims being paid by HMSA. HMSA and Hawaiian were operating under and complying with HRS §§ 393-1 through -51. Therefore, ERISA law does not apply to the factual pattern in this case where Wong was seeking and obtained information from Defendant's agent that he need not sign up for Medicare Part B and, if he got in late, Hawaiian could avoid the late-enrollment penalty, as it had been done in the past. Such information was false. Such information was not really about the HMSA or ERISA plan at all. It was about Medicare Part B late-enrollment penalty. Plaintiff was told by Medicare to contact his employer (39 ROA 250). Plaintiff Wong did, and got the March 1, 2010 letter from Defendant (39 ROA 252) which is contained in Wong's Exhibit 3 at p. 21 of his July 10, 2012 opposition to the first motion for summary judgment (39 ROA 252).

Wong further argues that preempting the alleged negligence and negligent misrepresentation tort claims does not standardize Defendant's administration of the retirement benefit plan for health care insurance. Wong's tort claims do not establish nor require Defendant to maintain an employee benefit plan. Defendant does so by the ALPA contract for the last 15 years and HRS §§ 393-1, et seq. This case is not about Defendant's failure to provide Wong with benefits under the health care insurance but about the negligent supplying of information and misrepresentation to him about the Medicare premiums and being able to avoid the late-enrollment fee. All Wong wants Defendant to do is to pay the late-enrollment penalty for his Medicare Part B on into the future until he dies or is 104, whichever occurs first.

Wong relies upon the fairly recent case of AFL Hotel & Restaurant Workers Health & Welfare Trust Fund vs. Bosque, 110 Haw. 318, 132 P.3d 1229 (2006). In Bosque, our ***14** Supreme Court decided that the plaintiff's state common law claim for breach of contract was not preempted by ERISA, either impliedly or expressly. Therefore, the Circuit Court committed reversible error in dismissing the plaintiff's complaint. The Court reasoned, in part, that there was no preemption because the state law claims did not involve a claim that AFL improperly withheld any of the benefits, so there was no need to inquire about the medical services furnished and no need to inquire about the administration of the plan or its benefit because the sole issue was whether plaintiff was entitled to money damages based on the breach of contract claim. Therefore, as in the Bosque case, Wong's state law tort claims do not involve, nor are they related to Defendant's administration of the benefits under the health care insurance. Wong's claim is about the negligent information he received and the misrepresentation by Defendant to him about the Medicare Part B premiums being avoided for late enrollment. Here, Wong is not suing the fund nor the insurer, only the former employer for negligence, negligent misrepresentation, and also his UDAP claim. Therefore, Wong is not seeking any remedy under ERISA. Wong is not suing for any benefits under the plan, only damages for the information negligently supplied to him upon which he relied to his detriment about the Medicare premium. Clearly, Medicare is an insurance company so, therefore, the preemption doctrine or rule does not apply, per 29 U.S.C. §§ 1144(b)(2)(A), and (b)(5)(A) as previously discussed.

The following cases located in preparing this brief support Wong's position that his state common law tort claims are **not preempted** by ERISA:

1. Transitional Hospitals Corporation vs. Blue Cross and Blue Shield of Texas, 164 F.3d 952, (5th Cir., 1999) [Misrepresentation claim by hospital against insurer was not preempted by ERISA because it was independent of and not derived from the insured's right to recover benefits. Therefore, Defendant's misrepresentations were actionable under common law and the Texas Code.]

***15** 2. *Gerosa vs. Savasta & Co.,* 329 F.3d 317 (2nd Cir., 2003) [Trustees of the benefit pension plan action against the plan actuary seeking damages for negligence was not preempted by ERISA.]

3. *Coldesina vs. Simper,* 407 F.3d 1126 (10th Cir., 2005) [Negligent supervision claim against the insurer not preempted by ERISA.]

4. *In Home Health, Inc. vs. Prudential Insurance Company of America,* 101 F.3d 600 (8th Cir., 1997) [Negligent misrepresentation claim against the employee benefit administration was not preempted by ERISA.]

5. *Lordmann Enterprises, Inc. vs. Equicor, Inc.,* 32 F. 3d 1529 (11th Cir., 1994) [Provider's negligent misrepresentation claim against the administrator was not preempted by ERISA.]

6. *The Meadows vs. Employers Health Insurance,* 47 F.3d 1006 (9th Cir., 1995) [Negligent misrepresentation claim asserted by provider not preempted by ERISA.]

7. *Hook vs. Morrison Milling Company,* 38 F.3d 776 (5th Cir., 1994) [Employee's negligence claim against employer for failing to furnish a safe work place in Texas was not preempted by ERISA.]

8. *Dukes vs. U. S. Healthcare, Inc.,* 57 F.3d 350 (3rd Cir., 1995) [Plaintiff's medical malpractice claims were not claims to recover plan benefit nor enforce rights under the terms of the plan or clarify rights on future benefits, so therefore, not preempted by ERISA.]

9. *Airparts Company, Inc. vs. Custom Benefit Services of Austin, Inc.,* 28 F.3d 1062 (10th Cir., 1994) [The pension plan state law claims for negligence ***16** against the consultant not related to ERISA plan and, therefore, not preempted by ERISA.]

10. *Nixon vs. Vaughn,* 904 F.Supp.2d 553 (W.D.La., 2012) [Negligence claim against 401(k) plan for failing to inform the beneficiary of her sister's action was not completely preempted by ERISA, so the case was remanded to state court.]

11. *Roessert vs. Health Net*, 929 F.Supp. 343 (N.D.Cal., 1996) Negligence claim by participants in the Bank of America's health benefits program was not a claim under ERISA because the advice was not related to its administrative role and made no claim for benefits or enforcement of rights under the plan, therefore, not preempted by ERISA.]

12. *Lazo vs. Inland Sales Company vs. Lumbermens Mutual Casualty*, 925 F.Supp. 463 (N.D.Tex., 1995) [Individual's state law negligence claim against sales corporation not preempted by ERISA since not seeking a claim for benefits under the ERISA plan.]

13. *Padeh vs. Zagoria*, 900 F.Supp. 442 (S.D. Fla., 1995) [Negligent misrepresentation claim not preempted by ERISA where it was claimed that defendant negligently advised plaintiffs to invest their proceeds from the sale of their hotel into a pension plan that was ill-suited for their financial needs and abilities.]

14. *Countryside Lawn & Tree Care, Inc. vs. Porter*, 1994 WL 114302 (D. Kan.) [Plaintiff's state law claim for misrepresentation causing damages resulting in tax penalties not preempted by ERISA and, therefore, remanded to state court because they are too tenuous and remote to be related to the plan.]

***17** 15. *Berlin City Ford, Inc. vs. Roberts Planning Group*, 864 F.Supp. 292 (D.N.H., 1994) [Professional negligence claim not related to ERISA and, therefore, not preempted by ERISA.]

16. *Pyle vs. Beverly Enterprises-Texas, Inc.*, 826 F.Supp. 206 (N.D.Tex., 1993) [Employee's work-related claim for negligence for personal injuries not preempted by ERISA.]

17. *Padilla de Higenbotham vs. Worth Publishers, Inc.*, 820 F.Supp. 48 (D.Puerto Rico, 1993) [Negligent misrepresentation claim under Puerto Rico statute was not preempted by ERISA because no interpretation of the plan is required where it does not relate to ERISA.]

18. *Capital Mercury Shirt Corp. vs. Employers Reinsurance Corp.*, 749 F.Supp. 926, 928 (W.D.Ark., 1990) [Plaintiff's negligence claim was not preempted by ERISA where plaintiff asserted that insurance company was guilty of negligence in performing its responsibilities to plaintiff undertaking to acquire medical reinsurance coverage in favor of plaintiff but, instead, defendant insurer provided inaccurate, misleading, and incomplete information to the employer.]

19. *Nunez vs. Wyatt Cafeterias, Inc.*, 771 F.Supp. 165 (N.D.Tex., 1991) [Employee's negligence action against employer was not preempted, and the court said, in pertinent part at p. 169:

> "There being no relation between plaintiff's action and the Plan in such sense, there is no preemption and there has been no showing that this court has subject matter jurisdiction. The unstated purpose of the Plan to give defendant, through the Plan, a vehicle for possible avoidance of common law actions such as this does not provide the legal relationship essential to preemption. ERISA's goal is to protect employee benefits, not to provide succor for schemes that are designed to take rights from employees."

***18** 20. *National Centers for Facial Paralysis, Inc. vs. Wal-Mart Claims Administration Group Health Plan*, 247 F.Supp.2d 755 (D.Maryland, 2003) [Home health care provider's negligent misrepresentation claim against the ERISA plan administrator was not preempted by ERISA, nor was the promissory estoppel claim.]

21. *West Pines Psychiatric Hospital vs. Sampsonite Benefit Plan*, 848 F.Supp. 907 (D.Colo., 1994) [Assignee of the plan participants rights under ERISA misrepresentation claim against the plan was not preempted by ERISA.]

This case is not about the Defendant administering its health care plan but about wrong advice given Plaintiff about late enrollment in Medicare. Medicare issues and claims are not preempted according to *Pagarigan vs. Superior Court,* 102 Cal.App.4th 1121, 126 Cal.Rptr.2d 124 (2002). According to Pagarigan, Medicare is in the business of insurance. Therefore, state law claims are assertable in state court without being preempted by the federal Medicare law.

Curiously, Defendant argued at p. 8 in their reply to the first motion for summary judgment that ERISA **did not apply,** but later convinced the Court otherwise. Here, Defendant's conduct did not directly involve the Plaintiff's rights under the Defendant's health care plan but was only ancillary to it when Daun Ito wrongly advised him that there would be no penalty for late enrollment in Medicare Part B and she could get the penalty eliminated if there were. This is not a case seeking extra-contractual damage by improper or untimely processing of benefit claims, but is one to recover from the Defendant damages caused by the wrong information about Medicare Part B late-enrollment penalty waiver. Plaintiff's claims for negligence, negligent misrepresentation, and also the UDAP claim do not relate to an ERISA plan but to Medicare which does not preempt state law. *Pagarigan, supra.* Plaintiff is not here seeking damages for failure to get benefits under the Defendant's health care plan; he is just seeking a judgment requiring Defendant to pay Plaintiff's future Medicare Part B ***19** penalty because the Defendant gave him wrong advice and he relied on it to his detriment. Therefore, his tort claims and UDAP claims are valid. Plaintiff is not seeking to enforce the collective bargaining agreement, just the state tort claims and the statutory UDAP claim.

Plaintiff cited to Judge Sakamoto the following cases supporting the Plaintiff's argument that his tort claims are not preempted by ERISA: *Ft. Halifax Packing Company, Inc. vs. Coyne,* 482 U.S. 1, 23, 107 S.Ct. 2211, 2223 (1987) [State statute req uiring employers to provide severance payment if the plan closed was not preempted by ERISA or NLRA in a five-to-four decision]; The Georgia Garnishment Statute was not preempted by ERISA. *Mackey vs. Lanier Collection Agency & Service,* 486 U.S. 825, 108 S.Ct. 2182 (1988); *Dishman vs. UNUM Life Insurance Company of America,* 269 F.3d 974 (9th Cir., 2001) [Defendant cited this case but forgot the holding that ERISA did not preempt the state law claim for tortuous invasion of privacy]; *Bell vs. Pfizer, Inc.,* 626 F.3 66 (2nd Cir., 2010) [cited by Defendant but it actually held that the company's stock plan was not an ERISA plan and, therefore, the fiduciary duties listed in 29 U.S.C. § 1104 did not apply to the company's stock plan. 626 F.3d at 78. The Bell case actually discussed at p. 78 the current Wong case when it advised the readers as follows: "Whether Pfizer might be liable for Gomez's actions under a state law, tort, or contract theory is not before us."; *Clark vs. Coats & Clark, Inc.,* 865 F.2d 1237 (11th Cir., 1989) [Intentional infliction of emotional distress (IIED) tort claim was not preempted by ERISA.]

The case of *Bui vs. American Telephone and Telegraph Company, Incorporated,* 310 F.3d 1143 (9th Cir., 2002), decided that ERISA did not preem pt the state tort claim including negligent provision of medical advice and negligent delay; *Bender vs. Newell Window Furnishings, Inc.,* 681 F.3d 253 (6th Cir., 2012) [employer agreed to pay Part B medicare for retirees and bound to do so, therefore retiree correctly used 29 U.S.C. §1132(a)(1)(B), recognizing that the Medicare Part B and health insurance are distinctly different programs]; *Aetna Life Insurance Company vs. Bay Area Surgical* ***20** *Management, LLC,* 2013 W.L. 144911, *5-*6 (N.D.Cal.) [merely using a federal statute as a predicate for state law claim does not transform that state law claim into a federal claim; mere relation to an ERISA plan is not sufficient to establish preemption. Aetna's claim did not involve any adverse benefits determination, therefore, not preempted by ERISA, so case remanded to state court]; *AFL Hotel & Restaurant Workers Health & Welfare Trust Fund vs. Bosque,* 110 Haw. 318, 132 P.3d 1229 (2006), held, *inter alia*, that the state common law claim for breach of contract was outside ERISA preemption because defendant's liability was based in part on an agreement does not supplement a federal claim for relief and, therefore, no conflict preemption. *Cress vs. Recreational Services, Inc.,* 795 N.E.2d 817, 840-842 (III.App.2d, 2003), held, inter alia, that the state law claims for tortuous interference with contract and prospective economic advantage not preempted by ERISA. In re Fruehauf Trailer Corp., 250 B.R. 168, 204-206 (D.Del., 2000) [whether defendant is a fiduciary is a mixed question of law and fact, but a corporation may be a fiduciary if exercising discretion or control over management assets or administering the plan]. *Heckler vs. Ringer,* 466 U.S. 602, 604-605, 104S.Ct. 2013, 2016-2017, (1984) [Medicare is a federally subsidized health insurance program, administered by the Secretary of Health and Human Services. The Medicare statute is found in 42 U.S.C. § 1395c.]

Defendant's reliance upon *Ingersol-Rand Company vs. McClendon,* 498 U.S. 133, 111 S.Ct. 478 (1990), does not prohibit the Plaintiff's claims here, as Plaintiff is not seeking to enforce any rights from ERISA. If the Defendant thought ERISA applied,

Defendant could have sought removal per *Ingersol* and *Metropolitan Life vs. Taylor,* 481 U.S. 58, 107 S.Ct. 1542 (1987). Therefore, Defendant waived that argument by failing to remove the case under 28 U.S.C. § 1441. *Wilson vs. U. S. Department of Agriculture,* 584 F.2d 137 (6th Cir., 1978). Removal had to be done within 30 days of service of the state complaint and summons per 28 U.S.C. § 1446(b) and *Brown vs. Demco, Inc.,* 792 F.2d 478, 481 (5th Cir., 1986).

***21** In the case of *Borreani vs. Kaiser Foundation Hospitals,* 875 F.Supp.2d 1050, (N.D.Cal., 2012), the state court lawsuit against a provider of medical services in which the tort claims of intentional misrepresentation, negligent misrepresentation, concealment, fraud, and was in negligent failure to warn, negligence in medical malpractice was remanded to state court because the conduct underlying the complaints did not relate to an ERISA plan administration. Rather the claims were grounded in allegations of negligence, fraud, and misrepresentation which are traditionally state law regulation claims decided by state law and in state court. It is, therefore, clear that ERISA does not preempt Plaintiff's negligence claims in this case. This case is not about administering the Defendant's health care plan, but about wrong advice about Medicare Part B.

Therefore, Wong also argues the Court violated Wong's constitutional rights to due process and equal protection by deciding his negligence claims were preempted by ERISA. Wong's Argument D is incorporated herein by reference.

Clearly, the Circuit Court erred disregarding Wong's arguments and authorities. Therefore, Judge Sakamoto's decisions on ERISA preemption of Wong's claims must be vacated.

**B. The Court committed reversible error granting summary judgment for Defendant on Wong's negligence claims based on Railway Labor Act (RLA) preemption.**

For some unexplained reason, the Circuit Court totally disregarded and failed to follow the two most important cases in Hawaii about the Railway Labor Act and its application to the facts in this case. *Hawaiian Airlines vs. Norris,* 512 U.S. 246, 114 S.Ct. 2239 (1994), agreed with the Hawaii Supreme Court opinion in *Norris vs. Hawaiian Airlines, Inc.,* 74 Haw. 235, 842 P.2d 634 (1992). Those two cases stand for the proposition that the former employee's Parnar and Hawaii Whistleblower Protection Act (HWPA) claim were not preempted by the Railway Labor Act (RLA). The same reasoning and result ***22** should have obtained in this case where Wong alleged and proved facts supporting his negligence and negligent misrepresentation claims against the same Hawaiian Airlines, Inc. Here, Wong was not even an employee but a retired pilot since 1996. Wong was not even in the union as a retired pilot and, therefore, lacked standing to even seek to enforce the collective bargaining agreement (CBA) upon which Defendant relies, so how can he now be required to seek an administrative remedy when he is not even in the union nor an employee? Clearly, under *Norris,* 512 U.S. at 256, 114 S.Ct. at 2246, even minor disputes under the CBA do not preempt the cause of action to enforce Wong's rights independent of the CBA. Clearly, Wong's negligence claims are independent of the CBA to which he is not even a party. Also, *Lingle vs. Norge Division of Magic Chef, Inc.,* 486 U.S. 399, 407, 108 S.Ct. 1877, 1882 (1988), clearly held, *inter alia,* that factual questions about the employer's conduct and motives do not require interpreting the CBA. Simply referring to the CBA is not interpreting it and is, therefore, not construing it, so the negligence claims in this case are not preempted by RLA. *Soldinger vs. Northwest Airlines, Inc.,* 51 Cal.App.4th 345, 368-369, 58 Cal.Rptr.2d 747, 760-761 (1997).

In *Winslow vs. Montana Rail Link, Inc.,* 328 Mont. 260, 121 P.3d 506 (2005), the Montana Supreme Court held, *inter alia,* that the employee's statutory state law claim for mismanagement against the employer was not preempted by the RLA because the Court did not need to interpret the CBA, again relying upon the Norris and Lingle cases. Similarly, in the case of *Saridakis vs. United Airlines,* 166 F.3d 1272 (9th Cir., 1999), held, *inter alia,* that a California wrongful discharge claim against the former employer was not preempted by the RLA, again relying upon *Norris.*

Our Hawaii Supreme Court, in *Norris,* concluded at 74 Haw. 258, 842 P.2d 645:

> "We conclude that Norris' claim for retaliatory discharge is not dependent on an interpretation of Articles IV and XVII of the CBA or any other provision of the CBA. Consequently, Norris' claims are not preempted under RLA."

***23** Accordingly, there is no need to interpret the contract in this case and, even if it were necessary to interpret it, the meaning is obvious and not ambiguous at all. Therefore, even the defense argument that the Court must construe or interpret the CBA in this case and therefore this case is preempted by RLA is contrary to the law and the facts.

The following authorities were cited to the Circuit Court in opposition to Defendant's summary judgment motion.

The Defendant's argument that it owed no duty to Plaintiff, relying upon *State by Bronster vs. U. S. Steel, supra,* 82 Haw. at 45-46, 919 P.2d at 307-308, is seriously misplaced at best. Defendant's argument based on having no pecuniary interest in providing this information to Plaintiff who relied upon it and claiming that its agent's information was purely gratuitous therefore Plaintiff was not entitled to rely upon it, is not supported by the *U.S. Steel case nor Restatement, Second, Torts,* § 552. The Defendant need not have a pecuniary interest in the transmittal of information where Defendant was the supplier of information and does so in the course of that business. Here, Daun Ito, on behalf of the Defendant, was the human resource person and the plan administrator, so Defendant was engaged in the business and employment of providing information to employees and retired employees about the retirement plan. Therefore, the business or employment category satisfies the pecuniary-interest test per the following language from the *U. S. Steel* case at 82 Haw. 49, 919 P.2d at 311:
"In the context of this case, there are two significant features. First, the defendant must supply the information in the course of his [or her] business, and second, the information must be supplied for the guidance of others in their business transactions. While section 552 of the Second Restatement of Torts says that liability arises when one 'in the course of his [or her] business' supplies false information for the guidance of others, *Moorman & Penrod* have construed that section to mean that the defendant must be in the business of supplying information. Neither of the defendants in this case at bar was in the business of supplying information. (citations omitted) Neither rationale, therefore, whether based on *Moorman or Penrod* is particularly compelling and we decline to apply them to our interpretation of section 552. iii. Section 552 reaches suppliers of information whose information affects transactions to which they are parties, as ***24** well as suppliers of information whose information affects others' transactions with third parties.

For the foregoing reasons, we hold that section 552 is not limited solely to (1) suppliers of information who are in the business of **312 *50 supplying information; and (2) situations involving damage stemming from a recipient of information's transactions with third parties other than the provider of information."

Certainly, if the Restatement, Second, Torts, § 552 imposes a duty on the Defendant in the course of its business for negligent representation, then it necessarily follows, under *Blair vs. Ing,* 95 Haw. 247, 270, 21 P.3d 452, 475 (2001), that the Defendant owed Plaintiff a duty to act reasonably under the facts and circumstances of this case, particularly where it undertook to misinform Plaintiff. Clearly, our courts recognize the tort of negligent misrepresentation as set forth in § 552 of the *Restatement, Second, Torts. Kohala Agriculture vs. Deloitte & Touche,* 86 Haw. 301, 322, 949 P.2d 141, 162 (1997). *Accord, Zanakis-Pico vs. Cutter Dodge, Inc.,* 98 Haw. 309, 321-322, 47 P.3d 1222, 1234-1235 (2002).

*Trytko vs. Hubbellinc,* 28 F.3d 715 (7th Cir., 1994), held the employer was liable to the retired employee for out-of-pocket losses and negligent misrepresentation regarding the dates of stock options, thus supporting the legal proposition that Defendant here owes a duty to the Plaintiff to provide accurate Medicare and retirement plan information. *Eby vs. York-Division, Borg-Warner,* 445 N.E.2d 623 (C.A.Ind., 1983), held the employer liable to the employer under Restatement, Second, Torts, § 552 for negligent misrepresentation in falsely advising the employee of job availability elsewhere. *Gediman vs. Anheuser Busch, Inc.,* 299 F.2d 537 (2nd Cir., 1962), held the defendant employer under the employer's pension plan liable for negligent misrepresentation

by August Busch, reasoning that he undertook to advise the plaintiff, therefore, liable for errors in such gratuitous advice. Therefore, Defendant's lack-of-duty argument is clearly wrong.

***25** The following authorities support the Plaintiff's argument that the labor laws do not preempt his negligence claims and that there is no need to construe the Air Line Pilots Association (ALPA) contract because this really is an insurance business question, not a labor issue. *Pagarigan vs. Superior Court, supra*, supports that conclusion. Moreover, Defendant's reliance upon *Hawaiian Airlines, Inc. vs. Norris,* 512 U.S. 246, 114 S.Ct. 2239 (1994), is totally misplaced because that case held: "Accordingly, we agree with the Supreme Court of Hawaii that respondents' claims for discharge in violation of public policy and in violation of the Hawaii Whistleblower Protection Act are not preempted by the RLA, and we affirm the court's judgment." 512 U.S. at 266, 114 S.Ct. at 2251.

This case is not a labor dispute, as Plaintiff has been a retired pilot since 1996. It is curious why Defendant is arguing preemption by *Norris,* as there is no duty derived from the ALPA agreement, as Plaintiff is retired.

*Caterpillar, Inc. vs. Williams,* 482 U.S. 386, 107 S.Ct. 2425 (1987), held, *inter alia,* that the California breach-of-contract claim was not preempted by the LMRA. Therefore, the case was improperly removed to federal court from state court. In so holding, the Court said, in pertinent part at 482 U.S. 397, 107 S.Ct. 2432:

> "Claims bearing no relationship to a collective-bargaining agreement beyond the fact that they are asserted by an individual covered by such an agreement are simply not preempted by § 301."

Likewise, in the case of *Chung vs. McCabe Hamilton & Renny Company,* Ltd., 109 Haw. 520, 128 P.3d 833 (2006), reversing Judge Chang, held, *inter alia,* that the torts of IIED, false light invasion of privacy, and defamation were not preempted by the 29 U.S.C. §§ 157 and 158 (National Labor Relations Act). The same effect is *Casumpang vs. ILWU, Local* 142, 94 Haw. 330, 13 P.3d 1235 (2000), holding that the Labor Management Relations Act (LMRA) and the Labor Management Relations Disclosure Act (LMRDA) did not preempt the employee's state law contract claim. ***26** Also, the case of *Hahn vs. Rauch,* 602 F.Supp.2d 895 (N.D. Ohio, 2008), held that the plaintiffs' claims for defamation and intentional interference with business relations under state law are not preempted by the LMRA nor by ERISA nor by the LMRDA. Hence, the Court remanded the case to state court.

Accordingly, the Court reversibly erred holding the RLA preempted Wong's negligence claims. Wong also argues that not only did the Court commit reversible error in holding that Wong's negligence claims were preempted by the Railway Labor Act, the Court also violated Wong's due process and equal protection rights guaranteed by the United States and the Hawaii Constitutions as argued in Argument D, *infra,* all of which is incorporated herein by reference.

**C. The Circuit Court committed reversible error granting summary judgment for Defendant on Wong's UDAP claim deciding that providing wrong information to Wong was not in Defendant's business.**

Defendant convinced the Circuit Court that the UDAP claim was not applicable to a former employee's claim against his former employer. This holding is contrary to *Davis vs. Four Seasons Hotel, Ltd.,* 122 Haw. 423, 429-432, 228 P.3d 303, 309-312 (2010). Our Supreme Court reasoned that the term any person includes employees as individuals within the meaning of HRS § 480-1 and, therefore, persons within the meaning of HRS §§ 480-2 and 480-13(a). Therefore, the Circuit Court was clearly in error in granting the summary judgment against Gene Wong as a former employee. Apparently, the judge relied on the Massachusetts cases cited by Defendant, but they do not overrule Davis, supra. Moreover, there are genuine issues of material fact existing in this case on the UDAP claim so, based on Courbat vs. Dahana Ranch, Inc., 111 Haw. 254, 261-264, 141 P.3d 427, 434-437 (2006), in this case the judg ment must be vacated and remanded as in Courbat because for sure there are genuine issues of material fact on the UDAP claim. Similarly, in *Hawaii Community Credit Union vs. Keka,* 94 Haw. 213, 226-229, 11 P.3d 1,14-17 (2000), the sum mary judgment for the ***27** defendant on the UDAP claim against the credit union was again vacated and remanded because factual issues precluded summary judgment under the remedial statute which must be liberally

construed to accomplish the purpose for which it was enacted. Additionally, *Hawaii Medical Association vs. Hawaii Medical Service Association, 113 Haw.* 77, 104-115, 148 P.3d 1179, 1206-1217 (2006), supports Wong's argument that the UDAP statutes apply to this case because certainly he is a person having standing to bring this UDAP claim.

Other states have found that a former employee and/or a former employer properly used a UDAP claim arising out of an employment relationship in the following cases: *Drouillard vs. Keister Williams Newspaper Services,* 423 S.E.2d 324 (N.C.App.,1992) [North Carolina UDAP statute applied in former employment background by former employer against former employee]; *Klinger vs. Weekly World News, Inc.,* 747 F.Supp. 1477 (S.D. Fla., 1990) [Injunction properly pled under Florida UDAP claim against former employer]; *Johnson vs. Colonial Life & Accident Insurance Company,* 618 S.E.2d 867 (N.C.App., 2005) [former employee against former employer on UDAP claim under North Carolina Statute upheld jury verdict for substantial damages and defendants summary judgment motion properly denied, so judgment affirmed for treble damages but the prejudgment interest was not to be trebled, only the actual damages awarded by the jury, so the damage award was reduced]; *Trotman vs. Velociteach Project Management, LLC,* 715 S.E.2d 449 (Ga.App., 2011) [Georgia UDAP applies to former employment type case].

Here, the Defendant erroneously convinced the Circuit Court judge that the UDAP did not apply because Defendant was not in the trade or commerce of supplying information to retirees (**41 ROA 723**). However, to the Courts credit, the Court did decide that Wong was a consumer for the UDAP purposes (**39 ROA 359**). Defendant is cross-appealing that issue.

***28** Wong also argues that HRS § 481A-3 applies in the definitions which should also apply under the definitions of HRS § 480-2 and 480-13 to assist this Court in holding that Defendant was a person who was engaged in deceptive trade practice when, in the course of Defendants business, the defendant "Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding." HRS § 481A-3(a)(12).

The following authorities and facts were cited to the Circuit Court in opposition to the second motion for summary judgment but the Court disregarded and failed to follow these authorities and facts by concluding that the summary judgment should be granted.

Even Daun Ito agrees that the advice that she gave to Plaintiff was within a business context. Clearly, Hawaiian Airlines was engaged in transportation business, and part of that business was providing information to its retirees. In fact, Defendant gives retirees a telephone number to call to answer any questions about health insurance matters. Clearly, Defendant was acting in a trade or commerce.

Defendant argued that Plaintiff's UDAP claim under HRS § 480-2 and -13 fails because it was not in the trade or commerce of the Defendant. That argument is based on the apparent premise that Defendant was not engaged in the trade or commerce as required by its cited case of *Cieri vs. Leticia Query Realty, Inc.*, 80 Haw. 54, 62, 905 P.2d 29, 37 (1995). Defendant conveniently overlooked the fact that Cieri decided, in pertinent part that a broker or sales person involved in real estate transactions is conducting any trade or commerce, therefore subject to UDAP liability. 80 Haw. at 65, 905 P.2d at 40. The Court further reasoned that the focus in the UDAP claim is on whether the transaction involved a trade, commerce, or business and not merely a private-in-nature transaction but one that is undertaken in the ordinary course of the defendants trade or business. 80 Haw. at 62-63, 905 P.2d at 37-38. *Cieri* also held, in ***29** pertinent part, that the plaintiffs qualified as consumers because they committed money in a personal investment and, therefore, had standing to sue under HRS § 480-2 and -13. 80 Haw. at 69, 905 P.2d at 44. *Cieri* also reasoned that whether a transaction took place in a business context is an issue of fact, requiring an assessment of six factors, as follows:
"(1) the nature of the transaction; (2) the character of the parties involved; (3) the activities engaged in by the parties; (4) whether similar transactions had been undertaken in the past; (5) whether the transaction was motivated by business or for personal reasons (as in the same of a home); and (6) whether the participant played an active part in the transaction." 80 Haw. at 63, 905 P.2d at 38.

*Kukui Nuts of Hawaii, Inc. vs. R. Baird & Company, Inc.*, 7 H.A. 598, 612, 789 P.2d 501, 511 (1990), also supports the proposition that whether an unfair or deceptive trade practice exists in the particular case is a factual question. *Kukui Nuts* also cited, in pertinent part, that HRS § 480-2 creates a statutory duty to conform to the law and, under the facts of that case, raised a question requiring plaintiff's UDAP claim to be determined by the Court. 7 H.A. at 615, 789 P.2d at 513.

Defendant's cited case of *Dalesandro vs. Longs Drugs Stores California, Inc.*, 383 F.Supp.2d 1244 (D.Haw., 2005), decided three pertinent matters relevant to this case, as follows:
(1) During summary judgment disposition, the Court is not to make credibility determinations or weight conflicting evidence. Id. at 1247;

(2) Hawaii statutory language is unambiguous, so there is no need to analyze it based on non-binding authority from other states or jurisdictions. *Id.* at 1248; and

(3) The transaction involved there was in the context of a settlement preparation and, therefore, not a business context when plaintiffs attorney sought plaintiff's medical record for settlement purposes prior to starting a ***30** personal injury suit which was not a business transaction or concern. *Id.* at 1250-1251.

Defendant next cited case of *Manning vs. Zuckerman*, 388 Mass. 8, 444 N.E.2d 1262 (1983), held that the Consumer Protection Act there involved the defendant buying a company's outstanding stock and assuring the shareholders that the plaintiff would remain editor and further guaranteeing retirement benefits to the plaintiff. When defendant refused to pay those benefits, plaintiff filed suit in the state court. Defendant's reliance on the *Manning* holding that UDAP does not apply to employment relationships in that state is not applicable here because Plaintiff is not an employee and has been retired since 1996. However, the Sherman Antitrust Act applies to suit by a former employee against a former employer in a price-fixing scheme in which plaintiff was forced to resign his former job as sales manager. *Ostrofe vs. H.S. Crocker Company*, 740 F.2d 739 (9th Cir., 1984). Likewise, the Sherman Antitrust Act, 15 U.S.C. § 15 applies to an employee's suit against his employer, a common carrier, for violating 15 U.S.C. § 1 and 15 in which the employee suffered a reduction in wages. *Wilson vs. Ringsby Truck Lines, Inc.*, 320 F.Supp. 699 (D.Colo, 1970). Clearly, an employment relationship is a commercial activity. *Holden vs. Canadian Consulate*, 92 F.3d 918, 922 (9th Cir., 1996).

Defendant forgot to discuss some Massachusetts cases applying their UDAP statute. *Passatempo vs. McMenimen*, 461 Mass. 279, 960 N.E.2d 275 (2012), held that their UDAP statute applies to misrepresentation in insurance cases. *Green vs. Blue Cross and Blue Shield of Massachusetts*, 47 Mass.App.Ct. 443, 713 N.E.2d 992 (1999), held that the UDAP statute applies to the insurance industry and that the insurer's failure to tell the insured the reimbursement for the surgery breached the insurer's duty of good faith and fair dealing under the UDAP claim. *Phalon vs. Varrasso*, 194 B.R. 537 (D.Mass., 1996), held, inter alia, that the UDAP claim may be proven without proving that the debtor knew the false representations were false and without proof that the plaintiffs relied thereon.

***31** *Pastoria vs. Nationwide Insurance*, 112 Cal.App.4th 1490, 6 Cal.Rptr.3d 148 (2003), held, inter alia, that the insurer was subject to the California UDAP statute for negligent misrepresentation and negligent failure to disclose a claim.

*Vaughn vs. C.V.S. Revco D.S., Inc.*, 144 N.C.App., 534, 551 S.E.2d 122 (2001), held that the UDAP claim there involved was not preempted by ERISA because only tangentially involved in the employee benefit plan.

Here, Defendant was clearly engaged as a common carrier in the trade or business of advising retirees about the company's health care plan as it applied to retirees. That was clearly part of Daun Ito's function for the Defendant. The company even furnished retirees with their telephone number so they could call in for advice on questions. Plaintiff did so, and was given erroneous information upon which he relied to his detriment. Even the new Defendant's employee, Edmund Bray, who replaced

Daun Ito was not knowledgeable about late-enrollment penalties for Medicare Part B (Bray depo, pp. 12-13) **(41 ROA 147-148).** Mr. Bray, however, was able to produce a schematic drawing of the relationship between the employee benefits section and the human resources part of the Defendant airline shown in Exhibit 8 to his deposition **(41 ROA 155).**

For the Defendant to claim that the UDAP statute does not apply in this factual pattern is really an absurd argument factually and legally. Clearly, Plaintiff's UDAP claim arises from the Defendant's trade or commerce or business. The cases and the statute and facts support that conclusion. Accordingly, Defendant's motion for summary judgment in that regard on the UDAP claim must be denied.

This case is not about Wong being an employee or a former employee but about the Medicare insurance, so the Defendant's employer cases are not controlling as a matter of law. Clearly, a trade or commerce involves Medicare insurance. That is why the federal government was so concerned about passing the Affordable Health Care Act.

***32** Clearly, Medicare is a business, and Defendant gave Wong bad advice and/or information about that business of insurance. There are material issues of fact; and, therefore, the motion should have been denied. It was reversible error for the judge to grant the Defendant's summary judgment motion. Wong also incorporates Argument D about the Circuit Court failing to follow Hawaii case law.

**D. The Circuit Court's reversible errors violated Wong's constitutional rights to due process and equal protection.**

Judge Sakamoto failed to follow Bronster, supra, per Argument A. Per Argument B, the Circuit Court failed to follow the two *Norris* cases, *supra*. Per Argument C, the Court refused to follow and apply four Hawaii cases. Clearly, the trial courts are obligated to follow the decisions of our highest courts of our country and our State. Instead, with all due respect to Judge Sakamoto, his decisions in this case failing to follow Hawaii cases deprived Wong of his right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 5 of the Hawaii Constitution. Those constitutional provisions prohibit courts from depriving persons of their life, liberty, or property without due process of law. *Romero vs. Star Markets Ltd.*, 82 Haw. 405, 412, 922 P.2d 1018, 1925 (1996). Where a court acts in a manner inconsistent with due process, the resulting judgment is void. *In re Genesys Data Technologies, Inc.*, 95 Haw. 33, 38, 18 P.3d 895, 900 (2001).

The equal protection provisions of the Fourteenth Amendment to the United States Constitution and Article I, Section 5 of the Hawaii Constitution also prohibit courts from depriving litigants of their equal protection of the laws. Since courts administer justice, they are subject to the Due Process and Equal Protection Clauses of the United States and Hawaii Constitutions. Brescia vs. North Shore Ohana, 115 Haw. 477, 501-503, 168 P.3d 929, 953-955 (2007); Aloha Care vs. D.H.S., 127 Haw. 76, 88-90, 276 P.3d 645, 657-659 (2012). Here, the Circuit Court violated both Wong's rights to due process and equal protection by refusing to follow numerous Hawaii cases and thereby deprived Wong of his property, forcing him to pay extra on his Medicare Part B ***33** coverage. KNG Corp. vs. Kim, 107 Haw. 73, 80-83, 110 P.3d 397, 404-407 (2005). The strict scrutiny test applies under the Equal Protection Clause argument. Nakano vs. Matayoshi, 68 Haw. 140, 151-152, 706 P.2d 814, 821 (1985); and Baehr vs. Lewin, 74 Haw. 530, 570-575, 852 P.2d 44, 63-65 (1993). Accordingly, this case must be reversed and remanded for all these constitutional errors.

**E. The Court reversibly erred taxing costs against Wong, and the costs taxed were excessive under the circumstances.**

Based upon the arguments presented above, the judgment including the cost award in this case must be vacated and the case remanded. In the event that Wong's arguments are rejected by this Court, then Wong argues that the order and judgment on the costs must likewise be vacated because of the arguments made at the trial court, most of which are located in Wong's opposition to the May 6, 2013 motion for taxing costs (43 ROA 159-375). The motion taxing costs should be denied because:
1. The motion was untimely. On April 10, 2013, the Order granting summary on all claims was filed. Defendant did not submit any proposed judgment per the Rules of Circuit Courts of the State of Hawaii (RCCH) Rule 23 and HRCP Rule 58 within ten

(10) days from April 10, 2013, in violation of said rules. On April 17, 2013, Defendant filed a notice of taxation of costs, to which the Plaintiff objected on April 19, 2013. On May 6, 2013, Defendant filed its motion for taxing costs, which was over five (5) days after the objection was filed to the notice of taxation of costs in violation of HRCP Rule 54(d). *Cox vs. Cox,* 125 Haw. 19, 250 P.3d 775, 784-785, (FN 14), (2011).

2. When Wong appealed on May 8, 2013, the trial court lost jurisdiction. *Cox vs. Cox, supra,* 250 P.3d at 784-785; and *Hoddick, Reinwald, O'Connor & Marrack vs. Lotsof,* 6 H.A. 296, 300, 719 P.2d 1107, 1111 (1986).

***34** Wong also argued at length supported by numerous documents that the costs sought were excessive and not reasonably necessary, so the cost award should be only $5,000 **(43 ROA 161-168).** In summary fashion, the following are authorities why the costs in this case awarded by the Circuit Court are excessive and unreasonable, supporting vacating the order and judgment for costs:
1. It is inequitable per *Pulawa vs. GTE,* 112 Haw. 3, 19-23, 143 P.3d 1205, 1221-1225 (2006), to award Defendant the requested costs based on this record. Costs must be reasonable as decided by the trial court. *Mist vs. Westin Hotels, Inc.,* 69 Haw. 192, 200-202, 738 P.2d 85, 91-93 (1987). Here, the Defendant's costs are not reasonable at all and, in fact, excessive and inequitable under the circumstances of this case.

2. According to *Wong vs. Takeuchi,* 88 Haw. 46, 52-55, 961 P.2d 611, 617-620 (1988), Plaintiff gave valid reasons why the requested costs must be reduced and/or denied the Defendant in this case. See **43 ROA 159-375** for those detailed facts and reasons. Appendix 11 has an excerpt of the arguments in said document.

3. *Arquette vs. State,* 128 Haw. 423, 444-447, 290 P.3d 493, 514-517 (2012), decided, in pertinent part, that one opposing a cost motion need not furnish evidence proving the reason why the costs should be denied or justified, but the Court needs to state reasons for such denial. Here, Plaintiff gave plenty of reasons to deny and/or substantially reduce the requested costs in this case **(43 ROA 159-375).**

4. There is limited itemization of what was copied by defense counsel. Therefore, in-house copying is not taxable. *Kikuchi vs. Brown,* 110 Haw. 204, 212, 130 P.3d 1069, 1077 (2006).

***35 V. RELEVANT PARTS OF CONSTITUTION, STATUTES, AND RULES**

The **Fourteenth Amendment to the United States Constitution** provides, in pertinent part: “nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.”

**Article I, Section 5 of the Hawaii Constitution** says, in pertinent part: “No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, * * *.”

**HRS § 480-2** (See Appendix 6 for full text)

**HRS § 480-13** (See Appendix 7 for full text)

**HRS § 481A-3** (See Appendix 8 for full text)

**HRCP Rule 58** (See Appendix 9 for full text)

**RCCH Rule 23** (See Appendix 10 for full text)

## VI. CONCLUSION

For each and all of the foregoing reasons, it is respectfully submitted that the judgment in this case must be vacated and the case remanded with directions to deny the summary judgment motions, to vacate the cost award, assign this case to a new judge who is unbiased in favor of Hawaiian Airlines, Inc. and follow the controlling case law Wong cited. Gene Wong should be awarded his costs on this appeal and reasonable attorney's fees under HRS § 480-13.

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