CONCURRING OPINION OF ACOBA, J.

I concur in the majority's resolution of the claims of Plaintiffs-Appellants/Cross-Appellees Mary Zanakis-Pico and Thomas M. Pico (the Picos).[1] As to the Picos' tort claims, I write separately (1) to clarify that minimal sums of compensatory damages are not synonymous with "nominal damages," as seemingly suggested by the Picos, and (2) to dispel the view of of the circuit court of the first circuit (the court) that "substantial pecuniary damage" encompasses a threshold amount. I believe it is essential in our case law to maintain clarity in the definitions, application, and use of terms such as compensatory, punitive, and nominal damages and "substantial" pecuniary damage. The imprecise use of these terms leads to confusion, but, worse, may deprive parties of remedies or defenses to which they would otherwise be properly entitled.

---

[1] Because I believe we should endeavor to provide as much guidance as possible to the parties, counsel, and the trial courts, I wholeheartedly agree with the decision to publish this opinion. This decision applies new rules of law. Various jurisdictions, both federal and state, by rule, either mandate publication of opinions adopting new rules of law or, at the very least, advise that such opinions should be published. See 4th Cir. R. 36(a) (stating that an opinion will be published if it "establishes, alters, modifies, clarifies, or explains a rule of law within [the Fourth] Circuit"); 5th Cir. R. 47.5.1 (explaining that an opinion is published if it "establishes a new rule of law"); 6th Cir. R. 206(a) (indicating that "whether [a decision] establishes a new rule of law" is considered in determining whether an opinion is published); 7th Cir. R. 53(c)(1) (stating that "a published opinion will be filed when the decision establishes a new, or changes an existing rule of law"); Cal. R. Ct. 976(b) (determining that an opinion of the Court of Appeals or other appellate department may be published if it "establishes a new rule of law", or fulfills other criteria); Mich. Ct. R. 7.215(A)-(B) (ordering that "[a] court opinion must be published if it . . . establishes a new rule of law").

Also, as a matter of sound appellate principle, this decision is appropriately published. See ABA Standards of Appellate Courts § 3.37, at 63 (1997). ("A concurring or dissenting opinion should be published if its author believes it should be; if such an opinion is published the majority opinion should be published as well."). Although the ABA Standards are not adopted in our jurisdiction, I believe this ABA Standard to be a salutary one.

I.

In their opening brief, the Picos characterize their claim for gasoline expenses as "nominal compensatory damages for their . . . actual expense in responding to [Defendant-Appellee/Cross-Appellant Cutter]'s advertisement." However, this appears to confuse "nominal damages" with compensatory damages, an error that may have dramatic effects on the ability to recover damages, in some cases.

II.

With respect to awards to a plaintiff for a tort action, it is axiomatic that three basic categories exist: (1) compensatory damages (general and specific);[2] (2) punitive damages (also called "exemplary damages"); and (3) nominal damages. See Restatement (Second) of Torts § 907 cmt. a (1979) ("Nominal damages are to be distinguished from compensatory

[2] "General damages," as compensation sought by a plaintiff, "encompass all the damages which naturally and necessarily result from a legal wrong done. Such damages follow by implication of law upon proof of a wrong[.]" Ellis v. Crockett, 51 Haw. 45, 50, 451 P.2d 814, 819 (1969) (internal citation omitted). "General damages" have been defined as "damages for a harm so frequently resulting from the tort that is the basis of the action that the existence of the damages is normally to be anticipated and hence need not be alleged in order to be proved." 1 Minzer, et al., Damages in Tort Actions, § 1.01[4] (Matthew Bender 1996) [hereinafter Damages in Tort Actions]. Whether damages are anticipated by a claim depends upon the specific tort and the harm pled. See id; Restatement (Second) of Torts § 904 cmts. a-c (1979).

Special damages are the "natural but not the necessary result of an alleged wrong and . . . depend on the circumstances peculiar to the infliction of each particular injury." Ellis, 51 Haw. at 50, 451 P.2d at 819 (citations omitted). "To recover special damages, a plaintiff must both plead and prove each item of loss claimed [because s]pecial damages flow from the individualized factors of an injury." 1 Damages in Tort Actions, supra, § 3.01[3]. In personal injury torts, "[s]pecial damages are often considered to be synonymous with pecuniary loss and include such items as medical and hospital expenses, loss of earnings, and diminished capacity to work." Dunbar v. Thompson, 79 Hawai'i 306, 315, 901 P.2d 1285, 1294 (App. 1995) (quoting 22 Am. Jur. 2d Damages § 41, at 65, (1993)).

("Nominal damages are to be distinguished from compensatory damages on the one hand and from punitive damages on the other[.]"). "Compensatory damages" are a broad range of damages that seek to restore a plaintiff to his or her position prior to the tortious act. 1 Minzer, et al., Damages in Tort Actions, § 1.01[3] (Matthew Bender 1996) [hereinafter Damages in Tort Actions]. Compensatory damages include "damages for pain and suffering, emotional distress, permanent injury, loss of enjoyment of life, medical expenses, lost wages, impairment of earning capacity, [and] damage to personal property." Id.

By contrast, "nominal damages" are "a small and trivial sum awarded for a technical injury due to a violation of some legal right and as a consequence of which some damages must be awarded to determine the right." Van Poole v. Nippu Jiji Co., 34 Haw. 354, 360 (1937); see also Restatement (Second) of Torts, supra, § 907 (defining nominal damages as "a trivial sum of money awarded to a litigant who has established a cause of action but had not established that he [or she] is entitled to compensatory damages" (emphasis added)); C. McCormick, Handbook on the Law of Damages § 20, at 85 (1935) ("Nominal damages are damages awarded in a trivial amount merely as a recognition of some breach of a duty owed by [a] defendant to [a] plaintiff and not as a measure of recompense for loss or detriment sustained . . . [and are] merely symbolic.").

Thus, whereas compensatory damages are "monetary damages awarded to recompense a tort victim for the value of the loss sustained[,]" 1 Damages in Tort Actions, supra, § 3.01, nominal damages are awarded when there has been a technical invasion of a plaintiff's rights or a breach of a legal duty and either (1) no harm or damage has resulted; or (2) although the plaintiff proves harm, its amount or extent is not proven with sufficient certainty to entitle him or her to an award of compensatory damages. See id. § 2.10; Black's Law Dictionary 392 (6th ed. 1990) ("Nominal damages are a trifling sum awarded to a plaintiff in an action, where there is no substantial loss or injury to be compensated, but still the law recognizes a technical invasion of [the plaintiff's] rights or a breach of the defendant's duty, or in cases where, although there has been a real injury, the plaintiff's evidence entirely fails to show its amount.").

Our appellate courts have recognized the concepts embodied in the first category. See, e.g., Weinberg v. Mauch, 78 Hawai'i 40, 44, 890 P.2d 277, 281 (stating that the plaintiffs "have also failed to prove damages. They argue that . . . only a showing of nominal damages [is required] -- that a breach occurred and therefore damages can be inferred. However, to maintain a tortious interference with contract claim . . . , the plaintiff must show that a breach has occurred and must separately establish damages"), reconsideration denied, 78 Hawai'i 421, 895 P.2d 172 (1995); Island-Gentry Joint Venture v.

State, 57 Haw. 259, 267, 554 P.2d 761, 766-67 (1976) ("The law on the measure of damages, wherein the purchaser breaches an executory contract to purchase land, is that the vendor is entitled to recover against the defaulting vendee the difference between the contract price for the sale and the market value of the land on the date of breach[, unless] the market value of the land on the date of breach [is] greater than the contract price, [then] the vendor is entitled only to nominal damages."); Hall v. American Airlines, Inc., 1 Haw. App. 258, 262, 617 P.2d 1230, 1234 (1980) (determining that nominal damages were appropriate where "counsel for appellant stated that his client was not interested in damages but that the case was one of principle").

Likewise, our jurisdiction has confirmed the proposition embodied in the second category. See, e.g., Neary v. Martin, 57 Haw. 577, 584, 561 P.2d 1281, 1286 (1977) (determining that where "[t]he trial court made no finding, and the record contains no evidence, with respect to the amount of the actual loss or injury sustained by Appellees, . . . we conclude that the judgment for substantial damages must be set aside and only nominal damages may be awarded"); Uyemura v. Wick, 57 Haw. 102, 110, 111-12, 551 P.2d 171, 177, 178 (1976) (determining that, because "[a] review of the record further fails to show any evidence of any basis by which the trial court could reasonably measure the loss and damages suffered by appellee[,]" "any judgment in favor of appellee for damages suffered, over and above nominal damages, would be unsupported by the record

herein"); Omura v. American River Investors, 78 Hawai'i 416, 418, 894 P.2d 113, 115 (App. 1995) (holding that when a plaintiff has proven injury but has failed to prove the amount of damages, the plaintiff is only entitled to nominal damages). Thus, a small award of compensatory damages is distinguishable from nominal damages awarded to recognize a technical violation, but not to compensate the plaintiff for the amount of harm caused. See, e.g., McGrew Mach. Co. v. One Spring Alarm Clock Co., 245 N.W. 263, 266 (Neb. 1932) ("By the term 'nominal damages' is meant a trivial sum, which recognizes a right, but makes no adequate return therefor. It has been said that a return of nominal damages is really no damages at all, but a mere peg to hang the costs on." (Citations omitted.) (Emphasis added.)).

III.

A.

As noted by one treatise on tort damages, the distinction between nominal damages and small awards of compensatory damages is sometimes misapplied, leading to confusion:

> It should be recognized that courts have not always been precise in their choice of terminology to describe particular damage awards. In some cases, although the plaintiff has made out a cause of action and presented sufficient proof of damages to warrant an assessment of compensatory damages, the loss or harm may be trivial in nature--justifying nothing more than a minimal award. Courts have sometimes imprecisely characterized such minimal awards as "nominal damages." The use of the term "nominal damages" in these instances is technically incorrect, since the small monetary sum awarded is, in reality, compensatory for the injury sustained. It would be less confusing if the courts--and litigants--would use the term "minimal" rather

> than "nominal" to describe what are actually insubstantial or trivial compensatory damage awards.

1 Damages in Tort Actions, supra, § 3.01 (emphases added). See also Cowan v. Flannery, 461 N.W.2d 155, 159 (Iowa 1990) ("Nominal damages are allowed, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right and are not the same as damages small in amount." (Citing Danker v. Iowa Power & Light Co., 86 N.W.2d 835, 837 (Iowa 1957).)); Richard v. Hunter, 85 N.E.2d 109, 111 (Ohio 1949) ("Small actual damages are not, however, to be confused with mere nominal damages, and the fact that the damages are small does not bring the case within the rule that nominal damages will not support a verdict for punitive damages." (Quoting 15 Am. Jur. Damages § 271.)); Texas & P. R. Co. v. Heathington, 115 S.W.2d 495, 499 (Tex. Civ. App. 1938) (stating that, "[t]he fact that the amount in controversy is small is no reason why plaintiff should not be permitted to prove, if he can, his damages" where the amount in controversy was $50.00); 22 Am. Jur. 2d Damages § 13 (1988) ("[N]ominal damages mean damages in name only and not for any substantial amount. Such damages are to be distinguished from a small award of damages. A small amount of damages may still be substantial, if that sum is sufficient to compensate the injured party for all the damage actually sustained.").

For example, in Buden v. Dombrouskas, 166 A.2d 157 (Conn. 1960), the trial court awarded $340 to a plaintiff. See id. at 157. The plaintiff had claimed damages in the amount of $15,000 for a breach of covenants by the lessor defendant. See id. In making the award, the trial court stated, "The damages I

find to be nominal on any ground that is alleged in the complaint. So damages -- judgment may be rendered for the plaintiff to recover $340." Id. at 158. On appeal, the Connecticut Supreme Court observed that the trial court had incorrectly used the term "nominal," stating that "[n]ominal damages mean no damages. They exist only in name, and not in amount." Id. at 157. The appellate court explained that "[i]t is obvious from the language of the court that it spoke extemporaneously and without legal precision in commenting on the trivial character of the case. Clearly, it was using the word 'nominal' as the equivalent of 'small.'" Id. at 158. Accordingly, the court determined that the $340 award was, in actuality, compensatory damages, and let the award stand. See id.

Other jurisdictions have also confirmed the award of small sums of money as compensatory damages when that is all that is needed to compensate the plaintiff. See, e.g., Troknya v. Cleveland Chiropractic Clinic, 280 F.3d 1200, 1208 (8th Cir. 2002) (disagreeing with defendant that jury's award of $1.00 in actual damages were, in fact, nominal damages, because "the jury could have found plaintiffs each entitled to a small amount of monetary compensation"); Werschkull v. United Cal. Bank, 149 Cal. Rptr. 829 (Cal. Ct. App. 1978) (upholding the award of compensatory damages in the amount of $1); Frazee v. Brazda, 399 P.2d 346, 347 (Or. 1965) (determining that $25 was not nominal damages, inasmuch as the jury "may well have concluded also that $25 was reasonable compensation for a superficial bruise or

abrasion and that $25 was reasonable compensation for any medical treatment which may have been required by such an injury").

B.

Similarly, in Hawai‘i case law, nominal damages have never referred to a small sum of compensatory damages. See Uyemura, 57 Haw. at 111, 551 P.2d at 177 ("And in defining nominal damages we stated: '. . . the sum of One Dollar and his costs.'" (Quoting Ferreira v. Honolulu Star-Bulletin, 44 Haw. 567, 580, 356 P.2d 651, 658, reh'g denied, 44 Haw. 581, 357 P.2d 112 (1960).) (Ellipses points in original.)). In fact, prior Hawai‘i cases have expressly limited nominal damages, because it is only a token, to $1.00. See Ferreira, 44 Haw. at 579, 357 P.2d at 658 (considering that other jurisdictions term various awards as nominal damages, ranging from $300 to 6 cents, and, noting that "[a] vast majority of cases hold that nominal damages are a token award only and usually adjudge one dollar to be the amount[,]" adopting the majority rule); Minatoya v. Mousel, 2 Haw. App. 1, 6, 625 P.2d 378, 382 (1981) ("We think Ferreira[, supra,], is binding authority that nominal damages may not exceed $ 1.00."). Thus, in order to faithfully adhere to the law, the distinction between "nominal damages," a symbolic award, and compensatory damages that are of a small amount, should be maintained.

IV.

As indicated in the foregoing discussion, the damages sought by the Picos are more accurately characterized as "compensatory," and not nominal in the legally accepted sense. The Picos here sought, inter alia, compensatory damages of a special nature, given that compensation for travels costs is "not the necessary result", Ellis, 51 Haw. at 50, 451 P.2d at 819, of the alleged misrepresentation in Cutter's advertisement. See supra note 1. As indicated in their third revised complaint, "Plaintiffs demand[ed] judgment against Defendant Cutter . . . as follows: . . . special damages in such amounts as will be proved at trial." In the Picos' Settlement Conference Statement, special damages were stated to include "Plaintiffs' actual loss for the cost of gas to travel to and from the Cutter dealership on September 14, 1997." The amount at issue was stated by the Picos as "$3.00 to $5.00 worth of gas[.]"

The Picos sufficiently pled these special damages in the amended complaint, for purposes of Hawai‘i Rules of Civil Procedure (HRCP) Rule 9(g). This rule provides that, "[w]hen items of special damage are claimed, they shall be specifically stated." By alleging "special damages in such amounts as will be proved at trial" in their amended complaint, the Picos met the specificity required in Rule 9(g). See In re Genesys Data Techs., Inc., 95 Hawai‘i 33, 42, 18 P.3d 895, 904 (2001) (determining that the plaintiff's prayer for relief in the form of "general, special, treble, and punitive damages in an amount to be determined at trial" in its complaint was sufficiently

specific for purposes of HRCP Rule 9(g) (internal quotation marks and citation omitted)).

The Picos' claim for "$3.00 to $5.00 worth of gas" was clearly to compensate them for traveling to the Cutter automobile lot, rather than simply a request for a symbolic token, unrelated to any specific compensable claim.[3] As mentioned, the Picos met the necessary requirements for pleading these damages, pursuant to HRCP Rule 9(g). Accordingly, although minimal in amount, the Picos' claim is for compensatory damages, and not for nominal damages. Thus, the Picos' claim, such as it is, cannot be precluded on the basis that their special damages claim was "nominal."

V.

As to the Picos' fraud allegation, nominal damages, properly defined, see supra, may be a basis for punitive damages in fraud actions, because the aim of punitive damages is to punish the defendant, rather than to compensate the plaintiff. See, e.g., Wagstaff v. Protective Apparel Corp., 760 F.2d 1074 (10th Cir. 1985) (fraud); Life Ins. Co. v. Smith, 719 So. 2d 797 (Ala. 1998) (fraud); Pihakis v. Cottrell, 243 So. 2d 685 (Ala. 1971) (fraud and deceit); Nappe v. Anschelewitz, Barr, Ansell & Bonello, 477 A.2d 1224 (N.J. 1984) (legal fraud); Beavers v. Lamplighters Realty, Inc., 556 P.2d 1328 (Okla. Ct. App. 1976) (fraud). An award of punitive damages rests upon the egregious nature of a defendant's conduct, see Masaki v. General Motors

[3] Because this case establishes precedent, it has implications far beyond its own facts and will impact cases that encompass greater loss.

Corp., 71 Haw. 1, 7, 780 P.2d 566, 570 ("In determining whether an award of punitive damages is appropriate, the inquiry focuses primarily upon the defendant's mental state, and to a lesser degree, the nature of his [or her] conduct."), reconsideration denied, 71 Haw. 664, 833 P.2d 899 (1989), rather than the extent of proof of injury a plaintiff can show at trial.

Of course, nominal damages may be the basis for punitive damages in other tort actions.[4] Hence, an imprecise use of the term "nominal" may have the effect of allowing defendants who have harmed plaintiffs to escape punitive damages, even when an award of such damages would be appropriate.

VI.

As to the Picos' deceit and misrepresentation claims, the court concluded that these actions were barred, based upon

---

[4] When appropriate, based upon the conduct of the defendant, an award of punitive damages may be awarded in civil rights actions. See, e.g., Ault v. Lohr, 538 So. 2d 454, 456 (Fla. 1989) (although based on a civil rights action, stated that, under the law of Florida, "a finding of liability alone will support an award of punitive damages even in the absence of financial loss for which compensatory damages would be appropriate" (internal quotation marks and citation omitted)); Sanchez v. Clayton, 877 P.2d 567, 573 (N.M. 1994) (stating that nominal damages may be the basis of an award of punitive damages in intentional torts, because "the jury may award nominal damages to acknowledge that the cause of action was established and punitive damages to punish the wrongdoer for violating the rights of the victim"); Save Charleston Found. v. Murray, 333 S.E.2d 60, 65 (S.C. Ct. App. 1985) (conversion).

Moreover, in cases alleging constitutional violations, courts allow punitive damage awards without either compensatory or nominal damage awards. See King v. Macri, 993 F.2d 294, 297-98 (2d Cir. 1993) (allowing punitive damage awards to stand in § 1983 claims alleging excessive force, false arrest, and malicious prosecution, although jury did not award either compensatory or nominal damages) (citing for the same proposition, Glover v. Alabama Dep't of Corrections, 734 F.2d 691, 694 (11th Cir. 1984), rev'd on other grounds, 474 U.S. 806 (1985); McCulloch v. Glasgow, 620 F.2d 47, 51 (5th Cir. 1980); Guzman v. Western State Bank of Devils Lake, 540 F.2d 948, 953 (8th Cir. 1976); Silver v. Cormier, 529 F.2d 161, 163-64 (10th Cir. 1976); Spence v. Staras, 507 F.2d 554, 558 (7th Cir. 1974); Gill v. Manuel, 488 F.2d 799, 802 (9th Cir. 1973); Basista v. Weir, 340 F.2d 74, 87-88 (3d Cir. 1965)).

the inaccurate characterization of the Picos' damage as not "substantial pecuniary damage." It must be observed that the court apparently granted summary judgment regarding all of the Picos' tort claims because, inter alia, it believed that the Picos' claim of three to five dollars for gasoline expenses was not "substantial" enough to satisfy a requirement of "substantial pecuniary damage."[5]

Cutter argued, and the court believed that the special compensatory damages alleged were not "substantial pecuniary damage," and proof of that nature was required in order for the tort claims to proceed. As with the implied threshold in the Picos' characterization of their gasoline expenses as "nominal," the use of the term "substantial" similarly does not connote a threshold, as believed by Cutter and the court.

A.

In Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989), this court stated that fraud, or the common law tort action of deceit,[6] requires a showing that

---

[5] Cutter and the court apparently relied upon Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 768 P.2d 1293 (1989), for the proposition that, in an action for deceit, a "plaintiff must show that he [or she] suffered substantial pecuniary damage[.]" 70 Haw. at 286, 768 P.2d at 1301 (citing Ellis, 51 Haw. at 52, 451 P.2d at 820).

[6] The Restatement (Second) of Torts § 525 (1977) describes this action as "fraudulent misrepresentation." It states:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him [or her] by his [or her] justifiable reliance upon the misrepresentation.

(continued...)

> (1) false representations were made by defendants, (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them. Further, plaintiff must show that he [or she] suffered substantial pecuniary damage for the aim of compensation in deceit cases is to put the plaintiff in the position he [or she] would have been had he [or she] not been defrauded.

Id. at 286, 768 P.2d at 1301 (citations and brackets omitted) (emphasis added). Ellis considered the issue of damages in deceit cases. See 51 Haw. at 52-53, 451 P.2d at 820. This court defined the required damage as "substantial actual damage, not nominal or speculative." Id. at 52, 451 P.2d at 820 (citation omitted). "The courts have often expressed this requirement in terms of *pecuniary* damage[.]" Id. (emphasis in original) (citing Hanlon v. MacFadden Pubs., Inc., 302 N.Y. 502, 511, 99 N.E.2d 546, 551 (1951); Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd., 265 F.2d 418, 421 (2d Cir. 1959); Restatement of Torts § 549 (1938)). "The aim of compensation in deceit cases is to put the plaintiff in the position he [or she] would have been had he [or she] not been defrauded." Id. Because a plaintiff may not recover for mental anguish and humiliation not intentionally inflicted, see id., the plaintiff's claims were said to be confined to "pecuniary damage," "which can be

---

[6](...continued)
Section 531 of the Restatement (1977) provides that

> [o]ne who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he [or she] intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he [or she] intends or has reason to expect their conduct to be influenced.

accurately calculated in monetary terms such as loss of wages and cost of medical expenses." Id. at 52-53, 451 P.2d at 820.

B.

The element of "substantial pecuniary damage," then, in a deceit action refers to proof of injury, i.e., pecuniary injury rather than the award of damages, as maintained by Cutter and the court. Generally, "substantial damages" are "[a] sum, assessed by way of damages, which is worth having; opposed to nominal damages, which are assessed to satisfy a bare legal right[; c]onsiderable in amount and intended as a real compensation for a real injury." Black's Law Dictionary at 392. See 22 Am. Jur. 2d Damages § 12 (1988). By contrast, "substantial," as it applies to the loss that a plaintiff must show to meet the requirement for damage, means "[b]elonging to substance; actually existing; real; not seeming or imaginary; not illusive; solid; true; veritable." Black's Law Dictionary at 1428. Accordingly, in my view, "substantial actual damage," as adopted by this court in Ellis, 51 Haw. at 52, 451 P.2d at 820, refers to this latter definition -- rather than imposing some sort of threshold as to the amount of damages, the loss sustained by a plaintiff must be substantive or real, rather than speculative.

1.

Rather than supporting a threshold construction, the source from which the Ellis court adopted this phrase indicates that "substantial" is used to convey certainty with respect to

damages. The Ellis court adopted the term "substantial" from Prosser and Keeton on Torts, W.P. Keeton, Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984) [hereinafter Prosser and Keeton on Torts], see 51 Haw. at 52, 451 P.2d at 820 ("In order to have a claim based on deceit, the plaintiff must have suffered substantial actual damage, not nominal or speculative. Prosser, *Law of Torts* at 748 (3d ed. 1964)."), which, in turn, cited to cases that explain the use of the term "substantive." See Prosser and Keeton on Torts, supra, § 110, at 765.

The cases relied upon by Professors Prosser and Keeton do not set a threshold, but relate to the requirement that a plaintiff show loss or injury with some certainty. For example, in Casey v. Welch, 50 So. 2d 124 (Fla. 1951), the Florida Supreme Court determined that, because "the plaintiff was unable to prove any damage, and the record is devoid of evidence that plaintiff was injured by the defendant's misrepresentations[,]" the judgment in favor of plaintiff should be reversed and the case remanded. Id. at 124-25. That supreme court said that "[i]t is of the very essence of an action of fraud or deceit that the same shall be accompanied by damage." Id. at 125. Prosser and Keeton on Torts also relied upon Tsang v. Kan, 177 P.2d 630 (Cal. Ct. App. 1947).

In that case, the California Appellate Court applied a statute which provided that, "[o]ne who willfully deceives another with intent to induce him [or her] to alter his [or her]

position to his [or her] injury or risk, is liable for any damage which he [or she] thereby suffers." Id. at 633. Stating the general rule that "[i]t is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action[,]" the court determined that, assuming a promise had been made, it was "difficult to see that [plaintiff] was damaged thereby[,]" when it did not appear that plaintiff relied on any promises by defendant.[7] Id. Accordingly, the general rule drawn from these cases is not that some threshold is required, but that some pecuniary damage must be shown. That is the general rule adopted by this court in Ellis.

2.

Other courts have also disapproved an interpretation of the term "substantial" as quoted from Prosser and Keeton on Torts as establishing a threshold amount. In Dilworth v. Lauritzen, 424 P.2d 136 (Utah 1967), after stating the rule that "one of the

[7] See also Castleman v. Stryker, 213 P. 436, 438 (Or. 1923) (stating that "fraud without damage is not sufficient to support an action . . . [h]owever, if it be established that the fraud operated to the prejudice of the party to a slight extent only, if its sufficient, as fraud gives a cause of action if it leads to any sort of damage[,]" and affirming the trial court's grant of plaintiff's motion for a directed verdict because defendants "wholly failed to establish" their loss) (citation omitted)); Benson v. Garrett Inv. Co., 287 P.2d 405, 408 (Cal. App. Dep't Super. Ct. 1955) (in "an action for damages for fraud, it is fatally defective in failing to allege any damage -- there being neither an allegation of general damages or the value of plaintiff's property which she conveyed to defendant"); Dilworth v. Lauritzen, 424 P.2d 136, 138 (Utah 1967) (determining that the trial court was "justified in ruling for the defendant on the further ground that no competent evidence was given regarding the damages which might have been sustained even if there had been fraud[,]" and stating that "[t]his is so because one of the essential elements of fraud and deceit is that the plaintiff sustain damages").

essential elements of fraud and deceit is that the plaintiff sustain damages[,]" the Supreme Court of Utah quoted Prosser, Law of Torts, § 107, at 747 (3d. ed.), to the effect that "the plaintiff must have suffered substantial damage before the cause of action can arise." Id. at 138. In a later case, Turner v. General Adjustment Bureau, Inc., 832 P.2d 62 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992), overruled on other grounds by Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, __ P.3d __ (2001) (overturning Turner's holding on the availability of emotional damages for fraud), the Utah Court of Appeals addressed the defendants' claim that "substantial damage" was a threshold requirement in a fraud case. Id. at 66 n.1. In that case, the defendants, employees of a firm hired to investigate the plaintiff's husband's worker's compensation claim, had masqueraded as a product marketing research company, in order to gain access to the plaintiff's home. See id. at 64-65. Defendants asked plaintiff to participate in a shopping spree. See id. On the day of the shopping spree, however, defendants canceled the shopping trip. See id. at 65.

Plaintiff later discovered that defendants were merely attempting to obtain information about her husband's activities. See id. She filed suit, claiming, inter alia, fraud. See id. As damages, plaintiff claimed that she had hired and paid a babysitter approximately $20.00 as a result of the invitation for the shopping spree, and that she lost time that she could have spent working for her landlord in exchange for rent credits. See

id. Plaintiff sought special, general, and punitive damages. See id.

At the close of the case, the jury returned a verdict against plaintiff on the fraud charge, and therefore, did not reach the issue of damages. See id. Plaintiff requested a judgment notwithstanding the verdict, which the trial court granted. See id. The trial court determined that the plaintiff had proved damages for $20.00, but concluded that the evidence regarding damage for lost work time was "too speculative." Id.

On appeal, defendants declared that the trial court had erred because "competent evidence supported the jury's verdict of no fraud in that [plaintiff] was not damaged as a result of the undercover investigation." Id. at 65-66. Relying upon Dilworth, supra, defendants maintained that plaintiff had to prove "substantial damage" in order to recover for fraud. Id. at 66 n.1. The court, however, declined to read this statement as a threshold for damages. See id. "[Defendants] read[] *Dilworth* too broadly. Utah law requires that a party sustain only some injury or damage." Id. (citations omitted).[8]

[8] In reviewing the trial court's grant of judgment notwithstanding the verdict, the court determined that plaintiff had not proven this damage adequately, see Turner, 832 P.2d at 66, and, thus, the judgment notwithstanding the verdict should not have been granted. Hence, although the amount of damage was sufficient, the damage was not proven with sufficient certainty to warrant a verdict for the plaintiff.

C.

Consequently, although the term "substantial" is employed in some formulations, that word refers to the requirement that such damages be pecuniary in nature and not speculative. Indeed, in deceit actions, Hawai‘i appellate courts have only barred recovery when there is no evidence of pecuniary damages at all. See Shanghai Inv. Co. v. Alteka Co., 92 Hawai‘i 482, 498, 993 P.2d 516, 532 (2000) (affirming the trial court's determination that "because Alteka did not prove pecuniary damage, the jury's verdict on the issue of fraud was not supported by the evidence"), overruled in part on other grounds by Blair v. Ing, 96 Hawai‘i 327, 31 P.3d 184 (2001); Larsen v. Pacesetter Sys., Inc., 74 Haw. 1, 29, 837 P.2d 1273, 1288 ("An action based on fraud will not lie where plaintiff has suffered no injury or damage." (Citations omitted.)), amended on reconsideration, 74 Hawai‘i 650, 843 P.2d 144 (1992); Hawaii's Thousand Friends, 70 Haw. at 286, 768 P.2d at 1301 (stating that there was no evidence that plaintiff had suffered any pecuniary damage as a result of any misrepresentations); Ellis, 51 Haw. at 53, 451 P.2d at 820 (determining that the plaintiff did not allege any loss from the misrepresentations).

Consequently, as employed in Ellis, "substantial actual damage" is a synonym for "pecuniary damage," 51 Haw. at 52, 451 P.2d at 820, that is, damage "[s]uch as can be estimated in and compensated by money; not merely the loss of money or salable property or rights, but all such loss, deprivation, or injury as

can be made the subject of calculation and of recompense in money[,]" Black's Law Dictionary at 392 (citing Ellis, 51 Haw. at 86, 451 P.2d at 820).

D.

Hawai'i cases have, in fact, treated the terms alike. Ellis, the first case to use the term "substantial," employed the terms "substantial actual damage" and "pecuniary damage" interchangeably. After first stating that a plaintiff must prove "substantial actual damage," id. at 52, 451 P.2d at 820, in deceit cases, this court utilized only the term "pecuniary damage" in the balance of the opinion. It was pointed out that the term "pecuniary damages" referred to established expenses and not the amount of such loss:

> Pecuniary damages, being narrow in scope, are those damages (either general or special) which can be accurately calculated in monetary terms such as loss of wages and cost of medical expenses. In fraud or deceit cases, the measure of pecuniary damages is usually confined to either the "out-of-pocket" loss (see, e.g., Beardmore v. T. D. Burgess Co., . . . 226 A.2d 329 (1967)) or the "benefit of the bargain" (difference between the actual value at time property is sold and the value it would have had if the representations had been true) (see, e.g., McInnis & Co. v. Western Tractor [&] Equip. Co., . . . 410 P.2d 908, 910 (1966)).

Id. at 52-53, 451 P.2d at 820. This court concluded that "[w]e do not reach the question of which measure is applicable in this case since the plaintiffs do not appear to have alleged any pecuniary loss from the alleged misrepresentations." Id. at 53, 451 P.2d at 820 (emphasis added).

The Intermediate Court of Appeals (ICA) has similarly construed Ellis as referring to "pecuniary damages," inasmuch as

the Ellis opinion itself uses that term as the equivalent of "substantial actual damage." Reiterating the rule in Ellis, the ICA stated in Cresencia v. Kim, 10 Haw. App. 461, 878 P.2d 725, cert. denied, 77 Hawai'i 373, 884 P.2d 1149 (1994), that "[w]ith respect to claims for fraud or deceit, the only damages generally recoverable are 'pecuniary damages'; i.e., damages which will 'put the plaintiff in the position he would have been had he not been defrauded' and 'which can be accurately calculated in monetary terms such as loss of wages and cost of medical expenses." Id. at 482-83, 878 P.2d at 736 (citing Ellis, 51 Haw. at 52-53, 451 P.2d at 820) (emphasis added).

VII.

In sum, the court's treatment of the words "substantial pecuniary loss" as establishing a threshold requiring substantial amounts of damages to prove the injury element of actions for fraud or deceit is incorrect.[9] As discussed supra, a threshold

[9] It also may have unintended consequences. For example, class action suits are often for small sums per individual plaintiff, but the aggregate may be enormous when combining the total damage sustained by the class. A threshold construction would bar such actions, when such suits would may be appropriate. See, e.g., Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997) (disagreeing with the trial court's determination that recovery of between 28 cents and $12.00 per potential class member out of a total $100,000 was a bar to a class action, stating "we believe that a de minimis recovery (in monetary terms) should not automatically bar a class action. The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights").

Aggregating the damage of the class presents its own problems under a threshold rubric. Even assuming that each plaintiff's "insubstantial loss" may be aggregated for purposes of meeting such a substantiality threshold, an individual plaintiff's claim, prior to certification, remains vulnerable to dismissal. Many class action lawsuits are initially begun by one plaintiff, who files a complaint, and thereafter, attempts to certify the

(continued...)

construction of the word "substantial" is not supported by the origins of the term, interpretation of the term by other jurisdictions,[10] or our own case law. Therefore, the word "substantial" does not mean a threshold amount of pecuniary loss that the plaintiff must satisfy in order to recover, as the court apparently believed. Insofar as the term "substantial" connotes pecuniary damages of a particular amount rather than the concreteness of pecuniary loss, it is misleading and is best consigned to past cases.

---

[9](...continued)
class. A defendant may file a Rule 12(b) motion to dismiss for failure to state a claim prior to this certification. Accordingly, a race to the courthouse may be created, wherein a defendant who requests dismissal quickly may evade tort liability, and a plaintiff with damage not reaching the threshold must certify the class before such a motion eliminates the plaintiff's claim. At the very least, this would have the effect of chilling individual plaintiffs from pursuing actions, thereby allowing large-scale fraud when damage to individual plaintiffs is minimal, and, thus, does not meet the "substantial" threshold.

[10] Most jurisdictions simply require a showing of some pecuniary loss or damage. See, e.g., Echols v. Beauty Built Homes, Inc., 647 P.2d 629, 632 (Ariz. 1982) ("We believe that the Baxters should be allowed to show what pecuniary loss they have sustained as a result of their reliance upon the defendants' misrepresentation as to the tax credit."); B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 285 (Iowa 1976) ("A successful plaintiff in a fraud case is entitled to recover for his actual pecuniary loss sustained as a direct result of the wrong."); UPS v. Rickert, 996 S.W.2d 464, 469 (Ky. 1999) ("In an action for fraud, it is not necessary to prove the amount of damages with certainty, but only to establish with certainty the existence of damages."); Crowley v. Global Realty, Inc., 474 A.2d 1056, 1058 (N.H. 1984) ("The general rule is therefore that the measure of damages recoverable for misrepresentation, whether intentional or negligent, is actual *pecuniary* loss."); Lama Holding Co. v. Smith Barney, Inc., 668 N.E.2d 1370, 1373 (N.Y. 1996) ("The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the 'out-of-pocket' rule[.]" (Internal quotation marks and citation omitted.)); Metropolitan Life Ins. Co. v. Haney, 987 S.W.2d 236, 245 (Tex. Ct. App. 1999) ("To recover for fraud, the plaintiff must plead and prove he suffered a pecuniary loss as a result of the false representation upon which he relied.").

VIII.

The court apparently construed the Picos' claim of negligence as one for negligent misrepresentation,[11] as shown by its statements during the hearing on Cutter's motion[12] for summary judgment:

> [CUTTER]: And on that basis I ask that the Court dismiss their fraud claims for failing to show substantial pecuniary loss as well as misrepresentation claims.
>
> THE COURT: So as far as any negligence or fraud, those would be the negligence and fraud claims?
>
> [CUTTER]: Yes.
>
> THE COURT: There's no other -- I don't think I saw any other negligence claim. I mean it's negligent misrepresentation, the fraud or deceit which -- and the contract claims.

Negligent misrepresentation occurs when

> [o]ne who, in the course of his [or her] business, profession or employment, or in any other transaction in which he [or she] has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he [or she] fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552, at 126-27 (emphasis added).[13]

---

[11] Our case law indicates that a negligent misrepresentation requires that "(1) false information be supplied as a result of the failure to exercise reasonable care or competence in communicating the information; (2) the person for whose benefit the information is supplied suffered the loss; and (3) the recipient relies upon the misrepresentation." Blair, 95 Hawai'i at 269, 21 P.3d at 474 (citing Kohala Agric. v. Deloitte & Touche, 86 Hawai'i 301, 323, 949 P.2d 141, 163 (1997); Restatement (Second) of Torts § 552)). As to the adequacy of the other elements of negligent misrepresentation, it appears the court did not reach these matters. Accordingly, I do not address the other elements of this claim.

[12] As to any claim of simple negligence by the Picos, I would note that Cutter, correctly, did not advance a similar argument that there is a threshold requirement for damage in a negligence action. Instead, Cutter argues that any simple negligence claim fails on the element of duty, inasmuch as, according to Cutter, it owes no duty to the Picos.

[13] Although not specifically cited to by either party, the court apparently believed that the Restatement (Second) of Torts § 552, which provides a cause of action for "information negligently supplied for the guidance of others in their business transactions[,]" id., applied in the

(continued...)

Although the court determined that the term "substantial" imposes a threshold amount for fraud or deceit actions, this jurisdiction in Chun v. Park, 51 Haw. 462, 462 P.2d 905 (1969), expressly adopted the elements set forth in Restatement (Second) of Torts § 552 for negligent misrepresentation. See id. at 468, 462 P.2d at 909. See also State by Bronster v. United States Steel Corp., 919 P.2d 294, 904 (1996) ("[B]oth [Restatement (Second) of Torts §] 552, and this court in Chun, recognize that pecuniary losses are recoverable in a claim for negligent misrepresentation. Section 552(1) expressly states that liability will attach 'for pecuniary loss caused . . . by [plaintiff's] justifiable reliance upon the information[.]" (Emphasis in original.)). See also Kohala Agric. v. Deloitte & Touche, 86 Hawai'i 301, 323, 949 P.2d 141, 163 (1997). This court's prior case law confirms that a prima facie case for negligent misrepresentation requires only

[13](...continued)
present situation. It is unclear whether the Picos' rely upon other Restatement sections in support of their generically described "action in tort[.]"

In addition to fraudulent misrepresentations, the Restatement (Second) of Torts provides for a variety of tort actions based upon concealment or nondisclosure, the liability for which depends upon the culpability of the defendant. For example, intentional concealment or nondisclosures, see id. at § 550 ("One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering."); § 551 (duty of disclosure in business transactions), negligent misrepresentations, see § 552, and innocent misrepresentations, see § 552C (misrepresentations of a material fact in a sale, rental or exchange transaction with another).

All of these tort actions allow for "pecuniary loss," unmodified by the terms "substantial" or "actual."

proof of some pecuniary injury.[14] The Picos have alleged that.

IX.

Accordingly, the court's interpretation of the word "substantial" was incorrect, as it apparently requires a sizable amount of damage and, as indicated in the preceding discussion, was wrongly applied. The court specifically granted summary judgment for Cutter regarding all the Picos' tort claims using this incorrect application of the "substantial pecuniary damage" standard. Therefore, the court erred when it granted Cutter's motion for summary judgment.

With the foregoing elaboration, I agree with the disposition of this case by the majority.

[14] Accordingly, adopting the "substantial" threshold also leads to an inconsistent result when comparing fraud or deceit (intentional misrepresentation), with negligent misrepresentation. An erroneous construction of the term "substantial" in deceit or fraud cases may result in two different standards of damage, one for intentional misrepresentation (substantial amount of pecuniary damages) and another for negligent misrepresentation (no threshold, only pecuniary damages). The untoward result would be that a plaintiff with minimal damages would be able to recover from a defendant who had acted only negligently, while the same plaintiff with the same damage would not be able to recover from a defendant who had acted fraudulently.