NO. 23541

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

TERRI SPRAGUE, Individually and as Conservator of the Estate of William S. Adams and Grace P. Adams, Deceased; DANA ADAMS; and BRIAN ADAMS, Plaintiffs/Appellants/Cross-Appellees, v. CALIFORNIA PACIFIC BANKERS & INSURANCE LTD., a Texas corporation also known as California Pacific Casualty; ANN N. NOTTAGE; IVAN W. C. KAM; LOUAN B. CHANDLER, and DOES 1-50, inclusive, Defendants/Appellees/Cross-Appellees, and JIM NOTTAGE INSURANCE, INC.; INSURANCE RESOURCES, INC., AVIATION INSURANCE ASSOCIATES, INC.; JAMES T. NOTTAGE; SALLY JO NOTTAGE; and ALLEN M. TOKUNAGA, Defendants/Appellees/Cross-Appellants

APPEAL FROM THE THIRD CIRCUIT COURT
(CIV. NO. 95-291K)

MEMORANDUM OPINION
(By: Burns, C.J., Lim and Foley, JJ.)

Plaintiffs/Appellants/Cross-Appellees Terri Sprague, individually and as Conservator of the Estate of William S. Adams and Grace P. Adams, Deceased; Dana Adams; and Brian Adams (collectively Plaintiffs) appeal from the following judgment and orders entered by Third Circuit Court Judge Ronald Ibarra: (1) the May 30, 2000 Second Amended Judgment; (2) the July 29, 1999 Order Denying Plaintiffs Terri Sprague, Individually and as Conservator of the Estates of William S. Adams and Grace P. Adams, Deceased; Dana Adams and Brian Adams' Motion to Amend Judgment, Dated June 16, 1999; (3) the August 17, 1999 Order

Awarding Attorneys Fees and Costs to Defendant Tokunaga, and Costs to Sally Jo Nottage and Insurance Resources, Inc. and James T. Nottage and Jim Nottage Insurance, Inc.; and (4) the August 17, 1999 Order Awarding Costs to Plaintiff Terri Sprague, Individually and as Conservator of the Estates of William Adams and Grace P. Adams, Deceased, et al.

Defendants/Appellees/Cross-Appellants Jim Nottage Insurance, Inc. (Nottage Insurance), Insurance Resources, Inc. (Insurance Resources), Aviation Insurance Associates, Inc. (Aviation Insurance), James T. Nottage (James Nottage), Sally Jo Nottage (Sally Nottage), and Allen Tokunaga (Tokunaga) (collectively Defendants/Cross-Appellants) cross-appeal (1), (3), and (4) above.

Defendants/Appellees/Cross-Appellees California Pacific Bankers & Insurance Ltd. (California Pacific)[1], Ann N. Nottage, Ivan W. C. Kam (Kam), Louan B. Chandler (Chandler), and Jeff H. Reynolds[2] (Reynolds) (collectively Defendants/Cross-Appellees) did not appeal.

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[1] Defendant/Appellee/Cross-Appellee California Pacific Bankers & Insurance Ltd. (California Pacific) is a Texas corporation. On September 27, 1996, Plaintiffs/Appellants/Cross-Appellees Terri Sprague, individually and as Conservator of the Estate of William S. Adams and Grace P. Adams, Deceased, Dana Adams, and Brian Adams (collectively Plaintiffs) amended their Complaint by adding the name of Jeff H. Reynolds (Reynolds), the President and Chief Executive Officer of California Pacific, because California Pacific allegedly was no longer in good standing as a corporation. Nevertheless, California Pacific continued in the case to judgment and, ultimately, Reynolds was dismissed from the case.

[2] *See* footnote 1 above.

In this opinion, Defendants/Cross-Appellants and Defendants/Cross-Appellees, collectively, are "the Defendants."

We affirm (1), (2), and (4). We vacate (3) and remand for reconsideration in light of this opinion.

I.

BACKGROUND

Doris Millard (Doris) testified, in relevant part, as follows: In August 1992, Doris and her husband, Maydwell Millard (Maydwell)[3], were doing business as Kona Aviation and renting aircraft to others at Keahole Airport (now known as Kona International Airport). James Nottage was their insurance agent in Kona, Hawai‘i. Seeking to obtain aviation liability insurance for their Grumman aircraft, Maydwell and Doris contacted James Nottage.[4] James Nottage enlisted the help of Chandler and Kam.

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[3] A November 13, 1995 letter from a medical doctor states that "Maydwell Millard [(Maydwell)] is a 79-year old Caucasian patient of mine with progressive Alzheimer's dementia, hypertension and diabetes."

[4] In their answering brief, Defendants/Appellees/Cross-Appellants Jim Nottage Insurance, Inc. (Nottage Insurance), Insurance Resources, Inc. (Insurance Resources), James T. Nottage (James Nottage), Sally Jo Nottage (Sally Nottage), and Allen Tokunaga (Tokunaga) state, in relevant part, as follows:

> Numerous inaccurate statements of fact exist in the opening brief that are in need of clarification:
>
> **1. The Millard's [sic] contacted Lou Ann Chandler for aviation insurance, not [James Nottage].** Plaintiff turns the undisputed evidence on its head by claiming that Millard approached [James Nottage] for aviation insurance, and [James Nottage] then "enlisted the help of Louan Chandler." The undisputed evidence and testimony by [James Nottage], Mrs. Millard, and Lou Ann Chandler is that in fact Millard sought coverage from Defendant Lou Ann Chandler, with whom he worked with for several years. See, *e.g.*, Testimony of Lou Ann Chandler

(continued...)

The annual premium for the policy was $1,150 payable in three installments. On August 10, 1992, Maydwell and Doris paid their first installment in the amount of $385 to Nottage Insurance.

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[4](...continued)

> . . . . Testimony of Doris Millard on October 23, 1998 at pp. 38-41.

(Emphasis in original.)

The above allegation misrepresents the record by ignoring the testimony of Doris Millard (Doris), in relevant part, as follows:

> Q Now, at any time prior to 1992 had you and your husband ever engaged the services of [James Nottage] to act as an insurance agent on your behalf?
>
> A Yes. Earlier we had him cover our aircraft for one year.
>
> Q Were there any other types of insurance that you had asked [James Nottage] to obtain for you; this is before 1992?
>
> A Sometimes we would contact him for office coverage.
>
> Q Now, around August of 1992 were you and Maydwell Millard interested in obtaining a knew [sic] aviation liability policy specifically for the Grumman airplane?
>
> A Yes. My husband had been flying Coast Guard auxiliary search and rescue. But that stopped and so we decided we would go back to renting our aircraft. And so we needed coverage, liability coverage.
>
> Q And who did you and your husband contact to obtain liability coverage for that airplane?
>
> A Lloyds of London. We could not pay the bill they said so we contacted [James Nottage] because we trusted him, we knew that he would search and get us insurance.
>
> . . . .
>
> Q Did [James Nottage] ask you to make any telephone calls or to contact anyone so that this type of coverage and the process to obtain the coverage could get started?
>
> A Well, we talked to [James Nottage] and he said call Louan Chandler . . . in Honolulu, maybe she can help you too.
>
> Q And so . . . was it [James Nottage's] recommendation that you call Louan Chandler?
>
> A Yes.

On August 24, 1992, Nottage Insurance issued a Certificate of Insurance to "Maidwell Millard" stating that Nottage Insurance was the "producer," California Pacific was the insurer, the coverage was from August 10, 1992, through August 10, 1993, and the policy was "to issue." The coverage was for "$6,000 on hull with $100 deductible not in motion/$500 deductible flight or taxiing on 1974 Gruman AAIB, $500,000 each person passenger bodily injury[.]"

On August 26, 1992, a second Certificate of Insurance was issued by Nottage Insurance "IN LIEU OF CERTIFICATE DATED 8/24/92[.]" It corrected the spelling of Maydwell's name and added the name of Aviation Insurance Associates to the name of Nottage Insurance as producers of the policy. It stated that the "policy number" was "BINDER #921008" and the coverage was "CSL $500,000 BI&PD INCL. PASS. LIAB." for a "1974 GRUMAN AAIB, REGISTRATION #N9890L, 1 PASSENGER SEAT[.]"

Maydwell subsequently received a revised invoice postmarked October 29, 1992, regarding "Binder No. - 921008" stating that the second payment was due on November 15, 1992, the third payment was due on December 1, 1992, and the checks should be made payable to Nottage Insurance.

On November 5, 1992, the insured Grumman airplane was rented from Kona Aviation by William S. Adams (William), a licensed pilot, for the stated purpose of William flying himself

and his wife, Grace P. Adams (Grace), from the Keahole Airport over the Volcano National Park and back to Kona. William and Grace departed Kona in the Grumman airplane on November 5, 1992. They and the Grumman airplane have not been seen or heard from again.

On November 14, 1992, Maydwell and Doris made their second premium payment of $385.00 to Nottage Insurance. James Nottage endorsed the check to Aviation Insurance and the latter cashed it.

After the disappearance of the Grumman airplane, James Nottage advised Maydwell and Doris that because of the disappearance, they could cancel the remaining portion of the policy and obtain a refund. James Nottage provided the form and Maydwell signed it. No refund was ever paid.

A letter dated March 1, 1993, from Nottage Insurance and signed by James Nottage informed Maydwell and Doris about their insurance. Doris read the letter to the jury, in relevant part, as follows:

> Says re: aviation insurance. It is difficult for me to accept and understand why good faith and trust can be abused. When I placed your insurance on your operations and aircraft, it was with confidence in the underwriter with whom I had dealt without problem for over ten years. It is apparent that this trust and confidence was in error. I have just been notified that Louan Chandler and Ivan Kam, the owners of Aviation Insurance Associates, did not place the insurance you paid for. I have received notice from the company that . . . implicates Mr. Kam by his statements, whereby he cancelled and returned all premiums on policies written through the insurance company he was to have used. Obviously this is in direct contradiction to statements he has made up to and including this morning in conversations with me.

> I have contacted the insurance commissioner's office and Mr. Kam. Louan has gone to the Mainland with no forwarding address. I have started a formal investigation with the state.[5] I have written and sent a demand letter to Aviation Insurance Associates for your premiums which we have paid on your behalf.
>
> I am going to Honolulu on March the 2nd, 1993 to discuss this situation with other insurance companies to see what can be done. It might cost more for your insurance through them, but you will be assured of coverage.
>
> I understand how you must feel under these circumstances. I too place my insurance through Aviation Insurance Associates. Please call me to discussion [sic] options and coverages in the future. At this point you do not have insurance and I suggest you take appropriate steps to protect your operation. Sincerely yours, [James Nottage], sales agent.

(Footnote added.)

Maydwell and Doris received, by mail, a letter signed by James Nottage on the letterhead of Insurance Resources.[6] Doris read it to the jury as follows:

> Date is 7/9/93. And the subject is listed surprise, surprise. And then in the message it says; I was, needless to say, more than a little surprised to find the policy delivered here day before yesterday. I thought you might like a copy.
>
> I have sent in the last[7] policy release to cancel the policy and maybe see if we can get money, some money back. I will keep in touch with any new developments.

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[5] This statement was not true. James T. Nottage (James Nottage) testified, in relevant part, as follows:

> I called the insurance commissioner's office . . . .
>
> . . . [I]t was explained to me that if Mr. and Mrs. Millard chose to make a complaint, that it would be followed up by the insurance commissioner's office, and that it was not the place of someone who is not an insured to make that action.

[6] Although Jim Nottage Insurance, Inc., continued to exist, James Nottage and Allen Tokunaga (Tokunaga) formed Insurance Resources, Inc. James Nottage signed the Articles of Incorporation on March 17, 1993, and it was filed on March 23, 1993. It named James Nottage as president and director, Tokunaga as vice-president and director, and James Nottage's wife, Sally Nottage, as secretary, treasurer, and director.

[7] The word "loss" is used in the letter, Exhibit P-1; however, the October 16, 1998 transcript indicates that Doris used the word "last" during testimony as she read the letter to the jury.

(Footnote added.) The "policy" mentioned in this letter is Aircraft Policy 921008 which, on November 20, 1992, had been typed by Chandler and signed by Kam. Kam testified that his "associate Louan Chandler was very knowledgeable in aviation insurance."

When they rented the Grumman airplane, both William and Grace signed an express waiver, release, and assumption of the risk agreement on a form provided them by Maydwell. The waiver paragraph of the Aircraft Rental Contract states as follows:[8]

> 6. WAIVER OF LIABILITY AND ASSUMPTION OF RISK: The Lessee, and any passengers or occupants of the aircraft, release for themselves, their legal representatives, heirs, and assigns, and hereby releases, Kona Aviation, and the owners of the aircraft and their agents and each of them from all liability to the Lessee, their spouse, legal representatives, heirs and assigns, for any and all loss or damage, and any claim or damages resulting therefrom, on account of injury to Lessor or any passengers or occupants of the aircraft or property, whether caused by the negligence of Lessor or anyone while the Lessee is renting or operating the aircraft.

James Nottage testified that Maydwell contacted Chandler, Chandler contacted James Nottage, and James Nottage "was working under the instructions of Louan Chandler." As his fee, James Nottage kept some money from the Millards' first check. On more than one occasion, Doris had asked James Nottage for a copy of the insurance policy. James Nottage testified that "we kept pressing [Chandler] to get the policy and we continually were assured the policies were coming, the policies were coming."

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[8] Paragraph 6 of the Aircraft Rental Contract is misquoted by Plaintiffs in their answering brief.

James Nottage did not understand the delay. James Nottage wrote the March 1, 1993 letter to the Millards after he "received a letter saying that there was no coverage, that Kam had not passed the money on to the insurance carrier and the insurance carrier was not about to make payments or assist."

Regarding the cancellation of the policy and refund after the loss of the Grumman airplane, James Nottage testified that "[s]ome policies have a fully earned clause in them and some policies have a clause that say that after a loss you can cancel for a refund."

Kam and Chandler are officers and directors of Aviation Insurance. The record shows that (1) Aviation Insurance did not have a Hawai‘i "insurance license as a general agent or surplus line broker[,]" and (2) California Pacific was not authorized to be "an insurer in the State of Hawaii."

In a letter dated November 16, 1993, to Maydwell, with a "cc" to James Nottage, Perry K. Brown (Brown) of All Claims Services wrote, in relevant part, as follows: "As you can see, we are either dealing with a non-existent insurance company or insurance agents that have taken your premium and disappeared. In either case, there is no way that our company can provide you with any refund on your premium."

In a letter dated March 24, 1993, to Maydwell, with a "cc" to James Nottage and Kam, Brown wrote, in relevant part, as follows:

> It has come to our attention that you may not have had a valid insurance policy at that time. We were recently informed that California Pacific Bankers & Insurance Limited is a fictitious and non-existent company. If that is correct, then you were without any insurance when this loss occurred.
>
> We have conducted a complete investigation of this occurrence and we are maintaining our file in the event of litigation, however, we will not provide anyone with a report until we receive instructions from you and our service bill is paid.
>
> Our bill is enclosed for your own records only. We do not expect you to pay it unless you need further assistance.

(Emphases in the original.)

On October 31, 1994, in Sprague v. Millard, Civil No. 94-289K, Third Circuit Court of the State of Hawai'i (Civil No. 94-289K), Plaintiffs commenced a wrongful death suit against Maydwell, Doris, and Kona Aviation.[9]

In a letter dated December 29, 1994, and signed by Reynolds, California Pacific wrote to counsel for Maydwell and Doris, in relevant part, as follows:

> It appears that the coverage/s were cancelled by our British Underwriter, Corporate Risk Management, on or about the 27th day of January, 1993.
>
> The file information indicates that AIA failed to remit due Premium/s for such coverages and also failed to deliver required documents and materials to our underwriter for processing.
>
> Furthermore, the file information does not evidence that AIA ever advised Corporate Risk Management or our firm of the concerned loss.

[9] Kona Aviation is the name under which Maydwell and Doris Millard did business. It is not a legal entity.

> We can only presume that AIA rewrote the business with another carrier.
>
> In light of these circumstances and facts, our firm can not extend or otherwise offer your client any form of insurance coverage.

By letter dated January 5, 1995, counsel for Maydwell and Doris tendered the defense to California Pacific. California Pacific did not provide a defense for Maydwell and Doris.

Maydwell and Doris filed a counterclaim for the loss of the Grumman airplane.

In Civil No. 94-289K, on March 27, 1995, Maydwell and Doris moved for summary judgment on the grounds that: (a) there was no evidence of (i) death, (ii) negligence by Maydwell or Doris, or (iii) breach of warranty by Maydwell or Doris; (b) there was no basis for strict liability; (c) *res ipsa loquitur* was inapplicable because William controlled the instrumentality of alleged harm; and (d) William and Grace had signed an express waiver of their rights.

Before their motion for summary judgment was decided, Maydwell and Doris stipulated to the entry of a stipulated order which included the following: (a) the entry of a $3,000,000 judgment in favor of Plaintiffs; (b) the dismissal of the counterclaim; (c) the assignment to Plaintiffs of all of the rights of Maydwell and Doris against the insurance agents, brokers, carriers, and all other persons or entities who may have been involved in the fruitless attempt by Maydwell and Doris to receive insurance coverage; and (d) an agreement that each side

would bear their own attorney fees and costs. The court ordered the stipulated judgment and, on August 24, 1995, entered it as a final judgment against Maydwell and Doris.[10]

In a separate Agreement Regarding Stipulated Judgment and Assignment of Rights that was not presented to or considered by the court when it ordered the stipulated judgment, Plaintiffs, Maydwell, and Doris agreed that (a) Plaintiffs would never record, execute, or levy said judgment upon Maydwell and Doris; (b) Plaintiffs would defend Maydwell and Doris against any attack based upon the Assignment of Rights given by Maydwell and Doris to Plaintiffs; (c) Maydwell and Doris would cooperate fully with Plaintiffs but without financial cost or obligation; (d) if Plaintiffs, as judgment creditors, actually receive more than $100,000, Plaintiffs shall pay to Maydwell and Doris $15,000 for loss of the airplane and $5,000 in reimbursement of attorney fees; and (e) Maydwell and Doris would advise Plaintiffs of their whereabouts.

On November 8, 1995, Plaintiffs commenced the instant case, Civil No. 95-291K, against the Defendants. Thus, Plaintiffs in the instant case and the prior settled case, Civil No. 94-289K, are the same.

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[10] Eventually, the question of whether the settlement is a reasonable and good faith settlement will have to be answered. In our view, it is most appropriately answered and should be answered prior to the entry of the stipulated judgment.

The complaint in the instant case asserts three counts. Count I asserts that Defendants were negligent in failing to provide aviation liability insurance coverage, were negligent in failing to provide coverage for the deaths of William and Grace, were negligent in failing to provide a defense, and caused $3,000,000 and other damages. Count II asserts that Defendants intentionally did not provide aviation liability insurance, intentionally misled William and Doris into thinking they had aviation liability coverage, misrepresented the existence of aviation liability coverage, intentionally refused to provide a defense, and their conduct amounted to bad faith and fraud and entitled Plaintiffs to punitive and exemplary damages. Count III asserts the existence of a contract obligating Defendants to provide insurance coverage and to provide a defense and a breach of that contract caused $3,000,000 damages plus interest and attorney fees and costs.[11]

On January 22, 1997, Defendants moved for a summary judgment that they were not liable for the $3,000,000 stipulated judgment in Civil No. 94-289K. On June 23, 1997, the court partially granted and partially denied this motion when it entered its order that Defendants "are not bound by the amount of the stipulated judgment in Civil Number 94-289K. The court

[11] The grounds for liability asserted in the closing argument to the jury by the attorney for Plaintiffs differ from the grounds for liability asserted in the Complaint.

further finds and concludes that an assignee is allowed to bring suit even if a covenant not to execute has been agreed to."

The court bifurcated the jury trial into two phases. During Phase One, the court entered a directed verdict in favor of Tokunaga.

On October 29, 1998, at the conclusion of Phase One of the trial, the jury made its findings on a special verdict form.

In response to Question No. 1, the jury found that the following parties were or were not negligent:

WERE NEGLIGENT	WERE NOT NEGLIGENT
James Nottage	Maydwell and Doris
Nottage Insurance	Sally Nottage
Chandler	Insurance Resources
Kam	
Aviation Insurance	
California Pacific	

In light of the answers to Questions Nos. 4 and 5, it appears that the act or acts of negligence related to the placement of the insurance by an unlicensed agent or broker with an unauthorized insurer and the insurance by an unauthorized insurer.

In response to Question No. 2, the jury found that the following did or did not commit fraud against Maydwell and Doris:

DID COMMIT FRAUD	DID NOT COMMIT FRAUD
Kam	Chandler
Aviation Insurance	California Pacific

The following part of the closing argument to the jury by the attorney for Plaintiffs indicates that the act or acts of fraud were as follows:

> It's also very obvious that when the two principals and the corporate officers of [Aviation Insurance Associates, Inc.] do not hold the proper licenses to sell any type of aviation liability policy, that there's also a misrepresentation of themselves and a fraud being committed. . . .
>
> And when they signed these insurance endorsements that Ivan Kam signed, . . . , the purpose of that was to cause the Millards to rely upon that information, to cause the Millards to believe that in fact they had insurance coverage for which they had paid. And that is fraudulent conduct.
>
> . . . .
>
> So I would submit to you that with regard to committing fraud, California Pacific Bankers & Insurance also has committed fraud. Why? Because they didn't even respond. . . .
>
> And when a company issues a policy and states that they're going to provide coverage, aviation liability coverage, and then they take no steps to provide the coverage that has been purchased, and their agents have been paid for that coverage, that is fraud.

In response to Question No. 3, the jury found that California Pacific acted in bad faith.[12]

In response to Question No. 4, the jury found that Maydwell and Doris did enter into a contract for insurance coverage.

The jury's answer to Question No. 4 determined whether the jury would answer Question No. 5 (regarding the actual contract) or Question No. 6 (regarding the contract that would

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[12] Pursuant to Best Place, Inc. v. Penn America Ins. Co., 82 Hawai‘i 120, 132, 920 P.2d 334, 346 (1996), the court instructed the jury that "[a]n insurer may face liability under a bad faith tort action if it fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy."

have been entered into had there been one). In light of their affirmative answer to Question No. 4, the jury answered subsections of Question No. 5 as follows: (a) Maydwell did not breach a condition of coverage which required a "certified flight instructor" to conduct a one-hour flight check out of prospective rental pilots prior to departure; (b) the coverage covered the hull of the airplane; (c) Doris was covered as an insured; (d) the coverage required California Pacific to defend Doris in the prior lawsuit; (e) the coverage required California Pacific to defend Maydwell in the prior lawsuit; (f) the alleged disappearance of William was excluded from coverage under the pilot exclusion clause; and (g) the alleged disappearance of William and Grace was not excluded under the limitation of liability provision.

On November 19, 1998, at the conclusion of Phase Two of the trial, on a special verdict form, the jury found in response to Questions Nos. 1 and 2 that the negligence of each of Chandler, Kam, James Nottage, Aviation Insurance, California Pacific, and Nottage Insurance was a legal cause of damage to Plaintiffs and the percentage of negligence of each was as follows:

Chandler	5%
Kam	25%
James Nottage	15%
Aviation Insurance	20%
California Pacific	20%
Nottage Insurance	15%

The jury further decided that special damages for negligence was $13,000; general damages for negligence was $15,300; special damages caused by Kam's fraud was $13,000; special damages caused by the fraud of Aviation Insurance was $13,000; Kam owed $250,000 punitive damages; Aviation Insurance owed $100,000 punitive damages; California Pacific's bad faith was a legal cause of damage to Maydwell and Doris; special damages caused by bad faith was $13,000; general damages caused by bad faith was $15,300; and California Pacific owed $250,000 punitive damages.

The Second Amended Judgment was entered on May 30, 2000. It awarded damages to Plaintiffs as follows:

	Negligence	Fraud	Punitive	Bad Faith
Chandler	$1,415			
Kam	$7,075	$13,000	$250,000	
James Nottage	$4,245			
Nottage Insurance	$4,245			
Aviation Insurance	$5,660	$13,000	$100,000	
California Pacific	$5,660			$ 13,000 (Special) $ 15,300 (General) $250,000 (Punitive)

The Second Amended Judgment also ordered as follows:

> 4. Judgment is entered in favor of Insurance Resources, Inc., Sally Jo Nottage and Allen H. Tokunaga on all claims and causes of action.

5. The Stipulation and Order for Dismissal of Defendant Anne Nottage aka Anne Nottage Ashford having been filed in this action on April 16, 1997, no Judgment is entered against Defendant Anne A. Nottage as to any claim or cause of action.

6. The Final Order of Dismissal (Rule 28) (Amended Complaint 9/27/96) as to: Jeff H. Reynolds, having been filed in this action on April 6, 2000, no Judgment is entered against Jeff H. Reynolds as to any claim or cause of action.

II.

PRELIMINARY DISCUSSION

The questions in this case could have been the following: (1) Was California Pacific an unauthorized insurer? (2) Was California Pacific contractually obligated to defend and cover? (a) If no, who is liable in negligence for the lack of defense and coverage? (b) If yes, what were the terms of, and did California Pacific breach the terms of, its contractual duty to defend and cover? (3) If California Pacific breached its contractual duty to defend and cover, is it liable for (a) bad faith damages and (b) punitive damages? (4) If California Pacific breached its contractual duty to cover, which defendants, if any, are liable under Hawaii Revised Statutes (HRS) § 431:8-204?

In contrast, it appears that the junction created by the answer to the question whether unauthorized insurer California Pacific was contractually obligated to defend and cover was ignored and this case proceeded on the basis of the negligence and fraud involved in dealing with, or being, unlicensed and unauthorized. As noted above, it appears that the

act or acts of negligence were related to (a) the placement of the insurance by an unlicensed agent or broker of the insurance with an unauthorized insurer and (b) the insurance by an unauthorized insurer.

At the conclusion of Phase One, the jury decided that California Pacific was negligent, did not commit fraud against the Millards, committed bad faith, entered into a contract for insurance coverage with the Millards that required California Pacific to defend the Millards, and the tragedy to William and Grace Adams and the airplane was not excluded from coverage. In other words, the jury found that California Pacific was liable for negligence, breach of contract, and bad faith.

A transcript of the closing arguments to the jury at the conclusion of Phase Two of the trial is not a part of the record on appeal. A transcript of the court's instructions to the jury states, in relevant part, as follows:

> In this case, the issues of negligence, fraud, and bad faith have already been decided in favor of the plaintiffs. The burden is still on the plaintiffs to prove that the negligence, fraud, and bad faith were a legal cause of damage to the Millards and to prove the nature and extent of any damages suffered.
>
> The plaintiffs must prove by a preponderance of the evidence that the negligence or bad faith was a legal cause of damage to the Millards. The plaintiffs must prove by clear and convincing evidence that the fraud was a legal cause of damage to the Millards. An act or omission is a legal cause of damage if it was a substantial factor in bringing about the damage. One or more substantial factors such as the conduct of more than one person may operate separately or together to cause an injury or damage. In such a case, each may be a legal cause of the damage.
>
> . . . .
>
> Under California probate law, a person who has not been seen or heard from for a continuous period of five years by those who

are likely to have seen or heard from that person and whose absence is not satisfactorily explained after a diligent search or inquiry is presumed to be dead. A person's death is presumed to have occurred at the end of the period unless there is sufficient evidence to establish that that occurred earlier.

When an insurer breaches its duty to defend, it waives its right to approve of any settlement and the insured is entitled to negotiate a reasonable and good faith settlement of the underlying claim.

The stipulated judgment may be considered as evidence of the Millards' damages if it resulted from a good faith settlement and the settlement was reasonable based on all of the circumstances. You are instructed that although the stipulated judgment is a final judgment entered against the Millards, the Court's approval of the stipulated judgment is not binding in determining whether the stipulated judgment is reasonable. The reasonableness of the stipulated judgment is for you, and only you, the jury, to decide.

. . . .

In determining the damages, if any, to be awarded to the plaintiffs in this case, you are to use as a measure of damages the loss or harm sustained by the Millards resulting from the negligence, fraud, or bad faith of the defendants in this case.

Plaintiffs can recover against the defendants only through the claims assigned to them by the Millards. To recover on the assigned claims, plaintiffs must show losses or damages sustained by the Millards. Fraud and bad faith actions are assignable and punitive damage claims which are based on these actions are assignable as well.

Under the law, claims which are personal in nature cannot be assigned from one person to another. This prohibition against assignment of personal claims includes claims for emotional suffering and mental distress . . . .

Compensation must be reasonable. You may award plaintiffs only such damages as will fairly and reasonably compensate the Millards for the injuries or damages legally caused by defendants' negligence, fraud, or bad faith. You are not permitted to award a party speculative damages, which means compensation for loss or harm which, although possible, is conjectural or not reasonably probable. In this case, general damages are those damages which fairly and adequately compensate the Millards for factors such as damage to credit, general reputation, and loss of business opportunities. Special damages are those damages which can be calculated precisely or can be determined by you with reasonable certainty from the evidence.

. . . .

The purpose of punitive damages is to punish the wrongdoer and serve as an example or warning to the wrongdoer and others not to engage in such conduct. You may award punitive damages against these defendants if and only if you find by clear and convincing evidence that these defendants acted intentionally, wantonly or

> oppressively or with such malice as implies a spirit of mischief or criminal indifference to civil obligations or that defendants' conduct constituted some willful misconduct or evidences that entire want of care which would raise a presumption of a conscious indifference to consequences.
>
> Punitive damages may not be awarded for mere inadvertence, mistake, or errors of judgment. The proper measurement of punitive damages should be the degree of malice, oppression, or gross negligence which forms the basis for the award and the amount of money required to punish defendants considering their financial condition. In determining such degree, your analysis should be limited to an examination of defendant's state of mind at the time of the particular act involved.

As can be seen from the above instructions, the only mention of breach of contract was in the instruction that mentioned the breach of the duty to defend and that mention pertained only to the resulting waiver of a right to approve of any settlement. Nothing was mentioned about the breach of the contract to provide financial coverage.

In their opening brief, Plaintiffs argue that

> [e]ven though the jury did not specifically award breach of contract damages against the Defendants, the jury concluded that Defendants James T. Nottage and Jim Nottage Insurance, Inc. were negligent in failing to provide aviation liability insurance coverage for the Grumman aircraft lost on November 5, 1992, and negligent for their failure to provide coverage for the deaths of William S. Adams and Grace P. Adams.
>
> . . . There could have been no finding of bad faith against the out-of-state insurance carrier in the absence of a contract of insurance and a duty to perform on behalf of the insureds. In giving reasonable weight to the evidence presented during trial, that the insurance carrier, [California Pacific], had no direct contact whatsoever with Doris and Maydwell Millard, but that procurement of the policy, payment of premiums, issuance of Certificates of Insurance, and delivery of the policy were all handled by Defendants, James T. Nottage and Jim Nottage Insurance, Inc., and Allen Tokunaga, the trial court, as well as the jury, could reasonably conclude that those Defendants breached their duties owed to the Millards in this case.

(Record citation omitted.)

There being a legally enforceable insurance contract and no determination that if California Pacific was legally obligated to pay, it was not financially able to pay, the record does not explain how anybody was "negligent in failing to provide aviation liability insurance coverage[.]"

In their reply brief, Plaintiffs further argue, in relevant part, as follows:

> In a bifurcated trial, the jury determined that Appellees James T. Nottage and Jim Nottage Insurance, Inc., and [California Pacific], the unauthorized insurer, were negligent, and that [California Pacific] breached its contract and acted in bad faith. The [Plaintiffs] thereafter filed a motion to amend the judgment, seeking to hold Appellees James T. Nottage and Jim Nottage Insurance, Inc. liable for the monetary damages imposed against [California Pacific], as provided in HRS section 431:8-204. [Plaintiffs'] theory was that [they] had established, through two trials, the negligence of the persons who aided and assisted the unauthorized carrier, the breach of contract and bad faith of the unauthorized insurer, and the fact that the unauthorized insurer, [California Pacific], had not paid the claim and loss as found by the jury in the Third Circuit Court trial. This approach was a reasonable attempt to achieve the statutory remedy as given to Hawaii consumers in the Insurance Code.

The instructions to the jury appear to assume that the mere placement of the insurance with an unauthorized insurer who breached the contract of insurance and who did so in bad faith was negligence that caused damages to the insured. This assumption is wrong. As will be seen, a contract of insurance with an unauthorized insurer is enforceable. Therefore, unless the person placing the insurance with the unauthorized insurer knows or should know that the unauthorized insurer cannot or will not defend and cover, placement of the insurance with the unauthorized insurer is not negligence.

III.

DISCUSSION OF POINTS ON APPEAL

A.

HRS § 431-8 (1993) states, in relevant part, as follows:

> **§ 431:8-102 Definitions.** As used in this article:
>
> . . . .
>
> "Unauthorized insurer" means an insurer not holding a valid certificate of authority to transact an insurance business in this State.
>
> . . . .
>
> **§ 431:8-201 Transacting insurance business without certificate of authority prohibited.** It shall be unlawful for any insurer to transact an insurance business in this State, . . . , without a certificate of authority, except that this section shall not apply to:
>
> (1) The lawful transaction of surplus lines insurance;
>
> . . . .
>
> **§ 431:8-202 Acting for or aiding unauthorized insurer prohibited.** (a) No person in this State shall directly or indirectly act as agent for, or otherwise represent or aid on behalf of another, any unauthorized insurer on the solicitation, negotiation, procurement, or effectuation of insurance or renewals thereof, or forwarding of applications, or delivery of policies or contracts or inspections of risks, or fixing of rates, or investigation or adjustment of claims or losses, or collection or forwarding of premiums, or in any other manner represent or assist such insurer in the transaction of an insurance business.
>
> . . . .
>
> **§ 431:8-203 Validity of contracts illegally effectuated.** A contract of insurance effectuated by an unauthorized insurer in violation of this article shall be voidable except at the instance of the insurer.
>
> **§ 431:8-204 Liability of person assisting unauthorized insurer.** In the event of failure of any such unauthorized insurer to pay any claim or loss within the provisions of such insurance contract, any person who assisted or in any manner aided directly or indirectly in the procurement of such insurance contract and who knew of should have known the transaction was illegal shall be liable to the insured for the full amount of the claim or loss in the manner provided by the provisions of the insurance contract.

In their opening brief, Plaintiffs state that California Pacific "was an out of state unauthorized carrier." There appears to be no disagreement with this statement. In light of HRS §§ 431:8-203 and 431:8-204, it appears that the placement of the policy with California Pacific was illegal but enforceable unless voided by the insured.

When the jury was instructed at Phase One of the trial, HRS § 431:8-202(a) was read to the jury. When the jury was instructed at Phase Two of the trial, Plaintiffs requested that HRS § 431:8-204 be read to the jury. In refusing this proposed instruction, the trial court "concluded that the insurance code established the standard of care, but not a private cause of action[.]"

On appeal, Plaintiffs assert that a private cause of action exists under HRS § 431:8-204 and that "[t]he jury, having determined negligence which legally caused damage to the Millards, [was] then prejudicially denied the instruction under H.R.S. § 431:8-204 which would have advised them that those who aid and assist the unauthorized carrier 'shall be liable to the insured for the full amount of the claim or loss[.]'"

HRS Article 431:13 (1993) governs "UNFAIR METHODS OF COMPETITION AND UNFAIR AND DECEPTIVE ACTS AND PRACTICES IN THE BUSINESS OF INSURANCE[.]" The following three cases conclude that HRS Article 431:13 does not authorize a private cause of

action for persons injured by insurance companies who violate it. Hough v. Pacific Ins. Co., Ltd., 83 Hawai‘i 457, 469-70, 927 P.2d 858, 869-70 (1996); Best Place, Inc. v. Penn America Ins. Co., 82 Hawai‘i 120, 126, 920 P.2d 334, 340 (1996); Hunt v. First Ins. Co. of Hawaii, Ltd., 82 Hawai‘i 363, 371-72, 922 P.2d 976, 985 (App. 1996).

In contrast, HRS §§ 431:8-202, 431:8-203, and 431:8-204 together expressly create a private cause of action based on a breach of an illegal and voidable insurance contract with an unauthorized insurer. A material element of this cause of action is the "failure of any such unauthorized insurer to pay any claim or loss within the provisions of such insurance contract[.]" This cause of action extends liability to "any person who assisted or in any manner aided directly or indirectly in the procurement of such insurance contract and who knew or should have known the transaction was illegal[.]" The liability is "to the insured for the full amount of the claim or loss in the manner provided by the provisions of the insurance contract." An HRS §§ 431:8-202, 431:8-203, and 431:8-204 cause of action does not pertain to a duty to defend.

In other words, the private cause of action created by HRS § 431:8-204 has the following six material elements: (1) the unauthorized insurer (2) failed to pay (3) any claim or loss (4) within the provisions of such insurance contract, (5) the

defendant (a) assisted or in any manner aided directly or indirectly in the procurement of such insurance contract and (b) knew or should have known the transaction was illegal, and (6) the defendant is liable for the full amount of the claim or loss in the manner provided by the provisions of the insurance contract.

For the following two reasons, Plaintiffs' point has no merit. First, Plaintiffs' argument that "[t]he jury, having determined negligence which legally caused damage to the Millards, [was] then prejudicially denied the instruction under H.R.S. § 431:8-204 which would have advised them that those who aid and assist the unauthorized carrier 'shall be liable to the insured for the full amount of the claim or loss[,]'" indicates a fundamental misunderstanding of the HRS §§ 431:8-202, 431:8-203, and 431:8-204 cause of action. Negligence is not a material element of it. Moreover, the liability is "for the full amount of the claim or loss in the manner provided by the provisions of the insurance contract." The liability is not "for the full amount of the claim or loss."

Second, Plaintiffs did not expressly plead an HRS §§ 431:8-202, 431:8-203, and 431:8-204 cause of action and such a cause of action is not reasonably encompassed within its pleadings.

B.

Plaintiffs contend that the trial court reversibly erred when it instructed the jury that "[t]he entry of a final judgment against an insured may constitute damage to him or her." Defendants/Cross-Appellants contend that, in light of the covenant not to execute, the trial court erred in not eliminating any damages that were based on the stipulated judgment.

In McClellan v. Atchison, 81 Hawai‘i 62, 68, 912 P.2d 559, 565 (App. 1996), this court concluded that "a covenant not to execute upon the Stipulated Judgment, by itself, did not eliminate the fact of damages[.]" In other words, as indicated by the following quote, Hawai‘i follows the "judgment rule" which concludes that damage to credit and general reputation, loss of business opportunities, and the like, may be a basis for recovery. Id. at 67, 912 P.2d at 564.

> We recognize that the minority view raises acute concerns with regard to the likelihood of collusion between the insured and assignee, especially when a stipulated judgment is involved. However, rather than allowing a negligent party to escape liability because of a covenant not to execute, we believe that the better choice is to hold that a covenant not to execute does not *per se* eliminate the fact of damages and then to permit an injured plaintiff to recover damages from the insurer.

Id. at 68, 912 P.2d at 565.

During Phase Two of the trial, Plaintiffs requested that the court instruct the jury as follows:

> The fact that an insured makes no out-of-pocket payments and incurs no personal liability because of the covenant not to execute, does not necessarily mean that the insured suffers no damage. The entry of a final judgment against an insured may constitute damage to him or her. Intangible harms are remedial in suits of this kind; factors such as damage to credit and general

> reputation, if any, loss of business opportunities, if any, are sufficient in and of themselves to afford a basis for recovery.

Over Plaintiffs' objection, the court instructed the jury, in relevant part, as follows:

> The fact that an insured makes no out-of-pocket payments and incurs no personal liability because of a covenant not to execute[,] does not necessarily mean that the insured suffers no damage. The entry of a final judgment against the insured may constitute damage to him or her. Intangible harms are remedial in suits of this kind; factors such as damage to credit and general reputation, if any, loss of business opportunities, if any, are sufficient in and of themselves to afford a basis for recovery.
>
> . . . .
>
> Compensation must be reasonable. You may award plaintiffs only such damages as will fairly and reasonably compensate the Millards for the injuries or damages legally caused by defendants' negligence, fraud, or bad faith. You are not permitted to award a party speculative damages, which means compensation for loss or harm which, although possible, is conjectural or not reasonably probable. In this case, general damages are those damages which fairly and adequately compensate the Millards for factors such as damage to credit, general reputation, and loss of business opportunities. Special damages are those damages which can be calculated precisely or can be determined by you with reasonable certainty from the evidence.

Plaintiffs contend that the trial court was wrong when it stated that "[t]he entry of a final judgment against an insured may constitute damage to him or her," rather than that "mere entry of a final judgment against the insured constitutes actual damage to him or her." We agree with the trial court's instruction. McClellan does not eliminate the plaintiffs' burden of proving actual damage.

C.

Plaintiffs assert that the trial court reversibly erred when it modified, over Plaintiffs' objection, Plaintiffs' special jury instruction based on the case of Sentinel Insurance v. First

Insurance, 76 Hawai'i 277, 875 P.2d 894 (1994). In Sentinel Insurance, the Hawai'i Supreme Court stated that when an insurer refuses to perform its contractual duty to defend, "the insured is entitled to negotiate a reasonable and good faith settlement of the underlying claim which amount may then be utilized as presumptive evidence of the breaching insurer's liability. Isaacson v. California Ins. Guar. Ass'n., 44 Cal. 3d 775, 791, 750 P.2d 297, 308, 244 Cal. Rptr. 655, 666 (1988)." Id. at 296, 875 P.2d at 913. In other words, the amount of a reasonable and good faith settlement is presumptive evidence of the breaching insurer's liability.

In Phase Two of the trial, Plaintiffs requested that the jury be instructed as follows:

> When Insurer breaches its duty to defend, it waives its right to approve of any settlement, and the insured is entitled to negotiate a reasonable and good faith settlement of the underlying claim, **which amount may then be utilized as presumptive evidence of breaching insurer's liability. Where the insured seeks indemnification after the insurer has breached its duty to defend, coverage is rebuttably presumed, and the insurer bears the burden of proof to negate coverage, and where relevant, carries traditional burden of proof that exclusionary clause applies**.

(Emphasis added.) The trial court refused to give the part of the instruction emphasized in bold print above and instructed the jury, in relevant part, as follows:

> When an insurer breaches its duty to defend, it waives its right to approve of any settlement and the insured is entitled to negotiate a reasonable and good faith settlement of the underlying claim.
>
> The stipulated judgment may be considered as evidence of the Millards' damages if it resulted from a good faith settlement and the settlement was reasonable based on all of the circumstances. You are instructed that although the stipulated judgment is a

> final judgment entered against the Millards, the Court's approval of the stipulated judgment is not binding in determining whether the stipulated judgment is reasonable. The reasonableness of the stipulated judgment is for you, and only you, the jury, to decide.

We conclude that the trial court's instruction is wrong to the extent that it fails to instruct the jury that if and when the jury decided that the stipulated judgment resulted from a good faith settlement and the settlement was reasonably based on all of the circumstances, the stipulated judgment was then presumptive evidence of the breaching insurer's liability. In this case, however, we conclude as a matter of law that the amount of the settlement was not reasonably based on all of the circumstances and, therefore, the amount of the settlement was not presumptive evidence of the amount of the damages.

D.

Plaintiffs contend that the directed verdict in favor of Tokunaga in Phase One of the trial was reversible error. Plaintiffs cite the following evidence in support of their position that a directed verdict should not have been granted in Tokunaga's favor.

> (1) [Insurance Resources] delivered by mail the aviation liability policy to the Millards on July 9, 1993, some eight months after the disappeared of the Grumman aircraft and Mr. and Mrs. Adams; Delivery of the policy was prohibited by H.R.S. Section 431:8-202.
>
> (2) At the time [Insurance Resources] delivered the insurance policy issued by the unauthorized carrier, [Tokunaga] was corporate vice-president, director, and office and business manager[.]
>
> (3) [Tokunaga] was aware of the legal requirement to perform due diligence to determine the financial condition and integrity of out of state unauthorized carriers before placement of insurance, pursuant to H.R.S. Section 431:8-302[.]

> (4) [Tokunaga], as a licenced insurance agent, corporate officer of [Insurance Resources] and as officer and business manager of the company, knew that it did not maintain any files with regard to the insurance transaction involving the Millards, in violation of H.R.S. Section 431:9-229 . . . .
>
> (5) [Tokunaga] knew that [Insurance Resources] from its incorporation, had not held annual meetings, or maintained any corporate records or files.

(Record citations omitted.)

Considering that William and Grace disappeared on November 5, 1992, we agree with the trial court that Tokunaga's involvement commencing July 9, 1993, is insufficient as a matter of law to subject him to liability in this case.

E.

Plaintiffs contend that the trial court reversibly erred when it denied Plaintiffs' motion to amend judgment, filed July 29, 1999, whereby Plaintiffs requested that the court amend the July 12, 1999 judgment by imposing liability upon James Nottage and Nottage Insurance for all negligence, bad faith, and punitive damages awarded against California Pacific. Plaintiffs assert that such a result is required by HRS § 431:8-204. We disagree for the reasons stated in section III.A above.

F.

Plaintiffs contend that the trial court reversibly erred when it entered its August 17, 1999 Order Awarding Attorneys' Fees and Costs to Defendant Tokunaga, and Costs to Sally Jo Nottage and Insurance Resources, Inc. and James T. Nottage and Jim Nottage Insurance, Inc.

On July 6, 1999, the court entered its Order Regarding Attorneys Fees and Costs, in relevant part, as follows:

> The court is required to identify the principal issues raised by the pleadings and proof in a particular case, and then determine on balance, which party prevailed on the issues. Fought & Co., Inc. v. Steel Eng., 87 Haw. 37 (1998).
>
> In this case, there were three Counts in the Complaint. Count I in negligence; Count II in contract alleging misrepresentation, bad faith and fraud; Count III in contract alleging breach of the insurance contract.[13] Prior to trial the court granted a directed verdict with respect to [Tokunaga]. The jury's verdict exonerated [Sally Nottage] and [Insurance Resources] with respect to Count I in negligence. The Plaintiffs obtained an award against [James Nottage] and [Nottage Insurance] for $4,245 each on Count I in negligence. The remaining counts II and III in contract, the jury found for Plaintiffs against Kam, [Aviation Insurance] and [California Pacific].
>
> Therefore, the Plaintiffs, . . . are the prevailing parties in Count I, negligence against [James Nottage] and [Nottage Insurance].
>
> While at the same time, . . . [Sally Nottage], [Insurance Resources] and [Tokunaga] are the prevailing parties in Count I, negligence against Plaintiffs, ...
>
> ITS [sic] IS HEREBY DIRECTED AND DECREED THAT:
>
> Plaintiffs . . . are not entitled to attorneys fees because . . . [a]ttorneys fees are not recoverable in negligence actions. . . .
>
> [Tokunaga] is the prevailing party with respect to all Counts in the Complaint . . . . [Tokunaga] is allowed attorney fees for Counts II and III pursuant to Haw. Rev. Stat. Sec. 607-14. [Sally Nottage] and [Insurance Resources] are the prevailing parties in Count I in negligence against Plaintiffs, ...
>
> With respect to costs, [Tokunaga] is entitled to costs because he is the prevailing party. [Sally Nottage] and [Insurance Resources] are the prevailing parties in the negligence counts, and they are entitled to costs. Plaintiffs prevailed in the negligence action against [James Nottage] and [Nottage Insurance] but Plaintiffs' judgment is less favorable than an offer of judgment by Defendants. Therefore, pursuant to Haw. Rule of Civ. Proc. 68[,] Plaintiffs are entitled to costs up to the offer of judgment from [James Nottage] and [Nottage Insurance] and [James Nottage] and [Nottage Insurance] are entitled to costs after the offer of judgment.

---

[13] The statement "Count II in contract alleging misrepresentation, bad faith and fraud" is wrong. Count II is not "in contract."

> The Plaintiffs and Defendants shall submit not later than July 15, 1999, their attorneys fees and costs apportioning their attorneys fees and taxable costs as to Counts I, II and III, and apportion their attorneys fees and costs as to each party, specifically to those where they prevailed. Taxable costs shall be submitted to the court instead of the clerk. Opposition to submitted fees and taxable costs shall be filed not later than July 25, 1999. The Court will then issue an Order determining reasonable fees and taxable costs.

"Ordinarily, attorney fees cannot be awarded as damages or costs unless so provided by statute, stipulation or agreement." Weinberg v. Mauch, 78 Hawai'i 40, 53, 890 P.2d 277, 290 (1995) (citation omitted). Under HRS § 607-14 (2000),[14] attorney fees may be awarded in three types of cases: (1) in all actions in the nature of assumpsit; (2) in all actions on a promissory note; and (3) in contracts in writing that provide for an attorneys' fee. Eastman v. McGowan, 86 Hawai'i 21, 31, 946 P.2d 1317, 1327 (1997). "Assumpsit" is "a common law form of action which allows for recovery of damages for the non-performance of a contract, either express or implied, written or

---

[14] HRS § 607-14 (2001) states, in relevant part, as follows:

> **Attorneys' fees in actions in the nature of assumpsit, etc.** In all the courts, in all actions in the nature of assumpsit and in all actions on a promissory note or other contract in writing that provides for an attorney's fee, there shall be taxed as attorneys' fees, to be paid by the losing party and to be included in the sum for which execution may issue, a fee that the court determines to be reasonable; provided that the attorney representing the prevailing party shall submit to the court an affidavit stating the amount of time the attorney spent on the action and the amount of time the attorney is likely to spend to obtain a final written judgment, or, if the fee is not based on an hourly rate, the amount of the agreed upon fee. The court shall then tax attorneys' fees, which the court determines to be reasonable, to be paid by the losing party; provided that this amount shall not exceed twenty-five per cent of the judgment.

verbal, as well as quasi contractual obligations." Id. at 31, 946 P.2d at 1327 (citations omitted).

In cases where a plaintiff has filed an action asserting both assumpsit and non-assumpsit claims, a court must base its award of fees, if practicable, on an apportionment of the fees between assumpsit and non-assumpsit claims, TSA International Ltd., v. Shimizu Corp., 92 Hawai'i 243, 264, 990 P.2d 713, 735 (1999), and award attorney fees to the prevailing party only on the assumpsit claim(s).

In this case, Tokunaga is the prevailing party on all claims. The trial court decided that both Counts II and III asserted assumpsit claims. We disagree with respect to Count II. We disagree with the conclusion that "Count II [is] in contract alleging misrepresentation, bad faith and fraud[.]" But that is not the end of the matter. In Blair v. Ing, 96 Hawai'i 327, 31 P.3d 184 (2001), the plaintiffs sued Thayer for professional negligence and breach of implied contract. The Hawai'i Supreme Court concluded that "[b]ecause the negligence claim in this case was derived from the alleged implied contract and was inextricably linked to the implied contract claim by virtue of the malpractice suit, we hold that it is impracticable, if not impossible, to apportion the fees between the assumpsit and non-assumpsit claims." Id. at 333, 31 P.3d at 190.

Whether this precedent applies in the instant case shall be decided on remand.

G.

HRS § 431:10-242 (1993) states as follows:

> **Policyholder and other suits against insurer**. Where an insurer has contested its liability under a policy and is ordered by the courts to pay benefits under the policy, the policyholder, the beneficiary under a policy, or the person who has acquired the rights of the policyholder or beneficiary under the policy shall be awarded reasonable attorney's fees and the costs of suit, in addition to the benefits under the policy.

The only defendant upon which this statute possibly imposes liability is California Pacific. Therefore, the contention by Plaintiffs that the trial court reversibly erred when it refused to award to Plaintiffs attorney fees and costs from California Pacific, James Nottage, Nottage Insurance, and Tokunaga, pursuant to HRS § 431:10-242, is wrong with respect to all Defendants named except California Pacific.

IV.

CROSS-APPEAL

A.

Defendants/Cross-Appellants contend that the trial court reversibly erred when it allowed Plaintiffs' experts to testify as to matters involving questions of domestic law and on matters for which no foundation existed.

We agree that it is a general rule "that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law." Create 21 Chuo, Inc. v.

Southwest Slopes, 81 Hawai‘i 512, 522, n.4, 918 P.2d 1168, 1178, n.4 (App. 1996). In this appeal, however, (a) this is not an issue because it has not been properly preserved or presented, and (b) if it is an issue, it has no merit.

In relevant part, Hawai‘i Rules of Appellate Procedure (HRAP) Rule 28(b)(4) requires that the opening brief shall contain the following:

> A concise statement of the points of error . . . . Where applicable, each point shall also include the following:
>
> (A) when the point involves the admission or rejection of evidence, a quotation of the grounds urged for the objection and the full substance of the evidence admitted or rejected;
>
> . . . .
>
> Points not presented in accordance with this section will be disregarded[.]

Defendants/Cross-Appellants' opening brief seriously violates HRAP Rule 28(b)(4). For example, their opening brief states, in relevant part, as follows:

> For example, expert Ching, who is not even a lawyer (Transcript of proceedings held on 10/20/98 at 4 (PM session)) repeatedly and wrongfully stated that Cross-Appellants were "personally liable" under the Hawaii Revised Statute [sic]" (page 14 10/20/99) and that his opinions were based on "Chapter 431 of the Hawaii Revised Statute [sic]." Ching and Takayama also repeatedly testified that Cross-Appellants were "personally liable" under the insurance code and "breached duties" owed under the code and "failed to comply" with the code and that "the breach of this duty as you just described constituted negligence." They were also allowed to testify to such matters as to their opinion "as to whether the purposes of the insurance code were fulfilled" by Cross-Appellants. Such opinions were not only a violation of the rule set forth in Pinero and Create 21, but were also not helpful to the jury (HRE 703), went to the ultimate issue and were simply flat-out wrong.

Moreover, the only transcript cited above (the transcript of the afternoon session on October 20, 1998) was of

Ching's testimony when Ching was being cross-examined by counsel for the Defendants/Cross-Appellants.

B.

Defendants/Cross-Appellants contend that the trial court erred in allowing expert Linda Chu Takayama (Takayama) to testify "as the former insurance commissioner of the State of Hawaii." We affirm the trial court.

Takayama testified, in relevant part, as follows:

> Q. Have you previously served as the Insurance Commissioner for the State of Hawaii?
>
> A. Yes.
>
> Q. And can you please tell us for what period of time you served as the Insurance Commissioner in this state?
>
> A. From December of 1991 to February of 1994.

Defendants/Cross-Appellants did not object to this testimony when it was presented in the circuit court.

Defendants/Cross-Appellants contend that Takayama's testimony violated the rule cited in Create 21 that a party cannot appeal to a jury to decide a legal question by presenting the opinions of public officers. We conclude that the rule cited above "that witnesses may not give an opinion on a question of domestic law or on matters which involve questions of law" applies to all witnesses, including public officers. We further conclude that no rule prohibits an expert from disclosing to the jury his or her prior service as a public officer in the field of his or her expertise.

C.

Defendants/Cross-Appellants contend that the trial court erred in not striking experts Ching, Takayama, and James Krueger in accordance with Glover v. Grace Pacific Corp., 86 Hawai‘i 154 (1997), and the trial court's own pretrial ruling. We disagree.

According to Defendants/Cross-Appellants, "[t]he Parties in this case were instructed far in advance of the trial to provide written opinions of experts before the discovery cutoff. Plaintiffs failed to comply with this order. As such, Plaintiffs' experts should have been stricken, especially in light of [Glover]."

Plaintiffs respond, in relevant part, as follows: "It is not surprising that no reference to the record on appeal is made, because no such order was given by the Third Circuit Court. Defendants erroneously imply that the Trial Court ordered experts to prepare and provide written reports of their opinions. No such pre-trial order was made."

The record on appeal supports Plaintiffs in this regard.

D.

Defendants/Cross-Appellants contend that the trial court erred in not "eliminating general damages as an item of damages." The specific questions presented are (1) whether

general damages awarded for a negligence cause of action are assignable and (2) whether general damages can be awarded absent some physical injury. The answer to both questions is yes.

Defendants/Cross-Appellants contend that "general damages are NOT ASSIGNABLE." (Emphasis in original.) The cases they cite, such as Austin v. Michiels, 6 Haw. 595 (1885), are precedent that "injuries which are personal on nature such as emotional distress, cannot be transferred to another," Cuson v. Maryland Casualty, 735 F. Supp. 966, 969 (D. Haw. 1990). This precedent is not relevant in the instant case.

In Forgione v. Dennis Pirtle Agency, Inc., 701 So.2d 557, 559 (1997), the Supreme Court of Florida recognized that "purely personal tort claims cannot be assigned." Although the negligence claims against an attorney in a legal malpractice action are not assignable "because of the personal nature of a legal relationship which involve highly confidential relationships[,]" id., relationships between an insurance agent and an insured do not carry the same "personal nature" as do attorney-client relationships. Id. at 560. Therefore, "public policy considerations do not preclude the assignment of an insured's claim for negligence against an insurance agent." Id.

Defendants/Cross-Appellants also contend that "[u]nder Hawaii law, general damages may not be awarded in a negligence action absent physical injury caused by the defendant." To support this position, Defendants/Cross-Appellants cite the case of Ross v. Stouffer Hotel Co. Hawaii Ltd., 76 Hawai‘i 454, 879 P.2d 1037 (1994). However, Ross is precedent, based on Chedester v. Stecker, 64 Haw. 464, 468, 643 P.2d 532, 535 (1982), that "recovery for negligent infliction of emotional distress by one not physically injured is generally permitted only when there is 'some physical injury to property or a person' resulting from the defendant's conduct." Ross, 76 Hawai‘i at 465-66, 879 P.2d at 1048. Ross is not precedent that general damages may not be awarded to the plaintiff in a negligence action absent physical injury caused by the defendant.

E.

Defendants/Cross-Appellants contend that the trial court erred in not granting summary judgment to Defendants/Cross-Appellants because the loss in question was not covered by the insurance policy. Specifically, Defendants/Cross-Appellants contend that the evidence is undisputed that: (1) Doris is not an insured under the policy, (2) William, the pilot, was an excluded member of the flight or cabin crew, (3) the policy was an indemnity only policy, (4) coverage was excluded because

Maydwell was a non-certified flight instructor who performed the required "checkout," (5) Maydwell and Doris had no liability, and (6) there was no hull coverage.

Upon a review of the record, we disagree with the position that the evidence of these facts is undisputed and that Defendants/Cross-Appellants were authorized a summary judgment regarding them.

F.

Defendants/Cross-Appellants contend that the trial court erred in not awarding the full amount of attorney fees and costs to them. In light of our decision, this contention is without merit.

V.

CONCLUSION

In accordance with the above discussions, we affirm the May 30, 2000 Second Amended Judgment, the July 29, 1999 Order denying Plaintiffs' Motion to Amend Judgment, and the August 17, 1999 Order Awarding Costs to Plaintiff Terri Sprague, Individually and as Conservator of the Estates of William Adams and Grace P. Adams, Deceased, et al.

We vacate the August 17, 1999 Order Awarding Attorneys Fees and Costs to Defendant Tokunaga, and Costs to Sally Jo Nottage and Insurance Resources, Inc. and James T. Nottage and

Jim Nottage Insurance, Inc., and remand for reconsideration of that order in the light of this opinion.

DATED: Honolulu, Hawai‘i, December 27, 2001.

On the briefs:

Maurice A. Priest,
(Priest & Associates,
of counsel) for
Plaintiffs/Appellants/
Cross-Appellees.

Chief Judge

Myles T. Yamamoto and
Terrance M. Revere
(Love Yamamoto & Motooka,
of counsel) for
Defendants/Appellees/
Cross-Appellants.

Associate Judge

Associate Judge