NOT FOR PUBLICATION

NO. 24395

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

DONNALEAH GALDEIRA, et al., Plaintiffs-Appellants, v.
CLAIMS MANAGEMENT, INC., et al., Defendants-Appellees

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(CIV. NO. 00-01-0471)

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

Plaintiffs-Appellants Donnaleah Galdeira (Donnaleah) and Leonard Galdeira (Leonard) (collectively, "the Galdeiras") appeal from the June 8, 2001 Final Judgment entered against them by Judge Greg K. Nakamura in favor of Donnaleah's self-insured employer, Defendant-Appellee Student Transportation, Inc. (STI), STI's adjustor, Defendant-Appellee Claims Management, Inc. (CMI), and CMI's Workers' Compensation Claims Examiner Neal Poepoe (Poepoe) (collectively, "Defendants").[1] The June 8, 2001 Final

[1/] Although Plaintiffs-Appellants Donnaleah Galdeira (Donnaleah) and Leonard Galdeira (collectively, "the Galdeiras"), in their opening brief filed November 19, 2001, and the State of Hawaiʻi, Department of Labor and Industrial Relations, Disability Compensation Division, in its February 1, 1999 and April 7, 2000 Decisions, designate Defendant-Appellee Student Transportation, Inc. (STI) as "employer" and Defendant-Appellee Claims Management, Inc., as "insurer," we note that, no later than the November 9, 2000 "Stipulation and Order Temporarily Remanding the Proceeding to the Director[,]" the parties and the State of Hawaiʻi Labor and Industrial Relations Appeals Board knew STI was a self-insured employer.

Judgment followed the court's June 8, 2001 "Order Granting Defendants [CMI], [Poepoe], Individually, and in His Capacity as an Authorized Employee or Agent of [CMI], and [STI's] Motion for Summary Judgment Against [the Galdeiras] Filed on April 10, 2001" (June 8, 2001 Order). We affirm.

I.

BACKGROUND

Donnaleah, born on August 10, 1950, was involved in a motor vehicle accident on August 21, 1997, and sustained multiple injuries, including injuries to both knees.

Donnaleah was involved in a second motor vehicle accident on May 19, 1998, when the bus Donnaleah was driving was rear-ended while stopped to drop off passengers. This is the workers' compensation injury. Donnaleah's physician, Dr. William Kama, diagnosed a lumbar sprain and sacroiliitis.

On June 5, 1998, Donnaleah submitted a WC-1 Employer's Report of Industrial Injury. On June 11, 1998, Poepoe, as the Workers' Compensation Claims Examiner for CMI, sent Donnaleah a letter acknowledging receipt of the WC-1 and provided her contact information for the handling of her claim. On or about June 11, 1998, CMI began paying workers' compensation, Temporary Total

Disability (TTD) benefits[2] to Donnaleah in the amount of $127.00 per week.

Dr. Leonard N. Cupo, the physician hired by Donnaleah's employer, examined Donnaleah on September 24, 1998. On November 1, 1998, Dr. Cupo reported that after examining

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[2/] Hawaii Revised Statutes (HRS) § 386-31(b) (1993) provides, in relevant part, the following:

> Temporary total disability. Where a work injury causes total disability not determined to be permanent in character, the employer, for the duration of the disability, but not including the first three calendar days thereof, shall pay the injured employee a weekly benefit at the rate of sixty-six and two-thirds per cent of the employee's average weekly wages, subject to the limitations on weekly benefit rates prescribed in subsection (a), or if the employee's average weekly wages are less than the minimum weekly benefit rate prescribed in subsection (a), at the rate of one hundred per cent of the employee's average weekly wages.
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> The employer shall pay temporary total disability benefits promptly as they accrue to the person entitled thereto without waiting for a decision from the director, unless such right is controverted by the employer in the employer's initial report of industrial injury. The first payment of benefits shall become due and shall be paid no later than on the tenth day after the employer has been notified of the occurrence of the total disability, and thereafter the benefits due shall be paid weekly except as otherwise authorized pursuant to section 386-53.
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> The payment of such benefits shall only be terminated upon order of the director or if the employee is able to resume work. When the employer is of the opinion that temporary total disability benefits should be terminated because the injured employee is able to resume work, the employer shall notify the employee and the director in writing of an intent to terminate such benefits at least two weeks prior to the date when the last payment is to be made. The notice shall give the reason for stopping payment and shall inform the employee that the employee may make a written request to the director for a hearing if the employee disagrees with the employer. Upon receipt of the request from the employee, the director shall conduct a hearing as expeditiously as possible and render a prompt decision as specified in section 386-86.

Donnaleah and reviewing her medical records,[3] he had concluded, in relevant part, as follows:

> On 8/21/97 [Donnaleah] was involved in a motor vehicle accident. . . . Dr. Sarubbi recorded employee complaints of right buttock and left elbow pain with no mention of knee pain. . . . Dr. Koga recorded [Donnaleah's] complaints of low back pain and right and left knee pain. . . . [Donnaleah] was cleared to return to work in a full duty capacity on 9/14/97. She added that she was able to return to work and remain functional, although she would experience occasional buckling of her knees, as well as on-going low back pain.
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> [Donnaleah] was in this baseline state until 5/19/98, the date of the current injury. . . . Examination of the knees revealed "no evidence of serious injury." . . . Dr. Kama's diagnosis was "neck strain secondary to motor vehicle accident." . . . On 6/2/98, Dr. Kama's diagnosis was lumbar sprain, ...
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> [Donnaleah] stated that her neck pain and low back pain have resolved completely, such that she is "healed." [Donnaleah] continues to complain of bilateral hip and knee pain. . . . She feels that she cannot work due to bilateral knee pain.
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> . . . .
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> . . . I believe that [Donnaleah] sustained a temporary aggravation of her chronic, pre-existing low back pain as a result of the 5/19/98 injury. . . . Similarly, it is my medical opinion that the injury of 5/19/98 resulted in a temporary aggravation of the employee's pre-existing right and left knee pain. . . .
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> . . . .
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> . . . It is my medical opinion that [Donnaleah] achieved her pre-5-19-98 injury state on 7/19/98, which would be two months status-post injury. . . . Treatment subsequent to 7/19/98 would be considered attributable to [Donnaleah's] chronic, pre-existing low back and bilateral knee pain, including the motor vehicle accident of 8/21/97. Disability beyond 7/19/98 would similarly be attributable to [Donnaleah's] chronic, pre-existing low back and bilateral knee pain rather than being attributable to the injury of 5/19/98. . . .
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> . . . [Donnaleah] was able to return to work in a full duty capacity with regard to the 5/19/98 [injury] on 7/19/98, the date at which she achieved her pre-5/19/98 injury state. Since she has achieved her pre-5/19/98 injury state, she has sustained no permanent partial impairment as a result of the injury of 5/19/98, for which she requires no more treatment.

[3/] Dr. Leonard N. Cupo obtained medical records from William Kama, M.D.; Joann Sarubbi, M.D.; Harvelee Leite-Ah Yo, D.C.; Roy Koga, M.D.; G. Smith, M.D.; and Bay Clinic (from July 21, 1998, pursuant to subpoena).

Donnaleah asserted that although her knee pain was caused by the first accident and continued to the second accident, she was able to function prior to the second accident, but after the second accident, she could not return to work due to weakness in her legs. In the latter part of 1998, Donnaleah reported "extreme pain in her hips and knees on both sides."

On November 5, 1998, Poepoe sent Donnaleah a letter informing her that STI would be terminating her TTD benefits as of November 21, 1998, because she had achieved pre-injury status.

Dr. Edward Gutteling examined Donnaleah on November 10, 1998. Both Dr. Cupo and Dr. Gutteling found Donnaleah had normal strength, no objective evidence of weakness, and no weakness in the lower extremities.

On November 12, 1998, Donnaleah filed an Employee's Claim for Workers' Compensation Benefits with the State of Hawai‘i, Department of Labor and Industrial Relations, Disability Compensation Division (the DLIR/DCD), alleging she was "still injured."

As of December 11, 1998, Donnaleah had not returned to work. She expressed a willingness to do so if STI would "sign a form accepting liability if anything should happen."

Donnaleah alleged that "in 1/99 [she] was told that she was terminated from her job[.]"

After a hearing on December 11, 1998, the Director of the DLIR/DCD (the Director) issued the Findings of Fact and Decision on February 1, 1999, stating, in relevant part, as follows:

> As noted above, both Dr. Cupo and Dr. Gutteling found normal motor strength with no weakness in the lower extremities. Both physicians agreed [Donnaleah] was at a pre-injury status. Dr. Gutteling recommended an MRI [magnetic resonance imaging] because of [Donnaleah's] long-standing, preexisting complaints. These are not [STI's] responsibilities. Based on the foregoing, it is determined [STI's] termination of TTD benefits was proper. However, it is determined November 5, 1998, the date of [STI's] notice to claimant, is more appropriate for TTD termination. [STI] shall be entitled to a credit for any benefits paid from this date. No permanent disability resulted from the May 19, 1998 accident.
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> Thereupon, the Director makes the following
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> DECISION
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> 1. Pursuant to Sections 386-21 and 386-26, [Hawaii Revised Statutes (HRS)], said employer shall pay for such medical care, services and supplies as the nature of the injury may require.
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> 2. Pursuant to Section 386-31(b), HRS, said employer shall pay to claimant weekly compensation of $127.00 for temporary total disability from work beginning May 23, 1998 through November 4, 1998 for 23-5/7 weeks, for a total of $3,011.72.
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> 3. No permanent disability resulted from this accident.
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> 4. No disfigurement resulted from this accident.

Donnaleah appealed this February 1, 1999 Decision.

On November 4, 1999, the State of Hawai‘i Labor and Industrial Relations Appeals Board (the LIRAB) "temporarily remanded the case to the Director for determination of employer's liability for further medical treatment, if any, and other issues as appropriate." After a hearing on March 2, 2000, the Director, on April 7, 2000, "reaffirmed" the February 1, 1999 Decision and

determined that further treatment was not required for the May 19, 1998 injuries (April 7, 2000 Decision).

On April 11, 2000, Donnaleah appealed the Director's April 7, 2000 Decision to the LIRAB. On November 9, 2000, pursuant to a stipulation, the LIRAB entered an order temporarily remanding the case to the Director "for a determination as to the compensability of [Donnaleah's] bilateral hip complaints and a finding regarding Employer's future credit pursuant to Section 386-8, [HRS,][4] [and] for determination of any other issue the Director deems appropriate." (Footnote added).

On November 14, 2000, prior to any action by the Director on remand, the Galdeiras filed the Complaint in this case in which they asserted the following seven causes of action against each of the Defendants: (1) mail fraud and/or violation

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[4/] HRS § 386-8 (1993) provides, in relevant part, the following:

> When a work injury for which compensation is payable under this chapter has been sustained under circumstances creating in some person other than the employer or another employee of the employer acting in the course of his employment a legal liability to pay damages on account thereof, the injured employee or his dependents . . . may claim compensation under this chapter and recover damages from such third person.
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> If the employee commences an action against such third person he shall without delay give the employer written notice of the action and the name and location of the court in which the action is brought by personal service or registered mail. The employer may, at any time before trial on the facts, join as party plaintiff.
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> If within nine months after the date of the personal injury the employee has not commenced an action against such third person, the employer, having paid or being liable for compensation under this chapter, shall be subrogated to the rights of the injured employee.

of the Racketeer Influence and Corrupt Organization (RICO) provisions of U.S.C. Title 18 § 1341, "by the fraudulent use of 'independent medical examiners', designed, and intended for the abusive and/or fraudulent pretenses and/or purposes of discouraging, delaying, frustrating, and/or defeating [Donnaleah's] legitimate workers' compensation claims via the U.S. mail system"; (2) bad faith denial of Donnaleah's rights to worker's compensation;[5] (3) breach of a contract that entitles Donnaleah "to employee benefits, including but not limited to full and complete workers' compensation protection, which contractual provisions or benefits have been breached by the conduct of [STI], and/or have been contractually interfered with by [CMI]"; (4) "conversion of property rightfully belonging to [the Galdeiras]"; (5) "intentional and/or negligent infliction of severe emotional distress"; (6) Leonard's loss of consortium; and (7) violation of "the rights and equal protection of law contained in the Civil Rights Act of 1866 (42 USC Section 1981),

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[5/] The Complaint alleged that

> on November 21, 1998, motivated by financial greed, said Defendant's [sic] terminated [Donnaleah's] TTD benefits and engaged in a pattern of bad faith behavior, conduct, and/or tactics designed to deny, frustrate, obstruct, and/or unreasonably delay, and/or behave contrary to law by ignoring presumptively required and/or recommended medical diagnostic testing which wrongful conduct and/or bad faith continues to date despite Defendants' knowledge of new and subsequent medical information, diagnosis, procedures, requirements and/or developments to [Donnaleah], including but not limited to hip replacement surgery in the Spring/Summer of 2000, and/or recommended psychological referrals, as a proximate cause of her work-related injuries, and has sustained damages in an amount to be proven at trial.

and/or the Civil Rights Act of 1991 (42 USC 1981(b)[)], by failing to provide [the Galdeiras] full and equal benefit of all laws and proceedings for the security of persons and property enjoyed by white citizens, in the formulation, making and enforcement of [a] contract with [Donnaleah][.]"

On March 19, 2001, Defendants filed their answer denying most of the Galdieras' allegations and asserting numerous affirmative defenses.

On April 10, 2001, Defendants filed a motion seeking summary judgment (MSJ) on the following grounds: (a) the Galdeiras' Complaint arose out of Donnaleah's work-related injury and HRS § 386-5 (1993)[6] provides the exclusive remedy for work-related injuries; (b) "Donnaleah's compensable work-related injuries were properly paid" and terminated in accordance with HRS § 386-31(b), that the February 1, 1999 and April 7, 2000 Decisions of the Director demonstrated that their actions were proper, and "[i]f Donnaleah is not satisfied with the decision of the DLIR Appeals Board the proper procedural step is to seek judicial review pursuant to HRS § 386-88"; (c) CMI cannot

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[6/] HRS § 386-5 (1993) provides, in relevant part, as follows:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

tortiously interfere with a contract between STI and Donnaleah because "[CMI] administrates workers' compensation claims on behalf of [STI]"; (d) there is no negligent or intentional infliction of emotional distress because "damages for emotional distress will rarely, if ever, be recoverable for breaches of an employment contract[,]" Francis v. Lee Enterprises, Inc., 89 Hawai‘i 234, 242, 971 P.2d 707, 715 (1999) (emphasis in the original), and the underlying wrongful negligent or intentional action required by Calleon v. Miyagi, 76 Hawai‘i 310, 320, 876 P.2d 1278, 1288 (1994), is lacking; (e) the conversion count fails "[b]ecause no tangible property is even alleged to have been converted"; (f) no violation of equal protection is alleged because "[the Galdeiras] have not alleged (1) that they are members of a racial minority or (2) that Defendants intended to discriminate on the basis of race"; (g) no RICO violation is alleged because "[t]here are no allegations in the Complaint identifying a RICO enterprise, a pattern of racketeering, or injury to [the Galdeiras'] business or property"; and (h) "[i]n the absence of any viable cause of action by Donnaleah . . . , there is no right to a derivative claim of loss of consortium for her husband."

In her May 7, 2001 response to the MSJ, Donnaleah argued, in relevant part, as follows:

I. FACTS:

[Donnaleah] visited the Hilo Medical Center Emergency Room on May 19, 1998 and reported that she was injured on her job. [Donnaleah] had sustained soft tissue injuries and reported pain to her neck, lower back, right and left hip, knees, legs and other parts of her body typical to a rear-end collision. [Donnaleah] also informed her employer that she had back spasms from a previous accident that were aggravated from the subject accident. Defendants initially agreed to pay for her medical treatments, and Temporary Disability Benefits as required by the Hawaii Workers' Compensation laws . . . . [Donnaleah] notified Defendants that Dr. William Kama from Hilo Bay Clinic would be her treating physician. Dr. Kama's diagnosis was neck strain secondary to motor vehicle accident, lumbar strain, sacroiliitis, and patellofemoral dysfunction right greater than left. After a few months of treatment by Dr. Kama consisting of prescriptions including Indocin, Soma and Zantac, and physical therapy, [Donnaleah] appeared to indicate some improvement of her medical condition. On November 10, 1998, [Donnaleah] visited Dr. Edward Gutteling from a referral by Dr. Kama. [Donnaleah] complained of low back pain with radiation down her right buttock to right thigh, significant weakness in her legs, pain to her knees and sleeping problems. Dr. Gutteling recommended that a low back MRI be administered and did not recommend that [Donnaleah] return to her job. On September 24, 1998, [Donnaleah] visited an IME doctor recommended and paid for by Defendants, Dr. Leonard Cupo, from Honolulu. Dr. Cupo filed a report dated November 1, 1998, which [Donnaleah] contends contained substantial lies and fabrications concerning her condition. (See Declaration of [Donnaleah.]) Although [Donnaleah's] condition had improved, she had not been cleared to return to work by her treating physician, Dr. Kama, when employer decided to terminate her TTD benefits around November 5, 1998. [STI's] decision to terminate TTD was made with the full knowledge that [Donnaleah] had not been cleared to return to work by her physician, that a low back MRI was outstanding, and that she had not reached preinjury status as of July 19, 1998, and could not resume her regular job duties. [Donnaleah] submits that Defendants are using a fraudulent IME report prepared by Dr. Cupo to boost their position and is believed to be part of an overall and illegal "cost containment policy" instrumented and enabled by Defendants. By November 12, 1998, [Donnaleah] decided to fight Defendants and filed a WC-5 with the Department of Labor. (See Exhibit "F" of Defendant's [sic] MSJ). [Donnaleah] noted her injuries on the form and sought to maintain her TTD benefits and stop the repayment of TTD since July 19, 1998 to Defendants. [Donnaleah] further complained that she was still injured and could not work at her regular position. A hearing before the Hilo DCD was held in January, 1999, and [Donnaleah] notified the DCD that her treating physician, Dr. Kama, had left the State. Nevertheless, the DCD essentially credited the alleged fraudulent report of Dr. Cupo and terminated TTD as of November 5, 1998, and opined that no permanent disability resulted from the May 19, 1998 accident. (See Exhibit "G" of Defendant's [sic] MSJ). A timely appeal followed.

Following the appeal, and with Dr. Kama gone, [Donnaleah] changed her treating physician to Dr. Dale McSherry, the Hilo

chiropractor, around February, 1999. Dr. McSherry performed chiropractic care and but [sic] still found [Donnaleah] to be disabled from work at her regular job. Dr. McSherry also recommended that she visit Drs. Jeffrey Lee, the orthopaedic surgeon from Honolulu, and Charles Salzberg, the physical rehabilitation specialist from Kamuela. Dr. Salzberg also recommended that a low back MRI would be needed. On August 30, 1999, a low back MRI was finally performed and paid for by [Donnaleah's] private insurance; her MRI indicated positive findings with deterioration present. Dr. Salzberg further recommended a psychiatric referral and on September 19, 1999, [Donnaleah] visited Dr. Presbrey who detected depression and anxiety in [Donnaleah] due to pain and difficulty in walking. (See Exhibit "I" of Defendant's [sic] MSJ). Dr. Salzberg also opined that [Donnaleah's] lumbrosacral problems were aggravated by the subject accident. On January 11, 2000, Dr. Lee performed a right hip replacement in Honolulu which resulted in infection complications but eventually was brought under control. A second hip replacement to the left side was performed a few months later. A second DCD hearing was held in Hilo around May, 2000. Again, the DCD sided with Defendants basing their decision on Dr. Cupo's allegedly fraudulent IME report, and held that Dr. McSherry and Dr. Presbrey's treatments were unrelated to the subject accident and that the request for MRI should be denied. (See Exhibit "I" of Defendant's [sic] MSJ). The second decision of the DCD was also timely appealed. On June 15, 2001, the Hilo DCD is set to convene again to address (or readdress) the specific compensability of [Donnaleah's] right and left hip compensability and other matters. (See Declaration of James Irejo).

II. Material Facts And Questions of Law In Dispute:

A. The Complaint is not a mere re-working of a workers' compensation claim contained before the DCD as claims of bad faith, employment discrimination, conversion, and RICO are beyond the jurisdiction of the Hawaii Workers Compensation Laws and statutory scheme contained in H.R.S. Section 386.

B. Dr. Leonard Cupo's Independent Medical Examination November 1, 1998 is disputed and contains false representations and fabrications paid for or directed by Defendants as a cost containment policy in violation of Workers' Compensation Laws and is a tort, a civil rights violation, a violation of RICO statutes, the intentional and/or negligent infliction of severe emotional distress, and a resultant common law tort of conversion.

C. It is against the Civil Rights Statutes to harass or discharge an employee due to factors such as race, ethnic origin, sex, and disability.

D. The law of bad faith arising out of a contractual relationship has been deemed to be a tort, subject to a two year Statute of Limitations, and thus must be timely filed.

E. The tort law governs the intentional and/or negligent infliction of severe emotional distress and not the Hawaii Workers' Compensations Scheme.

> F. Loss of consortium is a derivative claim arising from tort and must survives [sic] if [Donnaleah's] claim survives.

In the Declaration of Donnaleah Galdeira, Donnaleah stated, in relevant part, as follows:

> D. As a worker for [STI], I am within my contractual rights to expect that my workers' compensation benefits will be timely paid and without interference of contract and paid in good faith to allow my timely return to work, instead I was fired because of my work related injuries and the conduct of Defendants in getting Dr. Leonard Cupo or hiring him in other cases at good money is, I believe, part of an illegal cost containment policy instead of paying benefits required by law.
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> E. As a worker for [STI], when my benefits were not paid or were delayed or obstructed, I have a right to claim emotional distress caused by Defendant's [sic] intentional or negligent infliction against me causing severe harm against me and my husband.
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> F. As a worker for said Defendant, when my benefits were not paid or were delayed or obstructed, I have a right to claim common law conversion because said Defendants' [sic] are stealing property from me that rightfully belong [sic] to me.
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> G. With regard to my status as a woman, a Native Hawaiian, ethnic minority, and worker with a disability, I have been denied my civil rights and/or equal protection of the law, as contained in the Complaint by not providing the same rights as enjoyed by white citizens and therefor suffer from discrimination against me despite the law and despite even the public guarantees and proclamation against discrimination contained in the Decisions of the Hilo DCD.
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> H. With respect to the charges of mail fraud or racketeering against Defendants' [sic], my attorney has just filed this Complaint and in regards to all the other allegations, my attorney should have the right to conduct discovery and to find more evidence. For example, my attorney should be able to find out if Defendants' [sic] have used Dr. Cupo on other cases and how much money they have paid him in the past as well as the other doctors used by Defendants' [sic] in their claim of "Independent Medical Examiners", and if there is a pattern of lies used by Dr. Cupo, knowingly by said Defendants, and of any misdeeds used against other citizens injured like myself who file workers' compensation claims; to simply dismiss my case now before all the evidence is received would be premature and deny me due process of law and my day in court.

A hearing was held on May 8, 2001, by Judge Greg K. Nakamura. The record on appeal does not contain a transcript of

this hearing.[7] The June 8, 2001 Order awarding summary judgment in favor of Defendants was entered. The June 8, 2001 Final Judgment in favor of Defendants and against the Galdeiras was entered.

II.

ISSUES ASSERTED BY THE GALDEIRAS

The Galdeiras argue that the court erred when it ruled that: (1) HRS § 386-5, the exclusivity provision of the Hawai'i Workers' Compensation Law, is a complete bar to the Galdeiras' seven civil causes of action and (2) there are no genuine issues of material fact presented to the court to defeat Defendants' MSJ.

III.

STANDARD OF REVIEW

We review a circuit court's grant or denial of summary judgment *de novo* under the same standard applied by the circuit court. Roxas v. Marcos, 89 Hawai'i 91, 116, 969 P.2d 1209, 1234 (1998) (citation omitted); Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 104, 839 P.2d 10, 22, *reconsideration denied*, 74 Haw. 650, 843 P.2d 144 (1992) (citation omitted). As we have often articulated, "Summary judgment is appropriate if

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[7] The facts that (a) neither party alleged that anything significant occurred at the May 8, 2001 hearing and (b) this is an appeal of a summary judgment, suggest that the Galdeiras did not violate a duty to include a transcript of the May 8, 2001 hearing in the record on appeal, Lapere v. United Public Workers, 77 Hawai'i 472, 474 n.4, 887 P.2d 1029, 1032 n.4 (1995).

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Id. (citations and internal quotation marks omitted). We recognize that "[a] fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties." Hulsman v. Hemmeter Dev. Corp., 65 Haw. 58, 61, 647 P.2d 713, 716 (1982) (citations omitted).

When performing this review, "[w]e . . . view all of the evidence and the inferences drawn therefrom in the light most favorable to the party opposing the motion." Morinoue v. Roy, 86 Hawai‘i 76, 80, 947 P.2d 944, 948 (1997) (quoting Maguire v. Hilton Hotels Corp., 79 Hawai‘i 110, 112, 899 P.2d 393, 395 (1995)) (brackets omitted).

Hawai‘i Rules of Civil Procedure Rule 56(e) provides, in relevant part, as follows:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations of denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

A party opposing a motion for summary judgment cannot discharge his or her burden by alleging conclusions, nor can the hope of

producing the required evidence entitle the party to trial. Henderson v. Professional Coatings Corp., 72 Haw. 387, 401, 819 P.2d 84, 92 (1991) (quoting 10A C. Wright, A. Miller & M. Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983)).

IV.

RELEVANT STATUTES

HRS § 386-5 (1993) provides, in relevant part, as follows:

> The rights and remedies herein granted to an employee or the employee's dependents on account of a work injury suffered by the employee shall exclude all other liability of the employer to the employee, the employee's legal representative, spouse, dependents, next of kin, or anyone else entitled to recover damages from the employer, at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto, in which case a civil action may also be brought.

HRS § 386-8 (1993) provides, in relevant part, as follows:

> When a work injury for which compensation is payable under this chapter has been sustained under circumstances creating in some person other than the employer or another employee of the employer acting in the course of his employment a legal liability to pay damages on account thereof, the injured employee or his dependents . . . may claim compensation under this chapter and recover damages from such third person.
>
> If the employee commences an action against such third person he shall without delay give the employer written notice of the action and the name and location of the court in which the action is brought by personal service or registered mail. The employer may, at any time before trial on the facts, join as party plaintiff.
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> If within nine months after the date of the personal injury the employee has not commenced an action against such third person, the employer, having paid or being liable for compensation under this chapter, shall be subrogated to the rights of the injured employee.

HRS § 386-31(b) (1993) provides, in relevant part, as follows:

> Temporary total disability. Where a work injury causes total disability not determined to be permanent in character, the employer, for the duration of the disability, but not including the first three calendar days thereof, shall pay the injured employee a weekly benefit at the rate of sixty-six and two-thirds per cent of the employee's average weekly wages, subject to the limitations on weekly benefit rates prescribed in subsection (a), or if the employee's average weekly wages are less than the minimum weekly benefit rate prescribed in subsection (a), at the rate of one hundred per cent of the employee's average weekly wages.
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> The employer shall pay temporary total disability benefits promptly as they accrue to the person entitled thereto without waiting for a decision from the director, unless such right is controverted by the employer in the employer's initial report of industrial injury. The first payment of benefits shall become due and shall be paid no later than on the tenth day after the employer has been notified of the occurrence of the total disability, and thereafter the benefits due shall be paid weekly except as otherwise authorized pursuant to section 386-53.
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> The payment of such benefits shall only be terminated upon order of the director or if the employee is able to resume work. When the employer is of the opinion that temporary total disability benefits should be terminated because the injured employee is able to resume work, the employer shall notify the employee and the director in writing of an intent to terminate such benefits at least two weeks prior to the date when the last payment is to be made. The notice shall give the reason for stopping payment and shall inform the employee that the employee may make a written request to the director for a hearing if the employee disagrees with the employer. Upon receipt of the request from the employee, the director shall conduct a hearing as expeditiously as possible and render a prompt decision as specified in section 386-86.

HRS 386-73 (1993) provides, in relevant part, as follows:

> Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the appellate board and thence to the supreme court subject to chapter 602 as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersedeas or stay unless the appellate board or the supreme court so orders.

HRS § 386-98 (Supp. 2002) states, in relevant part, as follows:

> **Fraud violations and penalties.** (a) A fraudulent insurance act, under this chapter, shall include acts or omissions committed by any person who intentionally or knowingly acts or omits to act so as to obtain benefits, deny benefits, obtain benefits compensation for services provided, or provides legal assistance or counsel to obtain benefits or recovery through fraud or deceit by doing the following:
>
> (1) Presenting, or causing to be presented, any false information on an application;
>
> (2) Presenting, or causing to be presented, any false or fraudulent claim for the payment of a loss;
>
> (3) Presenting multiple claims for the same loss or injury, including presenting multiple claims to more than one insurer except when these multiple claims are appropriate and each insurer is notified immediately in writing of all other claims and insurers;
>
> (4) Making, or causing to be made, any false or fraudulent claim for payment or denial of a health care benefit;
>
> (5) Submitting a claim for a health care benefit that was not used by, or on behalf of, the claimant;
>
> (6) Presenting multiple claims for payment of the same health care benefit;
>
> (7) Presenting for payment any undercharges for health care benefits on behalf of a specific claimant unless any known overcharges for health care benefits for that claimant are presented for reconciliation at that same time;
>
> (8) Misrepresenting or concealing a material fact;
>
> (9) Fabricating, altering, concealing, making a false entry in, or destroying a document;
>
> (10) Making, or causing to be made, any false or fraudulent statements with regard to entitlements or benefits, with the intent to discourage an injured employee from claiming benefits or pursuing a workers' compensation claim; or
>
> (11) Making, or causing to be made, any false or fraudulent statements or claims by, or on behalf of, a client with regard to obtaining legal recovery or benefits.

(b) No employer shall wilfully make a false statement or representation to avoid the impact of past adverse claims experience through change of ownership, control, management, or operation to directly obtain any workers' compensation insurance policy.

(c) It shall be inappropriate for any discussion on benefits, recovery, or settlement to include the threat or implication of criminal prosecution. Any threat or implication shall be immediately referred in writing to:

(1) The state bar if attorneys are in violation;

(2) The insurance commissioner if insurance company personnel are in violation; or

(3) The regulated industries complaints office if health care providers are in violation, for investigation and, if appropriate, disciplinary action.

(d) An offense under subsections (a) and (b) shall constitute a:

(1) Class C felony if the value of the moneys obtained or denied is not less than $2,000;

(2) Misdemeanor if the value of the moneys obtained or denied is less than $2,000; or

(3) Petty misdemeanor if the providing of false information did not cause any monetary loss.

Any person subject to a criminal penalty under this section shall be ordered by a court to make restitution to an insurer or any other person for any financial loss sustained by the insurer or other person caused by the fraudulent act.

(e) In lieu of the criminal penalties set forth in subsection (d), any person who violates subsections (a) and (b) may be subject to the administrative penalties of restitution of benefits or payments fraudulently received under this chapter, whether received from an employer, insurer, or the special compensation fund, to be made to the source from which the compensation was received, and one or more of the following:

(1) A fine of not more than $10,000 for each violation;

(2) Suspension or termination of benefits in whole or in part;

(3) Suspension or disqualification from providing medical care or services, vocational rehabilitation services, and all other services rendered for payment under this chapter;

(4) Suspension or termination of payments for medical, vocational rehabilitation and all other services rendered under this chapter;

> (5) Recoupment by the insurer of all payments made for medical care, medical services, vocational rehabilitation services, and all other services rendered for payment under this chapter; or
>
> (6) Reimbursement of attorney's fees and costs of the party or parties defrauded.
>
> (f) With respect to the administrative penalties set forth in subsection (e), no penalty shall be imposed except upon consideration of a written complaint that specifically alleges a violation of this section occurring within two years of the date of said complaint. A copy of the complaint specifying the alleged violation shall be served promptly upon the person charged. The director or board shall issue, where a penalty is ordered, a written decision stating all findings following a hearing held not fewer than twenty days after written notice to the person charged. Any person aggrieved by the decision may appeal the decision under sections 386-87 and 386-88.

V.

UNPERSUASIVENESS OF ALLEGATION OF INADEQUATE TIME FOR DISCOVERY

In their opening brief, the Galdeiras state that "[a]bsent more time to conduct discovery, the Galdeiras' [sic] could not complete their theory of RICO liability as well as their overall case as well." There is, however, no indication on the record that (a) the Galdeiras initiated any discovery, (b) requested time to do any specific discovery, or (c) their hope of discovering the required evidence was supported by any reasonable suspicion.

VI.

POSSIBILITY OF ADMINISTRATIVE REMEDY WAS EXHAUSTED

In the field of administrative law, the doctrine of exhaustion of remedies generally requires that where a remedy is

available from an administrative agency, that remedy must be exhausted before the courts will act to afford relief.

2 Am. Jur. 2d, Administrative Law § 505 (1994).

In this civil case, although the Galdeiras assert various causes of action, in essence, they challenge (a) the Director's following three decisions: (i) the implicit decision that Dr. Cupo's November 1, 1998 Medical Report was credible, (ii) the explicit decision that no permanent disability resulted from the second accident, and (iii) the order requiring STI to pay Donnaleah temporary total disability through only November 4, 1998, and (b) the LIRAB's affirmation of those three decisions by the Director.

It is a fact that when the Galdeiras filed their Complaint in this case on November 14, 2000, although the LIRAB had affirmed the Director's three challenged decisions, the LIRAB had not entered a final decision because, on November 9, 2000, pursuant to a stipulation, the LIRAB had entered an order temporarily remanding the case to the Director "for a determination as to the compensability of [Donnaleah's] bilateral hip complaints and a finding regarding Employer's future credit pursuant to Section 386-8, [HRS,] [and] for determination of any other issue the Director deems appropriate." Notably, these issues on remand were unrelated to the three challenged decisions which had been affirmed by the LIRAB.

An exception to the doctrine of exhaustion of remedies is that "[w]here the justification for invoking the doctrine of exhaustion of administrative remedies is absent, application of the doctrine is unwarranted, and will be waived." 2 Am. Jur. 2d, Administrative Law § 510 (1994). In this case, the justification for invoking the doctrine of exhaustion of administrative remedies is the fact that, when the Galdeiras filed their Complaint in this case and when the court entered summary judgment, the LIRAB had the power to change its three challenged decisions. On the other hand, the odds that the LIRAB would invoke its power to change those three challenged decisions which it had previously affirmed were so slim that we conclude the application of the doctrine in this situation is unwarranted.

VII.

DISCUSSION OF THE VALIDITY
OF THE SEVEN CAUSES OF ACTION

1. Mail Fraud and or Violation of RICO by the Fraudulent Use of Independent Medical Examiners

In their cause of action no. 1, the Galdeiras allege that Defendants acted fraudulently when they used Dr. Cupo as an "independent medical examiner" and the Galdeiras were damaged when Defendants provided Dr. Cupo's allegedly fraudulent Medical

Report to the Director in the worker's compensation proceedings.[8]

This cause of action no. 1 is akin to an unsuccessful plaintiff in a civil case or an unsuccessful defendant in a criminal case subsequently suing the decisive witness for damages caused by the decisive witness' fraudulent testimony in the prior civil or criminal case. However, "[a]s a general rule, no civil action lies for damages resulting from false statements under oath constituting perjury, or from subordination of false testimony." 60A Am. Jur. 2d Perjury § 132 (1988 & Supp. 1998).

The precedents for this rule are numerous. Some of them are stated in the following quotes:

"[T]here is no civil cause of action for perjury or conspiracy to commit perjury." Allin v. Schuchmann, 886 F. Supp. 793, 799-800 (1995) (citations omitted). "The general rule is that, absent a statute authorizing such an action, no action lies to recover damages caused by perjury. . . . The only jurisdiction that recognizes a civil action for perjury is Maine which has a statute authorizing such an action. . . . See Spickler v. Greenberg, 644 A.2d 469, 470 n.1 (Me. 1994)." Cooper v. Parker-Hughey, 985 P.2d 1096, 1100-01 (Okla. 1995) (citations omitted).

8/ The Galdeiras sued the corporations and the person who retained Dr. Cupo but they did not sue Dr. Cupo.

> [T]he general rule [is] that absent an authorizing statute, there is no civil claim for perjury.
>
> There are sound reasons why courts do not recognize a cause of action for perjury. One is based on policy. Were such a theory of recovery available, many cases would be tried at least twice; first on the merits and then to see who lied at trial. If a party could sue another party for perjury, there is no reason why a party (or anyone else aggrieved by the perjury) could not sue a nonparty. There would be no finality to litigation, the costs of suit would expand, and witnesses would be reluctant to testify. The only workable remedy for perjury is reopening the first proceeding under . . . a criminal charge, not an independent private right of action."

Dexter v. Spokane County Health Dist., 76 Wash. App. 372, 376, 884 P.2d 1353, 1355 (1994).

> We recognize, as have applicable precedents, that the disallowance of derivative tort actions based on communications of participants in an earlier action necessarily results in some real injuries that go uncompensated. . . . [T]hat is the "price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say."
>
> We observe, however, that in a good many cases of injurious communications, other remedies aside from a derivative suit for compensation will exist and may help deter injurious publications during litigation. Examples of these remedies include criminal prosecution for perjury[.]"

Silberg v. Anderson, 50 Cal.3d 205, 218-19, 786 P.2d 365, 373, 266 Cal.Rptr. 638, 646-47 (1990).

> There are sufficient incentives for truth and disincentives for lying imposed upon a witness so that adding the threat of civil litigation is unlikely to increase the assurance of witness truthfulness. . . . The threat of criminal sanctions provides a sufficient deterrent against abuse of the witness privilege of absolute immunity. "[I]f the risk of having to defend a civil damage suit is added to the deterrent against such conduct already provided by criminal laws against perjury and subornation of perjury, the risk of self-censorship becomes too great."

Durand Equipment Co., Inc. v. Superior Carbon Products, Inc., 248 N.J.Super. 581, 586-87, 591 A.2d 987, 990 (1991) (citations omitted).

It has been argued that the rule against civil actions for perjury should not be applied to perjury in administrative agency proceedings. Comment, The Rule Against Civil Actions for Perjury in Administrative Agency Proceedings: A Hobgoblin of Little Minds, 31 U.Pa.L.Rev. 1209, 1210-14 (1983). In light of HRS § 386-98 quoted above, we disagree with respect to Hawai'i workers' compensation cases.

2. Bad Faith

Hawai'i recognizes the "unreasonable termination of [workers' compensation] benefits," Hough v. Pacific Ins. Co., Ltd., 83 Hawai'i 457, 461, 927 P.2d 858, 862 (1996), as a tort. In Hough, the Hawai'i Supreme Court stated, in relevant part, as follows:

> Hough alleges that intentional acts on the part of Pacific and its agents caused him harm, separate and distinct from the work injury suffered by Hough. The torts alleged by Hough were not directed against him because of his employment but because of his attempt to obtain workers' compensation benefits. The fact that Hough came into contact with Pacific as a result of seeking workers' compensation benefits does not make the injuries suffered as a result of Pacific's conduct "work injuries" within the meaning of HRS Chapter 386. The factual and legal events that caused Pacific's agents to have contact with Hough are irrelevant to whether they committed torts, unrelated to the original work injury, after those contacts were made.
>
> We therefore hold that the injuries alleged by Hough in the first amended complaint are not "work injuries" within the scope of HRS Chapter 386. Consequently, Hough is not precluded by the exclusivity provision of HRS § 386-5 from seeking common law tort remedies against Pacific.
>
> Pacific also argues that HRS § 386-73 deprives the circuit court of jurisdiction. HRS § 386-73 provides in relevant part that "[u]nless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter." . . .
>
> We reject Pacific's argument, however, with respect to Hough's common law tort claims. In those claims, Hough alleges

injuries caused by Pacific's tortious conduct *outside* the course and scope of his employment. Because Hough's common law tort claims do not "arise under" HRS Chapter 386, the director of labor and industrial relations does not have original jurisdiction under HRS § 386-73.

. . . .

Pacific also argues, albeit halfheartedly, that Hough's claims are barred by HRS §§ 386-31(b) and -92, which authorize specific penalties for an insurer's delay or failure to pay benefits. We discern no indication, however, that the administrative penalties authorized by HRS §§ 386-31(b) and -92 were intended by the legislature to abrogate common law rights to bring an action in tort.

. . . .

Because we determine that: (1) the exclusive remedy provisions of HRS § 386-5 do not bar judicial remedies for non-work injuries; (2) HRS § 386-73 does not deprive the circuit court of subject matter jurisdiction over common law tort claims not based on the original work injury; and (3) the administrative penalties authorized by HRS §§ 386-31(b) and -92 were not intended to provide an injured workers' exclusive remedy for injuries resulting from an insurer's tortious delay or termination of benefits, we hold that an employee seeking workers' compensation benefits is not precluded by these statutory provisions from pursuing a judicial remedy for torts allegedly perpetrated by his or her employer's workers' compensation insurance carrier subsequent and unrelated to the work injury. Accordingly, we vacate the circuit court's grant of summary judgment in favor of Pacific and against the Houghs on these bases.

. . . .

Consequently, summary judgment in favor of Pacific on Counts VI (breach of contract) and VIII ("bad faith") was improperly granted. Although we vacate the circuit court's order granting summary judgment in favor of Pacific on Counts VI and VIII and remand for a determination of the merits of those claims, we also reiterate our cautions concerning the "bad faith" claim in the context of an insurance contract:

> [C]onduct based on an interpretation of the insurance contract that is reasonable does not constitute bad faith. In addition, an erroneous decision not to pay a claim for benefits due under a policy does not by itself justify an award of compensatory damages. Rather, the decision not to pay a claim must be in "bad faith." California Shoppers Inc. v. Royal Globe Ins. Co., 175 Cal.App.3d 1, 221 Cal.Rptr. 171 (1985) (bad faith implies unfair dealing rather than mistaken judgment).

[Best Place, Inc. v. Penn. America Ins. Co., 82 Hawai'i 120,] at 133, 920 P.2d [858] at 347 [1996] (most citations omitted).

Hough v. Pacific Ins. Co., Ltd., 83 Hawai‘i 457, 465-69, 927 P.2d 858, 866-70 (1996) (footnote omitted.)

In Best Place, Inc., a case dealing with a fire insurance policy, the Hawai‘i Supreme Court concluded, in relevant part, as follows: (1) "every contract contains an implied covenant of good faith and fair dealing that neither party will do anything that will deprive the other of the benefits of the agreement." Id. at 123-24, 920 P.2d at 337-38 (citations omitted); (2) "Hawai‘i now recognizes a bad faith cause of action in the first-party insurance context." Id. at 127, 920 P.2d at 341; (3) "Hawai‘i law imposes a duty of good faith and fair dealing in *all* contracts, not only those in which there is an agency relationship. Whether a breach of this duty will give rise to a cause of action in tort, then, depends upon the duty or duties inherent in a particular type of contract." Id. at 129, 920 P.2d at 343 (emphasis in the original); and (4) "we hold that there is a legal duty, implied in a first- and third-party insurance contract, that the insurer must act in good faith in dealing with its insured, and a breach of that duty of good faith gives rise to an independent tort cause of action." Id. at 132, 920 P.2d at 346.

In the Galdeiras' case, the bad faith alleged by Donnaleah was Dr. Cupo's allegedly fraudulent Medical Report provided by Defendants to the Director in support of STI's denial

of Donnaleah's rights to workers' compensation benefits in pursuit of what the Galdeiras "believed" was a "part of an overall and illegal 'cost containment policy' instrumented and enabled by Defendants." As noted above, no civil action lies for damages resulting from false statements under oath constituting perjury. Although Dr. Cupo's Medical Report was not a statement under oath, it was subject to a law prohibiting perjury. If, in his Medical Report, Dr. Cupo misrepresented or concealed a material fact, made a false entry, or made a false or fraudulent statement with the intent to discourage Donnaleah from claiming benefits or pursuing a workers' compensation claim, Dr. Cupo was subject to prosecution and punishment for violation of HRS § 386-98(a)(8), (9), and (10) quoted above. Consequently, we conclude that the Galdeiras' bad faith claim is unauthorized.

3. STI's Breach of Contract, and CMI's Tortious Interference with Contract; and

4. Conversion of Property

In the Complaint, Donnaleah's claim for breach of contract was that she was "contractually entitled to employee benefits, including but not limited to full and complete workers' compensation protection, which contractual provisions or benefits have been breached by the conduct of [STI] and or have been contractually interfered with by [CMI][.]" In her declaration in opposition to the MSJ, Donnaleah's claim for breach of contract

was that STI breached her "contractual rights to expect that [her] workers' compensation benefits will be timely paid[.]"

In her memorandum in opposition to the MSJ, Donnaleah's claim for conversion was for "the deprivation of money and medication for a work place injury[.]" In her declaration in opposition to the MSJ, Donnaleah's claim for conversion was that "when my benefits were not paid or were delayed or obstructed, I have a right to claim common law conversion because said Defendants' [sic] are stealing property from me that rightfully belongs to me."

Donnaleah's claims for breach of contract and conversion are barred by the exclusive remedy provision of the workers' compensation law stated in HRS § 386-5. As noted by the Hawai‘i Supreme Court, "in return for furthering the legitimate state interest of securing sure compensation for those injured and their dependents, the legislature enacted HRS § 386-5 'to absolve employers of all liability save that imposed by statute.'" Estate of Coates v. Pacific Eng'g, 71 Haw. 358, 365, 791 P.2d 1257, 1261 (1990) (quoting Kamali v. Hawaiian Elec. Co., 54 Haw. 153, 157, 504 P.2d. 861, 864 (1972)).

5. Intentional and/or Negligent Infliction of Severe Emotional Distress.

In her declaration in opposition to the MSJ, Donnaleah alleged that "[a]s a worker for [STI], when my benefits were not paid or where delayed or obstructed, I have a right to claim

emotional distress caused by Defendants' intentional or negligent infliction against me causing severe harm against me and my husband." Donnaleah's position is contradicted by the Hawai‘i precedent that "damages for emotional distress will rarely, if ever, be recoverable for breaches of an employment contract, where the parties did not bargain for such damages or where the nature of the contract does not clearly indicate that such damages were within the contemplation or expectation of the parties." Francis v. Lee Enterprises, Inc., 89 Hawai‘i 234, 242, 971 P.2d 707, 715 (1999) (emphasis in the original). Moreover, there is no evidence of the underlying wrongful negligent or intentional action required by Calleon v. Miyagi, 76 Hawai‘i 310, 320, 876 P.2d 1278, 1288 (1994). Finally, in light of Donnaleah's specific allegations, Donnaleah's claims for the intentional and/or negligent infliction of severe emotional distress are barred by the exclusive remedy provision of the workers' compensation law stated in HRS § 386-5.

6. Leonard's Loss of Consortium.

In their memorandum in opposition to the MSJ, the Galdeiras contend that "where a tort occurs, the spouse of the injured person has a right to plead and prove the derivative claim of loss of consortium. In this case, where his wife has had to endure terrible suffering, emotional distress, the loss of

her job by discrimination, [Leonard] should be allowed to pursue his claim."

The relevant law, however, is not quite that simple. The supporting tort must be one for which the "injured person" has a legitimate cause of action. In this case, there is no such tort.

7. Violation of "the Civil Rights Act of 1866 (42 USC Section 1981), and/or the Civil Rights Act of 1991 (42 USC 1981(b)[).]"

In their opening brief, the Galdeiras explain their cause of action no. 7 as follows:

> As stated earlier, Section 386-5 does not bar civil actions or in this case civil rights violations that are alleged to occur after the original work injury. Under the Civil Rights Act of 1966 and/or the Civil Rights Act of 1991, Congress has expressly protected a citizen's rights in the formation of contract. Here, the Galdeiras' [sic] allege that they were not given the full and equal benefit of all laws and proceedings for the security of persons and property contractually enjoyed by white citizens by the deliberate breach of her employment contract, bad faith conduct, intentional infliction of emotional distress in contrast to white citizens. As a[n] ethnic minority, woman, and Native-Hawaiian, and a worker with a disability, she alleges that she has been provided less benefits and thereby has been discriminated against in contrast to white citizens. The United States Supreme Court has accordingly given the right of citizens to seek remedies due to the breach of contract based upon discriminatory motivations. Runyon v. McCrary, 427 US 160, 49 L.Ed. 415, 96 S Ct 2586 (1976). Here, the Galdeiras' [sic] claimed that her employment contractual right as to workers' compensation benefits were [sic] based upon [a] discriminatory factor and that summary judgment was improperly granted.

(Emphases in original; record citation omitted.)

To repeat, the Galdeiras "claimed that [Donnaleah's] employment contractual right as to workers' compensation benefits [was] based upon [a] discriminatory factor[.]" In asserting this right, Donnaleah faces two obstacles.

The first obstacle is the at-will employment doctrine explained by the Hawai‘i Supreme Court in Shoppe v. Gucci America, Inc., 94 Hawai‘i 368, 14 P.3d 1049 (2001), and Parnar v. Americana Hotels, Inc., 65 Haw. 370, 652 P.2d 625 (1982), in relevant part, as follows:

> The principle that the at-will doctrine prevails absent a collective bargaining agreement, a contractual provision, or a statutorily-conferred right has remained untouched in this jurisdiction since this court's decision in Parnar. We therefore reaffirm the general principle that, in the absence of a written employment agreement, a collective bargaining agreement, or a statutorily-conferred right, employment is at-will. Such at-will employment is, "by definition, . . . terminable at the will of either party, for any reason or no reason at all." As such, parties to an at-will employment contract enter into the contract with full knowledge that the employment is for an indefinite duration and can terminate at the will of either party. Correlatively, an employment contract of indefinite duration will generally be construed as giving rise to an at-will employment relationship and as therefore terminable at the will of either party for any reason or no reason.
>
> . . . .
>
> Despite our reaffirmation of the at-will principle, we recognize that courts have decided that the previously unfettered right of employers to discharge employees "can be contractually modified and, thus, qualified by statements contained in employee policy manuals or handbooks issued by employers to their employees." Indeed, "we joined the jurisdictions subjecting 'the employer's power of discharge to closer judicial scrutiny in appropriate circumstances' when we considered Parnar."
>
> In Parnar, this court recognized the public policy exception to the at-will employment doctrine. The plaintiff in Parnar, "whose contract [of employment] was of indefinite duration [and] hence terminable at the will of her employer[,] . . . sued for damages for an allegedly retaliatory discharge." Finding no genuine issue of material fact, the circuit court awarded the employer summary judgment. On appeal, the plaintiff argued that she "had a right to sue for a discharge in bad faith or in contravention of public policy," and that the presence of genuine issues of material fact rendered a summary disposition of her claims inappropriate.
>
> Because this court was unwilling "to imply into each employment contract a duty to terminate in good faith [and thereby] subject each discharge to judicial incursions into the amorphous concept of bad faith," we were "not persuaded that protection of employees required such an intrusion [into] the employment relationship or such an imposition on the courts."

Nevertheless, this court held that, where the "discharge of an employee violates a clear mandate of public policy[,]" his or her "employer [should] be . . . liable in tort." Accordingly, we vacated the judgment and remanded the case to afford the plaintiff an opportunity to prove her allegations that she was discharged to prevent her from giving evidence of the employer's illegal anti-competitive practices.

Subsequently, in Kinoshita [v. Canadian Pacific Airlines, Ltd., 68 Haw. 594, 724 P.2d 110 (1986)], we discussed the applicability of other theories of contractual recovery for the wrongful discharge of an at-will employee by virtue of statements contained in employee policy manuals or handbooks issued by employers to their employees. We first discussed an approach that required the traditional components of contract formation (i.e., offer, acceptance, and consideration) as necessary predicates to establish that statements and policies contained in an employment manual or handbook could give rise to contractual liability. However, we impliedly rejected this approach, noting that "other courts . . . have employed still another contractual theory to mitigate the severity of the doctrine when the circumstances are appropriate for relief."

In Toussaint v. Blue Cross & Blue Shield, 408 Mich. 579, 292 N.W.2d 880 (Mich. 1980), the Michigan Supreme Court reasoned, in determining whether statements made in an employee handbook gave rise to contractual liability, that the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation".

. . . .

In Kinoshita, this court applied the principles and reasoning announced in Toussaint, emphasizing that the employer had "created a situation 'instinct with an obligation.'" 68 Haw. at 603, 724 P.2d at 117 (citations omitted). The employment policies in Kinoshita were promulgated with a cover letter stating that the policies constituted "an enforceable contract between us under [the] labour law of the state in which you work. Thus your rights in your employment arrangement are guaranteed." Id. at 598 n.2, 724 P.2d at 114 n.2. On appeal, this court reasoned that the employer was

> striving to create an atmosphere of job security and fair treatment, one where employees could expect the desired security and even-handed treatment without the intervention of a union, when it distributed copies of the rules to the employees who were to vote in a representation election. *It attempted to do so with promises of specific treatment in specific situations; it encouraged reliance thereon*[.]

> As a result, this court held that if an employer issues policy statements or rules, in a manual or otherwise, and, by its language or by the employer's actions, encourages reliance thereon, the employer cannot be free to only selectively abide by it.

Shoppe, 94 Hawai‘i at 383-85, 14 P.3d at 1064-66 (emphasis in the original; citations omitted).

The public policy exception to the at-will employment doctrine was stated in Parnar as follows:

> We therefore hold that an employer may be held liable in tort where his discharge of an [at-will] employee violates a clear mandate of public policy. In determining whether a clear mandate of public policy is violated, courts should inquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy. However, courts should proceed cautiously if called upon to declare public policy absent some prior legislative or judicial expression on the subject. Of course, the plaintiff alleging a retaliatory discharge bears the burden of proving that the discharge violates a clear mandate of public policy.

Id. at 380, 652 P.2d at 631. If Donnaleah presented any evidence to support her allegation that "[a]s a[n] ethnic minority, woman, and Native-Hawaiian, and a worker with a disability, . . . she has been provided less benefits and thereby has been discriminated against in contrast to white citizens[,]" she could overcome the obstacle of the at-will principle. However, she did not present any such evidence.

The second obstacle is the applicability of the exclusivity of HRS § 386-5 to Donnaleah's alleged "employment contractual right as to workers' compensation benefits[.]" Commenting on that exclusivity, the Hawai‘i Supreme Court observed that "HRS § 386-5 was amended in 1992 to include an

exception to the exclusive remedy provision of the workers' compensation law for certain claims related to sexual harassment and sexual assault." Nelson v. University of Hawai‘i, 97 Hawai‘i 376, 394, 38 P.3d 95, 113 (2001) (citing 1992 Haw. Sess. L. Act 275, § 2 at 722). HRS § 386-5 expressly "exclude[s] all other liability of the employer to the employee, . . . at common law or otherwise, on account of the injury, except for sexual harassment or sexual assault and infliction of emotional distress or invasion of privacy related thereto[.]"

Nothing in the record supports an allegation that Donnaleah was subjected to sexual harassment or sexual assault by Defendants. Moreover, Donnaleah's allegation that she was denied workers' compensation benefits because of her sex is not an exception to the exclusivity of HRS § 386-5. Therefore, Donnaleah has not overcome the obstacle of the exclusivity of HRS § 386-5.

CONCLUSION

Accordingly, we affirm the June 8, 2001 Final Judgment.

DATED: Honolulu, Hawai‘i, May 6, 2003.

On the briefs:

James Ireijo
for Plaintiffs-Appellants. Chief Judge

George W. Van Buren,
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John B. Shimizu
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Associate Judge