

CONCURRING OPINION BY ACOBA, J.

I concur in the majority's conclusion that the bad faith claim of Petitioners/Plaintiffs-Appellants/Cross-Appellees Bang Ja Guajardo and Richard Guajardo (Petitioners) should not have been disposed of on summary judgment, and must be remanded. However, I respectfully disagree that, on remand, the Petitioners are limited to proving that they suffered actual damages in order to prevail on the bad faith claim.

The majority quotes Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawai'i 309, 320, 47 P.3d 1222, 1233 (2002), for the proposition that "in order to maintain a claim for relief grounded in fraud or deceit, the plaintiff must have suffered substantial actual damage, not nominal or speculative." Majority opinion at 26 (brackets omitted). This rule related to the Picos' claims that Cutter Dodge had committed negligent misrepresentation and fraud in advertising the sales price of a vehicle. Zanakis-Pico, 98 Hawai'i at 320, 47 P.3d at 1233. As to this matter, the majority in Zanakis-Pico concluded that the three to five dollars the plaintiffs estimated they had spent in responding to the allegedly misleading advertisement amounted to "substantial actual damage[s]" on which a fraud claim could be based. Id.

In my concurring opinion in Zanakis-Pico, it was concluded that nominal damages would be sufficient to sustain a cause of action for fraud. Id. at 330, 47 P.3d at 1243 (Acoba,

J., concurring) (stating that, "[a]s to the Picos' fraud allegation, nominal damages, properly defined, . . . may be a basis for punitive damages in fraud actions, because the aim of punitive damages is to punish the defendant, rather than to compensate the plaintiff"). That opinion noted that the Picos had inaccurately described their actual damages (the money they had spent on gasoline) as "nominal" damages. Id. at 326-27, 47 P.3d at 1239-40 (Acoba, J., concurring). It was explained that minimal compensatory damages, such as those claimed by the Picos, must be distinguished from nominal damages, which are a token payment awarded for a technical violation that does not result in actual damages. Id. at 327-30, 47 P.3d at 1239-43 (Acoba, J., concurring).

The proper definitions of categories of damages is critical because "in some cases" inaccurately referring to actual damages as nominal damages could "have dramatic effects on the ability to recover damages[.]" Id. at 327, 47 P.3d at 1240 (Acoba, J., concurring). However, this caution was not applicable to the Picos insofar as a claim for fraud could be premised on minimal compensatory as well as nominal damages. See id. at 330, 47 P.3d at 1243 (Acoba, J., concurring) (positing that, related to the Picos' fraud claim, punitive damages could be awarded in addition to nominal damages).

In the instant case, the majority concludes that there was a genuine issue of material fact as to whether the

Petitioners suffered actual damages as a result of the delay in settling their claim. Majority opinion at 25. However, I respectfully disagree that on remand, the Petitioners are limited to recovery based on proof of actual damages in order to prevail on the bad faith claim. To the contrary, I would hold that their bad faith claim can also proceed if based on nominal damages. Cf. Zanakis-Pico, 98 Hawai'i at 330, 47 P.3d at 1243 (Acoba, J., concurring).

A handwritten signature in black ink, appearing to read "Acoba", is written in a cursive style.