

Wong v. Hawaiian Airlines, Inc.

Supreme Court of Hawai'i

March 30, 2016, Decided; March 30, 2016, Filed

SCWC-13-0000703

Reporter

137 Haw. 258; 2016 Haw. LEXIS 78; 369 P.3d 841

GENE WONG, Petitioner/Plaintiff-Appellant,
Cross-Appellee, vs. HAWAIIAN AIRLINES,
INC., Respondent/Defendant-Appellee,
Cross-Appellant.

Prior History: **[**1]** CERTIORARI TO THE
INTERMEDIATE COURT OF APPEALS.
CAAP-13-0000703; CIV NO. 11-1-2459.

Wong v. Hawaiian Airlines, Inc., 133 Haw. 447,
329 P.3d 352, 2014 Haw. App. LEXIS 248 (Haw.
Ct. App., 2014)

Case Summary

Overview

HOLDINGS: [1]-45 U.S.C.S. § 153 of the Railroad Labor Act (RLA) did not preempt petitioner airline employee's negligence and negligent misrepresentation claims against respondent employer for giving incorrect Medicare information because nothing showed the claims were not independent of the employee's CBA with the employer, and the CBA's contemplation that the employer's medical coverage would be coordinated with Medicare benefits was not dispositive of an RLA preemption determination since, if the employer owed the employee a duty under the CBA, he was not foreclosed from bringing state law claims independent of the CBA; [2]-The employer was entitled to summary judgment dismissing the employee's deceptive trade practice claim under Haw. Rev. Stat. § 480-1 because the alleged conduct did not occur in the conduct of any trade or commerce.

Outcome

Judgment vacated in part, affirmed in part.

Counsel: R. Steven Geshell, for petitioner.

C. Michael Heihre and Allison Mizuo Lee, for respondent.

Judges: RECKTENWALD, C.J., McKENNA, POLLACK, AND WILSON, JJ., AND NAKAYAMA J., CONCURRING AND DISSENTING.

Opinion by: Richard W. Pollack

Opinion

[*260] OPINION OF THE COURT BY POLLACK, J.

This case involves claims brought by a retired employee against his former employer for allegedly providing inaccurate information regarding the late enrollment penalty that applies to Medicare Part B. The circuit court granted summary judgment in favor of the employer concluding that the retiree's negligent and negligent misrepresentation claims were preempted by federal law, and the Intermediate Court of Appeals affirmed the summary judgment on appeal. We conclude that the record in this case does not support federal preemption of the negligent and negligent misrepresentation claims.¹

I. BACKGROUND

¹ We also consider the circuit court's granting of summary judgment on Wong's unfair or deceptive practice claim on grounds other than preemption and the circuit court's award of costs.

Gene Wong was employed as a pilot by Hawaiian Airlines, Inc. (HAL) until he retired at the [**2] mandatory retirement age of sixty in 1996. Upon retiring, Wong became eligible to receive medical insurance paid for by HAL. HAL is obligated to provide retired [*261] pilots with medical coverage pursuant to a collective bargaining agreement between HAL and the Airline Pilots Association (Pilots Agreement). The Pilots Agreement contemplates coordination of the plan benefits provided by HAL with Medicare benefits:²

The Company shall continue to provide the medical, dental, drug and vision coverage in effect as of . . . the date of . . . Normal Retirement under the Retirement Plan for Pilots of Hawaiian Airlines, Inc. and such pilot's spouse until age sixty-five (65) at which time the Company shall provide coverage, which when coordinated with Medicare benefits, shall maintain the benefits to which the pilot would have been entitled to had s/he not retired.

When Wong became eligible for Medicare Part B in 2001, he consulted with HAL's Director [**3] of Employee Benefits and Compensation about whether or not he should enroll in Medicare Part B. Wong consulted with the benefits director regarding Medicare in part because the Medicare documents he received instructed him to contact his former employer's human resources department.³ Wong alleges that the employee benefits director advised him that he did not need to enroll in Medicare Part B because HAL would provide him with his primary medical insurance and "he could switch without penalty later."

Wong contacted HAL's benefits director in 2010 when his wife became eligible for Medicare Part

B coverage; his email to the director states the following:

If for some reason; I lose my medical, you mentioned that I would be able to enroll into the Medicare program without the penalty for both parts A & B since I was previously covered under an equal or better program. The Social Security is telling me that I should hold a letter that states my existing coverage is equal or better than Medicare and should I [**4] lose it, I can produce, that letter to allow myself and spouse to enroll in their program without the penalties

Wong also met with the director to discuss Medicare, at which time he asked for her assistance in enrolling in Medicare Part B. Wong requested that the benefits director write a letter for him to assist him in signing up for Medicare Part B. Wong received a letter from the director confirming that she provided Wong with inaccurate information regarding Medicare:

This is to confirm that we provided you with some incorrect information regarding Medicare when you turned 65. I've completed forms for Medicare in the past that requested cancelation data so that people could apply for Medicare at a delayed point in time when their group coverage was canceled. Since you will remain qualified for full coverage under our HMSA plan for your lifetime, we told you that if at some point in time your plan was canceled, we would be able to provide you with the necessary information in order to avoid the late enrollment penalty. I now know that this was incorrect.

² "Medicare is the federal health insurance program for people who are 65 or older. . . . Part B covers certain doctors' services, outpatient care, medical supplies, and preventive services." Medicare.gov, *What is Medicare?*, <https://www.medicare.gov/sign-up-change-plans/decide-how-to-get-medicare/whats-medicare/what-is-medicare.html> (last visited Oct. 26, 2015).

³ Upon retiring, Wong received a summary of his retiree benefits from HAL that provided a telephone number that retirees could call should they have any questions regarding their benefits.

Please see if Social Security is able to waive the late enrollment penalty because of the misinformation that you were provided. [**5]

The employee benefits director wrote the letter with the understanding that the letter would serve as proof for Wong to avoid the late enrollment penalty in enrolling in Medicare.

Wong claims that, as a result of the misinformation he received from the benefits director, he did not complete the necessary forms to enroll in Medicare Part B coverage in 2001 through March of 2010.⁴ Wong [*262] brought claims of negligence, negligent misrepresentation, and unfair or deceptive practice (UDAP) against HAL in the Circuit Court of the First Circuit (circuit court). Wong's complaint alleged that HAL "had a fiduciary, statutory, and common law duty" to provide Wong "with reasonably accurate Medicare retirement information." Wong also alleged that HAL had a duty to supply Wong with correct information regarding whether he should choose to have HAL's medical plan or Medicare Part B as his primary health care insurer. Wong contended that HAL's conduct in providing him incorrect information regarding Medicare Part B constituted an unfair or deceptive trade practice pursuant to Chapter 480 of the Hawai'i Revised Statutes (HRS), which financially injured him. Wong asserted that he suffered over \$286,846.72 in damages as a result of the inaccurate information [**6] provided by HAL.⁵

HAL moved for summary judgment arguing, *inter alia*, that Wong's claims for negligence and

negligent misrepresentation failed because HAL did not owe Wong a duty of care relating to information regarding Medicare.⁶ The circuit court denied HAL's motion for summary judgment in part because the court found that there were genuine issues of material fact as to whether HAL owed Wong a duty.⁷

HAL later filed a second motion for summary judgment arguing that Wong's negligence claims were preempted by federal law. HAL argued that Wong's negligence claims were preempted by the Railroad Labor Act (RLA) because any duty HAL owed to Wong would be derived from HAL's obligations to retired pilots under the Pilots Agreement. In support of its motion, HAL maintained that it was obligated to provide Wong with medical benefits to be coordinated with Medicare under the Pilots Agreement. HAL also maintained that any obligation to provide information about health benefits would flow from its duty to provide such benefits under the Pilots Agreement. With regard to Wong's UDAP claim, HAL argued that the claim failed because the alleged conduct did not occur "in the conduct of any trade or commerce" as required by HRS Chapter 480.

Wong maintained that his negligence and negligent misrepresentation claims had no relation to the Pilots Agreement and that "torts like this are independent of the contract." In response to HAL's arguments regarding [**8] the UDAP claim, Wong argued that HAL "was engaged in transportation business, and part of that business was providing information to its retirees."

⁴ Wong was not enrolled in Medicare Part B when he filed his complaint on October 18, 2011. He later enrolled in Medicare on January 31, 2012. Wong indicated that beginning on July 1, 2012, his monthly Medicare premium of \$239.80 would be deducted from his Social Security check; this premium included \$99.90 for late filing surcharges for Medicare Part B.

⁵ Wong specifically asserted the following: "(a) \$286,846.72 based on calculated incremental increases each year for Medicare Part B coverage; (b) an additional adjustment for inflation and increases in the cost of Medicare in an amount to be computed and proven at trial; and (c) interest at the rate of ten percent (10%) from March 1, 2010."

⁶ In arguing that HAL owed him a duty of care, Wong cited to an HMSA brochure instructing that more information [**7] regarding the Medicare coordination rules could be obtained by "contact[ing] your employer or the Centers for Medicare & Medicaid Services."

⁷ The Honorable Karl K. Sakamoto presided.

The court granted HAL's second motion for summary judgment, concluding that Wong's negligence and negligent misrepresentation claims were preempted by the RLA. The court also ruled in favor of HAL on the UDAP claim because the alleged unfair or deceptive act did not occur in "the conduct of any trade or commerce." The circuit court's June 6, 2013 Final Judgment included an award of costs in the amount of \$11,855.30 in favor of HAL.

Wong appealed the circuit court's order granting HAL's second motion for summary judgment and the court's Final Judgment to the Intermediate Court of Appeals (ICA), Wong argued that his negligence claims are independent of the Pilots Agreement and "there is no need to interpret the contract in this case" with regard to his claims. HAL responded that "[w]hen negligence claims are premised on actions taken by an employer pursuant to CBA⁸-imposed duties, resolution of negligence claims often requires interpretation of the CBA to evaluate the reasonableness [*263] of the employers actions." HAL asserted that "Wong cannot avoid the [**9] RLA's mandatory arbitral mechanism by omitting references to the Pilots Agreement in his Complaint and by characterizing HAL's actions solely by reference to state-law torts."

The ICA affirmed the circuit court's granting of HAL's second motion for summary judgment. The ICA concluded that Wong's negligence claims were preempted by the RLA because HAL's duty to Wong arose from its duties under the Pilots Agreement. In reaching this conclusion, the ICA's analysis seems to assume that HAL's duty to Wong under the Pilots Agreement was to act with reasonable care to ensure that its representatives did not provide him with misinformation about retirement benefits. The ICA also concluded that it was not error for the circuit court to dismiss Wong's UDAP claim because HAL's provision of medical coverage information to Wong did not

occur in a "business context." Additionally, the ICA affirmed the circuit court's grant of costs to HAL.

Wong filed an Application for Writ of Certiorari requesting that this court review the ICA Judgment on Appeal. Wong contends that the ICA erred in holding that his negligence and negligent misrepresentation claims [**10] were preempted by the RLA, in holding that his UDAP claim failed because the claim did not occur in the conduct of trade or commerce, and in affirming taxation of costs.

With regard to the RLA preemption determination, Wong argues that he "alleged and proved facts supporting his negligence and negligent misrepresentation claims against" HAL. Wong maintains that these state law claims are independent of the Pilots Agreement, do not involve interpretation of the agreement, and therefore they are not preempted by the RLA. Wong contends that HAL owed him a "duty to act reasonably under the facts and circumstances of this case." He asserts that Hawai'i courts recognize the tort of negligent misrepresentation as set forth in the Restatement Second of Torts "particularly where [the defendant] undertook to misinform Plaintiff."

Wong also contends that the ICA's holding that the alleged conduct did not occur in trade or commerce is flawed and that the Court was clearly in error in granting summary judgment upon his UDAP claim.

HAL maintains that the ICA did not err in affirming the circuit court's granting of summary judgment in favor of HAL on Wong's negligence claims. HAL argues that "any duty [**11] owed by HAL to provide information to Wong about Medicare Part B penalties and its interaction with the medical coverage provided by HAL arose from and was intertwined with HAL's

⁸ "CBA" refers to a collective bargaining agreement.

CBA-obligation to provide medical coverage to retired pilots.” HAL also argues that “the ICA correctly recognized that Wong’s negligence-based claims were not independent of the CBA, but rather, they did arise from CBA-imposed duties to provide benefits to retired pilots.”

HAL asserts that the ICA did not err in granting the motion for summary judgment on Wong’s UDAP claim because “the transaction upon which this claim is based did not occur ’in the conduct of any trade or commerce.’” HAL asserts that the ICA’s ruling “is consistent with the decisions of many other courts examining statutes similar to HRS § 480-2, which have held that ’[d]isputes arising out of the employer-employee relationship do not meet the trade or commerce requirement.’”

II. STANDARD OF REVIEW

“An award of summary judgment is reviewed de novo under the same standard applied by the circuit court.” *Omerod v. Heirs of Kaheananui*, 116 Hawai’i 239, 254, 172 P.3d 983, 998 (2007) (quoting *Taniguchi v. Ass’n of Apartment Owners of King Manor, Inc.*, 114 Hawai’i 37, 46, 155 P.3d 1138, 1147 (2007)). In considering a motion for summary judgment, the court “must view all of the evidence and the inferences drawn therefrom in the light most favorable to [**12] the party opposing the motion.” *Id.* (quoting *Taniguchi*, 114 Hawai’i at 46, 155 P.3d at 1147).

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact [*264] and that the moving party is entitled to judgment as a matter of law. A fact is material if proof of that fact would have the effect of establishing or refuting one of the essential elements of a cause of action or defense asserted by the parties.

Id. (alteration omitted) (quoting *Taniguchi*, 114

Hawai’i at 46, 155 P.3d at 1147).

III. DISCUSSION

A.

Wong contends that his negligence and negligent misrepresentation claims against HAL are not preempted by the RLA. “The RLA . . . sets up a mandatory arbitral mechanism to handle disputes ’growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.’” *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994) (quoting 45 U.S.C. § 153), *aff’g Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 648, 847 P.2d 263 (1993), *pursuant to* 74 Haw. 235, 842 P.2d 634; *see also* 45 U.S.C. § 153(i) (2006). The United States Supreme Court articulated the preemption standard that applies under the RLA in *Hawaiian Airlines, Inc. v. Norris*: “that a state-law cause of action is not pre-empted by the RLA if it involves rights and obligations that exist independent [**13] of the [collective bargaining agreement].” 512 U.S. at 260. Thus, “where the resolution of a state-law claim depends on an interpretation of the [collective bargaining agreement], the claim is pre-empted.” *Id.* at 261. The Court observed, “however, that ’purely factual questions’ about an employee’s conduct or an employer’s conduct and motives do not ’requir[e] a court to interpret any term of a collective-bargaining agreement.’” *Id.* (quoting *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988)).

The issue in *Norris* was whether an aircraft mechanic who claimed that he was discharged for refusing to certify the safety of a plane that he considered unsafe could pursue available state law remedies for wrongful discharge. *Id.* at 248. The aircraft mechanic in *Norris* initially challenged his discharge under a collective bargaining agreement governing his employment; the

agreement guaranteed that an employee may only be discharged for just cause and may not be disciplined for refusing to perform work in violation of safety laws. Id. at 250. After appealing his grievance to a step three grievance hearing, the employer offered to reduce the mechanic's punishment to suspension without pay. Id. The mechanic did not respond to the offer or further pursue his claim through the grievance procedures, and [**14] he later filed suit against his employer in Hawai'i state court alleging wrongful discharge under Hawai'i law. Id.

The Norris Court held that the RLA did not preempt the wrongful discharge claim. 512 U.S. at 248. Norris adopted the preemption framework applied to the Labor Management Relations Act (LMRA) in Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399, 108 S. Ct. 1877, 100 L. Ed. 2d 410 (1988). The relevant question under Lingle, the Court explained, is whether the state law claims are independent of the collective bargaining agreement. Norris, 512 U.S. at 266. The Court concluded that the aircraft mechanic's state law claims were not preempted by the RLA because "whether the employer's actions make out the elements of discharge under Hawaii law--is a 'purely factual question[n].'" Id. (alteration in original) (quoting Lingle, 486 U.S. at 407).

Accordingly, under Norris, a state law claim is preempted by the RLA if the resolution of the claim requires interpretation or application of a collective bargaining agreement. This same standard was applied in United Steelworkers of America v. Rawson, 495 U.S. 362, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990). Although the Rawson decision was not cited by the Court's later decision in Norris, it provides a useful illustration of the application of LMRA preemption of a state claim that is simply seeking to enforce

a collective bargaining agreement. Rawson involved wrongful death actions brought against [**15] a union by the survivors of four miners who were killed in an underground [*265] fire. 495 U.S. at 364. The complaint included a negligence claim that the miners' deaths were caused by their union's negligence.

The plaintiffs in Rawson specifically relied on the collective bargaining agreement in setting forth their negligence allegations. The complaint stated that the union "undertook to act as accident prevention representative and enforcer of an agreement negotiated between [sic] [the Union] on behalf of the deceased minors" and "undertook to provide representatives who inspected [the Sunshine Mine] and pretended to enforce the contractual accident prevention clauses." Id. at 364-65 (alterations in original). The United States Supreme Court concluded that the negligence claim could not be described as independent of the collective bargaining agreement because the "only possible interpretation" of the pleadings was that the union assumed the relevant duty under a collective bargaining agreement. Id. at 370-71.

The Rawson Court noted that a party may not evade the requirements of the LMRA "by relabeling their contract claims as claims for tortious breach of contract." 495 U.S. at 369 (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)). Thus, the plaintiffs in Rawson could not bring state [**16] negligence claims for the union's actions that were undertaken pursuant to the provisions of a collective bargaining agreement where "the agreement determined the nature and scope of the Union's duty."⁹ Id. at 371. The Court explained that the Union assumed the duty in accordance to a collective bargaining agreement

⁹ HAL quotes from the following passage from the Rawson opinion in which the Court contrasts the situation in Rawson with other possible circumstances:

This is not a situation where the Union's delegates are accused of acting in a way that might violate the duty of reasonable care owed to every [**17] person in society. There is no allegation, for example, that members of the safety

and, thus, the miners could not enforce the collective bargaining agreement through a state negligence claim:

If the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners. Clearly, the enforcement of that agreement and the remedies for its breach are matters governed by federal law.

Id. Hence, the Rawson decision demonstrates that RLA preemption applies where a plaintiff seeks to enforce a duty arising from a collective bargaining agreement through a state law claim.

Under the Court's preemption analysis, a [**18] state law claim is preempted by the RLA if the resolution of the claim requires interpretation or application of a collective bargaining agreement. Norris, 512 U.S. at 260; Rawson, 495 U.S. at 369. "The plaintiff's claim is the touchstone for this analysis; the need to interpret the [agreement] must inhere in the nature of the plaintiff's claim." Ward v. Circus Circus Casinos, Inc., 473 F.3d 994, 998 (9th Cir. 2007) (quoting Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 691 (9th Cir. 2001)). Accordingly, "[w]hen liability is governed by independent state law, the mere fact that a collective bargaining agreement will be consulted or referred in the course of [**266] state-law litigation does not require the claim to be

extinguished." *E.g.*, Casumpang v. ILWU, 94 Hawai'i 330, 343, n.14, 13 P.3d 1235, 1248, n.14 (2000) (citing Livadas v. Bradshaw, 512 U.S. 107, 122-26, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)). Additionally, a defense based on an agreement "is alone insufficient to require preemption." Ward, 473 F.3d at 998 (citing Caterpillar Inc. v. Williams, 482 U.S. 386, 398-99, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987)).

In this case, Wong has not relied on the Pilots Agreement in making out his claims for negligence and negligent misrepresentation. Wong's complaint alleged that HAL "had a fiduciary, statutory, and common law duty" to provide Wong "with reasonably accurate Medicare retirement information." Wong also alleged that HAL had a duty to supply Wong with correct information regarding whether he should choose to have HAL's medical plan or Medicare Part B as his primary health care insurer. Wong did not rely on the Pilots Agreement when [**19] discussing HAL's duty in his submissions to the circuit court or during the hearings on HAL's motions for summary judgment. Instead, in his memorandum in opposition to the first motion for summary judgment, Wong cited to an HMSA brochure instructing that more information regarding the Medicare coordination rules could be obtained by "contact[ing] your employer or the Centers for Medicare & Medicaid Services." Wong also referenced the Restatement, Second of Torts § 552, which imposes a duty on an employer in the course of business for negligent misrepresentation.

committee negligently caused damage to the structure of the mine, an act that could be unreasonable irrespective of who committed it and could foreseeably cause injury to any person who might possibly be in the vicinity.

Rawson, 495 U.S. at 371. The Rawson court determined that a duty created by a collective bargaining agreement cannot exist "independent of the collective bargaining agreement." See Rawson, 495 U.S. at 369; see also Stringer v. Nat'l Football League, 474 F. Supp. 2d 894, 908 (S.D. Ohio 2007) ("[T]he holding in Rawson was not dependent on a finding that the duty allegedly violated was owed only to the miners as opposed to 'every person in society.' Instead, the Court found that the wrongful death claim was preempted because '[i]f the Union failed to perform a duty in connection with inspection, it was a duty arising out of the collective-bargaining agreement signed by the Union as the bargaining agent for the miners.'" (second alteration in original) (quoting Rawson, 495 U.S. at 371)); Betty v. Brooks & Perkins, 446 Mich. 270, 521 N.W.2d 518, 525 (Mich. 1994) (explaining that the duty in Rawson "was owed only to union members by virtue of the terms of a collective bargaining agreement" rather than to "every current and prospective employee, regardless of union status").

Thus, there is nothing in the record to indicate that Wong's state law claims of negligence and negligent misrepresentation are dependent on the Pilots Agreement.

In its analysis, the ICA assumed that "Hawaiian's duty to act with reasonable care to ensure that its representatives do not provide misinformation about retirement benefits arose from its duties" under the Pilots Agreement. The ICA does not explain the origin for this conclusion, which is not found in the circuit court's findings. To the contrary, the circuit court specifically found that there were genuine issues of material fact as to whether HAL owed Wong a duty. Given that there are questions of material [**20] fact as to whether HAL owed Wong a duty, the record is insufficient for a reviewing court to make a determination regarding the question of duty as a matter of law.

More importantly, even assuming that HAL owed Wong a duty of care under the Pilots Agreement, it would not foreclose Wong from bringing his state law claims for negligence and negligent misrepresentation that are independent of the agreement. The United States Supreme Court has already rejected the proposition that the RLA and LMRA enable private parties to evade state law:

Of course, not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is preempted by § 301 or other provisions of the federal labor law Nor is there any suggestion that Congress, in adopting § 301, wished to give the substantive provisions of private agreements the force of federal law, ousting any inconsistent state regulation

Norris, 512 U.S. at 260 (alterations in original) (quoting Lueck, 471 U.S. 202, 211, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985)). Indeed, the Court in Norris did not accord any weight to the fact that the plaintiff in that case had the option to seek redress for his discharge through either the

grievance procedures of a collective bargaining agreement or in [**21] state court under state law claims. Norris, 512 U.S. at 250; see also Ward, 473 F.3d at 999 ("A state law claim is not preempted simply because it may require consideration of the same factual issues as a federal labor law." (citing Lingle, 486 U.S. at 410)).

By extension, HAL's argument that any duty HAL owed to Wong would be "intertwined with Hawaiian's duty to provide medical coverage to its retired pilots" is not demonstrated in the record before this court. HAL's emphasis on the Pilots Agreement's contemplation that HAL's medical coverage would be "coordinated with Medicare benefits" is not dispositive of the RLA preemption [**267] determination because, even if HAL owed Wong a duty under the Pilots Agreement, Wong is not foreclosed from bringing state law claims that are independent of the agreement. Additionally, HAL suggests that, because it is obligated to provide medical coverage under the Pilots Agreement, "any information supplied by Hawaiian would be provided in connection with its duty." Thus, HAL seems to suggest that, by virtue of its contractual obligation to provide medical coverage, it is insulated from all state law claims with regard to their providing of "information" to retired pilots. However, such an understanding of RLA preemption [**22] would give "private agreements the force of federal law," Norris, 512 U.S. at 260 (quoting Lueck, 471 U.S. at 211), allowing circumvention of state law through the collective bargaining process.

In summary, there is nothing in the record to demonstrate that Wong's negligence and negligent misrepresentation claims are not independent of the Pilots Agreement, and, thus, HAL has not sustained its burden to establish that Wong's negligence and negligent misrepresentation claims are preempted by the RLA. See Casumpang, 94 Hawai'i at 340, 13 P.3d at 1245 (describing the defense's burden to establish preemption). Thus,

the ICA and the circuit court erred in finding that Wong's negligence and negligent misrepresentation claims are preempted by the RLA.¹⁰ In light of our ruling, we also vacate the circuit court's award of costs in favor of HAL and the ICA affirmance of the award.

B.

HRS § 480-2 (2008) declares that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful." The purpose of the prohibition on unfair methods of competition and unfair or deceptive acts or practices is to "enjoin unfair [**24] and deceptive practices by which consumers are defrauded and the economy of the state are harmed." H. Stand. Comm. Rep. No. 55, in 1965 House Journal, at 538; *see also Cieri v. Leticia Query Realty, Inc.*, 80 Hawai'i 54, 65, 905 P.2d 29, 40 (1995) ("[T]he legislative history to §§ 480-2 and 480-13 makes clear that the paramount purpose of both statutes is to prevent deceptive practices by businesses that are injurious to other businesses and consumers." (emphasis omitted) (quoting *Beerman v. Toro Mfg. Corp.*, 1 Haw. App. 111, 118, 615 P.2d 749, 754 (1980))).

This court has held that "in order to fall within the purview of HRS Chapter 480, a claim for alleged

unfair and deceptive acts or practices . . . must stem from a transaction involving 'conduct in any trade or commerce.'" *Cieri*, 80 Hawai'i at 65, 905 P.2d at 40; *see Haw. Cmty. Fed. Credit Union v. Keka*, 94 Hawai'i 213, 227, 11 P.3d 1, 15 (2000) (construing *Cieri*). Whether an act or practice occurs in the "conduct of any trade or commerce" depends on whether or not the act or practice is perpetrated in a "business context." *Cieri*, 80 Hawai'i at 63, 905 P.2d at 40. The question of whether a transaction occurs within a "business context" is determined "on a case-by-case basis [**268] by an analysis of the transaction."¹¹ *See Cieri*, 80 Hawai'i at 65, 905 P.2d at 40.

The *Cieri* court cited approvingly of Massachusetts case law identifying six factors to aid courts in determining whether a transaction took place in a "business context":

- (1) the nature of the transaction;
- (2) the character of the parties involved;
- (3) the activities engaged in by the parties;
- (4) whether similar transactions had been undertaken in the past;
- (5) whether the transaction was motivated by business or for personal reasons . . . ; and
- (6) whether the participant played an active part in the transaction.

¹⁰ The minority suggests that it is necessary for the court to first determine Wong has a "viable" state claim before determining whether Wong's claim is preempted by the RLA. *See* minority at 5-6. Instead, under the preemption analysis of the Supreme Court, a state law claim is preempted by the RLA if the resolution of the claim requires interpretation or application of a collective bargaining agreement. *Norris*, 512 U.S. at 260; *Rawson*, 495 U.S. at 369 (articulating [**23] the federal preemption analysis). As the minority acknowledges, "Wong asserts only a common law right not to receive false information negligently, which he claims is not based on the CBA . . ." Minority at 3. Therefore, the minority's conclusion that "Wong's claim is preempted," minority at 2, is erroneous.

The minority also concludes "as a matter of law that, state law does not impose the duty of care on HAL that Wong asserts in this case." Minority at 6. As previously stated, the circuit court found genuine issues of material fact as to whether HAL owed Wong a duty. While the minority references the Restatement (Second) of Torts § 552, the comments to this section provides a possibly relevant explanation of this section. Restatement (Second) of Torts § 552 cmt. d. (1977) (recognizing that a defendant's pecuniary interest normally lies in a consideration paid for the transaction and that "[i]t may, however, be of a more indirect character"). However, we do not address whether HAL owed a duty to Wong under state law.

¹¹ Evaluating the transaction on a case-by-case basis is consistent with the broad language of HRS § 480-2. In adopting such a broad prohibition on unfair and deceptive acts, the legislature recognized that it would be impractical to enact laws fully defining the various practices [**25] it sought to prohibit. H. Stand. Comm. Rep. No. 55, *supra*. "It is also practically impossible to define unfair practices so that the definition will fit business of every sort Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case. What is harmful under certain circumstances may be beneficial under different circumstances." *Id.* (quoting House Report No. 1142, 63d Congress, 2d Sess., September 4, 1914, at page 19).

Id. at 63, 905 P.2d at 38 (citing Begelfer v. Najarian, 381 Mass. 177, 409 N.E.2d 167, 176 (Mass. 1980)). It is noted that the Cieri decision does not require consideration of any or all of these factors, and it does not limit the court to a consideration of only these six factors.

Wong alleged [**26] in his complaint that HAL's conduct in providing him incorrect information regarding Medicare Part B constituted a deceptive trade practice. Wong further contended that he "is a consumer within the meaning of HRS § 480-1, in that he committed money in a personal investment." He also maintained, "The misrepresentation by Defendant was material to Plaintiff's decision to not choose Medicare Part B as opposed to remaining with the Defendant's current and existing Pilots' group insurance plan with HMSA." In light of the summary judgment evidentiary record, and applying the criteria listed above, the circuit court and the ICA did not err in concluding that the alleged conduct did not occur in "the conduct of any trade or commerce."

IV. CONCLUSION

Accordingly, the ICA's June 25, 2014 Judgment on Appeal is vacated to the extent that it affirms the circuit court's granting of summary judgment in favor of HAL on Wong's negligence and negligent misrepresentation claims and the granting of HAL's motion for taxation of costs. The ICA's Judgment on Appeal is affirmed to the extent that it affirms the circuit court's granting of summary judgment in favor of HAL on Wong's UDAP claim. Additionally, the circuit [**27] court's April 10, 2013 "Order Granting Defendant Hawaiian Airlines, Inc.'s Motion for Summary Judgment, Filed January 29, 2013" and the June 6, 2013 Final Judgment are vacated except with regard to the granting of summary judgment in favor of HAL on Wong's UDAP claim. The case is remanded to the circuit court for further proceedings consistent with this opinion.

/s/ Mark E. Recktenwald

/s/ Sabrina S. McKenna

/s/ Richard W. Pollack

/s/ Michael D. Wilson

Concur by: Paula A. Nakayama

Concur

CONCURRING AND DISSENTING OPINION BY NAKAYAMA, J.

I concur with the Majority's conclusion that Wong's Unfair or Deceptive Acts and or Practices (UDAP) claim fails. However, I respectfully dissent from the Majority's conclusion that Wong's negligence or negligent misrepresentation claim is not preempted by the Railroad Labor Act (RLA). Although I agree that the RLA does not preempt state law claims that are independent of the collective bargaining agreement entered into by HAL and the Airline Pilots Association (the CBA or Pilots Agreement), Wong fails to raise any independent state law claims. There is no statute or case law that imposes a legal duty on HAL to provide Wong with reasonably accurate Medicare retirement information. [**28] Therefore, because the only other possible source of such a legal duty would be the CBA, Wong's claim is preempted.

In Hawaiian Airlines, Inc. v. Norris, the United States Supreme Court laid out the standard used to determine whether a state law claim is preempted by the RLA. 512 U.S. 246, 266, [*269] 114 S. Ct. 2239, 129 L. Ed. 2d 203 (1994). The court held that a state law claim is not preempted if it is independent of a collective bargaining agreement. Id. The court determined that Norris's state law claim for wrongful discharge was not preempted because

the CBA is not the 'only source' of [Norris]'s right not to be discharged wrongfully. In fact, the 'only source' of the right [Norris] asserts in this action is state tort law. Wholly apart

from any provision of the CBA, [Hawaiian Airlines] had a state-law obligation not to fire [Norris] in violation of public policy or in retaliation for whistle-blowing.

Id. at 258. In other words, the court looked for the source of the right Norris was claiming and held that the claim was not preempted because Norris asserted a state tort law action based on an independent obligation imposed on HAL by state law.

The Majority writes that “Wong has not relied on the Pilots Agreement in making out his claims for negligence and negligent [**29] misrepresentation. . . . [T]here is nothing in the record to indicate that Wong’s state law claims of negligence and negligent misrepresentation are dependent on the Pilots Agreement.” However, although Wong asserts only a common law right not to receive false information negligently, which he claims is not based on the CBA, this case is distinguishable from *Norris* because HAL did not have a state law obligation to use reasonable care in providing Wong with Medicare information.

Wong specifically relies on Restatement (Second) of Torts § 552 and this court’s decision in *State ex rel. Bronster v. U.S. Steel Corp.*, 82 Hawai’i 32, 919 P.2d 294 (1996), to support his state law claim for negligent misrepresentation. The tort of negligent misrepresentation, as framed by Restatement (Second) of Torts § 552, was adopted by this court in *Chun v. Park*, 51 Haw. 462, 462 P.2d 905 (1969), and reads in pertinent part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business

transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(emphasis added).

In *Bronster*, this court clarified that the [**30] tort did not apply only to those in the business of supplying information for the guidance of others, and “the central principle operating within section 552 is that the defendant supplier of information must have a pecuniary interest in the transaction or context in which the information is supplied in order to merit the imposition of a duty of care in obtaining and communicating the information.” 82 Hawai’i at 45-46, 919 P.2d at 307-08 (emphasis added). This court then held that there were two ways to meet this requirement: 1) “[t]he information may be supplied by one whose business it is to provide information -- such as accountants, attorneys or title companies, who provide information for a price, and for the guidance of others in their transactions with third parties[.]” and 2) the defendant otherwise has an actual pecuniary interest in the transaction in which he or she supplies the information. *Id.* at 46, 919 P.2d at 308.

Thus, this court has clearly limited the duty to exercise reasonable care to suppliers of information 1) who provide that information for a price or 2) who have a pecuniary interest in supplying the information.¹ HAL does not provide information about insurance plans or Medicare for a price, and it does not [*270] have a pecuniary interest in supplying [**31] this information to its former employees. Therefore, HAL is not a supplier of information that has a duty to exercise

¹ See *Bronster*, 82 Hawai’i 32, 919 P.2d 294 (claim asserted against supplier of steel for representations made regarding suitability of its product); *Chun*, 51 Haw. 462, 462 P.2d 905 (action by buyers against title company for negligence in preparation of certificate of title); *Kohala Agric. v. Deloitte & Touche*, 86 Hawai’i 301, 949 P.2d 141 (App. 1997) (accountant may be held liable by third parties for negligence in preparation of audit report); *Shaffer v. Earl Thacker Co.*, 6 Haw. App. 188, 716 P.2d 163 (1986) (real estate brokers could be held liable to purchaser for tort of negligent misrepresentation).

reasonable care and cannot be held liable for negligent misrepresentation under state law.

Wong asserts that HAL had a duty to use reasonable care in providing information to him because it took on the task of providing him information that turned out to be wrong. However, as stated above, this court's interpretation and application of Restatement (Second) of Torts § 552 does not impose such a duty on a former employer even if it undertakes the task of providing information to its former employees, unless it has a pecuniary interest in doing so. Moreover, Wong has failed to raise any other state law that imposes such a duty on HAL. Wong thus fails to assert an independent state law claim. Wong's failure to [**32] cite to or rely on the CBA as the source of HAL's duty does not necessarily establish that there is a state law claim that would be actionable and not preempted by the RLA.

The Majority declines to address whether HAL owed Wong a duty of care under state law and asserts that "the record is insufficient for a reviewing court to make a determination regarding the question of duty as a matter of law." However, "a negligence action lies only where there is a duty owed by the defendant to the plaintiff." Bidar v. Amfac, Inc., 66 Haw. 547, 551, 669 P.2d 154, 158 (1983). Under the Norris standard, the existence of an independent state law action is

necessary to a finding that a dispute is not preempted by the RLA. Thus, it is unclear how the Majority arrives at its conclusion without first determining that there is an independent state law source for Wong's claims.

Furthermore, although a question regarding whether a duty of care was breached is a question of fact, the question of whether a duty of care exists is a question of law. Bidar, 66 Haw. at 552, 669 P.2d at 158 ("The existence of a duty, that is, 'whether . . . such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other — or, more simply, whether the interest of [**33] the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant,' is entirely a question of law." (internal citations omitted)). And as a matter of law, state law does not impose the duty of care on HAL that Wong asserts in this case. Because Wong does not assert a viable independent state law claim, the only other possible source of Wong's right to receive reasonably accurate Medicare information is the CBA, and any claim to such a right is preempted by the RLA.

Therefore, I dissent from the Majority's opinion and would affirm the ICA and circuit court on this issue.

/s/ Paula A. Nakayama