IN THE SUPREME COURT OF THE STATE OF HAWAI`I

In the Matter of the Publication and Distribution of the Hawai`i Standard Civil Jury Instructions	)

ORDER APPROVING PUBLICATION AND DISTRIBUTION OF THE HAWAI`I STANDARD CIVIL JURY INSTRUCTIONS

Upon consideration of the Civil Pattern Jury Instructions Committee's final draft of proposed Civil Jury Instructions (attached),

IT IS HEREBY ORDERED that the proposed Civil Jury Instructions appended hereto are approved for publication and distribution. The instructions shall be referred to as the "Hawai`i Civil Jury Instructions, 1999 edition."

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai`i, October 11, 1999.

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INSTRUCTION NO. 1.1

PRELIMINARY INSTRUCTIONS OF LAW

It is my duty to give you instructions about the law which applies to this case. Before I do this, I will read some preliminary instructions of law that may help you better understand the case.

You should consider these preliminary instructions together with all the other instructions of law I will give you. If there is any conflict between these preliminary instructions and instructions given at the end of the case, the instructions at the end will control.

INSTRUCTION NO. 1.2

JUROR NOTETAKING

You are allowed to take notes during the presentation of this case. The bailiff will give you note paper and a pen or pencil. You are not required to take notes.

If you choose to take notes, you must follow some important rules:

1. As you take notes, do not distract yourself or your fellow jurors from listening to the evidence.

2. Do not doodle on your note paper or let your notetaking take priority over your duty to pay attention to the witnesses. Do not permit your notetaking to interfere with your listening to the testimony, or with your observation of the witnesses while they testify because your observation of the witnesses is a means you will use to evaluate their honesty.

3. Do not take your notes outside this courtroom. When you leave the courtroom, leave your notes face down on your seat.

4. At the end of this case, when you leave this courtroom to retire to the jury deliberation room, take your notes with you into the jury room. When you leave the jury room during deliberations, leave your notes face down on the table.

5. Keep your notes to yourself. Do not show them to any other person.

6. If there is an inconsistency between your memory

of the evidence and what you have recorded in your notes, treat your memory of the evidence as accurate and controlling.

7. After you have reached a verdict, your notes will be collected by the bailiff and will be destroyed.

Notes are only for a juror’s personal use, to assist the juror in refreshing his or her memory of the evidence. Jurors who do not take notes should rely on their own memory of the evidence and should not be influenced by the fact that another juror has taken notes.

INSTRUCTION NO. 2.1

CONSIDERATION AND APPLICATION OF INSTRUCTIONS

MEMBERS OF THE JURY:

You have heard the evidence in this case. I will now instruct you on the law that you must apply.

You are the judges of the facts. It is your duty to review the evidence and to decide the true facts. When you have decided the true facts, you must then apply the law to the facts.

I will tell you the law that applies to this case. You must apply that law, and only that law, in deciding this case, whether you personally agree or disagree with it.

The order in which I give you the instructions does not mean that one instruction is any more or less important than any other instruction. You must follow all the instructions I give you. You must not single out some instructions and ignore others. All the instructions are equally important and you must apply them as a whole to the facts.

INSTRUCTION NO. 2.2

CONSIDER ONLY THE EVIDENCE

In reaching your verdict, you may consider only the testimony and the exhibits received in evidence.*
The following are not evidence and you must not consider them as evidence in deciding the facts of this case.

1. Attorneys' statements, arguments and remarks during opening statements, closing arguments, jury selection, and other times during the trial are not evidence, but may assist you in understanding the evidence and applying the law.

2. Attorneys' questions and objections are not evidence.

3. Excluded or stricken testimony or exhibits are not evidence and must not be considered for any purpose.

4. Anything seen or heard when the court was not in session is not evidence. You must decide this case solely on the evidence received at the trial.

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* When warranted, additional reference may also be made to jury views, site inspections, matters of judicial notice, and the like.

INSTRUCTION NO. 2.3

OBSERVATIONS AND EXPERIENCE

Even though you are required to decide this case only upon the evidence presented in court, you are allowed to consider the evidence in light of your own observations, experiences, and common sense. You may use your common sense to make reasonable inferences from the facts.

INSTRUCTION NO. 2.4

NO INDEPENDENT INVESTIGATION OR RESEARCH

You must not use any source outside the courtroom to assist you in deciding any question of fact. This means that you must not make an independent investigation of the facts or the law. For example, you must not visit the scene on your own, conduct experiments, or consult dictionaries, encyclopedias, textbooks, or other reference materials for additional information.

INSTRUCTION NO. 2.5

NO FAVORITISM, PASSION, PREJUDICE OR SYMPATHY

It is your duty and obligation as jurors to decide this case on the evidence presented in court and upon the law given to you.

You must perform your duty and obligation without favoritism, passion, or sympathy for any party in the case, and without prejudice against any of the parties.

INSTRUCTION NO. 2.6

NO DISCRIMINATION[**]

Your personal feelings about a party's race, color, religion, age, sex, sexual orientation, marital status, national origin, ancestry or disability are not a proper basis for deciding any issue of fact in this case. You must not allow any personal feelings which you may have about a party to influence your verdict.

[**] This instruction may need revision in cases involving claims of discrimination.

INSTRUCTION NO. 2.7

CONSIDERATION OF BUSINESS ENTITY PARTIES

You must not be prejudiced or biased in favor of or against a party simply because the party is a corporation or other business entity. You must treat business entities the same as you treat individuals. In this case, the [corporate/partnership] plaintiff(s)/defendant(s) is/are entitled to receive the same fair and unprejudiced treatment that an individual plaintiff/defendant would receive under similar circumstances.

INSTRUCTION NO. 2.8

MULTIPLE PARTIES

Each plaintiff in this case has separate and distinct rights. You must decide the case of each plaintiff separately, as if it were a separate lawsuit. Unless I tell you otherwise, these instructions apply to all of the plaintiffs.

Similarly, each defendant in this case has separate and distinct rights. You must decide the case of each defendant separately, as if it were a separate lawsuit. Unless I tell you otherwise, these instructions apply to all of the defendants.

INSTRUCTION NO. 2.9

REMARKS OF THE COURT

If any of these instructions, or anything I have said or done in this case makes you believe I have an opinion about the facts or issues in the case, the weight to be given to the evidence, or the credibility of any witness, then you must disregard such belief. It is not my intention to create such an impression. You, and you alone, must decide the facts of this case from the evidence presented in court and you must not be concerned about my opinion of the facts.

INSTRUCTION NO. 3.1

BURDEN OF PROOF

Plaintiff(s) has/have the burden of proving by a preponderance of the evidence every element of each claim that plaintiff(s) assert(s). Defendant(s) has/have the burden of proving by a preponderance of the evidence every element of each affirmative defense that defendant(s) assert(s). In these instructions, whenever I say that a party must prove a claim or affirmative defense, that party must prove such claim or affirmative defense by a preponderance of the evidence, unless I instruct you otherwise.

INSTRUCTION NO. 3.2

BURDEN OF PROOF -- RE NEGLIGENCE

Plaintiff(s) must prove by a preponderance of the evidence that defendant(s) was/were negligent and that such negligence was a legal cause of plaintiff's(s') injuries and/or damages. Plaintiff(s) must also prove the nature and extent of his/her/their injuries and/or damages.

Defendant(s) must prove by a preponderance of the evidence that plaintiff(s) was/were negligent and that such negligence was a legal cause of plaintiff's(s') injuries and/or damages.

INSTRUCTION NO. 3.3

PREPONDERANCE OF THE EVIDENCE

To "prove by a preponderance of the evidence" means to prove that something is more likely so than not so. It means to prove by evidence which, in your opinion, convinces you that something is more probably true than not true. It does not mean that a greater number of witnesses or a greater number of exhibits must be produced.

In deciding whether a claim, defense, or fact has been proven by a preponderance of the evidence, you must consider all of the evidence presented in court by both the plaintiff(s) and the defendant(s). Upon consideration of all the evidence, if you find that a particular claim, defense or fact is more likely true than not true, then such claim, defense, or fact has been proven by a preponderance of the evidence.

INSTRUCTION NO. 3.4

BURDEN OF PROOF -- RE DAMAGES WHERE FAULT ADMITTED[***]

In this case, defendant(s) has/have admitted fault for the incident. The burden is still on plaintiff(s) to prove that defendant's(s') conduct was a legal cause of injury to plaintiff(s), and to prove the nature and extent of any injury suffered.

Therefore, the only questions which you must decide are:

1. Was defendant's(s') conduct a legal cause of injury to plaintiff(s)?
2. If so, what amount of damages, if any, is/are plaintiff(s) entitled to as compensation for that injury?

[***] This instruction is intended for use in personal injury cases only.

INSTRUCTION NO. 3.5

BURDEN OF PROOF -- RE DAMAGES WHERE FAULT ADJUDICATED

In this case, the issue of fault has already been decided against defendant(s). The burden is still on plaintiff(s) to prove that defendant's(s') conduct was a legal cause of injury to plaintiff(s), and to prove the nature and extent of any injury suffered.

Therefore, the only questions which you must decide are:

1. Was defendant's(s') conduct a legal cause of injury to plaintiff(s)?
2. If so, what amount of damages, if any, is/are plaintiff(s) entitled to as compensation for that injury?

INSTRUCTION NO. 3.6

CLEAR AND CONVINCING EVIDENCE

The plaintiff/defendant has the burden of proving certain facts, claims or defenses by "clear and convincing evidence." To "prove by clear and convincing evidence" means to prove by evidence which, in your opinion, produces a firm belief about the truth of the allegations which the parties have presented. It means to prove that the existence of a fact is highly probable.

"Clear and convincing evidence" is a higher requirement of proof than the "preponderance of the evidence" requirement, but it is a lower requirement of proof than the "beyond a reasonable doubt" requirement in criminal cases.

INSTRUCTION NO. 4.1

STIPULATION

Where the attorneys for the parties have stipulated to a fact, you must consider the fact as having been conclusively proved.

INSTRUCTION NO. 4.2

DEPOSITION TESTIMONY

The testimony of a witness has been read into evidence from a deposition. A deposition is the testimony of a witness given under oath before the trial and preserved in written form.

You must consider and judge the deposition testimony of a witness in the same manner as if the witness actually appeared and testified in court in this trial.

INSTRUCTION NO. 4.3

ANSWERS TO INTERROGATORIES

Evidence has been presented in the form of written answers given by a party in response to written questions from another party. The written answers were given under oath by the party. The written questions are called "interrogatories."

You must consider and judge a party's answers to interrogatories in the same manner as if the party actually appeared and testified in court in this trial.

INSTRUCTION NO. 4.4

VIOLATION OF STATUTE OR ORDINANCE

The violation of a state or city law is evidence of negligence, but the fact that the law was violated is not sufficient, by itself, to establish negligence. The violation of the law must be considered along with all the other evidence in this case in deciding the issue of negligence.

Whether there was a violation of a state or city law is for you to determine.

INSTRUCTION NO. 4.5

TYPES OF EVIDENCE -- DIRECT AND CIRCUMSTANTIAL

There are two kinds of evidence from which you many decide the facts of a case: direct evidence and circumstantial evidence.

Direct evidence is direct proof of a fact, for example, the testimony of an eyewitness.

Circumstantial evidence is indirect proof of a fact, that is, when certain facts lead you to conclude that another fact also exists.

You may consider both direct evidence and circumstantial evidence when deciding the facts of this case. You are allowed to give equal weight to both kinds of evidence. The weight to be given any kind of evidence is for you to decide.

INSTRUCTION NO. 4.6

OBJECTIONS TO EVIDENCE

During the trial, I have ruled on objections made by the attorneys. Objections are based on rules of law designed to protect the jury from unreliable or irrelevant evidence. It is an attorney's duty to object when he or she believes that the rules of law are not being followed. These objections relate to questions of law for me to decide and with which you need not be concerned.

INSTRUCTION NO. 4.7

EVIDENCE ADMITTED FOR LIMITED PURPOSE

During this trial, I instructed you that certain testimony [and certain exhibits] was [were] received in evidence only for a limited purpose. I instructed you that you could consider some testimony [and some exhibits] as evidence against a certain party, but not against another party. You must follow those instructions. You must consider such evidence only for the limited and specific purpose for which it was received. You cannot consider it or use it for any other purpose.

INSTRUCTION NO. 4.8

JUDICIAL NOTICE

The Court may take judicial notice of certain facts. When the Court says that it takes judicial notice of some fact, the jury must accept that fact as conclusively proved.

INSTRUCTION NO. 5.1

WEIGHT OF EVIDENCE AND CREDIBILITY OF WITNESSES

You are the sole judges of the credibility of all witnesses who testified in this case. The weight their testimony deserves is for you to decide.

It is your exclusive right to determine whether and to what extent a witness should be believed and to give weight to that testimony according to your determination of the witness' credibility. In evaluating a witness, you may consider:

(a) the witness' appearance and demeanor on the witness stand;

(b) the manner in which a witness testified and the degree of intelligence shown;

(c) the witness' degree of candor or frankness;

(d) the witness' interest, if any, in the result of this case;

(e) the witness' relationship to either party in the case;

(f) any temper, feeling or bias shown by the witness;

(g) the witness' character as shown by the evidence;

(h) the witness' means and opportunity to acquire information;

(i) the probability or improbability of the witness' testimony;

(j) the extent to which the witness' testimony is supported or contradicted by other evidence;

(k) the extent to which the witness made contradictory statements; and

(l) all other circumstances affecting the witness' credibility.

Inconsistencies in the testimony of a witness, or between the testimonies of different witnesses, may or may not cause you to discredit the inconsistent testimony. This is because two or more persons witnessing an event may see or hear the event differently. An innocently mistaken recollection or failure to remember is not an uncommon experience. In examining any inconsistent testimony, you should consider whether the inconsistency concerns important matters or unimportant details. You should also consider whether inconsistent testimony is the result of an innocent mistake or a deliberate false statement.

INSTRUCTION NO. 5.2

DISCREDITED TESTIMONY

The testimony of a witness may be discredited by contradictory evidence or by evidence showing that at other times the witness made statements inconsistent with the witness' testimony in this trial.

If you believe that testimony of any witness has been discredited, you may give that testimony the degree of credibility you believe it deserves.

INSTRUCTION NO. 5.3

FALSE WITNESS

You may reject the testimony of a witness if you find and believe from all of the evidence presented in this case that:

1. The witness intentionally testified falsely in this trial about any important fact; or

2. The witness intentionally exaggerated or concealed an important fact or circumstance in order to deceive or mislead you.

In giving you this instruction, I am not suggesting that any witness intentionally testified falsely or deliberately exaggerated or concealed an important fact or circumstance. That is for you to decide.

INSTRUCTION NO. 5.4

EXPERT WITNESS

In this case, you heard testimony from witnesses described as experts. Experts are persons who, by education, experience, training or otherwise, have special knowledge which is not commonly held by people in general. Experts may state an opinion on matters in their field of special knowledge and may also state their reasons for the opinion.

The testimony of expert witnesses should be judged in the same manner as the testimony of any witness. You may accept or reject the testimony in whole or in part. You may give the testimony as much weight as you think it deserves in consideration of all of the evidence in this case.

INSTRUCTION NO. 5.5

OPINION OF DOCTOR

The opinion of a doctor concerning the condition of a patient may be based on observation, examination, tests or treatment of the patient, or on the patient's statements, or on both.

In deciding the weight to give the doctor's opinion, you may evaluate the patient's statements along with the findings of the doctor. The patient's statements may be evaluated in the same way you would judge the testimony of any witness.

INSTRUCTION NO. 5.6

INDEPENDENT MEDICAL EXAMINATION

In this case, the court rules allowed the plaintiff/defendant to retain the services of a doctor who conducted an examination of the plaintiff and/or reviewed the plaintiff's medical records.

The testimony of this doctor should be judged in this same manner as the testimony of any witness. You may give the testimony as much weight as you think it deserves in consideration of all the evidence in this case.

INSTRUCTION NO. 6.1

NEGLIGENCE DEFINED

Negligence is doing something which a reasonable person would not do or failing to do something which a reasonable person would do. It is the failure to use that care which a reasonable person would use to avoid injury to himself, herself, or other people or damage to property.

In deciding whether a person was negligent, you must consider what was done or not done under the circumstances as shown by the evidence in this case.

INSTRUCTION NO. 6.2

FORESEEABILITY

In determining whether a person was negligent, it may help to ask whether a reasonable person in the same situation would have foreseen or anticipated that injury or damage could result from that person's action or inaction. If such a result would be foreseeable by a reasonable person and if the conduct reasonably could be avoided, then not to avoid it would be negligence.

INSTRUCTION NO. 6.3

ALLOCATION OF NEGLIGENCE

You must determine whether any of the parties in this case were negligent and whether such negligence on the part of a party was a legal cause of plaintiff's(s') injuries/damages. If you find that at least one defendant was negligent and such negligence was a legal cause of the injuries/damages, you must determine the total amount of plaintiff's(s') damages, without regard to whether plaintiff's(s') own negligence was also a legal cause of the injuries/damages.

If you find that more than one party was negligent and the negligence of each was a legal cause of the injuries/damages, then you must determine the degree to which each party's negligence contributed to the injuries/damages, expressed in percentages. The percentages allocated to the parties must total 100%.

INSTRUCTION NO. 6.4

EFFECT OF COMPARATIVE NEGLIGENCE

If you find that plaintiff's(s') negligence is 50% or less, the Court will reduce the amount of damages you award by the percentage of the negligence you attribute to plaintiff(s).

If, on the other hand, you find that plaintiff's(s') negligence is more than 50%, the Court will enter judgment for defendant(s) and plaintiff(s) will not recover any damages.

INSTRUCTION NO. 6.5

EFFECT OF JOINT/SEVERAL LIABILITY

Any defendant found liable to plaintiff(s) to any degree may be required to pay his/her/its share of the judgment as well as the share of another/other liable defendant(s). Any defendant who pays more than his/her/its share of the judgment has the right to seek payment from another/other liable defendant(s) to the extent of the other liable defendant's(s') proportionate share of the judgment.[****]

[****] This instruction may require modification to comply with Hawaii Revised Statutes § 663-10.9 and relevant case law.

INSTRUCTION NO. 7.1

LEGAL CAUSE

An act or omission is a legal cause of an injury/damage if it was a substantial factor in bringing about the injury/damage.

One or more substantial factors such as the conduct of more than one person may operate separately or together to cause an injury or damage. In such a case, each may be a legal cause of the injury/damage.

INSTRUCTION NO. 7.2

SUPERSEDING CAUSE

A superseding cause is an act or force which relieves defendant(s) of responsibility for plaintiff's(s') injury/damage.

To be a superseding cause, an act or force must:

(1) occur after defendant's(s') conduct,

(2) be a substantial factor in bringing about the injury/damage to plaintiff(s),

(3) intervene in such a way that defendant's(s') conduct is no longer a substantial factor in bringing about the injury/damage, and

(4) not be reasonably foreseeable at the time defendant(s) acted or failed to act.

If the act or force was a normal consequence of the situation created by defendant's(s') conduct, then said act or force is not a superseding cause.

The conduct of plaintiff(s) cannot be a superseding cause.

INSTRUCTION NO. 7.3

PRE-EXISTING INJURY OR CONDITION

In determining the amount of damages, if any, to be awarded to plaintiff(s), you must determine whether plaintiff(s) had an injury or condition which existed prior to the [insert date of the incident] incident. If so, you must determine whether plaintiff(s) was/were fully recovered from the pre-existing injury or condition or whether the pre-existing injury or condition was latent at the time of the subject incident. A pre-existing injury or condition is latent if it was not causing pain, suffering or disability at the time of the subject incident.

If you find that plaintiff(s) was/were fully recovered from the pre-existing injury or condition or that such injury or condition was latent at the time of the subject incident, then you should not apportion any damages to the pre-existing injury or condition.

If you find that plaintiff(s) was/were not fully recovered and that the pre-existing injury or condition was not latent at the time of the subject incident, you should make an apportionment of damages by determining what portion of the damages is attributable to the pre-existing injury or condition and limit your award to the damages attributable to the injury caused by defendant(s).

If you are unable to determine, by a preponderance of the

evidence, what portion of the damages can be attributed to the pre-existing injury or condition, you may make a rough apportionment.

If you are unable to make a rough apportionment, then you must divide the damages equally between the pre-existing injury or condition and the injury caused by defendant(s).

INSTRUCTION NO. 7.4

SUBSEQUENT INJURIES

In determining the amount of damages, if any, to be awarded to plaintiff(s), you must also determine whether plaintiff(s) was/were injured after the [insert date of the incident] incident. If plaintiff(s) suffered injury after the subject incident, and such injury was not legally caused by the conduct of defendant(s), then you should make an apportionment of damages by determining what portion of the damages is attributable to the later injury and limit your award to the damages attributable to the injury caused by defendant(s).

If you are unable to determine, by a preponderance of the evidence, what portion of the damages can be attributed to the later injury, you may make a rough apportionment.

If you are unable to make a rough apportionment, then you must divide the damages equally between the later injury and the injury caused by defendant(s).

INSTRUCTION NO. 7.5

APPORTIONMENT FOR BOTH PRE-EXISTING AND SUBSEQUENT INJURIES

If you must apportion damages among (1) pre-existing injuries or conditions, (2) injuries caused by defendant(s), and (3) later injuries, and you are unable to determine apportionment by a preponderance of the evidence, you may make a rough apportionment. If you are unable to make a rough apportionment, then you must divide the damages equally among the injuries or conditions.

INSTRUCTION NO. 8.1

DAMAGE INSTRUCTIONS - FOR GUIDANCE ONLY

Instructions on damages are only a guide for an award of damages if you find defendant(s) responsible to plaintiff(s). The fact that the Court is instructing you on damages does not mean that defendant(s) is/are responsible to plaintiff(s). That is for you to decide.

INSTRUCTION NO. 8.2

SPECIAL DAMAGES DEFINED

Special damages are those damages which can be calculated precisely or can be determined by you with reasonable certainty from the evidence.

INSTRUCTION NO. 8.3

GENERAL DAMAGES DEFINED

General damages are those damages which fairly and adequately compensate plaintiff(s) for any past, present, and reasonably probable future disability, pain, and emotional distress caused by the injuries/damages sustained.

INSTRUCTION NO. 8.4

PAIN

Pain is subjective, and medical science may or may not be able to determine whether pain actually exists. You are to decide, considering all the evidence, whether pain did(, does and will) exist.

INSTRUCTION NO. 8.5

EMOTIONAL DISTRESS DEFINED

Emotional distress includes mental worry, anxiety, anguish, suffering, and grief, where they are shown to exist.

INSTRUCTION NO. 8.6

LOSS OF CONSORTIUM

If you find that defendant(s) is/are liable, you may allow plaintiff _____ a fair and reasonable compensation for the loss and impairment of _____'s ability to perform services as wife/husband, because of her/his injuries.

In determining the amount of such compensation, you are to consider the loss and impairment of her/his companionship, aid, assistance, comfort and society, and services to her husband/his wife in performing her/his domestic and household functions, if any.

The services provided by a wife/husband to her husband/his wife may often be of such character that no one can say what they are worth. The relationship between spouses is a special and unique one, and the actual facts of the case, considered together with your own experience, must guide you in deciding what amount would fairly and justly compensate the husband/wife for his/her loss.

INSTRUCTION NO. 8.7

LIFE EXPECTANCY

The life expectancy of plaintiff(s) may be considered by you in determining the amount of damages, if any, which he/she/they should receive for permanent injuries and future expenses and losses.

INSTRUCTION NO. 8.8

ARGUMENT RE DAMAGES

In presenting his/her argument to you on the amount, if any, which should be awarded to plaintiff(s) as damages, the attorney for plaintiff(s) has proposed to you figures which he/she arrived at by mathematical calculations (and has shown you those figures on a chart). After first suggesting that a dollar value per hour or day or month or year be given to an item such as pain, disability, emotional distress and so forth, he/she multiplied that dollar value by a certain number of hours or days or months or years and came up with a total figure as an amount of damages for such items. Neither the chart nor what the attorney has said as to the dollar values or figures for measuring such items of damages is evidence. The law permits this kind of argument to be made, but you must remember argument is not evidence. The law gives you no way to mathematically calculate such items of damages and leaves them to be fixed by you as your common sense and good judgment dictate, based on the nature and extent of plaintiff's(s') injuries/damages under the evidence in this case.

INSTRUCTION NO. 8.9

ELEMENTS OF DAMAGES

If you find for plaintiff(s) on the issue of liability, plaintiff(s) is/are entitled to damages in such amount as in your judgment will fairly and adequately compensate him/her/them for the injuries which he/she/they suffered. In deciding the amount of such damages, you should consider:

1. The extent and nature of the injuries he/she/they received, and also the extent to which, if at all, the injuries he/she/they received are permanent;

2. The deformity, scars and/or disfigurement he/she/they received, and also the extent to which, if at all, the deformity, scars and/or disfigurement are permanent;

3. The reasonable value of the medical services provided by physicians, hospitals and other health care providers, including examinations, attention and care, drugs, supplies, and ambulance services, reasonably required and actually given in the treatment of plaintiff(s) and the reasonable value of all such medical services reasonably probable to be required in the treatment of plaintiff(s) in the future;

4. The pain, emotional suffering, and disability which he/she/they has/have suffered and is/are reasonably probable to suffer in the future because of the injuries, if any; and

5. The lost income sustained by plaintiff(s) in the past and the lost income he/she/they is/are reasonably probable to

sustain in the future.

INSTRUCTION NO. 8.10

PAIN AND SUFFERING

Plaintiff(s) is/are not required to present evidence of the monetary value of his/her/their pain or emotional distress. It is only necessary that plaintiff(s) prove the nature, extent and effect of his/her/their injury, pain, and emotional distress. It is for you, the jury, to determine the monetary value of such pain or emotional distress using your own judgment, common sense and experience.

INSTRUCTION NO. 8.11

SPECULATIVE DAMAGES

Compensation must be reasonable. You may award only such damages as will fairly and reasonably compensate plaintiff(s) for the injuries or damages legally caused by defendant's(s') negligence.

You are not permitted to award a party speculative damages, which means compensation for loss or harm which, although possible, is conjectural or not reasonably probable.

INSTRUCTION NO. 8.12

PUNITIVE DAMAGES

If you award plaintiff(s) any damages, then you may consider whether you should also award punitive damages. The purposes of punitive damages are to punish the wrongdoer and to serve as an example or warning to the wrongdoer and others not to engage in such conduct.

You may award punitive damages against a particular defendant only if plaintiff(s) have proved by clear and convincing evidence that the particular defendant acted intentionally, willfully, wantonly, oppressively or with gross negligence. Punitive damages may not be awarded for mere inadvertence, mistake or errors of judgment.

The proper measure of punitive damages is (1) the degree of intentional, willful, wanton, oppressive, malicious or grossly negligent conduct that formed the basis for your prior award of damages against that defendant and (2) the amount of money required to punish that defendant considering his/her/its financial condition. In determining the degree of a particular defendant's conduct, you must analyze that defendant's state of mind at the time he/she/it committed the conduct which formed the basis for your prior award of damages against that defendant. Any punitive damages you award must be reasonable.

INSTRUCTION NO. 8.13

PUNITIVE DAMAGES (DEFINITION OF "WILLFUL")

An act is "willful" when it is premeditated, unlawful, without legal justification, or done with an evil intent, with a bad motive or purpose, or with indifference to its natural consequences.

INSTRUCTION NO. 8.14

PUNITIVE DAMAGES (DEFINITION OF "WANTON")

An act is "wanton" when it is reckless, heedless, or characterized by extreme foolhardiness, or callous disregard of, or callous indifference to, the rights or safety of others.

INSTRUCTION NO. 8.15

PUNITIVE DAMAGES (DEFINITION OF "OPPRESSIVE")

An act is "oppressive" when it is done with unnecessary harshness or severity.

INSTRUCTION NO. 8.16

PUNITIVE DAMAGES (DEFINITION OF "MALICIOUS")

An act is "malicious" when it is prompted or accompanied by ill will or spite.

INSTRUCTION NO. 8.17

PUNITIVE DAMAGES (DEFINITION OF "GROSS NEGLIGENCE")

Gross negligence is conduct that is more extreme than ordinary negligence. It is an aggravated or magnified failure to use that care which a reasonable person would use to avoid injury to himself, herself, or other people or damage to property. But gross negligence is something less than willful or wanton conduct.

INSTRUCTION NO. 8.18

MITIGATION OF DAMAGES

Any plaintiff claiming damages resulting from the wrongful act of a defendant has a duty under the law to use reasonable diligence under the circumstances to mitigate or minimize those damages.

If you find plaintiff(s) suffered damages, plaintiff(s) may not recover for any damages which he/she/it/they could have avoided through reasonable effort. If you find that plaintiff(s) unreasonably failed to mitigate or lessen his/her/its/their damages, you should not award those damages which he/she/it/they could have avoided.

You are the sole judge of whether plaintiff(s) acted reasonably in mitigating his/her/its/their damages. Plaintiff(s) may not sit idly by when presented with a reasonable opportunity to reduce his/her/its/their damages. However, plaintiff(s) is/are not required to exercise unreasonable efforts or incur unreasonable expenses in mitigating his/her/its/their damages. Defendant(s) has/have the burden of proving the damages which plaintiff(s) could have mitigated.

You must consider all of the evidence in light of the particular circumstances of the case in deciding whether defendant(s) have satisfied his/her/its/their burden of proving that plaintiff's(s') conduct was not reasonable.

INSTRUCTION NO. 9.1

CONDUCT OF JURY

When you retire to the jury room to begin your deliberations, your first duty will be selection of a foreperson to preside over the deliberations and to speak on your behalf in court.

The foreperson's duties are:

1. To keep order during the deliberations and to make sure that every juror who wants to speak is heard;

2. To represent the jury in communications you wish to make to me; and

3. To sign, date and present the jury's verdict to me.

In deciding the verdict, all jurors are equal and the foreperson does not have any more power than any other juror.

After you select a foreperson, you will proceed to discuss the case with your fellow jurors and reach agreement on a verdict, if you can. You may take as much time as you feel is necessary for your deliberations.

Each of you must decide the case for yourself, but only after you have considered the views of you fellow jurors. Do not be afraid to change your opinion if you think you are wrong. But do not come to a decision simply because other jurors think it is a right decision, or simply to get the case over with.

INSTRUCTION NO. 9.2

EXHIBITS IN THE JURY ROOM

During this trial, items were received in evidence as exhibits. These exhibits will be sent into the jury room with you when you begin to deliberate.

INSTRUCTION NO. 9.3

VERDICT

Remember that you are the judges of the facts in this case. Your only interest is to seek the truth from the evidence presented.

From the time you retire to the jury room to begin your deliberations until you complete your deliberations, it is necessary that you remain together as a body. You should not discuss the case with anyone other than your fellow jurors. If it becomes necessary for you to communicate with me during your deliberations, you may send a note by the bailiff.

Your verdict will consist of answers to the questions on the verdict form. You will answer the questions according to the instructions I have given you and according to the directions contained in the verdict form.

At least ten of you must agree on each answer required by the verdict form. The same ten jurors need not agree on all answers, but at least ten jurors must agree on each answer. Each of the ten must be able to state, when you return to the courtroom after a verdict is reached, that his or her vote is expressed in the answer on the verdict form.

As soon as ten or more of you agree upon each answer required by the directions in the verdict form, the form should be dated and signed by your foreperson. The foreperson will then notify the bailiff by a written communication that (1) the jury

has reached a verdict; and (2) at least ten of the jurors have agreed as to each answer required by the verdict form. The bailiff will then arrange to have you return with the verdict form to the courtroom.

Bear in mind that you are not to reveal to the court or anyone else how the jury stands on the verdict until at least ten of you (and I repeat, at least ten of you) have agreed on it.

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

In the Matter of the Publication and Distribution

of the

Hawai`i Standard Civil Jury Instructions

ORDER APPROVING PUBLICATION AND DISTRIBUTION OF THE HAWAI`I STANDARD CIVIL JURY INSTRUCTIONS
(By: Moon, C.J., Levinson, Nakayama, Ramil and Acoba, JJ.)

Upon consideration of the Civil Pattern Jury Instructions Committee's proposed additions to the Hawai`i Civil Jury Instructions, 1999 edition,

IT IS HEREBY ORDERED that attached civil jury instructions 11.1 through 13.7, are approved for publication and distribution as additions to the Hawai`i Civil Jury Instructions, 1999 edition.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval of judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai`i, October 31, 2000.

Chief Justice

Associate Justice

Associate Justice

Associate Justice

Associate Justice

I. [RESERVED]

J. PRODUCT LIABILITY

K. EXPRESS WARRANTY

L. IMPLIED WARRANTY

INSTRUCTION NO. 11.1

STRICT PRODUCTS LIABILITY

To prevail on the claim of strict products liability against defendant(s), plaintiff(s) must prove all of the following elements:

1. The product was defective[1]; and

2. The defect was a legal cause of injury to plaintiff(s); and

3. Defendant(s) was/were part of the "chain of distribution" of the product. Defendant(s) was/were part of the "chain of distribution" of a product if he/she/it/they was/were a manufacturer, seller, or lessor of that product.

[1] In appropriate cases, add: "As to the claim for strict products liability based on defective design under the Risk-Utility Test, the burden may shift to defendant(s) to prove that the product was not defective."

INSTRUCTION NO. 11.2

DEFECT DEFINED

A defect is some feature the product had or lacked that made the product dangerously defective when used in an intended or reasonably foreseeable manner, including a reasonably foreseeable misuse.

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*Based upon the facts of each particular case, the trial court may wish to specify which entity in the chain of distribution should be used as the appropriate entity through whose eyes the jury should determine if the product was used as intended or reasonably foreseeable.

INSTRUCTION NO. 11.3

ORDINARY USE

In deciding whether the product was used in an intended or reasonably foreseeable manner, you may consider all of the surrounding circumstances.

INSTRUCTION NO. 11.4

PROOF OF DEFECT

A product may be defective under any of the following theories:

1. Defective manufacture; or

2. Defective design; or

3. [_____]1

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1 Tabieros v. Clark Equipment Company, 85 Haw. 336, 944 P.2d 1279 (1997) and Ontai v. Straub Clinic & Hospital, Inc., 66 Haw. 237, 659 P.2d 734 (1983) indicate a potential claim for strict products liability for defective instruction/warning, but no Hawai'i case states the elements of such claim. Where appropriate, "Defective Warning/Instruction" may be inserted here and the elements of that claim inserted in a new instruction following Instruction No. 11.6.

INSTRUCTION NO. 11.5

DEFECTIVE MANUFACTURE-ELEMENTS

To prove defective manufacture, plaintiff(s) must prove all of the following elements:

1. The product as manufactured, assembled, or distributed was different from the manufacturer's intended result; and

2. That difference made the product dangerously defective for its intended or reasonably foreseeable use (or reasonably foreseeable misuse); and

3. That difference was a legal cause of injury to plaintiff(s).

INSTRUCTION NO. 11.6

DEFECTIVE DESIGN-ELEMENTS

To prove defective design, plaintiff(s) must prove both of the following elements:

1. The product was defective in its design[1]; and

2. The product was a legal cause of injury to plaintiff(s).

Failure of a manufacturer to equip its product with a safety device may constitute a design defect.

[1] As to the claim for strict products liability based on defective design under the Risk-Utility Test, the burden may shift to defendant(s) to prove that the product was not defective.

INSTRUCTION NO. 11.7

NEGLIGENT DESIGN-ELEMENTS

To prevail on the claim of negligent design, plaintiff(s) must prove both of the following elements:

1. The manufacturer of the product failed to take reasonable measures to design its product to protect against a reasonably foreseeable risk of injury; and

2. That failure was a legal cause of injury to plaintiff(s).

INSTRUCTION NO. 11.8

NEGLIGENT FAILURE TO WARN-ELEMENTS

To prevail on the claim of negligent failure to warn, plaintiff(s) must prove all of the following elements:

1. Defendant(s) was/were part of the "chain of distribution" of the product; and

2. Defendant(s) knew or reasonably should have known that the product created a risk of injury if it was used in an intended or reasonably foreseeable manner, including reasonably foreseeable misuse; and

3. Defendant(s) failed to use ordinary care to warn those intended or reasonably anticipated to use the product of that risk; and

4. Defendant's(s') failure to warn was a legal cause of injury to plaintiff(s).

INSTRUCTION NO. 11.9

NEGLIGENT FAILURE TO WARN-ADDITIONAL ELEMENT WHEN OBVIOUSNESS OF RISK OF INJURY IS A FACT QUESTION FOR THE JURY[1]

(IF BURDEN IS ON PLAINTIFF(S))

To prevail on the claim of negligent failure to warn, plaintiff(s) must also prove that defendant(s) knew or reasonably should have anticipated that a user of the product might not be aware of the risk of injury created by the product.

(IF BURDEN IS ON DEFENDANT(S))

If defendant(s) prove(s) that the risk of injury created by the product was open and obvious, then you must find in favor of defendant(s) on the claim of negligent failure to warn.

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[1] Although whether defendant owes plaintiff a duty of reasonable care is a question of law, in some situations the answer turns on the fact question of whether the risk of injury from an intended or reasonably foreseeable use or misuse of a product is "open and obvious." In each of the reported Hawai'i cases on that point, the evidence was such that reasonable minds could not differ, and that fact question was resolved by the court. Tabieros contemplates that the jury may have to determine that question where reasonable minds can differ as to the obviousness of the risk. There is no reported Hawai'i decision in that circumstance holding whether plaintiff or defendant bears the burden of proof on that issue. In such a case, this instruction may be used, but only after the trial court determines if the burden of proof on this issue is on plaintiff or defendant.

INSTRUCTION NO. 11.10

LEARNED INTERMEDIARY

The duty of a manufacturer or distributor of a medical device or prescription drug to warn of a risk inherent in that product is satisfied when the manufacturer or distributor gives an adequate warning to the physician who prescribed or provided the product. The law permits the manufacturer and distributor to rely upon the physician to forward to the patient, who is the ultimate user of the product, any warnings given by the manufacturer or distributor.

INSTRUCTION NO. 11.11

TESTS FOR DEFECTIVE DESIGN

A product is defective in its design if plaintiff(s) prove(s) that the product was defective under any one of these three tests:

1. The Consumer Expectation Test; or

2. The Risk-Utility Test; or

3. The Latent Danger Test.

INSTRUCTION NO. 11.12

EFFECT OF FINDING DEFECT WAS OPEN AND OBVIOUS

If defendant(s) prove(s) that the danger caused by the alleged design defect was open and obvious, then only the Risk-Utility Test can be used to determine if the product was defective in its design.

INSTRUCTION NO. 11.13

CONSUMER EXPECTATION TEST

To prove that a product is defective in its design under the Consumer Expectation Test, plaintiff(s) must prove that the product failed to perform as safely as an ordinary user or consumer of the product would expect when used in an intended or reasonably foreseeable manner, including reasonably foreseeable misuse.

INSTRUCTION NO. 11.14

RISK-UTILITY TEST

To prove that a product is defective in its design under the Risk-Utility Test, plaintiff(s) must prove that the design was a legal cause of the injuries and defendant(s) must fail to prove that the benefits of the design outweigh the risk of danger inherent in the design. In determining whether or not the benefits of the design outweigh such risks, you may consider, among other things:

1. The likelihood that the danger posed by the design would cause injuries;

2. The probable severity of those injuries;

3. The feasibility of a safer alternative design at the time that the product was manufactured;

4. The financial cost of an improved design; and

5. The adverse consequences, if any, to the product and the user or consumer that would result from an alternative design.

INSTRUCTION NO. 11.15

LATENT DEFECT TEST

To prove that a product is defective in its design under the Latent Defect Test, plaintiff(s) must prove that:

1. Even if faultlessly made, the use of the product in a manner that is intended or reasonably foreseeable, including reasonably foreseeable misuse, involves a substantial danger; and

2. The manufacturer knew about the danger; and

3. The danger would not be readily recognized by the ordinary user or consumer of the product; and

4. The manufacturer failed to give adequate warnings of the danger or adequate instructions for safe use.

INSTRUCTION NO. 12.1

BREACH OF EXPRESS WARRANTY-ELEMENTS

To prevail on the claim for breach of an express warranty against defendant(s), plaintiff(s) must prove all of the following elements:

1. Defendant(s) was/were seller(s)/lessor(s) in a sale/lease of goods; and

2. Plaintiff(s) was/were reasonably expected to use, consume or be affected by the goods; and

3. A representation, affirmation of fact, or promise regarding the goods was made to buyer(s)/lessee(s) by defendant(s) or an authorized agent of defendant(s); and

4.[1] That representation, affirmation of fact, or promise became part of the basis of the bargain between seller(s)/lessor(s) and buyer(s)/lessee(s); and

5. The goods as delivered did not conform to that representation, affirmation of fact, or promise; and

6. The non-conformance of the goods with the representation, affirmation of fact, or promise was a legal cause of injury to plaintiff(s).

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[1] It is not clear under Hawai'i law whether this element applies in cases of personal injury to third-party beneficiaries of warranties under HRS §490:2-318.

INSTRUCTION NO. 12.2

"SELLER," "BUYER," "SALE," AND "GOODS"

As used in these instructions, the word "seller" means a person who sells or contracts to sell goods. The word "seller" includes the manufacturer(s) and each distributor, retailer or other participant in the chain of distribution of the goods. The word "buyer" means a person who buys or contracts to buy goods. A "sale of goods" is the passing of title or ownership of "goods" from the seller to a buyer for a price.

(As used in these instructions, the word "lessor" means a person who leases or contracts to lease goods. A "lease of goods" is a transfer of the right of possession and use of "goods" to a lessee for a price.)

"Goods" means movable things that are not attached to buildings or real estate, or that can be removed from buildings or real estate without material harm.

INSTRUCTION NO. 12.3

DESCRIPTIONS, SAMPLES, AND PARTICULAR WORDS

Any representation, affirmation of fact, or promise made by seller(s)/lessor(s) to buyer(s)/lessee(s) which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the representation, affirmation of fact, or promise.

Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

No particular word or form of expression is necessary to create an express warranty, nor is it necessary that seller(s)/lessor(s) has/have a specific intention to make a warranty or use formal words such as "warrant" or "guarantee."

INSTRUCTION NO. 12.4

BASIS OF THE BARGAIN

To prove that a representation, affirmation of fact, or promise regarding the goods was part of the basis of the bargain:

1. Plaintiff(s) must prove that seller(s)/lessor(s) made the representation, affirmation of fact, or promise during the bargaining process; and

2. Seller(s)/lessor(s) must fail to prove that the resulting bargain did not rest at all on seller's(s')/lessor's(s') representation, affirmation of fact, or promise.

Some statements by seller(s)/lessor(s) cannot fairly be viewed as having become a basis of the bargain, such as statements about the general value of the goods, or about seller's(s')/lessor's(s') general opinion regarding that value, or even seller's(s')/ lessor's(s') exaggerated claims about the superiority of his/her/its/their goods, sometimes known as "puffing."

Whether a statement of opinion regarding the goods is a representation, affirmation of fact, or promise that created an express warranty depends upon all of the circumstances surrounding the statement. A statement of opinion that is the expression of an individual's conclusion or personal judgment, but does not purport to be based on actual knowledge, does not create a warranty.

In determining whether a particular statement was a

representation, affirmation of fact, or promise that created an express warranty--as opposed to an affirmation of the general value of the goods or "puffing" that did not create a warranty--you may consider the surrounding circumstances under which the statement was made, the manner in which the statement was made, and the ordinary effect of the words used.

You may also consider the relationship of the parties and the subject matter with which the statement was concerned.

INSTRUCTION NO. 12.5

DISCLAIMER OF ALL EXPRESS WARRANTIES[1]

Buyer(s)/lessee(s) and seller(s)/lessor(s) may agree that there will be no express warranties relating to the goods.

[1] This instruction may not apply in personal injury actions involving consumer goods.

INSTRUCTION NO. 12.6

DISCLAIMER OF SOME BUT NOT ALL EXPRESS WARRANTIES[1]

Buyer(s)/lessee(s) and seller(s)/lessor(s) may agree that only certain warranties apply and all others are excluded. If buyer(s)/lessee(s) and seller(s)/lessor(s) have agreed that only certain warranties apply, there can be no express warranty contrary to the agreement's terms unless you find that the warranty that was given failed of its essential purpose.

A warranty fails of its essential purpose if plaintiff(s) prove(s) that there is a latent defect that was not discoverable upon receipt and reasonable inspection of goods, or that the seller's(s')/lessor's(s') action or inaction prevented the remedy in any warranty that was given from achieving its essential purpose.

[1] This instruction may not apply in personal injury actions involving consumer goods.

INSTRUCTION NO. 12.7

NOTICE OF BREACH REQUIRED[1]

Seller(s)/lessor(s) is/are not liable for a breach of an express or implied warranty unless seller(s)/lessor(s) received notice of the claimed breach within a reasonable time after plaintiff(s) knew or should have known of the alleged breach of warranty. What amounts to a reasonable time is for you to decide based upon all the circumstances of this case.

Notice may be oral or in writing; no particular form of notice is required. It must have informed defendant(s) of the alleged breach of warranty and plaintiff's(s') intention to look to defendant(s) for damages. Whether plaintiff(s) gave this information to defendant(s) within a reasonable time in this case is for you to determine.

If plaintiff(s) fail/fails to prove that he/she/it/they gave such notice within a reasonable time, then plaintiff(s) cannot recover on the claim for breach of warranty.

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[1] This instruction may not apply in personal injury actions involving consumer goods.

INSTRUCTION NO. 12.8

STATUTE OF LIMITATIONS

Plaintiff(s) must file the lawsuit on the claim for breach of warranty within four years after the statute of limitations starts to run. The statute of limitations on a claim for breach of warranty starts to run when the breach occurs. Normally, a breach of warranty occurs when the goods are delivered. If defendant(s) prove(s) that the breach occurred more than four years before this lawsuit was filed, then you must find for defendant(s) on plaintiff's(s') breach of warranty claim.[1]

[1] If the court determines as a matter of law that the seller made a promise of future performance regarding the goods, and that plaintiff(s) could not discover the breach until such performance, then an appropriate "discovery rule" instruction should be given.

INSTRUCTION NO. 13.1

IMPLIED WARRANTY OF MERCHANTABILITY-ELEMENTS

To prevail on the claim for breach of an implied warranty of merchantability, plaintiff(s) must prove all of the following elements:

1. Defendant(s) was/were a seller(s)/lessor(s) in a sale/ lease of goods; and

2. Plaintiff(s) was/were reasonably expected to use, consume or be affected by the product; and

3. Any one of the following:

(a)The product would not pass without objection in the trade under the contract description; or

(b) In the case of fungible goods, the product was not of fair average quality within the description; or

(c) the product was not fit for the ordinary purposes for which such goods are used; or

(d) The product did not run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; or

(e) The product was not adequately contained, packaged, and labeled as the agreement required; or

(f) The product did not conform to the promises or affirmations of fact made on the container or label if any;

and

4. The way in which the product was not fit for its ordinary purpose was a legal cause of damage to plaintiff(s).

INSTRUCTION NO. 13.2

IMPLIED WARRANTY OF MERCHANTABILITY-DEFECTIVE PRODUCT

If a product is "defective" for purposes of strict products liability, it is automatically not fit for its ordinary purpose.

INSTRUCTION NO. 13.3

IMPLIED WARRANTY OF MERCHANTABILITY-RELIANCE NOT REQUIRED

To prevail on the claim for breach of the implied warranty of merchantability, it is not necessary for plaintiff(s) to prove that he/she/it/they relied upon the implied warranty.

INSTRUCTION NO. 13.4

IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR PURPOSE-ELEMENTS

To prevail on the claim for breach of an implied warranty of fitness for a particular purpose against defendant(s), plaintiff(s) must prove all of the following elements:

1. Defendant(s) sold or leased the product or otherwise participated in the chain of distribution of the product; and

2. When the contract for sale/lease was entered into by defendant(s), he/she/it/they had reason to know:

a. a particular purpose for which plaintiff(s) obtained the product; and

b. buyer(s)/lessee(s) was/were relying on the skill or judgment of defendant(s) to select or furnish a suitable product; and

3. Buyer(s)/lessee(s) did in fact rely on defendant(s) to select or furnish a product suitable for the particular purpose for which plaintiff(s) obtained the product; and

4. The product was not fit for that particular purpose; and

5. The way in which the product was not fit for that particular purpose was a legal cause of damage to plaintiff(s).

INSTRUCTION NO. 13.5

THIRD PARTY BENEFICIARIES OF EXPRESS AND IMPLIED WARRANTIES

An express or implied warranty made by any seller/lessor of a product extends not only to buyer(s)/lessee(s) of that product, but also to any person who may reasonably be expected to use, consume or be affected by the product and who suffers personal injury caused by breach of the warranty.

INSTRUCTION NO. 13.6

NO DISCLAIMER OF LIABILITY FOR PERSONAL INJURIES TO A THIRD PARTY TO WHOM AN EXPRESS OR IMPLIED WARRANTY EXTENDS

Seller(s)/lessor(s) of a product may not exclude or limit his/her/its/their liability for personal injury to a third party--other than buyer(s)/lessee(s) of the product--who may be reasonably expected to use, consume, or be affected by the product and who suffers personal injury caused by breach of the warranty.

INSTRUCTION NO. 13.7

EXCLUSION OR LIMITATION OF WARRANTIES[1]

No exclusion or limitation of an express warranty is effective if it is based upon an unreasonable interpretation of the party's/parties' words or conduct.

The following general rules apply to the exclusion or limitation of warranties:

1. To exclude or limit the implied warranty of merchantability, the language must mention "merchantability," and, if in writing, it must be conspicuous. "Conspicuous" means that a written disclaimer or limitation must be in a larger print or typeface so as to stand out from the other portions of the document in which it is contained.

2. To exclude or limit any warranty of fitness (either express or implied), the language must be both in writing and conspicuous.

3. All implied warranties of fitness can be excluded by a single disclaimer that complies with all of the applicable rules.

The following special rules apply to the exclusion or limitation of warranties:

1. Unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all

[1] This instruction may not apply or may require modification in personal injury cases.

faults" or other language which in common understanding calls the buyer's(s')/lessee's(s') attention to the exclusion of warranties and makes it plain that there is no implied warranty.

2. When buyer(s)/lessee(s), before entering into the contract or lease, has/have examined the product as fully as he/she/they desired--or has/have refused to examine the product--there is no implied warranty with regard to defects which a reasonable examination should, in the circumstances, have revealed.

3. An implied warranty can also be excluded or limited by course of dealing or course of performance or usage of trade.

If they are in conflict, the special rules take priority over the general rules.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution

of the

Hawai'i Standard Civil Jury Instructions

ORDER APPROVING PUBLICATION AND DISTRIBUTION OF THE HAWAI'I STANDARD CIVIL JURY INSTRUCTIONS
(By: Moon, C.J., Levinson, Nakayama, Ramil and Acoba, JJ.)

Upon consideration of the Civil Pattern Jury Instructions Committee's proposed additions to the Hawai'i Civil Jury Instructions, 1999 edition,

IT IS HEREBY ORDERED, effective immediately, that attached civil jury instructions 14.1 through 14.6 and 15.1 through 15.27, are approved for publication and distribution as additions to the Hawai'i Civil Jury Instructions, 1999 edition.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval of judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, June 19, 2002.

M. MEDICAL MALPRACTICE

N. CONTRACT

INSTRUCTION NO. 14.1

ELEMENTS OF MEDICAL NEGLIGENCE

To prove medical negligence, plaintiff(s) must prove all of the following elements:

(1) Defendant(s) breached the applicable standard of care; and

(2) The breach of the standard of care was a legal cause of injury/damage to plaintiff(s); and

(3) Plaintiff(s) sustained injury/damage.

INSTRUCTION NO. 14.2

STANDARD OF CARE

It is the duty of a [physician/nurse/specialty] to have the knowledge and skill ordinarily possessed, and to exercise the care and skill ordinarily used, by a [physician/nurse/specialty] practicing in the same field under similar circumstances.

A failure to perform any one of these duties is a breach of the standard of care.

(Note to Publisher: brackets indicate alternatives not deletions)

INSTRUCTION NO. 14.3

EXPERT TESTIMONY REQUIRED

Plaintiff(s) is/are required to present testimony from an expert establishing the standard of care, that defendant(s) breached this standard, and that defendant's(s') breach was a legal cause of plaintiff's(s') injury/damages.[1]

[1]**This instruction may not necessarily be required in every case of medical negligence. See: H.R.E. Rule 702 and commentary, Lyu v. Shinn, 40 Haw. 198 (1953).**

INSTRUCTION NO. 14.4

INFORMED CONSENT

A physician has the duty to inform his or her patient of the information a reasonable patient objectively needs from his or her physician to allow the patient to make an informed and intelligent decision regarding proposed treatment.

To prevail on the claim of failure to obtain informed consent, plaintiff(s) must prove the following elements:

1. **Defendant(s) did not disclose at least one of the following:**
   a. **The condition being treated; or**
   b. **The nature and character of the proposed treatment; or**
   c. **The anticipated results; or**
   d. **The recognized possible alternative forms of treatment; or**
   e. **The recognized serious possible risks, complications, and anticipated benefits involved in the treatment, and in the recognized possible alternative forms of treatment, including non-treatment.**
2. **The patient was harmed;**
3. **Defendant's(s') failure to make the disclosure was a legal cause of the patient's harm; and**
4. **A reasonable person in the patient's circumstances would not have consented to the proposed treatment had**

the patient received the required disclosure.

Expert testimony is not required to prove the information that a physician is required to disclose to a patient.

Expert testimony is required to prove the materiality of the recognized serious possible risks of the proposed treatment, including the nature of risks inherent in a particular treatment, the probabilities of therapeutic success, the frequency of the occurrence of particular risks and the nature of available alternatives to treatment.

INSTRUCTION NO. 14.5

MORE THAN ONE METHOD

Where there is more than one recognized method of treatment, each of which conforms to the applicable standard of care, a physician does not breach the standard of care by utilizing one of these methods, provided such use conforms to the standard of care as defined by these instructions.

INSTRUCTION NO. 14.6

PHYSICIAN IS NOT AN INSURER

A physician is not an insurer of a patient's health. A physician is not negligent simply because of an unfortunate event if the physician conforms to the applicable standard of care.

INSTRUCTION NO. 15.1

CONTRACT - GENERAL: DEFINITION/ELEMENTS

A contract is an agreement between two or more persons which creates an obligation to do or not to do something. A contract may be written or oral.

A contract requires proof of all of the following elements:

(1) Persons with the capacity and authority to enter into the contract; and

(2) An offer; and

(3) An acceptance of that offer producing a mutual agreement, or a meeting of the minds, between the persons as to all of the essential terms of the agreement at the time the offer was accepted; and

(4) Consideration.

In this case, only element(s) _____ [and _____] is/are in dispute.

[Note to Publisher: brackets indicate alternatives not deletions]

INSTRUCTION NO. 15.2

CONTRACT - CAPACITY[1]

A person has capacity to enter into a contract if he/she has sufficient mental ability to understand in a reasonable manner the nature, consequences and effects of the contract.

[1] **This instruction should be used only if capacity is in issue.**

INSTRUCTION NO. 15.3

CONTRACT - AUTHORITY[1]

Authority means having the permission or right to enter into a contract.

[1] **This instruction should be used only if authority is in issue.**

INSTRUCTION NO. 15.4

CONTRACT - OFFER

An offer is an expression of willingness to enter into a contract which is made with the understanding that the acceptance of the offer is sought from the person to whom the offer is made.

An offer must be sufficiently definite, or must call for such definite terms in the acceptance, that the consideration promised is reasonably clear.

INSTRUCTION NO. 15.5

CONTRACT - ACCEPTANCE

An acceptance is an expression of agreement to the essential terms of an offer, in the manner which may be invited or required by the offer. All of the essential terms of the offer must be accepted without change or condition.

A change in any essential term set forth in the offer or an attempt to condition acceptance is a rejection of the offer. It is a counteroffer which may be accepted, rejected totally, or rejected by a further counteroffer.

INSTRUCTION NO. 15.6

CONTRACT - ESSENTIAL TERMS

The essential terms of an agreement are those terms which are basic, necessary and important to the agreement between the parties. In most contracts, the essential terms of an agreement are: (1) a description of the property, goods or services to be received; (2) the amount of money or other consideration to be given; and (3) the manner and time in which the property, goods or services are to be received and the money or other consideration is to be given. It is for you to decide whether there are any other essential terms under the circumstances of this case.

INSTRUCTION NO. 15.7

CONTRACT - CONSIDERATION

Consideration is an exchange which is bargained for by the parties, where there is a benefit to the one making the promise or a loss or detriment to the one receiving the promise. Promises given in exchange for each other can be valid consideration.

INSTRUCTION NO. 15.8

CONTRACT - BREACH OF

To prevail on the claim for breach of contract, plaintiff(s) must prove all of the following elements:

(1) The existence of the contract; and

(2) Plaintiff's(s') performance [unless excused]; and

(3) Defendant's(s') failure to perform an obligation under the contract; and

(4) Defendant's(s') failure to perform was a legal cause of damage to plaintiff(s); and

(5) The damage was of the nature and extent reasonably foreseeable by defendant(s) at the time the contract was entered into.

INSTRUCTION NO. 15.9

CONTRACT - SUBSTANTIAL PERFORMANCE

A person who has provided substantial performance under a contract is entitled to recover under that contract for the extent of his/her performance. Substantial performance is not full and complete performance under the contract, but is so nearly equivalent to what was bargained for that it would be unreasonable to deny the person payment under the contract.

A person entitled to recover for substantial performance may also be subject to liability for breach of the contract.[1]

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[1] **Note: This sentence should only be given if appropriate.**

INSTRUCTION NO. 15.10

CONTRACT - DAMAGES

The measure of damages for a breach of contract is the amount of money which will fairly compensate plaintiff(s) for any losses caused by the breach which were reasonably foreseeable to plaintiff(s) and defendant(s) at the time they entered into the contract. The amount of damages must be proved with reasonable certainty and may not be based upon mere speculation or guess. Any damages which you award must be reasonable in amount. If plaintiff(s) has/have been damaged by the breach, but did not prove the amount of damages with reasonable certainty, you must award plaintiff(s) nominal damages in the amount of $1.00.

INSTRUCTION NO. 15.11

CONTRACT - MITIGATION OF DAMAGES

The law requires any plaintiff claiming damages resulting from a breach of contract to use reasonable efforts under the circumstances to avoid or minimize those damages.

If defendant(s) prove(s) that plaintiff(s) unreasonably failed to avoid or minimize his/her/its/their damages, you must not award the portion of those damages resulting from such failure.

Plaintiff(s) may not sit idly by when presented with a reasonable opportunity to avoid or minimize his/her/its/their damages. However, plaintiff(s) is/are not required to exercise unreasonable efforts or incur unreasonable expenses in avoiding or minimizing his/her/its/their damages. Defendant(s) has/have the burden of proving the damages which plaintiff(s) could have avoided or minimized.

You must consider all of the evidence in light of the particular circumstances of the case in deciding whether defendant(s) has/have satisfied his/her/its/their burden of proving that plaintiff(s) unreasonably failed to avoid or minimize his/her/its/their damages. You are the sole judge of whether plaintiff(s) acted reasonably in avoiding or minimizing his/her/its/their damages.

INSTRUCTION NO. 15.12

PROMISSORY ESTOPPEL - ELEMENTS

To prevail on a claim of promissory estoppel, plaintiff(s) must prove all of the following elements:

(1) Defendant(s) made a promise to plaintiff(s); and

(2) A reasonable person in defendant's(s') position would have expected that the promise would induce action or reliance by plaintiff(s); and

(3) Plaintiff(s) reasonably relied upon the promise; and

(4) Plaintiff's(s') reliance on the promise was a legal cause of damage to plaintiff(s); and

(5) Injustice can be avoided only by enforcement of the promise.

INSTRUCTION NO. 15.13

PROMISSORY ESTOPPEL - DAMAGES

Any damages awarded for promissory estoppel must not put plaintiff(s) in a better position than would have resulted from performance of the promise.

INSTRUCTION NO. 15.14

STATUTE OF FRAUDS[1]

Defendant(s) assert(s) the affirmative defense of the statute of frauds. The statute of frauds can be a defense to a claim of an oral contract. To prevail on this defense, defendant(s) must prove all of the following elements:

(1) The alleged contract involves [*]; and

(2) The alleged contract or some memorandum or note thereof was not in writing and signed by defendant(s).

*** the applicable provision from the following should be inserted**

- **a personal representative, upon a promise that his/her/its own estate will be responsible for damages**
- **a promise to be responsible for the debt, default, or misdoings of another**
- **an agreement made in consideration of marriage**
- **the sale of lands, tenements, or hereditaments, or of any interest in or concerning them**
- **an agreement that is not to be performed within one year from the date the agreement was made**
- **an agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or commission**
- **an agreement which by its terms is not to be performed during the lifetime of the person making the promise, or, in the case of an agreement made prior to July 1, 1977, [**]an**

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[1] This instruction is based upon § 656-1, HRS, and does not cover the UCC statute of fraud provisions. If appropriate, this instruction will need to be modified, or a separate instruction will need to be given, to address such UCC provisions.

[**] The word "of" which is contained in § 656-1(7), HRS, has been removed.

agreement to devise or bequeath any property, or to make any provision for a person by will

- **an agreement by a financial institution to lend money or extend credit in an amount greater than fifty thousand dollars ($50,000)**

INSTRUCTION NO. 15.15

STATUTE OF FRAUDS - PART PERFORMANCE

The statute of frauds defense does not apply if Plaintiff(s) prove(s) part performance.

To prevail on a claim of part performance, plaintiff(s) must prove all of the following elements by clear and convincing evidence:

(1) Plaintiff(s) partially or fully performed his/her/its/their obligations under the alleged contract; and

(2) In making such performance, plaintiff(s) substantially relied on the promises made to him/her/it/them in the alleged contract; and

(3) To allow defendant(s) to avoid performing his/her/its/their obligations under the alleged contract would constitute an injustice upon plaintiff(s).

INSTRUCTION NO. 15.16

STATUTE OF FRAUDS - PROMISSORY ESTOPPEL

The statute of frauds defense does not apply if Plaintiff(s) prove(s) promissory estoppel.

To prevail on a claim of promissory estoppel, plaintiff(s) must prove all of the following elements:

(1) Defendant(s) made a promise to plaintiff(s); and

(2) A reasonable person in defendant's(s') position would have expected that the promise would induce action or reliance by plaintiff(s); and

(3) Plaintiff(s) reasonably relied upon the promise; and

(4) Plaintiff's(s') reliance on the promise was a legal cause of damage to plaintiff(s); and

(5) Injustice can be avoided only by enforcement of the promise.

INSTRUCTION NO. 15.17

AGENCY - GENERAL

The act of an agent done within the scope of the agent's authority is binding on the principal. Put another way, the act of an agent done within the scope of the agent's authority has the same effect as if the principal performed the act instead of the agent. In this case, plaintiff(s) claim(s) that defendant(s) _____ was/were the principal(s) and _____ was his/her/its/their agent.

An agency relationship may be based upon either actual authority or apparent authority.

INSTRUCTION NO. 15.18

AGENCY - ACTUAL AUTHORITY

Actual authority may be created by express agreement or implied from the conduct of the parties.

To establish express actual authority, plaintiff(s) must prove an oral or written agreement between defendant(s) and the agent which includes all of the following:

(1) Defendant(s) has/have delegated authority to the agent; and

(2) The agent has accepted that authority; and

(3) The agent is authorized to do certain acts.

To establish implied actual authority, plaintiff(s) must prove both of the following:

(1) Conduct by defendant(s), including acquiescence, which is communicated directly or indirectly to the agent; and

(2) A reasonable belief by the agent based on such conduct that defendant(s) desired the agent to perform certain acts for defendant(s).

Acquiescence is a silent appearance of consent and occurs where the principal knows that the agent is acting on the principal's behalf and takes no action to object.

INSTRUCTION NO. 15.19

AGENCY - APPARENT AUTHORITY

Apparent authority exists when the principal does something or permits the agent to do something which reasonably leads a third person to believe that the agent has the authority he/she/it purports to have. The issue is not whether the principal and agent intend to enter into an agency relationship, but whether a third party in the position of plaintiff(s) reasonably relies on the principal's conduct as showing the existence of such a relationship.

To establish apparent authority, plaintiff(s) must prove all of the following elements:

(1) Defendant(s) _____ as principal(s) demonstrated his/her/its/their consent to the agent's exercise of authority or knowingly permitted the agent to exercise such authority; and

(2) Plaintiff(s) knew of the actions of defendant(s) _____ and, acting in good faith, reasonably believed that the agent possessed such authority; and

(3) Plaintiff(s), relying on such appearance of authority, changed his/her/its/their position and will be injured or suffer a loss if the act done or transaction executed by the agent does not bind defendant(s) _____ as principal(s).

INSTRUCTION NO. 15.20

CONTRACT - IMPOSSIBILITY OF PERFORMANCE

Defendant(s) assert(s) the affirmative defense that impossibility of performance excused his/her/its/their performance under the contract.

To prevail on the affirmative defense of impossibility of performance, defendant(s) must prove that his/her/its/their performance of the contract was made impossible:

(1) Through no fault of defendant(s); and

(2) By unforeseeable events.

INSTRUCTION NO. 15.21

CONTRACT - MISTAKE: GENERAL[1]

Defendant(s) assert(s) the affirmative defense that mistake excused his/her/its/their performance under the contract.

A mistake is a belief that is not in agreement with the facts. A mistake is either mutual or unilateral.

[1] **If the risk of the mistake is allocated by the court to defendant(s), instructions on mistake, 15.21 - 15.24, should not be given. AIG Hawaii Insurance Co. v. Bateman, 82 Hawaii 453, 457-58, 923 P.2d 395, 399-400 (1996).**

INSTRUCTION NO. 15.22

CONTRACT - MUTUAL MISTAKE

To prevail on the affirmative defense of mutual mistake, defendant(s) must prove all of the following elements:

(1) At the time they entered into the contract, the parties made a mistake as to the same basic assumption on which the contract was made; and

(2) That mistake had a material effect on the agreed exchange of performances; and

(3) That mistake adversely affected defendant(s).

INSTRUCTION NO. 15.23

CONTRACT - UNILATERAL MISTAKE

To prevail on the affirmative defense of unilateral mistake, defendant(s) must prove all of the following elements:

(1) At the time defendant(s) entered into the contract, defendant(s) made a mistake as to a basic assumption on which he/she/it/they made the contract; and

(2) The mistake had a material effect on the agreed exchange of performances that was adverse to defendant(s); and

(3) Enforcement of the contract would be unconscionable, or plaintiff(s) had reason to know of or caused the mistake.

INSTRUCTION NO. 15.24

CONTRACT - RISK OF MISTAKE

Defendant's(s') performance under the contract is not excused by mistake if plaintiff(s) prove(s) that defendant(s) bore the risk of the mistake. To prevail on the claim that defendant(s) bore the risk of the mistake, plaintiff(s) must prove either of the following elements:

(1) The risk was placed on defendant(s) by agreement; or

(2) Defendant(s) knew at the time the contract was made that he/she/it/they had only limited knowledge of the facts to which the mistake related, but treated such limited knowledge as sufficient.

INSTRUCTION NO. 15.25

CONTRACT - DURESS

Defendant(s) assert(s) the affirmative defense that duress excused his/her/its/their performance under the contract.

To prevail on the affirmative defense of duress, defendant(s) must prove either of the following elements:

(1) Plaintiff(s) used actual physical force to get defendant(s) to agree to the contract; or

(2) Plaintiff(s) used an improper threat that left defendant(s) with no reasonable alternative but to agree to the contract.

INSTRUCTION NO. 15.26

CONTRACT - UNDUE INFLUENCE

Defendant(s) assert(s) the affirmative defense that undue influence excused his/her/its/their performance under the contract.

To prevail on the affirmative defense of undue influence, defendant(s) must prove both of the following elements:

(1) Plaintiff(s) unfairly persuaded defendant(s) to enter into the contract; and

(2) Plaintiff(s) either:

(a) Was/were in a position of domination over defendant(s); or

(b) Was/were in a relationship with defendant(s) such that defendant(s) would be justified in assuming that plaintiff(s) would be acting in defendant's(s') best interests.

INSTRUCTION NO. 15.27

CONTRACT - FRAUD

Defendant(s) assert(s) the affirmative defense that he/she/it/they is/are excused from performing under the contract because plaintiff(s) fraudulently induced defendant(s) to enter into the contract.

To prevail on the affirmative defense of fraudulent inducement, defendant(s) must prove all of the following elements by clear and convincing evidence:

(1) Plaintiff(s) represented a material fact; and

(2) The representation was false when it was made; and

(3) Plaintiff(s) knew the representation to be false or was/were reckless in making the representation without knowing whether it was true or false; and

(4) Plaintiff(s) intended that defendant(s) rely upon the representation; and

(5) Defendant(s) relied upon the representation by entering into the contract; and

(6) Defendant's(s') reliance upon the representation was reasonable.

The representation must relate to a past or existing material fact, and not to the happening of a future event, except as to a promise of future conduct which plaintiff(s) did not intend to fulfill at the time it was made. A fact is material if a reasonable person would want to know it before deciding whether to enter into the contract.

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution

of the

Hawai'i Standard Civil Jury Instructions

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF THE HAWAI'I STANDARD CIVIL JURY INSTRUCTIONS

(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy, JJ.)

Upon consideration of the Civil Pattern Jury Instructions Committee's request to publish and distribute (1) revisions to Civil Jury Instruction 14.4, and (2) addition of Civil Jury Instruction 14.4A,

IT IS HEREBY ORDERED, that the attached civil jury instructions 14.4 and 14.4A, are approved for publication and distribution.

IT IS FURTHER ORDERED that this approval for publication and distribution is not and shall not be considered by this court or any other court to be an approval or judgment as to the validity or correctness of the substance of any instruction.

DATED: Honolulu, Hawai'i, July 05, 2005.

M. MEDICAL MALPRACTICE

INSTRUCTION NO. 14.4

INFORMED CONSENT

A physician must give a [patient/patient's guardian/legal surrogate] information a reasonable patient objectively needs to make an informed and intelligent decision regarding the proposed [medical treatment/surgical treatment/diagnostic procedure/therapeutic procedure]. A physician must give all of the following information to the [patient/patient's guardian/legal surrogate] before the proposed treatment/procedure:

1. The condition to be treated; and

2. A description of the proposed treatment/procedure; and

3. The intended and anticipated results of the proposed treatment/procedure; and

4. The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures; and

5. The recognized material risks of serious complications or death associated with:

   a) The proposed treatment/procedure; and

   b) The recognized alternative treatments or procedures; and

   c) Not undergoing any treatment or procedure; and

6. The recognized benefits of the recognized alternative treatments or procedures.

To prevail on the claim of failure to obtain informed consent, plaintiff(s) must prove all of the following elements:

1. Defendant(s) did not give the required information; and

2. The patient was harmed; and

3. Defendant's(s') failure to give the required information was a legal cause of the patient's harm; and

4. A reasonable person in the patient's circumstances would not have consented to the proposed treatment/procedure had the required information been given.

Expert testimony is not required to prove what information needs to be given to an individual patient in order to make an informed and intelligent choice regarding the proposed treatment/procedure. However, expert testimony is required to establish the nature of risks inherent in the treatment/procedure, the probabilities of therapeutic success, the frequency of the occurrence of particular risks, and the nature of available alternatives to treatment.

Note: This instruction was revised to conform with the changes to HRS § 671-3 which became effective on January 1, 2004.

(Note to Publisher: Brackets indicate alternatives not deletions.)

INSTRUCTION NO. 14.4A

EMERGENCY TREATMENT - INFORMED CONSENT

Defendant(s) assert(s) the affirmative defense that informed consent was not required in this case. Informed consent is not required when: (1) emergency treatment or an emergency procedure is rendered by a health care provider; and (2) the obtaining of consent is not reasonably feasible under the circumstances without adversely affecting the condition of the patient's health. If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on plaintiff's(s') claim of failure to obtain informed consent.

HRS § 671-3(d)