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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

PRELIMINARY INSTRUCTIONS TO THE JURY

As the judge in this case, I have three main duties: (1) to make sure that the court proceedings are kept orderly; (2) to determine what evidence may be received during this trial; and (3) to instruct you on the law that you must apply in this case.

You are the judges of the facts. You will decide the true facts solely on the evidence received at trial. The evidence in this case will come from the testimony of witnesses and from exhibits received into evidence. A very important part of your job will be to decide whether witnesses are truthful, whether witness testimony is accurate, and how much weight or importance to give to the testimony and exhibits.

The following are not evidence and you must not consider them as evidence in deciding the facts of this case: statements and arguments by attorneys; questions and objections by attorneys; excluded or stricken testimony or exhibits; and anything you see or hear while the court is not in session.

During the course of this trial, you may hear the attorneys make objections to testimony and exhibits. It is an attorney's right to object when he or she believes an objection is

appropriate or necessary. Objections help the court keep out matters that are not relevant to the issues in this trial.

I will rule on objections according to the law. When I rule on objections or motions, do not be concerned with the reasons for my rulings.

If I sustain an objection to a question and I do not allow the question to be answered, you must not speculate about what the answer might have been or draw any conclusion from the question itself.

At times you may be excused from the courtroom so that the attorneys can discuss legal matters with me. Under the law, some matters must be heard outside of your presence. At other times, the attorneys may approach me at the bench and quietly discuss a legal matter. This is called a bench conference. Please do not be offended by our whispering and do not guess or speculate about the reasons for the bench conference.

During this trial, you must not discuss this case with anyone, not even your friends, co-workers, family or household members. Do not allow anyone to discuss this case with you. You must not discuss this case with anyone in person, over the telephone, or by e-mail, text message, tweet, blog, through Facebook, or any other form of communication. If anyone asks you about this case, I instruct you to tell that person the judge ordered you not to discuss this case and excuse yourself.

You must immediately tell the bailiff about any such contact. Do not talk to the parties, the attorneys, the witnesses or anyone else connected with this case, except for court staff.

You must not discuss this case even among yourselves until I instruct you to begin your deliberations. During your deliberations, you may discuss the case only in the jury room, and only when all jurors are present.

You must not investigate the case in any way, on your own or as a group. You must not visit any places mentioned during this trial or conduct experiments. Do not consult any dictionaries, encyclopedias, maps, or other reference materials. You are not permitted to search the internet, for example, by using Google* or any other search engine to look for information about this case or about the judge, parties, lawyers and witnesses. You must not read, listen to, or watch anything about this case from any source, such as a television or radio broadcast, a newspaper article, or an internet transmission. Your decision must be based only on the evidence you receive in this courtroom and the court's instructions on the law.

If you receive any information about this case from any source outside this trial, even unintentionally, do not share that information with any other juror. If you do receive such information, or if anyone tries to influence you or any other juror, you must immediately tell the bailiff.

Keep an open mind throughout this trial. Do not make up your mind about the verdict or about any issue until after you have discussed the case with the other jurors during deliberations. Do not conclude from my rulings or from anything that I say or do during the trial that I favor one side over the other. Do not let bias, sympathy, prejudice, or public opinion influence you during this trial.

PRACTICE NOTE: *The reference to "Google" should be modified in the event other search engines become more commonly used and known.*

INSTRUCTION NO. 1.3

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.

<u>INSTRUCTION NO. 2.1</u>

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.[1]

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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[1] 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 USE OF INDEPENDENT SOURCES OF INFORMATION

You must not use any source outside the courtroom to assist you.

This means that you must not talk to anyone about this case, except for court staff. Do not communicate with anyone else, including the parties, witnesses, your fellow jurors, friends or family members, about anything having to do with this trial. Do not talk to anyone in person, over the telephone, or by e-mail, text message, tweet, blog or any other form of communication until the court receives the jury's verdict or you are excused from jury service.

In addition, you must not conduct an independent investigation of the facts or the law. You must not visit the scene on your own, conduct experiments, or consult dictionaries, encyclopedias, textbooks, the internet, electronic resources, or other reference materials for additional information. Do not read, listen to or watch any news reports about this trial, if there are any.

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[1]

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.

[1] 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.

<u>INSTRUCTION NO. 3.3</u>

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[1]

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?

[1] 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 may 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.

<u>INSTRUCTION NO. 5.5</u>

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.

Only the general nature of the harm need be foreseeable. A person need not have foreseen the precise nature of the resulting injury or the exact manner in which it occurred.

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.[1]

[1] This instruction may require modification to comply with Haw. Rev. Stat. § 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 that 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) acted or failed to act,

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

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

(4) not be foreseeable by a reasonable person at the time defendant(s) acted or failed to act. Defendant(s) need not have foreseen the precise nature of the resulting injury/damage or the exact manner in which such injury/damage occurred. The act or force is foreseeable if there is some probability of harm sufficiently serious such that a reasonable person would take precautions to avoid the harm.

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.

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.

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[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.

PRACTICE NOTE: *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]

[1] *Tabieros v. Clark Equipment Company*, 85 Hawai'i 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 Hawaiʻi law whether this element applies in cases of personal injury to third-party beneficiaries of warranties under Haw. Rev. Stat. § 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:

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

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

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.

Barbee v. Queen[']*s Med. Ctr.*, 119 Hawai'i 136, 158-59, 194 P.3d 1098, 1120-21 (App. 2008)
Bernard v. Char, 79 Hawai'i 371, 377, 903 P.2d 676, 682 (1995), *cert. granted*, 78 Haw. 474, 896 P.2d 930, *aff'd*, 79 Hawai'i 362, 903 P.2d 667 (1995)
Nishi v. Hartwell, 52 Haw. 188, 195-96, 473 P.2d 116, 120-21, *reh'g denied*, 52 Haw. 296, 473 P.2d 116 (1970) (*overruled on other grounds by Carr v. Strode*, 79 Hawai'i 475, 904 P.2d 489 (1995))

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)

Burrows v. Hawaiian Trust Co., 49 Haw. 351, 360-61, 417 P.2d 816, 821-22 (1966)
Tittle v. Hurlbutt, 53 Haw. 526, 531 & n.5, 497 P.2d 1354, 1358 & n.5 (1972)

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) (*res ipsa loquitur* doctrine); *Medina v. Figuered*, 3 Haw. App. 186, 188, 647 P.2d 292, 294 (1982) (the "common knowledge" exception).

INSTRUCTION NO. 14.4

INFORMED CONSENT[1]

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

[1] This instruction was revised to conform with the changes to Haw. Rev. Stat. § 671-3 which became effective on January 1, 2004.

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 Haw. Rev. Stat. § 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.

H.R.S. § 671-3(d)

Leyson v. Steuermann, 5 Haw. App. 504, 513-14, 705 P.2d 37, 44-45 (1985) (*overruled on other grounds by Bernard v Char*, 79 Hawai'i 362, 903 P.2d 667 (1995))
Mroczkowski v. Straub Clinic & Hosp., 6 Haw. App. 563, 566-67, 732 P.2d 1255, 1258 (1987)

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.

Hirahara v. Tanaka, 87 Hawai'i 460, 465, 959 P.2d 830, 835 (1998)

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,

[1] This instruction is based upon Haw. Rev. Stat. § 656-1 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.

in the case of an agreement made prior to July 1, 1977,[2] an 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)

[2] The word "of" which is contained in Haw. Rev. Stat. § 656-1(7) has been removed.

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 Hawai‘i 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.

<u>INSTRUCTION NO. 15.24</u>

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.

INSTRUCTION NO. 16.1

EMPLOYMENT CONTRACT: GENERAL DEFINITION

An employment contract is a contract by which one party, the employer, engages another party, the employee, to do something for the benefit of the employer or a third party for which the employee receives compensation. Under an employment contract, the employee works under the direction or control of the employer.

An employment contract may be express, which means that it has been spoken or written down, or it may be implied from the circumstances.

INSTRUCTION NO. 16.2

EMPLOYMENT CONTRACT FOR A SPECIFIED TERM: DEFINITION

A contract to employ a person for a definite period of time is an employment contract for a specified term.[1] The length of that term may be expressly stated or implied from the facts and circumstances.

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[1] A "specified term" includes, e.g., month-to-month contracts. *Crawford v. Stewart*, 25 Haw. 226, 230 (1919).

INSTRUCTION NO. 16.3

AT-WILL EMPLOYMENT CONTRACT: DEFINITION

An employment contract of indefinite duration is an at-will employment contract. An at-will employment contract can be terminated at the will of either employee or employer, for any reason or no reason.[1]

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[1] *Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 374, 652 P.2d 625, 627 (1982); *Vlasaty v. Pacific Club*, 4 Haw. App. 556, 564, 670 P.2d 827, 833 (1983).

INSTRUCTION NO. 16.4

EMPLOYEE OR INDEPENDENT CONTRACTOR: DEFINITION

An independent contractor is not an employee. Whether a person is an employee or an independent contractor depends on the degree of control exercised over that person. If the person contracting for the work has the express or implied power to control the means and methods of performance or production, the person performing the work is an employee and not an independent contractor. If the person performing the work retains the express or implied power to control the means and methods of production, that person is an independent contractor and not an employee.

PRACTICE NOTE: *Different labor statutes utilize different tests for determining whether an individual is an employee or an independent contractor.* See, e.g., *Haw. Rev. Stat. § 383-6 (unemployment insurance), Haw. Rev. Stat. § 386-1 (workers compensation, Haw. Admin. R. § 12-12-1 (prepaid health care), Haw. Admin. R. § 12-11-1 (temporary disability). This instruction may need to be revised where the statutes at issue have a specific test for determining the existence of employee status.*

Locations v. Hawaii Dept. of Labor, 79 Hawaiʻi 208, 900 P.2d 784 (1995) (following *Bailey's Bakery v. Borthwick*, 38 Haw. 16 (1948) and *Tomondong v. Ikezaki*, 32 Haw. 373 (1932)).

INSTRUCTION NO. 16.5

PROMISSORY ESTOPPEL

PRACTICE NOTE: *Refer to Instruction Nos. 15.12, 15.13, and 15.16 of the Hawai'i Civil Jury Instructions.*

INSTRUCTION NO. 16.6

TERMINATION OF EMPLOYMENT: VOLUNTARY, INVOLUNTARY, CONSTRUCTIVE

An employee can choose to terminate his/her employment voluntarily by resigning/retiring. An employer can choose to terminate an employee's employment involuntarily, by firing or laying off the employee.

An employer can also terminate an employee by causing the employee to resign/retire involuntarily. When that occurs, the employer is said to have constructively terminated the employee.

INSTRUCTION NO. 16.7

CONSTRUCTIVE TERMINATION DUE TO INTOLERABLE WORKING CONDITIONS

Plaintiff(s) claim(s) that he/she/they was/were constructively terminated by defendant(s), in that he/she/they resigned/retired involuntarily due to intolerable working conditions.

To prove constructive termination due to intolerable working conditions, plaintiff(s) must prove all of the following elements:

1. Plaintiff's(s') working conditions were so intolerable as to cause a reasonable employee to resign/retire; and
2. Defendant(s) knew or reasonably should have known of plaintiff's(s') intolerable working conditions; and
3. Plaintiff(s) gave defendant(s) a reasonable opportunity to remedy the intolerable working conditions; and
4. Defendant(s) failed and/or refused to remedy the intolerable working conditions, which continued to exist up to the time of plaintiff(s)'s resignation/retirement; and
5. Plaintiff(s) resigned/retired because of the intolerable working conditions.

PRACTICE NOTE: *This instruction should be given only if the plaintiff affirmatively claims that a resignation or retirement was a constructive termination. It is used to attempt to satisfy an element of a cause of action (e.g., wrongful "termination" in violation of law, as in retaliation, harassment, discrimination, etc.) and is not a separate cause of action in and of itself.*

INSTRUCTION NO. 16.8

CONSTRUCTIVE TERMINATION: INTOLERABLE WORKING CONDITIONS

In determining whether working conditions are intolerable, you must consider whether the conditions would be intolerable to a reasonable employee under similar circumstances. From that standpoint, you may consider what options, if any, were reasonably available to plaintiff(s), the length of time plaintiff(s) remained on the job under those working conditions, and what a reasonable employee would have done under similar circumstances. Trivial or isolated acts of misconduct by an employer are generally insufficient to be deemed intolerable.[1]

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[1] *Watson v. Nationwide Insurance Co.*, 823 F.2d 360 (9th Cir. 1987).

INSTRUCTION NO. 16.9

WRONGFUL TERMINATION:
BREACH OF EMPLOYMENT CONTRACT FOR SPECIFIED TERM

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

1. Defendant(s) contracted to employ plaintiff(s) for [a specified period of time]; and
2. Plaintiff(s) was/were ready, willing, and able to perform the contract during the specified term;[1] and
3. Defendant(s) terminated plaintiff's(s') employment contract before the completion of the specified term; and
4. The termination was a legal cause of damage to plaintiff(s).

PRACTICE NOTE: *This instruction states the general law, and does not attempt to address instances in which defendants admit terminating the employment contract for cause before completion of the specified term. In such instances, Instruction Nos. 16.10 and 16.11 should be used and/or this instruction should be modified accordingly.*

[1] *Low v. Honolulu Rapid Transit*, 50 Haw. 582, 585, 445 P.2d 372, 376 (1968).

INSTRUCTION NO. 16.10

TERMINATION FOR CAUSE: DEFINITION

Termination for cause means termination based on reasonable grounds in view of the facts and circumstances.

PRACTICE NOTE: *This instruction is to be used only when the employment contract does not define or explain "cause" or "good cause." Collective bargaining agreements and civil service regulations, for example, may contain such definitions. Where "cause" or "good cause" is more specifically defined in the written contract, the instruction should follow the contract definition that was bargained for.*

Vieira v. Robert's Hawaii Tours, Inc., 2 Haw. App. 237, 630 P.2d 120 (1981) ("cause" not defined in written contract specifying that termination be for "cause").

INSTRUCTION NO. 16.11

TERMINATION FOR CAUSE: AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that plaintiff's (s') employment contract was terminated for cause. If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on the claim of termination without cause.

INSTRUCTION NO. 16.12

BREACH OF IMPLIED EMPLOYMENT CONTRACT: ELEMENTS

To prevail on plaintiff’s(s’) claim that defendant(s) wrongfully terminated him/her/them in breach of certain promises on which he/she/they relied as part of an implied employment contract, plaintiff(s) must prove all of the following elements:

1. Plaintiff(s) was/were (an) at-will employee(s) of defendant(s); and
2. Defendant(s) circulated [employee handbooks/policy manuals/rules and regulations] that gave his/her/its/their at-will employees promises of specific treatment in specific situations; and
3. Plaintiff(s) reasonably relied on defendant’s(s’) promises of specific treatment in specific situations by remaining on the job and not actively seeking other employment; and
4. Defendant(s) terminated plaintiff(s) in breach of defendant’s(s’) promise requiring [describe specific promise(s)].

INSTRUCTION NO. 16.13

DISCLAIMER OF IMPLIED EMPLOYMENT CONTRACT: ELEMENTS

Defendant(s) assert(s) the affirmative defense that he/she/it/they gave notice to all at-will employees that defendant's(s') statements in [employee handbooks/policy manuals/rules and regulations] did not change their status as employees who could be terminated at will.

To prevail on his/her/its/their affirmative defense, defendant(s) must prove both of the following elements:

1. Defendant(s) made no written guarantees of continued employment to defendant's(s') employees; and
2. Disclaimers in defendant's(s') [employee handbooks/policy manuals/rules and regulations] clearly state that the employees can be terminated at will.[1]

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[1] *Shoppe v. Gucci America, Inc.*, 94 Hawai'i 368, 385-86, 14 P.3d 1049, 1066-67 (2000).

INSTRUCTION NO. 16.14

WRONGFUL (RETALIATORY) TERMINATION IN VIOLATION OF PUBLIC POLICY

To prevail on the claim of wrongful termination in violation of public policy, plaintiff(s) must prove all of the following elements:

1. Plaintiff(s) was/were employed by defendant(s); and
2. Plaintiff(s) engaged in [describe assertion of rights or conduct protected by clear mandate of public policy]; and
3. Defendant(s) subsequently [fired plaintiff(s)/laid off plaintiff(s)/forced plaintiff(s) to resign]; and
4. Plaintiff's(s') [describe protected conduct] was a substantial or motivating factor in defendant's(s') decision to [fire plaintiff(s)/lay off plaintiff(s)/force plaintiff(s) to resign].

Parnar v. Americana Hotels, Inc., 65 Haw. 370, 377-82, 652 P.2d 625, 629-32 (1982); *Norris v. Hawaiian Airlines, Inc.*, 74 Haw. 235, 261, 842 P.2d 634, 646 (1992); *Crosby v. State Dept. of Budget & Finance*, 76 Hawai'i 332, 342, 876 P.2d 1300, 1310 (1994).

INSTRUCTION NO. 16.15

HAWAII WHISTLEBLOWERS' PROTECTION ACT:
ELEMENTS OF A REPORTING CLAIM
(HAW. REV. STAT. § 378-62(1))

To prevail on the claim of a violation of the Hawaii Whistleblowers' Protection Act, plaintiff(s) must prove all of the following elements:

1. Plaintiff(s) was/were employed by defendant(s); and
2. [Plaintiff(s)] [A person or persons on behalf of plaintiff(s)] reported or was/were about to report one or both of the following to [defendant(s)/a public body]:
    a. A violation or suspected violation of a/an [law/ordinance/rule/regulation] of the [Federal/State/County] government; or
    b. A violation or suspected violation of a contract with the [Federal/State/County] government; and
3. Defendant(s) [discharged plaintiff(s)/threatened plaintiff(s)/discriminated against plaintiff(s) in compensation or terms, conditions, location or privileges of employment]; and
4. The actual or potential reporting as noted above was a substantial or motivating factor in defendant's(s') decision to [discharge/other adverse employment

action].

PRACTICE NOTE: *This instruction can be tailored to the facts of the specific case. For example, where the "public body" is identified as a matter of law (e.g., the State Legislature) the proper name can be inserted.*

INSTRUCTION NO. 16.16

HAWAII WHISTLEBLOWERS' PROTECTION ACT: ELEMENTS OF A PARTICIPATION CLAIM (HAW. REV. STAT. § 378-62(2))

To prevail on the claim of a violation of the Hawaii Whistleblowers' Protection Act, plaintiff(s) must prove all of the following elements:

1. Plaintiff(s) was/were employed by defendant(s); and
2. Plaintiff(s) had been requested by [name of public body] to participate in a/an [investigation/hearing/inquiry/court action]; and
3. Defendant(s) [discharged plaintiff(s)/threatened plaintiff(s)/discriminated against plaintiff(s) in compensation or terms, conditions, location or privileges of employment]; and
4. Plaintiff's(s') actual or potential participation as noted above was a substantial or motivating factor in defendant's(s') decision to [discharge/other adverse employment action].

INSTRUCTION NO. 16.17

HAWAII WHISTLEBLOWERS’ PROTECTION ACT:
HAW. REV. STAT. § 378-62 GENERAL AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that the [termination/threat/discrimination in compensation or terms, conditions, location or privileges of employment] would have occurred regardless of the actual or potential [reporting/participation]. If defendant(s) prove this affirmative defense, then you must find in favor of defendant(s) on plaintiff’s(s’) whistleblower claim.

Crosby v. State Dept. of Budget & Finance, 76 Hawai‘i 332, 342, 876 P.2d 1300, 1310 (1994).

INSTRUCTION NO. 16.18

HAWAII WHISTLEBLOWERS' PROTECTION ACT: HAW. REV. STAT. § 378-62(1) AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that plaintiff(s) knew that his/her/their report was false when made. If defendant(s) prove this affirmative defense, you must find in favor of defendant(s) on plaintiff's(s') whistleblower claim.

INSTRUCTION NO. 16.19

UNLAWFUL DISCRIMINATORY PRACTICES: GENERAL DEFINITION

It is an unlawful discriminatory practice for any employer to [refuse to hire/refuse to employ/bar or discharge from employment] or otherwise to discriminate against any person in compensation or in the terms, conditions, or privileges of employment because of the person's [race/sex/sexual orientation/age/religion/color/ancestry/disability/marital status/arrest and court record/other[1]].

In this case, plaintiff(s) claim(s) that defendant(s) [refused to hire plaintiff(s)/refused to employ plaintiff(s)/barred or discharged plaintiff(s) from employment/discriminated against plaintiff(s) in compensation,

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[1] Laws enacted after Haw. Rev. Stat. § 378-2(1)(A) have recognized additional protected categories under certain circumstances. Under the following paragraphs of Haw. Rev. Stat. § 378-2, it is unlawful to discriminate "because of" the:

(5) "assignment of income for the purpose of satisfying the individual's child support obligations as provided for under section 571-52";

(6) "known disability of an individual with whom the qualified individual is known to have a relationship or association";

(7) breastfeeding or expressing of "milk at the workplace"; or

(8) "individual's credit history or credit report, unless the information in the individual's credit history or credit report directly relates to a bona fide occupational qualification under section 378-3(2)."

or in the terms, conditions, or privileges of employment] because of plaintiff's(s') [race/sex/sexual orientation/age/religion/color/ancestry/disability/marital status/arrest and court record/other[2]].

Haw. Rev. Stat. § 378-2(1)(A); *Nelson v. University of Hawaii*, 97 Hawaiʻi 376, 387, 38 P.3d 95, 106 (2001).

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[2] *See* footnote 1.

INSTRUCTION NO. 16.20

DISCRIMINATION: ESSENTIAL FACTUAL ELEMENTS

Plaintiff(s) claim(s) that defendant(s) wrongfully discriminated against him/her/them.[1] To prevail on this claim of discrimination, plaintiff(s) must prove all of the following:

1. Plaintiff(s) [are/were employed by/sought employment with] defendant [employer's name];

2. Plaintiff(s) was/were [not hired/refused employment/barred or discharged from employment/discriminated against in compensation, or in the terms, conditions, or privileges of employment];

3. Plaintiff(s) is/are qualified for [his/her/their position(s)/the position(s) sought];[2]

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[1] A plaintiff claiming discrimination has the burden of establishing either (1) intentional discrimination against a protected class to which the plaintiff belongs (also known as "pattern-or-practice" discrimination); (2) unintentional discrimination based on a neutral employment policy that has a disparate impact on a protected class to which the plaintiff belongs (also known as "disparate impact" discrimination); or (3) intentional discrimination against an individual who belongs to a protected class (also known as individual "disparate treatment" discrimination). *See Shoppe v. Gucci America, Inc.*, 94 Hawaiʻi 368, 377-78, 14 P.3d 1049, 1058-59 (2000). The vast majority of discrimination cases are of the third variety, for which this instruction is appropriate.

[2] When the claimed discrimination is on the basis of a disability, this third element of proof is modified to read as follows: "Plaintiff(s) is/are qualified, with or without reasonable accommodation, to perform the essential duties of [his/her/their position(s)][the position(s) sought]. *See French v. Hawaii Pizza Hut*,

4. Plaintiff's(s') [*state protected status—e.g., race,*[3] *age,*[4] *gender,*[5] *disability,*[6] *marital status,*[7] *etc.*[8]] was a substantial or motivating factor in [the failure or

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Inc., 105 Hawai'i 462, 467, 99 P.3d 1046, 1051 (2004); *Suzuki v. State of Hawai'i*, 119 Hawai'i 288, 298, 196 P.3d 290, 300 (App. 2008); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 478 (1999) (*overturned due to legislative action* in U.S. Pub. L. 110-325 (September 25, 2008) § 5).

[3] *See Furukawa v. Honolulu Zoological Society*, 85 Hawai'i 7, 12-13, 936 P.2d 643, 648-49 (1997). A person may be "discriminated against" because of race in comparison to other "similarly situated" employees. Similarly situated employees are those who are generally subject to the same policies and subordinate to the same decision-maker as the plaintiff, *i.e.*, those whose "relevant aspects" of employment are similar. *See* Instruction No. 6.13.

[4] *See Shoppe v. Gucci America, Inc.*, 94 Hawai'i 368, 378, 14 P.3d 1049, 1059 (2000).

[5] *See Nelson v. University of Hawaii,* 97 Hawai'i 376, 387, 38 P.3d 95, 106 (2001) (sex discrimination/sexual harassment); *Sam Teague, Ltd. v. Hawaii Civil Rights Commission,* 89 Hawai'i 269, 279 n.10, 971 P.2d 1004, 1114 n.10 (1999) (sex/pregnancy discrimination).

[6] *See French v. Hawaii Pizza Hut, Inc.*, 105 Hawai'i 462, 467, 99 P.3d 1046 (2004); *Suzuki v. State of Hawai'i*, 119 Hawai'i 288, 298, 196 P.3d 290, 300 (App. 2008); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) (*overturned due to legislative action* in U.S. Pub. L. 110-325 (September 25, 2008) § 5). A plaintiff has the burden of establishing that: (1) he or she is an individual with a "disability" within the meaning of the statute; (2) he or she is otherwise qualified to perform the essential duties of his or her job with or without reasonable accommodation; and (3) he or she suffered an adverse employment decision because of his or her disability.

[7] *See Ross v. Stouffer Hotel Co.*, 76 Hawai'i 454, 458-9, 879 P.2d 1037, 1041-42 (1994); Haw. Rev. Stat. §§ 378-1 & 378-2(1)(A). A plaintiff has the burden of establishing that he or she was qualified for the position, but suffered an adverse employment action because of plaintiff's status as a married or unmarried person, or because of the identity and occupation of plaintiff's spouse.

[8] Other protected categories are stated in paragraphs (5) through (8) of Haw. Rev. Stat. § 378-2, as noted in Instruction No. 16.19 at footnote 1.

refusal to hire/the discharge/the discrimination in compensation, or in the terms, conditions, or privileges of employment];

5. Plaintiff(s) was/were harmed; and

6. The [adverse action] was a legal cause of plaintiff's(s') harm.

INSTRUCTION NO. 16.21

RETALIATION: ELEMENTS

To prevail on the claim of unlawful retaliation, plaintiff(s) must prove all of the following:

1. Plaintiff(s) engaged in a legally protected activity by [opposing an act or practice of the defendant(s) in the good faith belief that it was unlawfully discriminatory/filing a complaint, testifying, or assisting in any proceeding regarding unlawful discrimination];

2. After plaintiff's(s') [opposition to/participation in] such activity, defendant(s) [*describe adverse employment action*][1];

3. Plaintiff's(s') [opposition to/participation in] such activity was a substantial or motivating factor in [*describe adverse employment action*]; and

4. Defendant's(s') [*describe adverse employment action*] was a legal cause of harm to plaintiff(s).

PRACTICE NOTE: *Plaintiffs are protected from retaliation after engaging in one or both of the following types of activities—*

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[1] *See* Instruction No. 16.20 and Haw. Rev. Stat. § 378-2 for general categories of adverse employment actions (*e.g.*, failure or refusal to hire, discharge from employment, discrimination in compensation or in the terms, conditions, or privileges of employment).

opposing discrimination or participating in a discrimination complaint process. The appropriate type of protected activity should be selected for this instruction.

Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 426, 32 P.3d 52, 70 (2003); *Shoppe v. Gucci America, Inc.*, 94 Hawai'i 368, 378-79, 14 P.3d 1049, 1059-60 (2000) (age discrimination); *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000).

INSTRUCTION NO. 16.22

PRETEXT: DEFINITION

"Pretext" means a dishonest explanation or deceit used to cover one's tracks. Defendant's(s') reason for [*describe adverse employment action*] is "pretextual" if it is unworthy of belief.[1]

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[1] *Hac v. University of Hawaii*, 102 Hawai'i 92, 100 n.15, 73 P.3d 46, 54 n.15 (2003).

INSTRUCTION NO. 16.23

INTENT TO DISCRIMINATE:
PRIOR ACTS OF DEFENDANT

In determining whether defendant(s) intended to discriminate against plaintiff(s) on the basis of [*see*, *e.g.*, *Instruction No. 6.2., for insertion here of appropriate protected category*], you may consider evidence of defendant's(s') prior acts and conduct towards plaintiff's(s') co-employees.

Furukawa v. Honolulu Zoological Society, 85 Hawai'i 7, 16, 936 P.2d 643, 652 (1997).

INSTRUCTION NO. 16.24

INTENT MAY BE INFERRED

You may infer intent to discriminate from proof that similarly situated employees outside the protected category received better treatment than plaintiff(s). “Similarly situated” employees are generally those employees who are subject to the same policies and subordinate to the same decision-maker as plaintiff(s). Plaintiff(s) must prove that all of the relevant aspects of his/her/their employment situation were similar to those employees with whom he/she/they seek(s) to compare his/her/their treatment.

Furukawa v. Honolulu Zoological Society, 85 Hawai‘i, 7, 14–15, 936 P.2d 643, 650–51 (1997).

INSTRUCTION NO. 16.25

INTENT TO DISCRIMINATE: SAME ACTOR INFERENCE

If defendant(s) prove(s) that the person who hired plaintiff(s) is the same person who [*describe adverse employment action, e.g., "made the decision to terminate"*] plaintiff(s), and both actions occurred within a relatively short period of time, then you may infer that that person lacked the intent to discriminate against plaintiff(s).

Shoppe v. Gucci America, Inc., 94 Hawai'i 368, 380, 14 P.3d 1049, 1061 (2000).

INSTRUCTION NO. 16.26

BONA FIDE OCCUPATIONAL QUALIFICATION: AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that he/she/it/they is/are not liable for discrimination because defendant's(s') [*describe employment action, e.g., "hiring of males only"*] was necessitated by a Bona Fide Occupational Qualification (BFOQ). To establish a BFOQ, defendant(s) must prove both of the following elements:

1. The [*describe employment action*] was reasonably necessary to the normal operation of defendant's(s') particular business; and
2. The [*describe employment action*] was substantially related to the functions of the position in question.

A BFOQ cannot be based on assumptions, stereotypes, or the subjective preferences of the defendant(s) or of other employees, clients or customers.

If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on the claim of discrimination.

PRACTICE NOTE: *The Hawai'i Administrative Rules recognize a BFOQ based on sex (Haw. Admin. R. § 12-46-102); marital status (Haw. Admin. R. § 12-46-122); age (Haw. Admin. R. § 12-46-132); ancestry (Haw. Admin. R. § 12-46-172); and disability (Haw.*

Admin. R. § 12-46-193(3)). However, there are no Rules recognizing a BFOQ for discrimination based on other protected classes, including race and color. Haw. Rev. Stat. § 378-2(8) codifies the 2009 addition of the protected category of credit history or credit report, subject to bona fide occupational qualifications, as well as to exceptions stated in Haw. Rev. Stat. § 378-2.7.

Haw. Rev. Stat. § 378-3(2); *Sam Teague, Ltd. v. Hawaii Civil Rights Commission*, 89 Hawaiʻi 269, 280, 971 P.2d 1104, 1115 (1999).

INSTRUCTION NO. 16.27

SEXUAL HARASSMENT: TWO TYPES

Sexual harassment is a form of unlawful sex discrimination. In other words, it is conduct, verbal and/or physical, that discriminates against a person based on that person's sex. There are two different types of sexual harassment: "hostile environment" and "quid pro quo."

Nelson v. University of Hawaii, 97 Hawai'i 376, 387, 38 P.3d 95, 106 (2001); *Steinberg v. Hoshijo*, 88 Hawai'i 10, 18 n.11, 960 P.2d 1218, 1226 n.11 (1998); Haw. Admin. R. § 12-46-109(a); Haw. Rev. Stat. § 378-2(1)(A).

INSTRUCTION NO. 16.28

HOSTILE ENVIRONMENT SEXUAL[1] HARASSMENT: ELEMENTS

To prevail on the claim of hostile environment sexual harassment, plaintiff(s) must prove all of the following elements:

1. He/she/they was/were subjected to discriminatory conduct on the basis of plaintiff's(s') sex in the form of sexual advances, requests for sexual favors, or other verbal, physical, or visual harassment of a sexual nature; and
2. The conduct was unwelcome; and
3. The conduct was severe or pervasive; and
4. The conduct had the purpose or effect of either:
   a. Unreasonably interfering with plaintiff's(s') work performance, or
   b. Creating an intimidating, hostile, or offensive work environment; and
5. Plaintiff(s) actually perceived the conduct as having such purpose or effect; and
6. Plaintiff's(s') perception was objectively reasonable

[1] To date, the Hawaiʻi appellate courts have not considered hostile environment claims based on any protected category other than sex. However, Hawaiʻi Administrative Rule § 12-46-175 recognizes harassment on the basis of ancestry.

to a person of the same sex as plaintiff(s).

Nelson v. University of Hawaii, 97 Hawai‘i 376, 390, 38 P.3d 95, 109 (2001); Haw. Admin. R. § 12-46-109(a).

INSTRUCTION NO. 16.29

HOSTILE ENVIRONMENT SEXUAL HARASSMENT BY CO-WORKER

In this case, plaintiff(s) must also prove that defendant(s) [*name of employer(s)*] knew or should have known of the harassment and failed to take prompt action reasonably calculated to end the harassment. In certain circumstances, an oral warning with the threat of disciplinary action may be sufficient to satisfy the employer's obligation. The more serious the harassing conduct, the more serious the employer's response should be.

PRACTICE NOTE: *In any sexual harassment case where the alleged harasser is a non-supervisory co-employee, the elements of Instruction No. 16.28 must be accompanied by this instruction.*

INSTRUCTION NO. 16.30

SEXUAL HARASSMENT (HOSTILE ENVIRONMENT): NO PROOF OF TANGIBLE OR PHYSICAL HARM REQUIRED

To prevail on the claim of the hostile environment sexual harassment, plaintiff(s) need not prove that he/she/they suffered tangible physical or psychological harm. Plaintiff's(s') perception of harm is sufficient, as long as the perception is objectively reasonable.

Nelson v. University of Hawaii, 97 Hawai'i 376, 390, 38 P.3d 95, 109 (2001); *Arquero v. Hilton Hawaiian Village LLC*, 104 Hawai'i 423, 428, 91 P.3d 505, 510 (2004).

INSTRUCTION NO. 16.31

SEXUAL HARASSMENT (HOSTILE ENVIRONMENT): TOTALITY OF CIRCUMSTANCES

In deciding plaintiff's(s') claim of hostile environment sexual harassment, you must consider the totality of the circumstances, such as the nature of the sexual conduct and the context in which the alleged incident(s) occurred.

Steinberg v. Hoshijo, 88 Hawai‘i 10, 18, 960 P.2d 1218, 1226 (1998), *followed in Arquero v. Hilton Hawaiian Village LLC*, 104 Hawai‘i 423, 428, 91 P.3d 505, 510 (2004).

INSTRUCTION NO. 16.32

SEXUAL HARASSMENT: SEVERE OR PERVASIVE CONDUCT

To satisfy the third element of a hostile environment sexual harassment claim, defendant's(s') conduct must be either severe or pervasive. The more serious the harassing conduct, the less pervasive or frequent it need be. A single severe act may satisfy this element, but trivial conduct does not. Multiple acts, each of which may not be severe when considered individually, may constitute severe or pervasive conduct when considered together.

Nelson v. University of Hawaii, 97 Hawai'i 376, 390, 38 P.3d 95, 109 (2001); *Arquero v. Hilton Hawaiian Village LLC*, 104 Hawai'i 423, 428, 91 P.3d 505, 510 (2004).

INSTRUCTION NO. 16.33

SEXUAL HARASSMENT (HOSTILE ENVIRONMENT): PLAINTIFF'S(S') PERCEPTION

To satisfy the sixth element of a hostile environment sexual harassment claim, plaintiff's(s') perception of defendant's(s') conduct must be objectively reasonable. In deciding this issue, you must consider whether a reasonable woman/man in plaintiff's(s') position[1] would share plaintiff's(s') perception as to the purpose or effect of the conduct in question. If a reasonable woman/man would consider such conduct sufficiently severe or pervasive as to alter his/her conditions of employment and either unreasonably interfere with his/her work performance or create an intimidating, hostile, or offensive work environment, the sixth element is satisfied.

[1] The perception must be that of the victim. *Steinberg v. Hoshijo*, 88 Hawaiʻi 10, 18, 960 P.2d 1218, 1226 (1998).

INSTRUCTION NO. 16.34

SEXUAL HARASSMENT (QUID PRO QUO): ELEMENTS

To prevail on the claim of quid pro quo sexual harassment, plaintiff(s) must prove both of the following elements:

1. He/she/they was/were subjected to unwelcome [sexual advances/requests for sexual favors/other verbal statements or physical conduct of a sexual nature] by [insert title, position, or name of person(s) who is/are alleged to have had power to control or dictate terms or conditions of plaintiff's(s') employment]; and

[2. Plaintiff(s) was/were required to submit to [*repeat bracketed conduct from paragraph 1*] in order to [avoid (*describe adverse employment action*)/receive (*describe job benefit*)].

[2. Plaintiff(s) refused to submit to [*repeat bracketed conduct from paragraph 1*] and, as a result, [*describe adverse employment action*].

PRACTICE NOTE: *The language in the first bracketed paragraph applies where the plaintiff submitted to the sexual requests or advances. The language in the second bracketed paragraph applies where the plaintiff's refusal to submit to the sexual conduct resulted in an adverse employment action being taken against, or a job benefit being withheld from, the plaintiff.*

Nelson v. University of Hawaii, 97 Hawai'i 376, 387, 38 P.3d 95, 106 (2001); *Ninth Circuit Manual of Model Jury Instructions-Civil* (2001) § 13.6 (as modified).

INSTRUCTION NO. 16.35

CONVICTION DISCRIMINATION:
AFFIRMATIVE DEFENSE

Defendant(s) assert(s) the affirmative defense that the nature of the plaintiff's(s') criminal conviction record bears a rational relationship to the duties and responsibilities of the position. If defendant(s) prove(s) this affirmative defense, then you must find in favor of defendant(s) on the claim of discrimination on the basis of conviction record.

Haw. Rev. Stat. § 378-2.5; *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 142 P.3d 265 (2006).

INSTRUCTION NO. 16.36

BREACH OF EMPLOYMENT CONTRACT –
SPECIFIED TERM: DAMAGES

If defendant(s) breached the employment contract with plaintiff(s), plaintiff(s) is/are entitled to recover monetary damages caused by the breach.

Damages for breach of the employment contract should include the amount of compensation agreed upon from the date of breach to the date on which the contract was to have terminated.

PRACTICE NOTE: T*his instruction should be given in every case involving breach of an employment contract for a specified term. In appropriate cases, this instruction should be followed by Instruction No. 16.39 regarding mitigation of damages. All or part of Instruction No. 15.10 (Contract – Damages) may also apply.*

Vieira v. Robert's Hawaii Tours, Inc., 2 Haw. App. 237, 630 P.2d 120 (1981); BAJI 10.34; Instruction No. 15.10 of the Hawai'i Civil Jury Instructions.

INSTRUCTION NO. 16.37

PUBLIC POLICY WRONGFUL TERMINATION: DAMAGES

If you find that plaintiff(s) has/have prevailed on the claim of wrongful termination in violation of public policy, you must decide the amount that will reasonably and fairly compensate plaintiff(s) for the damages he/she/they suffered as a result. In deciding the amount of such damages, you should determine the amount of compensation that plaintiff(s) would have earned from defendant from the time of the termination up to today, including any benefits and pay increases.

If you also find that plaintiff(s) would have continued his/her/their employment into the future, you should consider how long he/she/they would have been reasonably certain to continue in employment, and then decide what the present cash value of plaintiff's(s') future wages and benefits would be.

In determining the period that plaintiff(s) would have been reasonably certain to continue in employment, you may consider plaintiff's(s') age, work performance, and intent regarding continuing employment with defendant; defendant's prospects for continuing the operation involving plaintiff(s); and any other factor that bears on how long plaintiff(s) would have continued to work.

PRACTICE NOTE: *In appropriate cases, this instruction should be followed by Instruction No. 16.39 regarding mitigation of damages.*

INSTRUCTION NO. 16.38

BREACH OF IMPLIED EMPLOYMENT CONTRACT: DAMAGES

If you find that plaintiff(s) has/have prevailed on the claim of breach of implied employment contract, you must decide the amount that will reasonably and fairly compensate plaintiff(s) for the damages he/she/they suffered as a result. In deciding the amount of such damages, you should determine the amount of compensation that plaintiff(s) would have earned from defendant from the time of the breach up to today, including any benefits and pay increases.

If you also find that plaintiff(s) would have continued his/her/their employment into the future, you should consider how long he/she/they would have been reasonably certain to continue in employment, and then decide what the present cash value of plaintiff's(s') future wages and benefits would be.

In determining the period that plaintiff(s) would have been reasonably certain to continue in employment, you may consider plaintiff's(s') age, work performance, and intent regarding continuing employment with defendant; defendant's prospects for continuing the operations involving plaintiff(s); and any other factor that bears on how long plaintiff(s) would have continued to work.

PRACTICE NOTE: *In appropriate cases, other types of contract damages may be sought. In most instances, this instruction should also be accompanied by Instruction No. 16.39 regarding mitigation of damages.*

Francis v. Lee Enterprises, Inc., 89 Hawai'i 234, 971 P.2d 70 (1999).

INSTRUCTION NO. 16.39

MITIGATION OF DAMAGES

Plaintiff(s) has/have a duty to mitigate or minimize his/her/their damages by making a reasonable effort to find employment in a job that is comparable or substantially similar to the job lost.

Defendant(s) has/have the burden of proving that plaintiff(s) failed to make such an effort. Defendant(s) must prove by a preponderance of the evidence that other comparable or substantially similar employment was available and that plaintiff(s) failed to make reasonable efforts to find such employment or rejected such employment.

If you find that plaintiff(s) could have found comparable or substantially similar employment through reasonable efforts, but did not do so, you must deduct from plaintiff's(s') damages the amount that plaintiff(s) could reasonably have earned from such comparable employment.

Vieira v. Robert's Hawaii Tours, Inc., 2 Haw. App. 237, 239, 630 P.2d 120, 122 (1981); *Tabieros v. Clark Equipment Co.*, 85 Hawai'i 336, 372-374, 944 P.2d 1279, 1315-17 (1997). *See also* Instruction Nos. 8.18 & 15.11 of the Hawai'i Civil Jury Instructions.

INSTRUCTION NO. 16.40

DISCRIMINATION: COMPENSATORY DAMAGES

If you find that plaintiff(s) has/have prevailed on the claim of wrongful discrimination, you must decide the amount that will reasonably and fairly compensate plaintiff(s) for the damages he/she/they suffered as a result.

You may award compensatory damages for emotional distress, pain or suffering. Emotional distress includes mental worry, anxiety, anguish, suffering, and grief, where they are shown to exist.

Compensation must be reasonable. You may award only such damages as will fairly and reasonably compensate plaintiff(s) for the injuries or damages that you find were legally caused by defendant’s(s’) discrimination.

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.

On the other hand, the law does not require that the plaintiff(s) prove the amount of the losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit. 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.

PRACTICE NOTE: *In applicable cases, Instruction Nos. 8.12, 8.13, 8.14, 8.15 and 8.16 regarding punitive damages may also be given.*

Front pay is not an element of compensable damages that may be awarded by a jury. Front pay is an equitable remedy that may be awarded only by the court.

Furukawa v. Honolulu Zoological Society, 85 Hawaiʻi 7, 18, 936 P.2d 643, 654 (1997) ("Compensatory and punitive damages are generally available in employment discrimination cases, as remedies from a court or an agency, or both."); Haw. Rev. Stat. § 368-17; Haw. Rev. Stat. § 378-5. *See also* Instruction Nos. 8.9, 8.10 and 8.11 of the Hawaiʻi Civil Jury Instructions.

INSTRUCTION NO. 17.1

PREMISES LIABILITY – ELEMENTS

An/a [owner/landlord/tenant/occupier] of [land/property/a building] has a duty to exercise reasonable care to maintain the land/property/building in a safe condition or to give adequate warning to persons reasonably anticipated to be on/in the land/property/building.

To prevail on his/her/their claim, plaintiff(s) must prove all of the following elements:

1. People like plaintiff(s) were reasonably anticipated to be on/in the land/property/building; and
2. A condition on/in the land/property/building posed an unreasonable risk of harm; and
3. Defendant(s) knew or should have known of the unreasonable risk of harm; and
4. Defendant(s) had sufficient control over the land/property/building to be able to take reasonable steps to remove the unreasonable risk of harm or to give adequate warning of that risk; and
5. Defendant(s) failed to take reasonable steps to remove the unreasonable risk of harm or to give adequate warning of that risk; and
6. Defendant’s(s’) failure was a legal cause of injury to

plaintiff(s).

PRACTICE NOTE: *Delete elements that are not in dispute.*

Pickard v. City & County of Honolulu, 51 Haw. 134, 452 P.2d 445 (1969); *Gibo v. City & County of Honolulu*, 51 Haw. 299, 459 P.2d 198 (1969); *Corbett v. Association of Apartment Owners of Wailua Bayview Apartments*, 70 Haw. 415, 772 P.2d 693 (1989).

INSTRUCTION NO. 17.2

PREMISES LIABILITY - DEGREE OF CONTROL

Defendant(s) need not have exclusive control to have sufficient control over the land/property/building. Several persons or entities may each have sufficient control as owners, occupiers or otherwise, even though their control is only partial or joint.

Wemple ex rel. Dang v. Dahman, 103 Hawai‘i 385, 83 P.3d 100 (2004).

<u>INSTRUCTION NO. 17.3</u>

[REPEALED]

Repealed in light of *Steigman v. Outrigger Enterprises, Inc.*, 126 Hawai‘i 133, 267 P.3d 1238 (2011).

INSTRUCTION NO. 17.4

PREMISES LIABILITY – MARKETING METHOD OR MODE OF OPERATION[1]

A business has a duty to exercise reasonable care to maintain its premises in a safe condition and remove unreasonable risks of harm that arise from the way in which a business is conducted or operated.

To prevail on his/her/their claim, plaintiff(s) must prove all of the following elements:

1. A condition on/in the land/property/building posed an unreasonable risk of harm; and

2. Defendant(s) failed to take reasonable steps to remove the unreasonable risk of harm or to give adequate warning of that risk;[2] and

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

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[1] This instruction applies to cases with facts similar to *Gump v. Walmart Stores, Inc.*, 93 Hawaiʻi 428, 5 P.3d 418 (App. 1999), *aff'd in relevant part, rev'd in other part*, 93 Hawaiʻi 417, 5 P.3d 407 (2000).

[2] The phrase "or to give adequate warning of that risk" does not appear in *Gump*.

INSTRUCTION NO. 17.5

PREMISES LIABILITY - NON-OWNER, NON-OCCUPIER; ELEMENTS

To prevail on a claim of negligence against a defendant who/which did not own, occupy or control the land/property/building, plaintiff(s) must prove all of the following elements:

1. Defendant(s) affirmatively took action to induce plaintiff(s) to engage in conduct on/in the [land/property/building] on/in which plaintiff(s) sustained injury; and
2. Defendant's(s') action created a false appearance of safety upon which plaintiff(s) relied to his/her/their detriment; and
3. Defendant's(s') action was a legal cause of injury to plaintiff(s).

Geremia v. State, 58 Haw. 502, 573 P.2d 107 (1977); *Lansdell v. County of Kauai*, 110 Hawai'i 189, 130 P.3d 1054 (2006).

INSTRUCTION NO. 17.6

RECREATIONAL PURPOSE DEFENSE

Defendant(s) assert(s) the defense that he/she/it/they had no duty to plaintiff(s) because plaintiff's(s') use of the land/property/building was for a recreational purpose.

To prevail on this defense, defendant(s) must prove that:

1. Defendant(s) directly or indirectly invited or permitted plaintiff(s) to use the land/property/building for a recreational purpose; and

2. Defendant(s) did not charge for such use of the land/property/building.

Haw. Rev. Stat. §§ 520-3, 520-4, 520-5.

INSTRUCTION NO. 17.7

RECREATIONAL PURPOSE - DEFINITION

Recreational purpose includes, but is not limited to, any of the following: hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites.

Haw. Rev. Stat. § 520-2.

INSTRUCTION NO. 17.8

COMMERCIAL PURPOSE

The recreational purpose defense does not apply if the plaintiff's(s') use of the land/property/building was related at least in part to the owner's(s')[1] commercial purpose.

Crichfield v. Grand Wailea Co., 93 Hawai'i 477, 6 P.3d 349 (2000); *Thompson v. Kyo-Ya Co., Ltd.*, 112 Hawai'i 472, 146 P.3d 1049 (2006).

[1] Under Haw. Rev. Stat. § 520-2, an "owner" means "the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises."

INSTRUCTION NO. 17.9

INTENTIONS OF OWNER AND USER

In determining whether defendant(s) invited or permitted plaintiff(s) to use the land/property/building for a recreational purpose, and whether plaintiff(s) used the land/property/building for a recreational purpose, you may consider the subjective intentions of plaintiff(s) and defendant(s).

Crichfield v. Grand Wailea Co., 93 Hawaiʻi 477, 6 P.3d 349 (2000).

INSTRUCTION NO. 17.10

EXCEPTION FOR WILFUL OR MALICIOUS FAILURE TO GUARD OR WARN

The recreational purpose defense does not apply if defendant(s) wilfully or maliciously failed to guard or warn against:

1. A dangerous [condition/use/structure] [on/in] defendant's(s') land/property/building that defendant(s) knowingly created or allowed to continue; or
2. A dangerous activity that defendant(s) knowingly pursued or allowed to continue.

Haw. Rev. Stat. § 520-5.

INSTRUCTION NO. 17.11

EXCEPTION FOR HOUSE GUESTS

The recreational purpose defense does not apply if plaintiff(s) was/were [a] house guest(s), even though plaintiff(s) was/were also invited for a recreational purpose. A house guest is any person specifically invited by the owner[1] or a member of the owner's household to visit at the owner's home for dinner, for a party, for conversation or for any other similar purposes including for recreation. [A house guest may include playmates of the owner's minor children.]

PRACTICE NOTE: *This instruction may need to be modified in cases involving multiple defendants.*

Haw. Rev. Stat. §§ 520-2, 520-5.

[1] Under Haw. Rev. Stat. § 520-2, an "owner" means "the possessor of a fee interest, a tenant, lessee, occupant, or person in control of the premises."

INSTRUCTION NO. 18.1

ANIMAL ATTACKS
(ANIMALS NOT KNOWN BY THEIR SPECIES OR NATURE TO BE DANGEROUS, WILD OR VICIOUS)

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

1. Defendant(s) was/were the owner(s)/harborer(s) of the animal that bit/attacked plaintiff(s);

2. Defendant(s) was/were negligent; and

3. Such negligence was a legal cause of plaintiff's(s') injuries/damages.

Plaintiff(s) need not prove that defendant(s) knew of the animal's vicious or dangerous propensities, if any.

PRACTICE NOTE: *Liability may also arise from animal conduct other than bites or attacks.*

Haw. Rev. Stat. § 663-9(a); *Hubbell v. Iseke*, 6 Haw. App. 485, 727 P.2d 1131 (1986).

INSTRUCTION NO. 18.2

ANIMAL ATTACKS
(ANIMALS KNOWN BY THEIR SPECIES OR NATURE
TO BE DANGEROUS, WILD OR VICIOUS)

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

1. Defendant(s) was/were the owner(s)/harborer(s) of the animal that bit/attacked plaintiff(s);

2. That animal was known by its species or nature to be dangerous, wild, or vicious; and

3. That animal was a legal cause of plaintiff's(s') injuries/damages.

PRACTICE NOTE: *Liability may also arise from animal conduct other than bites or attacks.*

Haw. Rev. Stat. § 663-9(b); *Hubbell v. Iseke*, 6 Haw. App. 485, 727 P.2d 1131 (1986).

INSTRUCTION NO. 18.3

ANIMAL ATTACKS
DEFENSE OF UNLAWFUL ENTRANCE AND PRESENCE ON PREMISES

Defendant(s) assert(s) the defense that [he/she/it/they] [is/are] not liable for plaintiff's(s') injuries or damages because plaintiff(s) intentionally or knowingly entered or remained [in a building/upon land/on the premises] unlawfully.

To prevail on this defense, defendant(s) must prove that:

1. The animal bit/attacked plaintiff(s) [in a building/upon land/on the premises] owned, leased or occupied by defendant(s); and

2. Plaintiff(s) intentionally or knowingly entered or remained [in the building/upon the land/on the premises] unlawfully.

Haw. Rev. Stat. § 663-9.1

INSTRUCTION NO. 18.4

ANIMAL ATTACKS
DEFINITION OF TERMS IN INSTRUCTIONS RELATING TO
DEFENSE OF UNLAWFUL ENTRANCE AND PRESENCE ON PREMISES

"Enter or remain unlawfully." A person "enters or remains unlawfully" in or upon premises when the person is not licensed, invited, or otherwise privileged to be upon the premises. A person is not licensed or privileged to enter or remain in or upon a premises if a warning or warnings have been posted reasonably adequate to warn other persons that an animal is present on the premises. A person who, regardless of the person's intent, enters or remains in or upon premises which are at the time open to the public does so with license and privilege unless the person defies a lawful order not to enter or remain, personally communicated to the person by the owner of the premises or some other authorized person. A license or privilege to enter or remain in a building which is only partly open to the public is not a license or privilege to enter or remain in that part of the building which is not open to the public. A person who enters or remains upon unimproved and apparently unused land, which is neither fenced nor otherwise enclosed in a manner designed to exclude intruders, does so with license and privilege unless notice against trespass is personally communicated to the person by the owner of the land

or some other authorized person, or unless notice is given by posting in a conspicuous manner.

PRACTICE NOTE: *This definition may need to be tailored to fit the facts of the case.*

"Intentionally." A person acts "intentionally" with respect to his/her conduct when it is his/her conscious object to engage in such conduct.

A person acts "intentionally" with respect to attendant circumstances when he/she is aware of the existence of such circumstances or believes or hopes that they exist.

A person acts "intentionally" with respect to a result of his/her conduct when it is his/her conscious object to cause such a result.

"Knowingly." A person acts "knowingly" with respect to his/her conduct when he/she is aware that his/her conduct is of that nature.

A person acts "knowingly" with respect to attendant circumstances when he/she is aware that such circumstances exist.

A person acts "knowingly" with respect to a result of his/her conduct when he/she is aware that it is practically certain that his/her conduct will cause such a result.

“Premises” includes any building or portion thereof or any real property owned, leased, or occupied by the owner or harborer of an animal.

Haw. Rev. Stat. §§ 663-9.1(a) and (b); Haw. Rev. Stat. §§ 702-206(1) and (2). *See* Hawai‘i Criminal Jury Instruction No. 6.02 (State of Mind - Intentionally) and No. 6.03 (State of Mind - Knowingly).

INSTRUCTION NO. 18.5

ANIMAL ATTACKS
DEFENSE OF TEASING, TORMENTING OR ABUSING

Defendant(s) assert(s) the defense that [he/she/it/they] [is/are] not liable for plaintiff's(s') injuries or damages because the animal caused the injuries or damages as a result of being teased, tormented or otherwise abused.

To prevail on this defense, defendant(s) must prove that:

1. The animal bit/attacked plaintiff(s) as a result of being teased, tormented or otherwise abused; and

2. Such teasing, tormenting or abuse was not the result of the negligence, direction or involvement of defendant(s).

Haw. Rev. Stat. § 663-9.1(c)(1).

INSTRUCTION NO. 18.6

ANIMAL ATTACKS
DEFENSE OF JUSTIFICATION

Defendant(s) assert(s) the defense that [he/she/it/they] [is/are] not liable for plaintiff's(s') injuries or damages because his/her/its/their use of the animal was justified.

To prevail on this defense, defendant(s) must prove that:

PRACTICE NOTE: *Refer to the Hawai'i Criminal Jury Instructions for justification defenses, for example:*

Instruction No. 7.01 (Self-defense)
Instruction No. 7.02 (Defense of Others)
Instruction Nos. 7.11 and 7.12 (Choice of Evils)
Instruction No. 7.15 (Care, Discipline or Safety of Others)

Refer to the Penal Code for other justification defenses, for example:

Haw. Rev. Stat. § 703-303 (Execution of Public Duty)
Haw. Rev. Stat. § 703-306 (Protection of Property)
Haw. Rev. Stat. § 703-307 (Law Enforcement)
Haw. Rev. Stat. § 703-308 (Prevention of Suicide or Commission of Crime)

Haw. Rev. Stat. §§ 663-9.1(c)(2), 703-300 et seq.

INSTRUCTION NO. 19.1

UNFAIR OR DECEPTIVE ACTS OR PRACTICES: HAW. REV. STAT. §480-2 ELEMENTS

To prevail against defendant(s) on the claim of unfair or deceptive acts or practices, plaintiff(s) must prove all of the following elements:

1. Plaintiff(s) (is a)/are consumer(s); and

2. Defendant(s) engaged in an act or practice that was unfair or deceptive; and

3. The unfair or deceptive act or practice occurred in the conduct of trade or commerce; and

4. The unfair or deceptive act or practice was a legal cause of damages to plaintiff(s).[1]

Haw. Rev. Stat. §§ 480-1, 480-2(a), (d), & 480-13.

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[1] *See Flores v. Rawlings Co.*, 117 Hawaiʻi 153, 177 P.3d 341 (2008).

INSTRUCTION NO. 19.2

CONSUMER: HAW. REV. STAT. § 480-1 DEFINITION

A consumer is an individual who, primarily for personal, family, or household purposes, purchases goods or services, attempts to purchase goods or services, is solicited to purchase goods or services, or commits money, property, or services in a personal investment.[1]

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[1] Certain associations of condominium apartment owners can be "consumers" for purposes of Chapter 480. *See* Haw. Rev. Stat. § 514B-104(a)(4).

INSTRUCTION NO. 19.3

UNFAIR ACT OR PRACTICE: HAW. REV. STAT. § 480-2 DEFINITION

An act or practice is “unfair” if it offends established public policy and is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.

Hawaii Community Federal Credit Union v. Keka, 94 Hawai‘i 213, 11 P.3d 1 (1996).

INSTRUCTION NO. 19.4

DECEPTIVE ACT OR PRACTICE: HAW. REV. STAT. § 480-2
DEFINITION

An act or practice is "deceptive" if it is a material representation, omission, or practice that is likely to mislead consumers acting reasonably under the circumstances.

Plaintiff(s) need not show that defendant(s) intended to deceive plaintiff(s) or that plaintiff(s) was/were actually deceived. It is sufficient if the representation, omission, or practice was likely to deceive.

A representation, omission, or practice is "material" if it involves information that is important to consumers and is likely to affect their choice of, or conduct regarding, a product, service, or investment.

See Courbat v. Dahana Ranch, 111 Hawai'i 254, 141 P.3d 427 (2006).

INSTRUCTION NO. 19.5

TRADE OR COMMERCE
DEFINITION

An act or practice occurs in the conduct of trade or commerce if it is in the context of business activity or a business transaction.

See Cieri v. Leticia Query Realty, Inc., 80 Hawai‘i 54, 905 P.2d 29 (1995).

INSTRUCTION NO. 19.6

DAMAGES

If you find that plaintiff(s) has/have prevailed against defendant(s) on the claim of unfair or deceptive acts or practices, you must decide the amount that will reasonably and fairly compensate plaintiff(s) for the actual economic loss legally caused[1] by the unfair or deceptive acts or practices.[2]

See Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 47 P.3d 1222 (2002); *Leibert v. Finance Factors, Inc.*, 71 Haw. 285, 788 P.2d 833 (1990).

[1] *See* Instruction No. 7.1 (Legal Cause).

[2] In cases where plaintiffs have actually purchased goods or services, contract damages may be appropriate. *See* Instruction No. 15.10 (Contract - Damages).

INSTRUCTION NO. 19.7

NO PUNITIVE DAMAGES OR DAMAGES FOR NON-ECONOMIC LOSS

In awarding damages, if any, for unfair or deceptive acts or practices, you must not include any amount:

1. For non-economic losses, such as emotional distress; or

2. To punish or make an example of defendant(s); or

3. For legal fees or costs.

See Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 47 P.3d 1222 (2002).

INSTRUCTION NO. 19.8

DAMAGES - BENEFIT OF THE BARGAIN[1]

In determining the amount, if any, to award plaintiff(s), you may consider whether plaintiff(s) is/are entitled to the benefit of the bargain he/she/they believed he/she/they purchased, contracted for, or invested in. The benefit of the bargain is the difference, if any, between the value of the goods, services, or investment represented to plaintiff(s), and the value of such goods, services, or investment delivered to plaintiff(s).

[1] This instruction is applicable only in cases involving a breach of contract. *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai‘i 309, 47 P.3d 1222 (2002).