

SCMF-11-0000655

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Publication and Distribution
of the
Hawai'i Pattern Jury Instructions - Civil

AMENDED¹

ORDER APPROVING PUBLICATION AND DISTRIBUTION
OF HAWAI'I PATTERN JURY INSTRUCTIONS - CIVIL
(By: Recktenwald, C.J., for the court²)

Upon consideration of the request of the Standing Committee on Pattern Civil Jury Instructions to publish and distribute amendments to Civil Instructions 6.2, 7.2, 14.1, 14.2, 14.3, 14.4, 14.4A, 14.6, 16.19, and 16.20 of the Hawai'i Pattern Jury Instructions - Civil,

IT IS HEREBY ORDERED, that the request is granted in part and the attached civil jury instructions 6.2, 7.2, 14.1,

¹ The original order, filed on March 7, 2016, is amended to clarify that the request is granted in part.

² Considered by: Recktenwald, C.J., Nakayama, McKenna, Pollack, and Wilson, JJ.

14.2, 14.3, 14.4A, 14.6, and 16.20 are approved for publication and distribution.

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

DATED: Honolulu, Hawai'i, March 7, 2016.

FOR THE COURT:

/s/ Mark E. Recktenwald
Chief Justice



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. 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. 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)

(Revised 3/7/16)

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

Barbee v. Queen[']s Med. Ctr., 119 Hawai'i 136, 158-159, 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)
Devine v. Queen's Med. Ctr., 59 Haw. 50, 51-52, 574 P.2d 1352, 1353 (1978)

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. 14.4A

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)

(Revised 3/7/16)

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 Hawaii 460, 465, 959 P.2d 830, 835 (1998)

(Revised 3/7/16)

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

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 Hawai'i 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, 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).

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 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.

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 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, 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*). 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); HRS §§378-1 and 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.