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Intermediate Court of Appeals
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IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

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LESLIE CABRAL, individually
and as Personal Representative of
the Estate of LEONARD CABRAL, JR.;
LEONARD CABRAL, SR.; and NICHOLAS CABRAL,
Plaintiffs-Appellants,
v.
PALI MOMI MEDICAL CENTER, Defendant-Appellee

NO. CAAP-24-0000431

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CASE NO. 1CCV-22-0000466)

August 18, 2026

NAKASONE, CHIEF JUDGE, HIRAOKA AND WADSWORTH, JJ.

OPINION OF THE COURT BY HIRAOKA, J.

Leonard Cabral, **Junior** died five days after being released from **Pali Momi** Medical Center. His mother **Leslie** Cabral, for herself and as personal representative of his estate, his father Leonard Cabral, **Senior**, and his brother **Nicholas** Cabral sued Pali Momi and others for medical malpractice. A jury found that Pali Momi was not negligent. Leslie, Senior, and

Nicholas appeal from the *Final Judgment* for Pali Momi entered by the Circuit Court of the First Circuit.¹

We hold: (1) the trial court erred by granting summary judgment for Pali Momi on its potential vicarious liability for alleged professional negligence by a non-employee doctor who provided health care, under a contract with Pali Momi, to Junior while he was hospitalized; (2) the trial court did not err by granting summary judgment for Pali Momi on the Cabrals' claim for failing to obtain Junior's informed consent to treatment or to a procedure; and (3) the trial court did not err by denying the Cabrals' motion for new trial based on alleged juror misconduct. We affirm the *Final Judgment* in part, vacate in part, and remand for further proceedings.

I. BACKGROUND

On November 4, 2019, 31-year old Junior went to Pali Momi's emergency room, complaining of chest pain and shortness of breath. He signed Pali Momi's *Consent for Treatment*. He was examined and admitted to the hospital. He was released the next day, with instructions to follow up for further testing. He died on November 10, 2019.

The Cabrals sued Pali Momi. Their amended complaint alleged counts for medical negligence, vicarious liability, and negligent infliction of emotional distress.

The trial court granted Pali Momi partial summary judgment on the Cabrals' claims for vicarious liability and

¹ The Honorable Gary W.B. Chang presided.

failure to obtain informed consent. Their claims for medical negligence and negligent infliction of emotional distress were tried to a jury.²

The jury was selected on Friday, January 12, 2024. Neither Leslie nor Senior testified during the Cabrals' case-in-chief. After the Cabrals rested, Pali Momi moved for judgment as a matter of law on Leslie's and Senior's individual claims. The trial court granted the motion, ruling that "a reasonable jury would not have a legally sufficient evidentiary basis to find for" Leslie and Senior. The court denied a motion for reconsideration, a motion to call Leslie and Senior as rebuttal witnesses, and a motion to reopen the Cabrals' case.

The jury returned a verdict on Friday, January 19, 2024. It found Pali Momi was not negligent.

On January 29, 2024, the Cabrals moved to set aside the verdict. They claimed misconduct by the jury foreperson. The trial court entered findings of fact, conclusions of law, and an order denying the motion.

On March 15, 2024, the Cabrals moved for a new trial based on manifest weight of the evidence. The motion was denied. The Final Judgment was entered on May 24, 2024. This appeal followed.

II. POINTS OF ERROR

The Cabrals state six points of error. They contend the trial court erred when it: (1) granted Pali Momi's motion for

² Consistent with the partial summary judgment on vicarious liability, the jury was instructed: "Defendant is not liable for the acts or omissions of doctors who were not its employees."

partial summary judgment; (2) granted judgment as a matter of law for Pali Momi against Leslie and Senior; (3) denied their motion to reconsider the judgment as a matter of law against Leslie and Senior; (4) denied their request to reopen their case-in-chief; (5) denied their motion for a new trial based on juror misconduct; and (6) denied their motion for a new trial because the jury verdict was against the manifest weight of the evidence.

III. STANDARDS OF REVIEW

A. Motion for Summary Judgment

We review a grant of summary judgment *de novo*. Ralston v. Yim, 129 Hawai'i 46, 55, 292 P.3d 1276, 1285 (2013). Summary judgment is appropriate if the evidence shows there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

When (as here) the summary judgment movant does not bear the burden of proof at trial, it has the burden to show (1) there is no genuine issue of material fact on the essential elements of the claim addressed by the motion, and (2) the uncontroverted facts entitle it to judgment as a matter of law. Id. at 56, 292 P.3d at 1286.

Once the movant satisfies its burden, the non-moving party must "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Id. at 56-57, 292 P.3d at 1286-87. The evidence must be viewed in the light most favorable to the non-moving party. Id. at 56, 292 P.3d at 1286.

B. Juror Misconduct

We review a trial court's inquiry into potential juror misconduct for abuse of discretion. State v. Grewer, 157 Hawai'i 104, 110, 575 P.3d 737, 743 (2025). "The trial court abuses its discretion when it clearly exceeds the bounds of reason or disregards rules or principles of law or practice to the substantial detriment of a party litigant." Id.

IV. DISCUSSION

We address Pali Momi's motion for partial summary judgment first, because it affected the scope of the trial. After the discovery cutoff, Pali Momi moved for partial summary judgment on the Cabrals' claims for (a) vicarious liability for acts or omissions of non-employees and (b) failure to obtain Junior's informed consent to treatment or to a procedure. The trial court granted the motion.

A. Pali Momi was not entitled to summary judgment on its potential vicarious liability for alleged professional negligence by its contracted hospitalist or house physician.

Under the respondeat superior theory of vicarious liability, an employer can be liable for its employee's negligence if the employee's act or omission happened in the scope of employment. Wong-Leong v. Hawaiian Indep. Refinery, Inc., 76 Hawai'i 433, 438, 879 P.2d 538, 543 (1994).

Attached to Pali Momi's motion for summary judgment was a report by the Cabrals' expert witness, Ahvie **Herskowitz**, M.D. He opined that Shayne **Castanera**, M.D., John **Kao**, M.D., and Nurse Practitioner Kate **Deans** breached standards of care. Pali Momi

had stipulated to be bound by Dr. Kao's and N.P. Deans's acts or omissions because they were Pali Momi's employees. The issue presented by the motion was whether Pali Momi could be vicariously liable for Dr. Castanera's alleged professional negligence.

Pali Momi supported its motion for summary judgment with its risk manager's declaration stating that Dr. Castanera was not a Pali Momi employee. The risk manager authenticated portions of Pali Momi's *Agreement for Hospitalist and House Physician Services* with Hawaii Hospital Physicians, Inc. (HHP) which, although not mentioning Dr. Castanera by name, was apparently the contract under which he provided "in-house hospitalist and house physician coverage" at Pali Momi Medical Center.³

Pali Momi's risk manager also authenticated the Consent for Treatment that Junior signed on November 4, 2019. It stated:

I understand that I will receive a bill from this medical facility. The physician(s) may also bill me separately for their services provided to me while at this facility. ***I further understand not all physicians are employees of this medical facility.***

(emphasis added).

Pali Momi thus sustained its burden as summary judgment movant under the law set forth in Wong-Leong. Ralston, 129 Hawai'i at 56, 292 P.3d at 1286. The burden then shifted to the Cabrals to "demonstrate specific facts, as opposed to general allegations, that present a genuine issue worthy of trial." Id.

³ Pali Momi's contract with HHP, which was apparently subject to a protective order, was redacted, and only three pages of the 12-page contract were attached to the risk manager's declaration.

at 56-57, 292 P.3d at 1286-87. Or to argue an alternative legal basis for imposing vicarious liability, which is what they did.

Dr. Herskowitz opined that: Junior had a heart attack and coronary artery spasm while hospitalized at Pali Momi; Dr. Castanera misdiagnosed Junior with pericarditis or myocarditis or cardiomyopathy; and the misdiagnosis and failure to treat Junior for his heart attack and coronary artery spasm "directly led to his death on November 10th, 2019." According to Dr. Herskowitz:

If [Junior] was accurately diagnosed and treated within the standard of care, he would have been told that he had suffered a heart attack, and educated on how best to avoid a recurrence. He would have undergone risk stratification during hospitalization and sent home on specific heart medications. The medical literature clearly shows that coronary artery spasm is a treatable disorder that responds well to calcium channel blockers, nitroglycerin and anti-platelet therapy. The goal of treating coronary artery spasm is to prevent the spasm, relieve the chest pain, and prevent new heart injury.

The Cabrals argued the trial court should adopt the ruling in Bynum v. Magno, 125 F. Supp. 2d 1249 (D. Haw. 2000). The issue in Bynum was: "under what circumstances may a hospital be liable for the allegedly negligent acts of its independent contractor doctors?" Id. at 1265. After noting that "Hawaii has not squarely addressed this question," the federal district court predicted that Hawai'i would recognize vicarious liability for hospitals under the theory of *apparent authority* if a plaintiff "establish[es] that (1) he/she had a reasonable belief that [the] physician was [an] agent/employee of the hospital, (2) the belief was generated by some affirmative act of the hospital or physician, and (3) the patient justifiably relied on the

representation of authority." Id. at 1265-66; see also Raymond v. Wilcox Mem'l Hosp., 403 F. Supp. 3d 868, 884-85 (D. Haw. 2019); cf. Bartholomew v. Burger King Corp., 15 F. Supp. 3d 1043, 1048-49 (D. Haw. 2014) (applying vicarious liability based on apparent agency, citing Restatement (Second) of Agency § 267 (1958) and Cho Mark Oriental Food, Ltd. v. K & K Int'l, 73 Haw. 509, 516, 836 P.2d 1057, 1062 (1992)).

Under Hawai'i law, vicarious liability is not limited to the employer-employee context. One may be vicariously liable in tort for acts or omissions of another under agency theories of *actual authority* or *implied actual authority*. State v. Hoshijo ex rel. White, 102 Hawai'i 307, 318-19, 76 P.3d 550, 561-62 (2003).

Hoshijo addressed whether the University of Hawai'i could be held vicariously liable in tort for misconduct by a non-employee agent – the men's basketball team's student manager. The supreme court noted that an agency relationship can be created through actual or implied actual authority, 102 Hawai'i at 318, 76 P.3d at 561, but agency status alone does not make a principle "*ipso facto* liable" for an agent's actions, id. at 319, 76 P.3d at 562. Generally, "a principal can only be held vicariously liable for the actions of an agent under the theory of respondeat superior." Id. "Vicarious liability under the respondeat superior doctrine ordinarily requires some kind of employment relationship or other consensual arrangement under which one person *agrees to act under another's control*." Id. (underscoring added).

Pali Momi's contract with HHP provided:

HHP shall be an "independent contractor" with the authority and responsibility to control and direct the performance and details of the work and services required under this Agreement All persons hired or used by HHP shall be HHP's employees and agents and HHP shall ensure that such persons are qualified to engage in the activities and services in which they participate. HHP shall be responsible for the accuracy, completeness and adequacy of any and all work and services performed by HHP's employees and agents and shall ensure that all applicable licensing and operating requirements of federal, state, county and municipal governments, and all applicable accreditation and other standards of quality generally accepted in the field of HHP's activities, are complied with and satisfactorily met.

The contract required HHP, not Pali Momi, to control Dr. Castanera's medical practice. The Cabrals did not proffer evidence showing that HHP or Dr. Castanera agreed to let Pali Momi control Dr. Castanera's exercise of professional judgment or his diagnosis or treatment of Junior. Under Hoshijo, Pali Momi could not be vicariously liable for Dr. Castanera's negligence under theories of actual or implied actual authority.

The supreme court in Hoshijo specifically declined to consider vicarious liability under the *apparent authority* theory of agency. 102 Hawai'i at 318, 76 P.3d at 561. Under Hawai'i law:

Apparent authority can occur under the following circumstances:

- (1) The principal has manifested his consent to the exercise of such authority or has knowingly permitted the agent to assume the exercise of such authority;
- (2) the third person knew of the principal's actions and, acting in good faith, had reason to believe, and did actually believe, that the agent possessed such authority; and
- (3) the third person, relying on such appearance of authority, has changed his position and will be injured or suffer loss if the act done or transaction executed by the agent does not bind the principal.

Cho Mark, 73 Haw. at 517, 836 P.2d at 1062 (cleaned up) (formatting altered).

Apparent authority thus

arises when the principal does something or permits the agent to do something which reasonably leads another to believe that the agent had the authority he was purported to have. The critical focus is not on the principal and agent's intention to enter into an agency relationship, but on whether a third party relies on the principal's conduct based on a reasonable belief in the existence of such a relationship.

State Farm Fire & Cas. Co. v. Pac. Rent-All, Inc., 90 Hawai'i 315, 326-27, 978 P.2d 753, 764-65 (1999) (cleaned up) (quoting Cho Mark, 73 Haw. at 516-17, 836 P.2d at 1062).

But Cho Mark and Pacific Rent-All were contract cases. Cho Mark involved a commercial real property lease. Pacific Rent-All involved tort subrogation claims, but the apparent authority issue concerned the scope of a settlement agreement, which is a contract. The Cabrals' medical malpractice claim against Pali Momi sounds in tort. Troyer v. Adams, 102 Hawai'i 399, 411-12, 77 P.3d 83, 95-96 (2003); HRS § 671-1 (2016) (defining "medical tort"). The Hawai'i Supreme Court has not decided whether vicarious tort liability can be imposed under the apparent authority theory of agency, a question left open by Hoshijo, 102 Hawai'i at 318, 76 P.3d at 561.

Other jurisdictions have considered the issue. In Cefaratti v. Aranow, 141 A.3d 752 (Conn. 2016), Aranow performed gastric bypass surgery on the plaintiff at Middlesex Hospital. He left a surgical sponge in her. She sued Aranow and Middlesex. Middlesex moved for summary judgment because Aranow was not its employee. The trial court granted summary judgment. The

appellate court affirmed, citing its own precedent that "the doctrine of apparent authority cannot be used to hold a principal liable for the tortious actions of its alleged agent." Cefaratti v. Aranow, 105 A.3d 265, 293 (Conn. App. Ct. 2014), rev'd, 141 A.3d 752 (Conn. 2016). The Supreme Court of Connecticut granted the plaintiff's petition for certification to decide whether to "recognize the doctrine of apparent agency in tort actions[.]" Cefaratti, 141 A.3d at 754.

The Connecticut supreme court noted that "[t]he rules of vicarious liability respond to a specific need in the law of torts: how to fully compensate an injury caused by the act of a single tortfeasor. Upon a showing of agency, vicarious liability increases the likelihood that an injury will be compensated, by providing two funds from which a plaintiff may recover. If the ultimately responsible agent is unavailable or lacks the ability to pay, the innocent victim has recourse against the principal." Id. at 761 (cleaned up). It held, "[b]ecause a hospital may be held vicariously liable for the medical malpractice of its agents and employees under the doctrine of respondeat superior, it may also be held vicariously liable under the doctrine of apparent agency." Id. at 763.

The court explained, "when an entity has held itself out as providing certain services to the public – and, indeed, may have made great efforts to persuade members of the public to avail themselves of those services, and benefited from doing so – and has selected the specific individual who will provide those services to particular members of the public, we do not believe

that it is unfair to hold that entity liable for the individual's negligence." Id. at 769-70 (footnote omitted).

The Connecticut court also noted, in response to the argument its ruling would "transmute hospitals into excess insurers of those physicians who are neither employees nor actual agents of the hospital[,]" that "a principal that is held vicariously liable for another's negligence under the doctrine of apparent agency may be able to seek indemnification from the tortfeasor[.]" Id. at 763 n.14. Here, Pali Momi submitted only three pages of its 12-page contract with HHP; we don't know whether the contract contained an indemnity agreement, a requirement that HHP add Pali Momi as an additional insured to HHP's professional liability and excess liability insurance policies, or other risk-transfer provisions. In addition to common law joint tortfeasor indemnification, those are ways a hospital can protect itself against vicarious liability for medical torts committed by non-employee doctors whom the hospital allows to treat its patients.

Other jurisdictions have also applied vicarious tort liability under the apparent authority theory of agency to a hospital or other health care provider. See, e.g., Wilson v. Anonymous Defendant 1, 183 N.E.3d 289 (Ind. 2022) (applying Restatement (Second) of Agency § 267 (1958)); Arrendale v. Am. Imaging & MRI, LLC, 183 N.E.3d 1064 (Ind. 2022) (applying Restatement (Second) of Torts § 429 (1965)); Wilkins v. Marshalltown Med. & Surgical Ctr., 758 N.W.2d 232 (Iowa 2008) (applying Restatement (Second) of Agency § 267 (1958) and

Restatement (Second) of Torts § 429 (1965)); Popovich v. Allina Health Sys., 946 N.W.2d 885 (Minn. 2020); Eads v. Borman, 277 P.3d 503 (Or. 2012).

We hold that a hospital can be vicariously liable for professional negligence by an independent contractor physician under the apparent authority theory of agency if the plaintiff proves:

- (1) the plaintiff reasonably believed that the hospital authorized the physician to treat them;
- (2) the hospital did something or allowed the physician to do something that led to this belief; and
- (3) the plaintiff relied on the physician's apparent authority.

Cf. Cho Mark, 73 Haw. at 517, 836 P.2d at 1062.

Here, viewed in the light most favorable to the Cabrals, the evidence showed that Pali Momi contracted with HHP to have Dr. Castanera treat Pali Momi's patients. Pali Momi required that Junior sign its Consent for Treatment form, which stated:

I wish to receive medical care and treatment at Pali Momi Medical Center. Accordingly, I consent to the procedures, which may be performed during this hospitalization or clinic visit, including emergency treatment. I authorize and consent to any of the following: X-ray examination, laboratory procedure, other diagnostic procedures, medical or surgical treatment, or other clinical and hospital services as directed by my physician(s) or my physician's(s) assistants, which my physician(s) believes are advisable to evaluate or treat me, and to other services rendered under the general and special instructions of my physician(s).

A reasonable jury could find that Pali Momi's use of the Consent for Treatment led Junior to believe the doctors treating him in Pali Momi's hospital were authorized by Pali Momi to do so, even if they may not all be Pali Momi employees.

The record does not show that Dr. Castanera was Junior's personal physician. A reasonable jury could thus find that Junior's signing of Pali Momi's Consent for Treatment showed he reasonably relied on Pali Momi allowing Dr. Castanera to provide him with medical care.

On this record, the trial court erred by granting Pali Momi's motion for partial summary judgment on its potential vicarious liability for Dr. Castanera's alleged professional negligence.

B. Pali Momi was entitled to summary judgment on the Cabrals' claim for failure to obtain Junior's informed consent to a treatment or procedure.

The other issue presented by Pali Momi's motion was whether Pali Momi failed to obtain Junior's informed consent to treatment or to a procedure. Under the common law doctrine of informed consent, physicians had a duty to disclose to patients "all relevant information concerning a proposed treatment, including the collateral hazards attendant thereto, so that the patient's consent to the treatment would be an intelligent one based on complete information." Ngo v. Queen's Med. Ctr., 136 Hawai'i 54, 63, 358 P.3d 26, 35 (2015).

The common-law doctrine was supplanted by Hawaii Revised Statutes (**HRS**) § 671-3(b). Garcia v. Robinson, 137 Hawai'i 388, 396 n.7, 375 P.3d 167, 175 n.7 (2016). HRS § 671-3 (2016) provides:

(b) The following information shall be supplied to the patient or the patient's guardian or legal surrogate prior to obtaining consent **to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure:**

(1) The condition to be treated;

- (2) A description of the proposed treatment or procedure;
- (3) The intended and anticipated results of the proposed treatment or procedure;
- (4) The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
- (5) The recognized material risks of serious complications or mortality associated with:
 - (A) The proposed treatment or procedure;
 - (B) The recognized alternative treatments or procedures; and
 - (C) Not undergoing any treatment or procedure; and
- (6) The recognized benefits of the recognized alternative treatments or procedures.

(Emphasis added.)

Pali Momi argued that physicians, not hospitals, are obligated to obtain a patient's informed consent to treatments and procedures. HRS § 671-3(a) imposes the duty to give information on "health care providers." HRS § 671-1 (2016) defines "health care provider" to include a health care facility as defined in HRS § 323D-2. The HRS § 323D-2 (2022) definition includes "hospitals." And in Mroczkowski v. Straub Clinic & Hospital, 6 Haw. App. 563, 732 P.2d 1255 (1987), the hospital was the only defendant. We applied HRS § 671-3(b) (1976) and held:

Mroczkowski was required to prove the specifically itemized components of the statutory general standard. More specifically, Mroczkowski was required to prove by proper evidence that the harm he is complaining about was a probable risk of the August 12, 1980 operation and that **Straub** knew or should have known of that fact.

Id. at 568, 732 P.2d at 1259 (emphasis added).

Pali Momi thus had a duty to obtain its patient's informed consent to a proposed medical or surgical treatment or a diagnostic or therapeutic procedure to be performed at Pali Momi.

We held that Pali Momi could potentially be vicariously liable for Dr. Castanera's alleged medical negligence under the apparent authority theory of agency. To prove a claim for Dr. Castanera's failure to obtain Junior's informed consent to a treatment or procedure, the Cabrals had to produce evidence that Dr. Castanera "proposed [a] medical or surgical treatment or a diagnostic or therapeutic procedure[.]" HRS § 671-3(b).

The Cabrals argued: "The medical records confirm that none of these medical doctors discussed Junior's Troponin levels or myocarditis (or any other diagnosis) with Junior/Plaintiffs. They told him he was fine and sent him home with instructions to change his diet and lifestyle (an all-too-common practice in healthcare, especially here in Hawai'i)." The Cabrals did not offer Junior's medical records or any other evidence to support their argument.

Nor did the Cabrals offer evidence that Dr. Castanera proposed a medical or surgical treatment or a diagnostic or therapeutic procedure for Junior that would have triggered his duty to provide information under HRS § 671-3(b). We hold, on this record, that the trial court did not err by granting partial summary judgment for Pali Momi on the Cabrals' claim for failure to obtain Junior's informed consent to a treatment or procedure under HRS § 671-3.⁴

We next address the trial court's denial of the Cabrals' motion for a new trial based on alleged juror

⁴ The Cabrals' opening brief makes arguments that weren't made to the trial court in opposition to Pali Momi's motion for partial summary judgment. Arguments made for the first time on appeal are deemed waived. Hawaii Ventures, LLC v. Otaka, Inc., 114 Hawai'i 438, 500, 164 P.3d 696, 758 (2007).

misconduct, because it could impeach the jury's finding that Pali Momi was not negligent based on Dr. Kao's and N.P. Deans's acts or omissions.

C. The trial court did not err by denying the motion for new trial based on alleged juror misconduct.

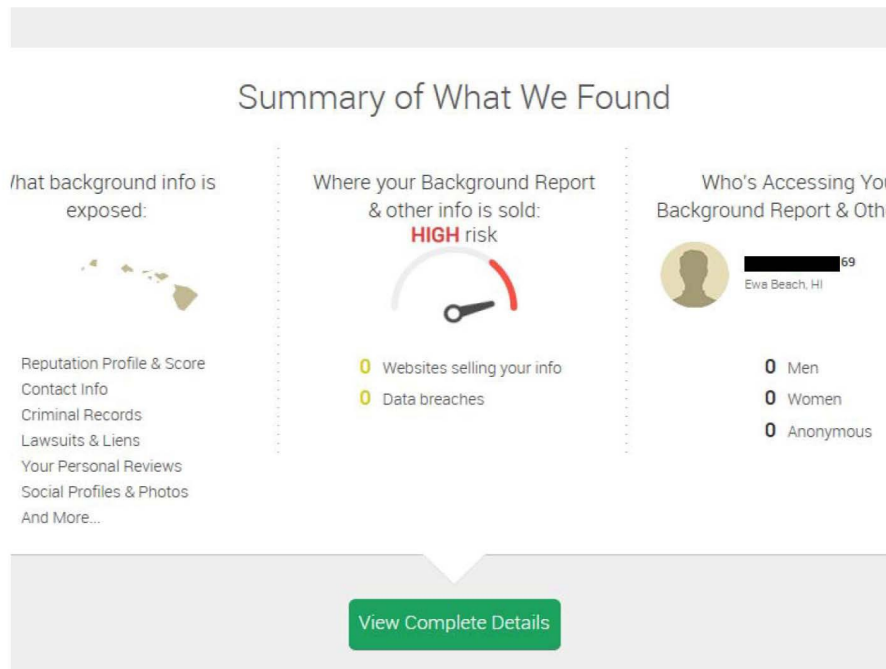
Ten days after the jury returned its verdict, the Cabrals moved for a new trial. They alleged misconduct by the jury foreperson. The motion was supported by Senior's declaration and some exhibits. Senior declared:

3. On January 19, 2024, after the verdict, I searched for . . . the foreperson, on the internet and eventually landed on the site www.mylife.com. When I looked him up on that site, I was shocked to see that [the foreperson] had already viewed my profile on www.mylife.com[.] Attached hereto is a copy of my profile and the screenshot proving that he viewed my profile.

. . . .

8. I truly believe [the foreperson] was influenced by his search of my profile. He likely concluded I was some sort of deadbeat dad based on my prior DUI arrest and that we were trying to profit from the death of our son based on our past financial troubles as set forth on www.mylife.com. For example, at the beginning of trial, he would politely smile at us if we saw him outside of the courtroom. Towards the end of the trial, he refused to make eye contact. It cannot be because he did not like our testimony, as my wife and I did not testify.

Exhibit 1 to the motion (we redacted the foreperson's name) was:



Senior's declaration did not authenticate Exhibit 1, although he refers to it as "the screenshot proving that [the foreperson] viewed my profile." Senior did not testify at the hearing on the motion for new trial. His name appears nowhere on Exhibit 1, and there is nothing on Exhibit 1 tying it to Senior. It does not contain a date or any identifying information, such as a URL or website address, revealing its origin or tying it in any way to mylife.com.

Exhibit 1, viewed in the light most favorable to the Cabrals, shows that someone input "[foreperson's name] 69, Ewa Beach, HI" into a search engine to see who had accessed something called a "Background Report" about "[foreperson's name] 69, Ewa Beach, HI," and found that no one had, no websites were selling

the foreperson's information, and there had been no data breaches. No reasonable person could interpret Exhibit 1 as showing that someone with the foreperson's name had "viewed [Senior's] profile on www.mylife.com" as alleged in Senior's declaration.

Exhibit 2 appears to be information from <https://www.mylife.com> about "Leonard Cabral, 55" including an unredacted date of birth, several addresses and telephone numbers, and other information. It is undated. Senior's declaration appears to describe it – although he never refers to "Exhibit 2" – as "a copy of my profile[.]" Nothing on Exhibit 2 shows that the foreperson – or any person other than Senior – ever viewed it.

"The trial judge, at a hearing on a motion for new trial, acts as the trier of fact." State v. Furutani, 76 Hawai'i 172, 179, 873 P.2d 51, 58 (1994). The Cabrals' statement of the points of error does not challenge the trial court's findings. See Hawai'i Rules of Appellate Procedure (**HRAP**) Rule 28(b)(4)(C). Unchallenged findings of fact are binding on appeal. Okada Trucking Co. v. Bd. of Water Supply, 97 Hawai'i 450, 459, 40 P.3d 73, 82 (2002).

The trial court found:

21. In support of their Motion, Plaintiffs offered Exhibit 1 – an alleged screenshot taken by Leonard Cabral, Sr. of the mylife.com website. Leonard Cabral, Sr. admitted to searching the internet AFTER the verdict was entered to find out information about [the jury foreperson]. There are three columns of information on Exhibit 1. In the third column, there is the name "[foreperson], 69, Ewa Beach, Hawaii." Plaintiffs' counsel represented that a program called "Snagit" was used to capture the screenshot.

22. Exhibit 1 has no date on it.

23. Exhibit 1 has no identifying information to determine where it came from.

24. Exhibit 1 does not indicate a date and time when "[foreperson], 69, Ewa Beach, Hawaii" allegedly accessed Leonard Cabral, Sr.'s profile on mylife.com.

25. Exhibit 1 does not state that [foreperson's name], the juror, conducted a search of Leonard Cabral, Sr.'s mylife.com profile.

26. Leonard Cabral, Sr. was not able to recreate Exhibit 1.

27. Plaintiffs' counsel was not able to recreate Exhibit 1.

28. Plaintiffs' counsel did not know and was unable to provide the Court with the search engine that Leonard Cabral, Sr. allegedly used to view the information contained in Exhibit 1.

29. In support of their Motion, Plaintiffs' [sic] also offered Exhibit 2 - an alleged a [sic] screenshot of Leonard Cabral, Sr.'s mylife.com profile with the name "Leonard Cabral" appearing a fifth of the way down the page, but no way to confirm it is the same as Leonard Cabral, Sr.

. . . .

31. Neither Exhibit 1 nor 2 confirm that [the foreperson] even accessed the mylife.com website or what [the foreperson] allegedly saw or viewed (assuming access occurred). There is also no information in either Exhibits 1 or 2 regarding when [the foreperson] allegedly accessed the mylife.com website.

Even if those findings of fact had been properly challenged, the record contains substantial evidence supporting them, and they were not clearly erroneous. See Cowan v. Exclusive Resorts PBL1, LLC, 156 Hawai'i 268, 272, 574 P.3d 288, 292 (2025) (stating the clearly erroneous standard of review for findings of fact).

The Cabrals contend the trial court applied the wrong legal standard because, before applying the two-step test described in Oishi v. Ganel, No. CAAP-18-0000036, 2024 WL 278962

(Haw. App. Jan. 25, 2024) (SDO),⁵ the court found "the record failed to establish a credible allegation that [the jury foreperson] engaged in juror misconduct before the verdict was reached."⁶ They argue: "This was a clear abuse of discretion since the lower court ignored applicable, controlling precedent to impose an unnecessary requirement of its own." They contend the trial court should have *assumed* the jury foreperson searched mylife.com for information about Senior before the verdict was returned. Their argument relies on a misreading of supreme court precedent.

Grewer involved a murder trial. During jury selection, "Prospective Juror 20 expressed to the courtroom bailiff a desire to be excused from service, stating that she 'already had [her] opinion.'" 157 Hawai'i at 107, 575 P.3d at 740. While being questioned by the trial court outside the presence of the other

⁵ Oishi, an unpublished summary disposition order, quoted the test articulated in State v. Chin, 135 Hawai'i 437, 445, 353 P.3d 979, 987 (2015):

[T]he initial step for the trial court to take is to determine whether the nature of the alleged deprivation rises to the level of being substantially prejudicial. If it does not rise to such a level, the trial court is under no duty to interrogate the jury. And whether it does rise to the level of substantial prejudice is ordinarily a question committed to the trial court's discretion.

Where the trial court does determine that such alleged deprivation is of a nature which could substantially prejudice the defendant's right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality. The standard to be applied in overcoming such a presumption is that the alleged deprivation must be proved harmless beyond a reasonable doubt.

2024 WL 278962, at *3 (emphasis omitted).

⁶ The Cabrals' motion for new trial made other arguments, but their opening brief only challenges the jury foreperson's alleged internet search for Senior. Their other arguments are waived.

potential jurors, Prospective Juror 20 said three other potential jurors heard her say "I wish I didn't have to be here. I – literally I caretake for my uncle. I have – he just got out of the hospital." Id.

The supreme court advised:

When determining if jury misconduct deprives a criminal defendant⁷ of an impartial jury, the following "conceptual framework" guides our analysis:

[W]hen a defendant in a criminal case claims a deprivation of the right to a fair trial by an impartial jury, the initial step for the trial court to take is to determine whether the nature of the alleged deprivation rises to the level of being substantially prejudicial. If it does not rise to such a level, the trial court is under no duty to interrogate the jury. And whether it does rise to the level of substantial prejudice is ordinarily a question committed to the trial court's discretion.

Where the trial court does determine that such alleged deprivation is of a nature which could substantially prejudice the defendant's right to a fair trial, a rebuttable presumption of prejudice is raised. The trial judge is then duty bound to further investigate the totality of circumstances surrounding the alleged deprivation to determine its impact on jury impartiality. The standard to be applied in overcoming such a presumption is that the alleged deprivation must be proved harmless beyond a reasonable doubt.

The defendant bears the initial burden of making a prima facie showing of a deprivation that could substantially prejudice his or her right to a fair trial by an impartial jury. But once a rebuttable presumption of prejudice is raised, the burden of proving harmlessness falls squarely on the prosecution.

Id. at 111, 575 P.3d at 744 (underscoring omitted) (bold italics added) (quoting State v. Bailey, 126 Hawai'i 383, 399-400, 271 P.3d 1142, 1158-59 (2012)).

A prima facie showing of a deprivation is thus part of the first step. The showing must include "some specific,

⁷ The framework applies in civil cases as well. Ricapor-Hall v. Philip Morris USA Inc., Hawai'i P.3d , , No. SCAP-24-0000313, slip op. at 23 (Aug. 6, 2026).

substantial evidence showing the occurrence of the outside influence that may have possibly biased the juror." Ricapor-Hall v. Philip Morris USA Inc., ___ Hawai'i ___, ___, ___ P.3d ___, ___, No. SCAP-24-0000313, slip op. at 22 (Aug. 6, 2026) (emphasis added) (quotation marks omitted) (quoting Chin, 135 Hawai'i at 443 n.10, 353 P.3d at 985 n.10); State v. Pauline, 100 Hawai'i 356, 381, 60 P.3d 306, 331 (2002) (party claiming juror misconduct should "first present some specific, substantial evidence showing a juror was possibly biased").

Here, the Cabrals did not sustain their step-one burden. The trial court found, and the evidence supported, that "[n]either Exhibit 1 nor 2 confirm that [the jury foreperson] even accessed the mylife.com website or what [the foreperson] allegedly saw or viewed (assuming access occurred). There is also no information in either Exhibits 1 or 2 regarding when [the foreperson] allegedly accessed the mylife.com website."

The Cabrals argue "the Hawaii test for juror misconduct and undue influence is not limited to cases where the facts of the misconduct are undisputed or uncontested." Grewer and the previous Hawai'i cases on the issue involved conduct that was undisputed.⁸ But that doesn't mean undisputed conduct must be

⁸ See Grewer, 157 Hawai'i at 107, 575 P.3d at 740 (Juror 20's comments were confirmed by the bailiff); State v. Pitts, 146 Hawai'i 120, 131-32, 456 P.3d 484, 495-96 (2019) (during deliberations, jury cut open sealed evidence bag and found "evidence that had not been presented in court, for which no foundation had been laid, and which had not been properly admitted into evidence"); Chin, 135 Hawai'i at 440-41, 353 P.3d at 982-83 (during trial, juror approached witness about possible employment); Bailey, 126 Hawai'i at 385, 271 P.3d at 1144 (during deliberations, one juror informed the others that defendant had previously been charged with and/or convicted of murder); State v. Yamada, 108 Hawai'i 474, 475, 122 P.3d 254, 255 (2005) (juror fell asleep during defendant's closing argument); Pauline, 100 Hawai'i at 382, 60 P.3d at 332 (alternate juror made statements to defendant's counsel suggesting she had predeliberation discussions with jurors who actually
continue...

shown before the two-step test can be applied. As part of step one, there just has to be a prima facie showing "of some specific, substantial evidence showing the occurrence of the outside influence that may have possibly biased the juror." Chin, 135 Hawai'i at 443 n.10, 353 P.3d at 985 n.10 (quotation marks omitted); Pauline, 100 Hawai'i at 381, 60 P.3d at 331. There may be a dispute about what happened, but with "specific, substantial evidence" of an outside influence a court can conduct the first-step analysis.

Here, the trial court expressed frustration during the hearing on the motion for new trial:

Okay. The Court is reluctantly ready to rule.

I will start off with saying the record is extremely imperfect in the Court's estimation. All of the case law before today involved cases where there is no dispute that juror misconduct occurred. And then we have this case. And none of the lawyers appear to appreciate how different this case is from every other appellate case on the question of juror misconduct.

This case was different because the Cabrals failed to sustain their step-one burden to show specific, substantial evidence of an outside influence that could have substantially prejudiced their right to a fair trial by an impartial jury. We

⁸...continue
deliberated); Furutani, 76 Hawai'i at 177, 873 P.2d at 56 (during deliberations, general comments were made about defendant's failure to testify); State v. Williamson, 72 Haw. 97, 99, 807 P.2d 593, 595 (1991) (dictionary was found in jury room after trial court denied jury request for a dictionary and two definitions); Lopez v. Sears Roebuck & Co., 70 Haw. 562, 563-64, 777 P.2d 715, 715-16 (1989) (in suit for negligent assembly of bicycle, jury foreperson went to defendant's store, watched assembly process, then reported to the other jurors "he was now certain that Sears was 100% free from fault or liability"); State v. Larue, 68 Haw. 575, 578, 722 P.2d 1039, 1042 (1986) (during deliberations in rape trial, jury foreperson vouched for, and attempted to secure acceptance by other jurors of, reliability of statements by child complainant based on foreperson remembering being "touched" when she was three); State v. Keliioholokai, 58 Haw. 356, 357, 569 P.2d 891, 893 (1977) (newspaper published article about defendant's previous robbery convictions during non-sequestered jury trial).

hold that under these circumstances, the trial court did not abuse its discretion by denying the Cabrals' motion for new trial based on alleged juror misconduct of which there was no specific, substantial evidence.

D. The Cabrals waived their appeal from the denial of their motion for new trial based on manifest weight of the evidence.

The Cabrals also moved for a new trial arguing the verdict was against the manifest weight of the evidence. See Carr v. Strode, 79 Hawai'i 475, 488, 904 P.2d 489, 502 (1995). The trial court denied the motion. Although stated as a point of error, the Cabrals present no argument on the point. The point is waived. See HRAP Rule 28(b)(7) ("Points not argued may be deemed waived.").

We need not address the points relating to the judgment as a matter of law on Leslie's and Senior's individual claims because they were mooted by the jury's finding that Pali Momi was not negligent.

V. CONCLUSION

The May 24, 2024 *Final Judgment* is affirmed in part and vacated in part. The judgment for Pali Momi and against the Cabrals on the jury's finding that Pali Momi was not negligent based on acts or omissions of its employees, including Dr. Kao and N.P. Deans, is affirmed. The February 8, 2024 *Order Granting Defendant Pali Momi Medial Center's Motion for Partial Summary Judgment Regarding Informed Consent and Vicarious Liability* is affirmed as to the claim for failure to obtain informed consent, but vacated as to the claim for vicarious liability.

This case is remanded for further proceedings on the claims by Leslie, Junior's estate, Senior, and Nicholas that Pali Momi is vicariously liable for acts or omissions by Dr. Castanera under the theory of apparent authority, including their claims for negligent infliction of emotional distress.

We note that a *Stipulation for Partial Dismissal with Prejudice of Defendant Shayne M. Castanera, M.D. and to Amend Caption* was entered on October 31, 2023; we express no opinion on the effect of the stipulation, if any, on remand.

On the briefs:

Kai Lawrence,
Sergio Rufo,
for Plaintiffs-Appellants
Leslie Cabral, as
Personal Representative,
and Nicholas Cabral.

/s/ Karen T. Nakasone
Chief Judge

/s/ Keith K. Hiraoka
Associate Judge

/s/ Clyde J. Wadsworth
Associate Judge

Gail Y. Cosgrove,
Deirdre Marie-Iha,
Maegan A. Ruggles,
Lindsey N. Barrios,
for Defendant-Appellee
Pali Momi Medical Center.