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Supreme Court
SCAP-23-0000277
09-OCT-2026
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Dkt. 42 OP

IN THE SUPREME COURT OF THE STATE OF HAWAII

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R.H., Individually and as Guardian Ad Litem for A.H.,
an Incompetent Adult,
Plaintiff-Appellant/Cross-Appellee,

vs.

KEITH T. HAYASHI, in his official capacity as
Superintendent of the Hawaii Department of Education and
STATE OF HAWAII DEPARTMENT OF EDUCATION,
Defendants-Crossclaimants-Crossclaim Defendants-Appellees/Cross-
Appellees,

and

STATE OF HAWAII,
Defendant-Crossclaimant-Crossclaim Defendant-
Appellee/Cross-Appellant,

and

CHRIS NAKAGAWA and ANTHONY JONES,
Defendants-Crossclaimants-Crossclaim Defendants-
Appellees/Cross-Appellees,

and

LANAKILA PACIFIC, a non-profit organization,
Defendant-Crossclaim Defendant-Crossclaimant-
Appellee/Cross-Appellee.

SCAP-23-0000277

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CAAP-23-0000277; CIV. NO. 1CC121003327)

OCTOBER 9, 2026

DEVENS, C.J., McKENNA, EDDINS, AND GINOZA, JJ.,
AND CIRCUIT JUDGE REMIGIO, ASSIGNED BY REASON OF VACANCY

OPINION OF THE COURT BY McKENNA, J.

I. Introduction

Both the plaintiffs and defendants appeal a circuit court final judgment in this transfer case.

A.H. (pseudonym "Amy") has severe cognitive disabilities and lacks capacity to consent to sex. While a student at McKinley High School ("McKinley"), Amy was sexually abused by male students. The abuse eventually caused her to suffer a psychotic breakdown and sustain serious, continuing psychological injuries.

Amy's mother ("Mother") filed this negligence lawsuit on behalf of Amy and herself (collectively, "Plaintiffs") in the Circuit Court of the First Circuit ("circuit court"). The State of Hawai'i, its Department of Education ("DOE"), and DOE employees (collectively, "the State") were named as defendants. Plaintiffs alleged that the State negligently failed to protect Amy from repeated sexual abuse while she attended McKinley.

The circuit court presided over a sixty-six-day bench trial. There was extensive evidence that school personnel knew

of Amy's significant cognitive disabilities, recognized her extraordinary vulnerability to sexual exploitation, were repeatedly confronted with warning signs that she was being sexually abused, but failed to take reasonable measures to prevent it.

The circuit court concluded that the State negligently failed to protect Amy. It determined that Plaintiffs' injuries and requisite treatment merited a total damages award of more than \$14 million, more than half for special damages. But without any request from the State that it do so, in its written decision, the circuit court apportioned 30% of the fault to the male students and reduced Plaintiffs' damages award by that percentage.

This sua sponte apportionment is the main issue on appeal.

The circuit court cited Hawai'i Revised Statutes ("HRS") § 663-10.5 (Supp. 2017) as the basis for this apportionment. That statute provides in relevant part:

- §663-10.5 Government entity as a tortfeasor; abolition of joint and several liability.** (a) Any other law to the contrary notwithstanding, . . . in any case where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity[.]
- (b) For purposes of this section, the liability of a government entity shall include its vicarious liability for the acts or omissions of its officers and employees.
- (c) For purposes of this section, "government entity" means any unit of government in this State, including:
- (1) The State[.]

Plaintiffs contend the circuit court improperly reduced their recovery when the State never pursued apportionment of liability to the male students. The State pled HRS § 663-10.5 as a defense in its answer but never argued that the male students should bear a portion of liability. Rather, in its closing argument and proposed findings and conclusions, the State briefly argued that if the State was found liable, then part of the liability should be apportioned to Mother.

Specifically, the State asked the circuit court to reduce the Plaintiffs' damages by Mother's alleged negligence in failing to provide more information to the school. The circuit court rejected this argument but then, on its own accord, allocated liability to the male students.

On Plaintiffs' points of error on appeal, we hold that the circuit court's sua sponte allocation of fault to the male students violated Plaintiffs' Hawai'i constitutional due process rights. Plaintiffs were deprived of notice and an opportunity to be heard on whether the boys were actually "other tortfeasors" under HRS § 663-10.5 and, if so, what percentage, if any, should be allocated to them. We set out what steps due process requires for an "other tortfeasor" determination.

We also hold that there was insufficient evidence that the male students qualified as "other tortfeasors" under HRS § 663-10.5, especially because the circuit court explicitly found

little to no evidence the boys knew any details about Amy's cognitive disabilities or that they were aware or should have been aware that Amy lacked capacity to consent to sex.

We further hold that apportionment of liability under HRS § 663-10.5 is an affirmative defense for which the State did not meet its burden of proof.

Finally, based on these holdings, we also hold that the circuit court erred by denying Plaintiffs' motion to amend the judgment to reverse its apportionment decision.

On cross-appeal, the State argues that the circuit court abused its discretion by limiting Amy's deposition, refusing to order a Hawai'i Rules of Civil Procedure ("HRCP") Rule 35¹ medical examination of Amy, and awarding excessive damages.

These arguments are without merit. The circuit court acted within its discretion by denying additional discovery based on the extensive evidence indicating that further examination of

¹ HRCP Rule 35 states, in relevant part:

Rule 35. Physical and Mental Examination of Persons. (a) Order for Examination. When the mental or physical condition . . . of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.

Amy, whether through a continued deposition or a HRCP Rule 35 examination, would likely cause her significant psychological harm. Finally, the damages awarded by the circuit court were supported by the record.

We therefore affirm the circuit court's findings, conclusions, and judgment except for its allocation of 30% of the liability to the male students. We remand to the circuit court for entry of an amended judgment consistent with this opinion.

II. Background

A. Factual Background

This factual background is derived from the circuit court's findings of fact.

Amy was a special education student with serious cognitive impairments. She was identified as a special education student in the third grade and since then had Individualized Education Plans ("IEP") that identified her educational needs.

Amy had no obvious physical manifestations of her cognitive disability. But her impairments were severe, and she was functioning far below her chronological age and appearance. When Amy entered McKinley High School in 2008, she functioned at the level of a five-year-old, or even younger. Amy's disability was consistently affirmed during multiple cognitive assessments, including testing that showed an IQ score of 40.

A chronology of relevant events follows.

August 2008: Amy began ninth grade at McKinley. McKinley received her eighth-grade IEP and was aware she was a particularly low-functioning special education student who required monitoring. Amy's eighth-grade IEP recommended that she not be placed with general education students, particularly due to a history of bullying.

Fall 2008: Despite this recommendation, Amy was initially placed in two pre-algebra classes with significantly higher-functioning students. The teacher, Mr. Choy ("Choy"), immediately determined that his class was not suitable for Amy. Choy was also aware of incidents in which other children in his class teased Amy.

He also heard that students were talking about Amy performing oral sex on a higher-functioning boy. The only step Choy took regarding this was to discuss the allegation with the boy, who denied it. There is no record of the school administration or of Mother being informed. Choy did recommend, however, that Amy be placed in a non-diploma track program that teaches simple workplace skills such as cooking, how to be on time, and how to make change. In November 2008, Mother also requested that Amy be moved into this non-diploma track program. Despite the recommendation, Amy was kept in her assigned classes.

February 2009: By February 2009, multiple additional teachers had become aware that Amy was reportedly giving oral sex to several different boys. For instance, Ms. Folger ("Folger") had heard Amy mentioning that she was giving oral sex to boys at school. Folger reported this information to Mr. Greenland ("Greenland"), Amy's care coordinator, and Maile French, the Special Education Department Chair.

There is no evidence that this information was further reported to school administrators or to Mother, or that the report was investigated.

Also during her freshman year, Amy left campus unnoticed with a senior and went to Ala Moana Beach Park, where he apparently raped her orally, vaginally, and anally in a public bathroom. This incident was not reported or investigated at the time.

November 2009: When Amy was in tenth grade, Greenland called Mother and informed her that Amy was performing oral sex on various boys. But around the same time, Greenland also sent Mother inappropriate personal text messages, including calling her "beautiful" and offering to "bring her some soup." Mother renewed her request that Amy be transferred to the non-diploma track program.

Mother began seeing a therapist to get advice on how to speak with Amy about sex and about what was going on.

Spring 2010: In spring 2010, Amy was moved to the non-diploma track program. She was moved into Mr. Nakagawa's ("Nakagawa") class. Nakagawa also took over as her care coordinator from Greenland.

In April 2010, various teachers reported to Nakagawa that Amy "displays inappropriate conduct w/her male peers & this needs to be addressed." The report also noted that "she was also caught in the closet a couple of times w/the same male peer, after being told not to do so."

Nakagawa did not act on the report, nor was Mother notified.

August 2010: In August 2010, another instructor submitted a report documenting concerns about Amy's interactions with male students. The report was provided to Choy, who, in turn, reported the concerns to Nakagawa. Although Choy understood that Amy's cognitive disabilities could be contributing to her interactions with male peers and recognized that she sought attention, both Choy and Nakagawa minimized the reported concerns by characterizing Amy as "boy crazy."

Mother was not notified of these reported concerns.

Fall 2010: Amy's Fall 2010 IEP reflected Nakagawa's concern that peers might take advantage of Amy. But the record does not indicate that Nakagawa further reported these concerns, informed Mother, or that any steps were taken to address them.

Mr. Price ("Price"), Amy's art teacher, was told by two girls that Amy "performed oral sex on a boy at school." Price confirmed that he had previously heard similar rumors about Amy and sex.

Price did not act upon the information until after the additional January 2011 incident next described. At that time, he did not inform Amy's care coordinator, any school administrator, or Mother.

January 2011: On January 4, 2011, Amy and a boy both asked Price if they could go to the bathroom. Price allowed them to go to the bathroom at the same time. Another student reported she saw the boy with Amy in the boys' bathroom. Price took both Amy and the boy to the office of Vice-Principal Jones ("VP Jones").

Although the boy was in the same class as Amy and had a specific learning disability, he was not severely cognitively disabled like Amy. Without any investigation, the school determined that the sexual conduct was consensual. The school then suspended both Amy and the boy.

Before deciding to suspend Amy, VP Jones did not review Amy's IEP or speak with Mother. After deciding to suspend Amy, VP Jones met with Mother but would not identify the boy involved. The school did not review Amy's IEP to determine whether her cognitive disabilities affected her ability to

consent, nor did it ask whether the boy knew Amy was cognitively disabled. The incident was not reported to the police.

February 2011: In February 2011, Mother reported to the school by email that a boy wrote a note to Amy asking her to meet out of view of the cameras to "hug." Mother also discovered that the boy had arranged to have phone sex with Amy.

There is no evidence the school took any action after receiving this email.

March 2011: Worried about Amy's safety, Mother had Amy examined by Dr. Tyson, a licensed psychologist. Dr. Tyson assessed Amy and wrote a report delivered to the school in March 2011 stating that Amy "should not ever be unsupervised while on school grounds."

One-on-one supervision was a fairly standard service for a student with severe cognitive disabilities. In fact, Nakagawa had never previously had to recommend one-on-one supervision because most non-diploma students already had an assigned one-on-one aide. Yet, Amy was still not assigned a one-on-one aide.

April 2011: Amy started seeing therapist Karlene Perez ("Perez"). Amy told Perez about the January 4, 2011 incident and that "she didn't want to do it and that she was scared."

Also, another student reported to Choy that Amy touched the crotch of a male student. Choy spoke with Amy about the

incident. Amy cried and told Choy she was afraid that the boy would not like her "if she did not do it."

There is no evidence that Choy reported the incident to anyone.

Becoming increasingly concerned for Amy's safety, Mother again informed the school she urgently believed Amy needed one-on-one supervision. The record does not reflect that McKinley ever provided such supervision. A few days later, Mother sent an email to the school reporting that a boy had stuck a note to Amy's back that said "kick me" and that another student hit Amy hard enough to leave a mark.

There is no evidence that the school acted in response to these concerns.

On April 15, 2011, a behavioral assessment in school records concluded that, "whenever unsupervised and a peer asks [Amy] for something, [Amy] has given in to peer persuasion, including sex acts, to gain peer attention and friendship." The record does not identify who prepared the assessment or explain the circumstances under which it was conducted. Based on that assessment, the school created a Behavioral Support Plan requiring that any future incidents be reported to Mother and the vice-principal.

May 2011: Mother sent another email to school administrators reporting that Amy had again been pressured by a

boy who wanted her to go to a specific building to "do bad things." Amy reported that the boy said, "come here, suck my d--."

Mother again demanded that the school provide increased supervision. The school did not do so.

August 2011: Shortly after beginning twelfth grade, after years of repeated sexual assaults, Amy experienced a catastrophic psychotic breakdown. Within a week of starting her senior year at McKinley, she displayed a marked change in behavior and became increasingly agitated. She reported feeling "scared" and that "she couldn't feel her heart." She had to come home early from a church event due to this fear. Amy told a school employee that "everyone was looking at her." She also said an adult female neighbor wanted to have sex with her.

Within a few days, Amy was clearly hallucinating and was not lucid. She was hospitalized on August 8, 2011, and remained so for three months.

Amy was provided with medication and started to feel safer by the end of August, when she was able to speak about what was causing her to feel scared. Amy described repeated sexual abuse by students at McKinley. She was diagnosed with post-traumatic stress disorder ("PTSD") stemming from the sexual abuse.

PTSD is typically treated with cognitive behavioral therapy. But cognitive behavioral therapy does not work for Amy due to her cognitive disability.

November 2011: Amy was discharged from the hospital on November 2, 2011. A typical stay for a child at an inpatient center is about seven to ten days; Amy's hospitalization lasted three months.

Her doctors recommended that she not return to McKinley. She was then transferred to Variety School.

In 2013, Amy began seeing psychiatrist Angela King, M.D. ("Dr. King"). Dr. King confirmed that sexual abuse at McKinley was a cause of Amy's PTSD, and that Amy could not benefit from the best available treatment, cognitive behavioral therapy, because of her cognitive deficits. Dr. King opined that Amy would need treatment for the rest of her life resulting from the events at McKinley.

In 2014, Mother also sought treatment from Dr. King. Dr. King diagnosed Mother with panic disorder and major depressive disorder, and opined that Amy's abuse and PTSD were substantial factors in her diagnosis.

In 2015, Dr. Tyson assessed Amy and concluded that she had PTSD due to the history of sexual assault and that she should stay at Variety School because of the close supervision available.

By the time the circuit court made its findings, Amy was twenty-seven years old. Her PTSD remained persistent and untreatable.

B. Circuit Court Proceedings

1. Complaint and Pre-Trial Discovery Issues

On February 14, 2014, Plaintiffs filed their first amended complaint. Plaintiffs asserted claims against the State arising from its failure to protect Amy from repeated sexual abuse while she attended McKinley and sought damages for the severe physical, psychiatric, psychological, and emotional injuries that followed.

Before trial, the parties engaged in extensive discovery concerning Amy's condition. Issues arose from the State's discovery efforts. The circuit court appointed a discovery master on June 4, 2015.

The State sought to depose Amy, and Plaintiffs moved for a protective order seeking to prohibit or limit the deposition. Two psychiatrists and two psychologists provided medical opinions that Amy was incompetent to testify and that subjecting her to a deposition "would subject her to a substantial risk of harm and re-victimization based on her medical history, hospitalization and diagnosis of PTSD, and her subsequent treatment." Some excerpts from these reports are as follows:

Dr. King, Amy's psychiatrist, reported:

Due to these symptoms along with her intellectual disability it is unlikely that she will ever be able to benefit from the gold standard of trauma therapy, specifically Trauma Focused Cognitive Behavioral Therapy, since it has a higher chance of re-traumatizing her. Similarly, being placed in any situation that will cause her to discuss her past trauma experiences, including going through deposition will likely retrigger her trauma symptoms and may even lead to re-hospitalization since she does not have the ability to be able to process the trauma due to her intellectual disability.

Therefore, it is not medically recommended to place her in an anxiety inducing setting which could trigger her PTSD symptoms and risk hospitalization.

Dr. Anthony Urquiza ("Dr. Urquiza"), a psychologist who specializes in treating victims of sexual molestation, wrote:

It is common for victims of sexual assault to experience trauma symptoms that are sustained for many years after their victimization. Thoughts and images of being sexually victimized can trigger intense and de-stabilizing mental health symptoms. [Amy] has a multi-year history of serious mental health symptoms associated with her prior sexual victimization, has had a prior inpatient psychiatric hospitalization due to psychotic behavior, and is currently taking several types of psychiatric medication (i.e., an antidepressant, an antipsychotic, and medication to decrease agitation). Asking [Amy] a series of questions about her prior sexual victimization may trigger thoughts and feelings that are likely to increase her trauma-based symptoms. Given the severity of her past symptoms (e.g., self-mutilation, severe psychosis, prior inpatient psychiatric hospitalization), direct questioning of [Amy] on this topic could result in a resumption of these problems or other devastating consequences.

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Given the high potential for a severely negative traumatic response to being questioned, participating in a deposition or court proceeding is an unsafe proposal that would endanger [Amy's] mental health. The presence of a 'third person' to oversee the experience of [Amy] being a witness would not decrease the risks associated with responding to such questions.

After additional briefing and a hearing on January 19, 2016, the circuit court denied Plaintiffs' request for a blanket prohibition on Amy's deposition, indicating that the State had a

legitimate interest in preparing for trial. But the circuit court found good cause to impose protective measures to "minimize any anxiety-inducing situation and to protect [Amy] from emotional distress or risk of harm to her psychological well-being." The circuit court also reserved deciding on Amy's competency to testify, ruling that questions regarding whether the deposition testimony would be admissible at trial would not preclude the State from taking Amy's deposition.

The circuit court (1) ordered that Amy's deposition occur at the Children's Justice Center or another child-friendly location, (2) limited questioning to ninety-minute sessions and seven hours total, (3) required the discovery master to observe the deposition through a one-way mirror, with authority to recess or terminate the deposition if Amy became distressed, (4) permitted Amy's therapist to monitor the proceedings, and (5) authorized the discovery master to implement any additional protective measures deemed necessary.

Amy's first ninety-minute deposition session took place on March 31, 2016. Amy's treating psychiatrist, Dr. King, attended the deposition, during which Amy exhibited significant anxiety. After examining Amy, Dr. King concluded that the deposition had caused substantial emotional deterioration and that no additional deposition could be conducted safely because Amy's

chronic PTSD and intellectual disability prevented meaningful recovery. Dr. King explained:

My significant concern is that [Amy] reported being scared, worried and uncomfortable and the bulk of the most difficult and serious material, including [Amy]'s victimization, is likely to be raised in the next session. My clinical impression is that [Amy]'s fear combined with any questions about sexual victimization together with her preoccupation that [the attorney conducting the deposition questioning] knows where she lives will trigger her complex PTSD and a resumption of her psychotic symptoms, requiring hospitalization.

She also stated in an additional declaration that:

As provided in the treatment records and as I testified at my deposition, multiple attempts have been made to treat [Amy] with the PTSD specific intervention of trauma-focused cognitive behavior therapies. These attempts have not been successful because [Amy] lacks the intellectual capacity to retain and maintain the necessary coping strategies that must be in place to engage in and receive the benefit of this therapy.

In a third declaration, she wrote:

I opined that there is no set amount of time when it may be safe to put [Amy] through a deposition since chronic PTSD can be a lifelong condition and because of [her] intellectual disability she is unable to benefit from treatment. When we discussed the harms outweighing the benefits, I identified the harms of a deposition as the risk of re-hospitalization and the likelihood of her becoming acutely unstable again. I identified the benefits as her testimony and since that may not be reliable or accurate because of her intellectual disability, then the benefits do not outweigh the harms.

Dr. Urquiza also reviewed the video recording of Amy's deposition and observed symptoms consistent with her PTSD diagnosis, including anxiety, hypervigilance, and avoidance. Dr. Urquiza warned that requiring Amy to confront the circumstances of her trauma through further deposition questioning would likely retraumatize her. Dr. Urquiza wrote:

I understand that in the next session of [Amy]'s deposition, she will be confronted with facts surrounding her trauma and prior-victimization. It is medically contraindicated to confront [Amy] with such questions in a deposition setting because forcing [Amy] to do so will likely result in re-traumatizing her resulting in more severe symptoms than she exhibited during and after the first session of her deposition. As I indicated in my report dated July 17, 2015, it was reasonably expected [Amy] might persist in a deposition even though distressed and have a delayed negative response to the deposition. The reports of Dr. Angela King subsequent to the first session of [Amy]'s deposition, demonstrating that presented with evidence of anxiety and paranoia is consistent with my expressed concerns.

The first deposition also illustrated concerns regarding the reliability of Amy's testimony. During the session, Amy gave inaccurate responses regarding basic aspects of her personal history, including testifying (1) that she rode a Roberts Hawai'i school bus during her freshman year, even though that did not happen until she began attending Variety School, and (2) that she owned a "German Shepherd," despite not having one. Plaintiffs argued that these examples demonstrated Amy's confusion regarding time periods and susceptibility to leading questions, concerns that were echoed by multiple medical professionals. For example, Dr. Urquiza wrote:

I observed in the video that [Amy] exhibited symptoms consistent with her PTSD diagnosis, including anxiety, hyper-vigilance, reassurance from adults and avoidance. I observed that the questioning of [Amy] was not designed to ensure that she understood the questions that she was answering and, in fact, demonstrated how suggestible she was based on the leading manner in which she was asked questions. An example of such testimony was with respect to whether she understood the difference between fiction and non-fiction. All of this evidences the fact that she is not competent to testify at a deposition or trial.

Based on these concerns, Plaintiffs again moved to terminate Amy's deposition. After considering the discovery master's report and medical evidence, the circuit court found Amy competent to testify and ordered that her remaining deposition sessions proceed under the existing protective order conditions.

On September 29, 2016, Amy participated in a second ninety-minute deposition. During that session, questioning focused extensively on the sexual abuse Amy experienced while a student at McKinley.

After the second deposition, Amy's condition deteriorated significantly. Dr. King reported that Amy exhibited increased fear, anxiety, depression, nervousness, tearfulness, and sleeplessness. Dr. King wrote:

During the September 29, 2016 deposition session, [Amy] was asked numerous questions regarding her sexual assaults including her rape by [a student]. [Amy] exhibited symptoms of distress. This became particularly evident to me during a break at the 1-hour mark of the deposition when I had an opportunity to personally observe [Amy] in an adjoining conference room. At that time, [Amy] was crying and anxious[.]

After the session held on September 29, 2016, I saw [Amy] in my office on an emergent basis the following day. [Amy] presented with heightened anxiety, fear, inability to sleep, and tearfulness.

. . . .

I saw [Amy] again in my office on October 5, 2016. I observed that [Amy]'s condition had worsened . . . While alone in my office, she cried, appeared fearful and reported being scared. She is afraid of being alone and has been experiencing more anxiety attacks. She has been fairly stable up to this point during our sessions, but I have definitely seen an increase in symptoms, including

depression, fear, and anxiety since she went through the most recent deposition. She is being asked questions that are traumatic in nature and ordinarily in therapy, these questions would not be asked when the patient is not able to apply relaxation skills. They are also not asked when the patient is unable to safely process past trauma as [Amy]'s current symptoms demonstrate. Forcibly asking these questions can lead to further trauma, increasing symptoms, and possible re-hospitalization. It is my firm opinion that [Amy]'s increased symptomology is a result of her experience at her depositions recounting the trauma that she experienced at school.

It continues to be my clinical opinion that the deposition of [Amy] [is] harmful and should be terminated. This opinion is reinforced by my witnessing [Amy] exhibiting distress and harm during the deposition sessions and the increased symptoms and instability she is exhibiting in their aftermath.

Dr. King increased Amy's psychiatric medication to address her worsening symptoms and to minimize the risk of another psychotic episode. When Dr. King examined Amy again on October 5, 2016, she remained fearful, cried throughout the visit, and appeared to be in worse condition, despite the increased medication.

Dr. Urquiza also submitted a supplemental declaration noting that "there is significant concern about [Amy]'s current level of distress, and risk of additional harm." He stated:

It should be clear that [Amy] has been harmed by her involvement in her second deposition session and continued involvement in the third portion of her deposition will likely result in additional harm.

Dr. Barry Carlton, one of Amy's treating psychiatrists, likewise stated:

[C]onsidering the severity of the symptoms which the patient presented, as well as the severity of her cognitive impairment, and the incomplete nature of her treatment, if she were to attempt to re-create what happened in an unprotected, deposition environment, it would pose a risk

of exacerbation of symptoms, return of anxiety, and an increase in anxiety from which it might prove to be difficult for the patient to recover.

Her treating therapist, Perez, also reported that Amy's presentation and "intense fear" were "very similar" to what she had observed immediately before Amy's psychotic break in 2011.

Despite these reports, the discovery master recommended denying Plaintiffs' motion to terminate Amy's deposition and permitting the deposition to continue under the imposed protections. Plaintiffs appealed this discovery master order to the circuit court. After hearings, the circuit court denied Plaintiffs' appeal and ordered "the third deposition session of [Amy]" to proceed.

The State agreed, however, that Amy's deposition should be postponed. On March 6, 2017, the State moved to continue the trial, acknowledging that Amy should not undergo a further deposition while her condition remained unstable. The State indicated that "[a] fair trial requires that the Defendants finish [Amy]'s deposition only when [Amy] is emotionally well" and requested that trial be reset once [Amy] was "stable enough to present reliable testimony." The State later clarified that it would consider Amy "stable" only when her medication had been reduced and her symptoms had returned to the level they were at before the September 29, 2016 deposition.

The State's retained expert, Dr. Tanya D'Avanzo ("Dr. D'Avanzo"), similarly recommended suspending Amy's scheduled HRCP Rule 35 examination after learning of her condition after the deposition. The State reported as follows to the circuit court:

Appraised of [Amy]'s condition as reported recently by Mr. Ferrer, Dr. D'Avanzo recommended and the State by this communication suspends the [examination] of [Amy] scheduled for February 17, 2017. In Dr. D'Avanzo's opinion, the medication taken by [Amy], now at twice the dosage as when [Amy] was observed in September of 2016, can have a sedating effect on any patient and which effect could impair [Amy]'s clarity during the interview portion of Dr. D'Avanzo's assessment. Because the State also noticed the deposition of [Mother] for February 22, 2017 to follow the last examination session with [Amy], the State will suspend the deposition of [Mother] to a date which follows the final deposition session of [Amy].

The State's motion to continue was granted.

The circuit court then granted Plaintiffs' request for a limited HRCP Rule 35 examination for the sole purpose of determining whether Amy could safely undergo any further deposition questioning and, if not, when the issue should be revisited. The court appointed Dr. Barbara Higa-Rogers ("Dr. Higa-Rogers") as its neutral expert psychologist. After reviewing Amy's medical records, observing the videotaped deposition sessions, and conducting her own clinical evaluation, Dr. Higa-Rogers issued her report on December 13, 2018. She opined against allowing any further depositions of Amy:

[I]t is my professional opinion, the potential benefits of [Amy] testifying for a two hour period or less, do not outweigh the risk to her emotional state, and is therefore not supported.

.

Given the severity of [Amy]'s intellectual disability, which is pervasive in nature, there is no expected improvement expected in her ability to comprehend the legal process or be able to engage in gold standards of treatment to assist her in navigating her prior experiences. Therefore, change is unlikely. As noted, [Amy] also has significant trauma related sequelae and the prior depositions lead to an increase in her symptoms and required an increase in her medications to address her nightmares, startle response and fears of seeing the state's attorney. The benefits of pursuing a third deposition do not outweigh the potential risks to [Amy]'s mental health, limited coping and is unlikely to yield any significant additional information now or in the foreseeable future.

Dr. Higa-Rogers further opined that, if the circuit court nevertheless required additional questioning, protective measures should be implemented to reduce the risk of harm, including allowing Amy to control breaks, imposing strict time limits, permitting questioning through her treating providers where possible, limiting repetitive questioning, and allowing counsel to observe from a separate room.

After Dr. Higa-Rogers' report, Plaintiffs again moved for a protective order terminating any further deposition testimony. The circuit court denied the motion without prejudice but ordered that no further deposition of Amy could occur without prior court approval.

More than a year later, the State moved to resume Amy's deposition and separately moved for a HRCF Rule 35 examination. As to the deposition, the State argued that (1) additional testimony was necessary to satisfy pretrial deadlines, (2) Amy

had received sufficient therapy since her prior deposition, (3) questioning would be limited to events occurring after July 2011, and (4) further discovery was necessary to develop its alternative causation defense.

As to the proposed HRCP Rule 35 examination, the State sought an eight-hour examination consisting of four hours of interviews and four hours of testing. The State asserted that good cause existed for the examination because the causes of Amy's August 2011 psychotic break had "never been fully established or evaluated."

Plaintiffs opposed both motions, relying on updated opinions from Amy's treating providers that her condition remained substantially unchanged and that additional questioning or examination continued to pose a significant risk of psychological harm. Dr. King reported that Amy continued to suffer from PTSD symptoms, including nightmares, anxiety, fear, hypervigilance, and the risk of potential psychosis. She agreed with Dr. Higa-Rogers' earlier opinion that additional questioning would likely retraumatize Amy without providing meaningful benefit.

After a hearing on March 10, 2020, the circuit court denied without prejudice the State's motion to resume Amy's deposition, explaining that it was "very concerned about ordering something

that could cause this young woman further harm" but said it was "not saying she can never be deposed."

With respect to the proposed HRCP Rule 35 examination, the court declined to rule pending a further assessment from its neutral expert, Dr. Higa-Rogers. The court expressed concerns regarding the potential adversarial nature of HRCP Rule 35 examinations and sought assurances that any examiner would exercise independent medical judgment rather than conduct a purely forensic examination. The circuit court explained that it would consider allowing a HRCP Rule 35 examination if it could be conducted safely. The circuit court requested further information concerning the proposed examination, including Dr. D'Avanzo's medical judgment regarding its safety.

Dr. Higa-Rogers issued her supplemental report on July 15, 2020. She opined:

As previously noted in my December 2018 report, given the severity [Amy]'s intellectual disability, which is pervasive in nature, she is not expected to show significant improvements in her ability to comprehend the legal process or complex questions, and is more likely to agree when a yes/no question is asked of her and to assent when a suggestion is made to her. Furthermore, there is documentation that following prior depositions [Amy] experienced an increase in her symptoms and required an increase in her medications to address her nightmares, startle response and fears. The benefits of pursuing further questioning/testing do not appear to outweigh the potential risks to [Amy]'s mental health, limited coping, and is unlikely to yield significant additional information.

Dr. Higa-Rogers opined that if the court nevertheless ordered an examination, protective measures should be implemented to reduce the risk of harm.

On August 20, 2020, the circuit court denied the State's motion for a HRCF Rule 35 examination, concluding that the proposed examination presented a significant risk to Amy's mental health. The State then sought another trial continuance, arguing that it lacked essential discovery because it had been unable to complete Amy's deposition or conduct a HRCF Rule 35 examination. The circuit court continued the trial and reset it for March 1, 2021. The State's deposition of Amy was never resumed, and the case proceeded to trial.

2. The State's Pre-Trial References to Apportionment

Before trial, the State made several brief and nonspecific references to apportionment.

The fifteenth defense in the State's answer to the first amended complaint says: "The liability, if any, of the DOE, Nakagawa and Jones, any of them or collectively, is limited under HRS §663-10.5."

The State's cross-claim against a previous co-defendant similarly stated, without further elaboration, that "[a]pportionment of fault is determined pursuant to Section 663-10.5 of the Hawai'i Revised Statutes." Neither filing identified the male students, characterized them as "other tortfeasors," or

indicated that the State sought to reduce Plaintiffs' recovery by allocating fault to the students. The State also did not implead any of the male students.

The State later referenced HRS § 663-10.5 in a pre-trial motion to continue trial. The State argued it was "not jointly and severally liable with the person(s) responsible" for events surrounding Amy's 2011 psychotic break and quoted HRS § 663-10.5. The State asserted that the boys did not cause Amy's psychotic break in August 2011, but instead suggested that something happened at home that had caused the psychotic break.

3. Trial

The case proceeded to a bench trial over the course of sixty-six days in March through September 2021. The court identified the principal issues as (1) whether Amy had the cognitive ability to consent to sex; (2) whether the State breached duties owed to Amy and Mother while Amy was a special education student at McKinley; (3) whether the State's acts and omissions were a substantial factor in causing harm to Plaintiffs; (4) what harms were proximately caused by the State's conduct; and (5) damages.

The court heard testimony from more than thirty witnesses and received numerous documents and photographs in evidence.

Although liability and damages were heavily contested at trial, the State's closing argument consistently maintained that

the boys were not responsible for Amy's injuries. Throughout closing argument, the State maintained that the alleged assaults by the boys either were not proven to have occurred, were consensual, or otherwise could not be attributed to any negligence by the DOE.

For instance, with respect to the alleged Ala Moana incident, the State argued that the evidence did not support Plaintiffs' account that Amy left school to go to Ala Moana and that, even if an incident occurred there, it could not be attributed to any negligence by the DOE.

Likewise, with respect to the January 4, 2011 incident, the State argued that the evidence established a consensual encounter.

The State further argued that Plaintiffs failed to prove that any additional sexual assaults occurring at school caused Amy's injuries.

Consistent with these positions and the State's trial strategy, the State's discussion of responsibility for Amy's injuries focused on two theories, neither of which sought to allocate fault to the boys.

First, the State argued that Plaintiffs had overlooked other events unrelated to the DOE, including Amy's statements regarding a "neighbor lady" and her belief that Mother was her

"lesbian lover," as alternative explanations for Amy's mental health crisis.

Second, with respect to HRS § 663-10.5, the State argued that any reduction in the DOE's liability should be based on Mother's role in failing to disclose information to the school. The State argued:

8 Also, plaintiff did not address Hawai'i
9 Revised Statute 663-10.5 which unequivocally states
10 that the State can only be responsible for its share of
11 damages.
12 **Now, again, it gets into this area of [Mother's]**
13 **role.** Now, [Mother] had no duty. The DOE -- or no duty
14 under the IDEA, and the Department of Education has no
15 counterclaim against [Mother] for negligence. **But she**
16 **had**
17 **a role in what happened to [Amy].** That is undeniable.
18 **She had information that for whatever reason,** whether
19 it was shame or a personality disorder as described by
20 Dr. D'Avanzo, she didn't -- **she chose not to share this**
21 **information.** And even absent a duty, this decision
22 impacted the DOE's ability to reasonably develop an IEP
23 plan.
24 And whatever damages may exist, which in this
25 case, obviously the State feels there's no duty,
1 breach, or causation, or these damages, but even if the
2 court were to disagree, the State can only be
3 responsible for that portion of its damages, or of the
4 total damages, and plaintiff did not address that.

After trial, the parties submitted proposed findings of fact and conclusions of law. In two paragraphs of its 127-page submission, the State proposed the following conclusions of law:

74. The State of Hawai['i, as a government entity, is liable for no more than the percentage share of damages attributable to the government entity. HRS § 663-10.5

75. Even assuming, without finding, that Plaintiff had established any damages to a reasonable degree of certainty, Plaintiff would still not be entitled to recover the vast majority of those damages from the State. The State of Hawai['i, as a government entity, is liable for no more than the percentage share of damages attributable to the government entity. Hawai['i Revised Statutes § 663-10.5.

The State then made clear that its reference to HRS § 663-10.5 was to request an apportionment of liability aimed at Mother, not the male students. In its proposed conclusion of law 76, the State argued that "the primary reason that allowed those alleged events to happen was [Mother's] willful non-disclosure of information that was necessary for the DOE to form [sic] provide more appropriate educational and behavioral supports."

Thus, the State never requested that the male students be determined to be "other tortfeasors" to whom liability should be apportioned under HRS § 663-10.5.

The court then resolved each liability issue in Plaintiffs' favor. It found that Amy lacked the cognitive ability to consent to sex, the State breached its duties, and the State's conduct was a substantial factor in causing multiple sexual assaults, mental illness, and emotional distress.

In reaching those findings, the court credited the testimony of Amy's treating and retained experts. It rejected opinions of the State's expert, Dr. D'Avanzo, as not reliable and not adequately supported by the record. The circuit court noted that the relationship between cognitive disability and sexual victimization was core to this case but that Dr. D'Avanzo rarely treated children and could not recall having a single child patient who was cognitively disabled.

The circuit court also heard extensive evidence concerning Plaintiffs' damages. The court credited the testimony of Plaintiffs' treating and retained experts and found that Amy suffered chronic PTSD, obsessive behaviors, psychotic episodes, and an increased risk of future psychosis requiring lifelong psychiatric treatment, monitoring, medication, periodic hospitalization, and one-on-one supervision. Amy's life-care plan reflected costs that medical experts opined were reasonable, necessary, and caused by the sexual assaults and PTSD. The court further found that Mother suffered major depressive and panic disorders as a result of the harm to Amy.

In assessing Amy's general damages, the court acknowledged that "[i]t is more than difficult to place a monetary value on sexual assault of an impaired child," but explained that it had made a "serious effort to balance all the issues" in determining reasonable compensation. In assessing Mother's general damages, the court similarly observed that, "[g]iven what happened to [Amy], the court cannot think of anything more distressing to a parent generally or [Mother] in particular, short of a child's death."

Based on these findings, the circuit court awarded Plaintiffs a total of \$14,167,354.81 in damages: \$190,986.78 in past medical expenses, \$7.87 million in future care, and \$4 million in general damages to Amy; and \$26,368.03 in past

medical expenses, \$80,000.00 in future medical expenses, and \$2 million in general damages to Mother.

Then, the court sua sponte addressed apportionment of liability to the male students. It noted HRS § 663-10.5 says "where a government entity is determined to be a tortfeasor along with one or more other tortfeasors, the government entity shall be liable for no more than that percentage share of the damages attributable to the government entity[.] The circuit court said that, here, the "one or more other tortfeasors" "would be the boys who engaged in sex with [Amy]."

The circuit court noted that the statute had been "briefly mentioned" in the State's proposed conclusions and that Plaintiffs "did not cover the issue in any depth, if at all." But it indicated its belief that because the State had raised the issue, it had to be addressed.

The circuit court said that the interplay between Hawai'i case law, some of which is discussed below, and the statute was not easy and straightforward under the circumstances of this case.

The circuit court then determined that the State should be held liable for only 70% of the damages. It ruled that HRS § 663-10.5 did not require it to assign specific percentages of liability between various actors, but that it could assign 30% to all the boys who sexually abused Amy.

The circuit court also determined, however, that there was little to no evidence the boys involved knew any particulars about Amy's cognitive disabilities, and that with the possible exception of the boy who assaulted Amy at Ala Moana, to the boys, Amy was likely a peer special education student. The court also specifically found that there was little to no evidence the boys were aware or should have been aware that Amy lacked ability to consent to sex.

But the circuit court concluded that "all persons who abused [Amy] sexually during the relevant time period" constituted "other tortfeasors" under HRS § 663-10.5 and collectively allocated 30% of the fault to them and 70% to the State.

The court then reduced Plaintiffs' \$14,167,354.81 damages award by 30%, or \$4,250,206.44, and entered judgment against the State for \$9,917,148.37.

4. Post-Judgment Proceedings

Plaintiffs then filed an HRCP Rule 59(e) motion to amend the judgment, challenging the circuit court's apportionment of 30% of the fault to the unidentified persons who sexually abused Amy. Plaintiffs argued that this apportionment is an affirmative defense, that the State had never provided notice that it intended to seek apportionment based on the conduct of the male students, and that it had not presented or litigated

such an apportionment claim at trial. Plaintiffs further contended that the court's post-trial allocation of fault deprived them of a meaningful opportunity to address whether there "should be any apportionment at all" or the "proper percentage of culpability between tortfeasors."

In opposition, the State disputed that apportionment under HRS § 663-10.5 is an affirmative defense. The State argued that the statute "operates not as an affirmative defense but rather a limitation on the liability of governmental entities as a tortfeasor" and asserted that governmental entities "cannot be held liable for more than [their] fair share of damages." The State also argued that HRS § 663-10.5 does not require it to file claims against other tortfeasors for an apportionment of liability to occur.

Plaintiffs filed a reply with no new arguments. The circuit court denied the motion to amend.

C. Appeals and Transfer

Plaintiffs filed a notice of appeal, and the State filed a notice of cross-appeal. This court then granted Plaintiffs' application for transfer and entered a notice of no oral argument.

D. Questions on Appeal

1. Plaintiffs' Appeal

Plaintiffs raise four points of error on appeal:

1. The Court Erred by Apportioning Damages to Alleged Tortfeasors Not Identified by the State, Violating Plaintiffs' Due Process Rights.
2. The Court Erred in Determining that the Male Students Were Tortfeasors as There Was Insufficient Evidence in the Record of Their Tortfeasor Status or Degree of Fault.
3. The Court Erroneously Shifted the Burden of Proof on Apportionment from the State to the Plaintiffs.
4. The Court Erred in Denying Plaintiffs' Motion to Amend the Judgment to Reverse its Apportionment Decision.

2. The State's Cross-Appeal

The State raises three points of error on cross-appeal:

1. The trial court abused its discretion by denying the State's request to conduct a Rule 35 examination of [Amy]
2. The trial court abused its discretion by precluding the State from completing [Amy]'s deposition.
3. The trial court's damages award was grossly excessive.

For the reasons discussed below, we agree with Plaintiffs' points of error and disagree with the State's points of error.

III. Standards of Review

A. Findings of Fact

HRCP Rule 52(a) provides that, in a bench trial, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." HRCP Rule 52(a). A finding of fact is clearly erroneous when "(1) the record lacks substantial evidence to support the finding, or (2) despite substantial evidence in support of the finding, the appellate court is nonetheless left with a definite and firm conviction that a mistake has been made." Klink v.

State, 113 Hawai'i 332, 351, 152 P.3d 504, 523 (2007).

"'Substantial evidence' . . . is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Id. (cleaned up).

B. Conclusions of Law

"This court 'may freely review conclusions of law and the applicable standard of review is the right/wrong test.'" State v. Levi, 102 Hawai'i 282, 285, 75 P.3d 1173, 1176 (2003). As such, a conclusion of law is not binding upon an appellate court and such findings can be "freely review[ed]" for its correctness. Dan v. State, 76 Hawai'i 423, 425, 879 P.2d 528, 530 (1994). Questions of statutory interpretation and constitutional law are likewise questions of law reviewed de novo. Levi, 102 Hawai'i at 285, 75 P.3d at 1176.

C. Statutory Interpretation

"The fundamental starting point for statutory interpretation is the language of the statute itself." Peterson v. Haw. Elec. Light Co., 85 Hawai'i 322, 327, 944 P.2d 1265, 1270 (1997), superseded on other grounds by HRS § 269-15.5 (Supp. 1999) (cleaned up). "[W]here the statutory language is plain and unambiguous, the court's sole duty is to give effect to its plain and obvious meaning." Id. (cleaned up). "[I]mplicit in the task of statutory construction is the court's foremost obligation to ascertain and give effect to the intention of the

legislature, which is to be obtained primarily from the language contained in the statute itself." Id. (citation omitted).

"[W]hen there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists." 85 Hawai'i 322 at 327-28, 944 P.2d at 1270-71 (cleaned up).

When a statute is ambiguous, "the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning." Citizens Against Reckless Dev. v. Zoning Bd. of Appeals, 114 Hawai'i 184, 194, 159 P.3d 143, 153 (2007) (quoting HRS § 1-15(1) (1993)). Courts may also "resort to extrinsic aids in determining legislative intent, such as legislative history, or the reason and spirit of the law." Id.

D. Discovery Rulings

The extent to which discovery is permitted under Rule 26 (as well as under Rules 33 and 34) is subject to considerable latitude and discretion. Appeal of Goodfader, 45 Haw. 317, 335, 367 P.2d 472, 483 (1961). Accordingly, "the trial court may not be reversed by an appellate court unless the trial court has clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Kealoha v. Cnty. of Haw., 74 Haw. 308, 318,

844 P.2d 670, 675 (1993) (cleaned up). Under that standard, different trial judges may, on the same facts, arrive at opposite rulings "without any of them being reversible on appeal." State v. Rabe, 5 Haw. App. 251, 260-61, 687 P.2d 554, 561 (App. 1984).

To the extent this issue requires review of the circuit court's factual findings regarding Plaintiffs' medical condition and ability to participate in discovery, those findings are "reviewed on appeal under the clearly erroneous standard." Birano v. State, 143 Hawai'i 163, 181, 426 P.3d 387, 405 (2018) (cleaned up).

E. Damages Awards

Hawai'i law has long recognized that the assessment of damages lies primarily within the province of the factfinder, and appellate review is correspondingly limited. See Kang v. Harrington, 59 Haw. 652, 663, 587 P.2d 285, 292 (1978). Most recently, this court reaffirmed these longstanding principles in Kekona v. Bornemann and explained:

On appeal, the courts analyze whether the damages awarded by the jury were palpably not supported by the evidence, or so excessive and outrageous when considered with the circumstances of the case as to demonstrate that the jury in assessing damages acted against rules of law or suffered their passions or prejudices to mislead them.

135 Hawai'i 254, 257, 349 P.3d 361, 364 (2015).

This court has further explained that "[a] similar test is used in a jury-waived case," where "the inquiry on review is

limited to whether, 'upon the evidence adduced, reasonable [people] could have come to the same conclusion as the jury, or the trial court in a jury-waived case.'" Kang, 59 Haw. at 663, 587 P.2d at 292 (cleaned up).

IV. Discussion

A. Plaintiffs' Appeal

1. **The circuit court erred by apportioning liability to tortfeasors not identified or pursued by the State and violated Plaintiffs' due process rights.**

In their first point of error on appeal, Plaintiffs allege that the circuit court erred by apportioning damages to alleged tortfeasors not identified by the state, violating their due process rights. For the reasons that follow, we agree.

- a. **Hawai'i law generally only permits apportionment of liability to nonparties in limited circumstances.**

Here, the circuit court apportioned 30% of the fault to the male students who abused Amy. The male students were never named as parties.

Preliminarily, the State argues that this court "expressly held in Cummings v. State that the plain language of HRS § 663-10.5 does not require the State to file a claim against [another tortfeasor] to have liability apportioned to them[,]" citing to a December 29, 2006 summary disposition order of this court. Cummings v. State, No. 26975, 2006 WL 3834309 (SDO) (Haw. Dec. 29, 2006). But Hawai'i Rules of Appellate Procedure ("HRAP"),

Rule 35(c)(1) explicitly provides that, unless certain exceptions apply, "[a] memorandum opinion or unpublished dispositional order filed before July 1, 2008 shall not be cited in any other action or proceeding[.]" The exceptions in HRCP Rule 35(c)(1) are not applicable here, and thus, the State improperly cites to an uncitable unpublished dispositional order. We assume this was an unintentional error but note that it is highly improper to cite uncitable dispositions.

Turning to governing law, HRS § 663-10.5 was enacted to prevent government entities from being held jointly and severally liable for damages disproportionate to their responsibility. See Conf. Comm. Rep. No. 48, in 1994 House Journal, at 803; Conf. Comm. Rep. No. 48, in 1994 Senate Journal, at 718 ("The government entity shall be liable for no more than that percentage share of the damages attributable to the government entity."). The conference committee further explained that the measure was necessary to promote "fairness and equity for government entities" that, because of their perceived "deep pockets," might otherwise be required to pay more than their fair share when determined to be joint tortfeasors. Id.

HRS § 663-10.5 provides, in relevant part, that it is only if "a government entity is determined to be a tortfeasor along with one or more 'other tortfeasors'," then "the government

entity shall be liable for no more than that percentage share of the damages attributable to [it][.]" The circuit court determined sua sponte that the male students were such "other tortfeasors."

With respect to whether the male students are "other tortfeasors" under HRS § 663-10.5, Black's Law Dictionary (12th Ed. 2024) defines "tortfeasor" as "[s]omeone who commits a tort; a wrongdoer." Tortfeasor, Black's Law Dictionary (12th Ed. 2024). It further generally defines "tort" as "[a] civil wrong; other than breach of contract, for which a remedy may be obtained, usu. in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to one another." Tort, Black's Law Dictionary (12th Ed. 2024).

If they breached a duty to Amy, the male students would seemingly qualify as "other tortfeasors." But, as argued by the Plaintiffs, here, the circuit court determined them to be "other tortfeasors" without any notice to them or to the Plaintiffs. We therefore address whether this was permissible.

We note that cases construing contribution among joint tortfeasors under the Uniform Contribution Among Tortfeasors Act, codified at HRS §§ 663-11 through - 17 ("UCATA"), do not control this analysis. HRS § 663-10.5 explicitly provides that the statute controls notwithstanding any other law to the

contrary, including UCATA. But UCATA cases can still provide some guidance.

Gump v. Wal-Mart Stores, Inc., 93 Hawai'i 417, 5 P.3d 407 (2000), addressed whether an identified nonparty joint tortfeasor can be included on a special verdict form. There, the plaintiff sued both Wal-Mart and McDonald's after slipping on a French fry inside a Wal-Mart store, but later settled with and dismissed McDonald's. 93 Hawai'i at 419, 5 P.3d at 409. Wal-Mart did not file a cross-claim against McDonald's but sought to have McDonald's included on the special verdict form. Id. This court held that non-parties may be considered joint tortfeasors under UCATA. Id. This court further held that nonparties may, "in the trial court's sound discretion," be included on a special verdict form "under appropriate circumstances." Id.

But this court concluded that it was inappropriate to include McDonald's on the special verdict form under the circumstances of that case. 93 Hawai'i at 423, 5 P.3d at 413. This court noted that Wal-Mart chose not to file a cross-claim against McDonald's. Id. Although this court acknowledged that "there are tactical reasons to choose not to file a cross-claim," it explained that "one of the risks that accompanies such a decision is the risk that McDonald's would settle, which could prevent Wal-Mart from establishing the pro rata share of

fault between the two.” Id. This concern is not at issue here because HRS § 663-10.5 does not allow joint liability against governmental entities. But this court did note the relevance of Wal-Mart’s decision not to file a cross-claim against McDonald’s.

Then in Moyle v. Y & Y Hyup Shin Corp., 118 Hawai‘i 385, 191 P.3d 1062 (2008), this court clarified Gump’s statement that a trial court has “sound discretion” to include a nonparty on a special verdict form under “appropriate circumstances.” 118 Hawai‘i at 397-98, 191 P.3d at 1074-75. In Moyle, the defendants sought to allocate fault to an identified nonparty who had assaulted the plaintiff. 118 Hawai‘i at 390, 191 P.3d at 1067. Four months before trial, the defendants moved to implead the nonparty, but the circuit court denied the motion as untimely. 118 Hawai‘i at 399, 191 P.3d at 1076. Nevertheless, the circuit court included the nonparty on the special verdict form, and the jury allocated 95% of the fault to him. 118 Hawai‘i at 390, 191 P.3d at 1067.

This court clarified that Gump did not create unfettered discretion to place nonparties on a special verdict form. Moyle, 118 Hawai‘i at 398, 191 P.3d at 1075. Rather, this court indicated that Gump’s reference to “appropriate circumstances” under which nonparties could be included on special verdict forms was limited to narrow situations such as where a nonparty

was, "(1) dismissed because their participation would destroy jurisdiction, (2) not named because of a bankruptcy stay that was effective throughout the course of the proceedings, or (3) released from the case through settlement, but included on the special verdict pursuant to terms of the release." Moyle, 118 Hawai'i at 398, 191 P.3d at 1075 (citations omitted).

Moyle explained:

Although a trial court has "discretion" to include, or to decline to include, a non-party on a special verdict form, it does not, as a matter of law, have the authority to include a non-party who has not been brought into the case by pleading pursuant to HRS §§ 663-12 and 663-17(c).

118 Hawai'i at 398, 191 P.3d at 1075.

Further, this court said that "exclusion is mandated when a party fails to protect its rights." Id. Because the defendants waited until four months before trial to seek to implead the nonparty, the nonparty "could not have been included on the special verdict form as a matter of law." 118 Hawai'i at 399, 191 P.3d at 1076. This court emphasized that the discretion recognized in Gump is confined to narrow circumstances and does not permit defendants to assert a contribution claim at the "eleventh hour" after choosing not to pursue contribution during the preceding two years of litigation. Id.

Moyle also distinguished between presenting evidence of a nonparty's conduct and allocating fault to that nonparty. 118 Hawai'i at 402, 191 P.3d at 1079. It explained that evidence of

the nonparty's conduct remained admissible where relevant to the defendants' liability, but "it does not follow that the nonparty should be included on the special verdict." Id.²

Again, HRS § 663-10.5 specifically provides that the language of that statute governs notwithstanding other laws, including UCATA, HRS §§ 663-11 through -17. And Gump and Moyle are UCATA cases involving different considerations from joint and several liability issues. HRS § 663-10.5 explicitly eliminates joint and several liability for government entities in the circumstances of this case. So UCATA cases arguably do not control. And the language of HRS § 663-10.5 does not appear to preclude an allocation of fault to nonparties.

But Gump and Moyle are not only based on the language of the UCATA statutes and other principles of joint and several liability. Their holdings also reflect principles of fundamental fairness. They say that a defendant cannot seek

² This court applied these principles in Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai'i 34, 73-74, 58 P.3d 545, 584-85 (2002). After the plaintiffs settled with and dismissed a defendant with prejudice, the Department argued that the dismissed defendant nevertheless remained an "other tortfeasor" whose fault should reduce its liability under HRS chapter 663. Id. This court rejected that argument. Id. It reiterated that "[a] party is liable within the meaning of HRS § 663-11 if the injured person could have recovered damages in a direct action against that party, had the injured person chosen to pursue such an action." Id. Because the dismissed defendant could no longer be sued, he was "not an 'other tortfeasor' within the meaning of HRS § 663-11," and his fault could not be considered in reducing the remaining defendant's liability. Id.

allocation of fault at the "eleventh hour." In other words, they are also fundamentally grounded in due process principles.

b. Due process requires notice and a meaningful opportunity to be heard before a plaintiff's recovery may be reduced based on the percentage of liability of nonparties.

Article I, Section 5 of the Hawai'i Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." Haw. Const. Art. I, § 5.

Procedural due process "protect[s] individuals against the State's arbitrary deprivation of life, liberty, or property." Brown v. Thompson, 91 Hawai'i 1, 11, 979 P.2d 586, 596 (1999).

Plaintiffs contend the circuit court reduced their damages award in violation of their due process rights "without notice or an opportunity to be heard."

We agree.

i. Plaintiffs have a property interest.

In a due process analysis, Hawai'i courts first ask whether the particular interest which the claimant seeks to protect is "'property' within the meaning of the due process clauses." 91 Hawai'i at 10, 979 P.2d at 595 (cleaned up). "[A] benefit which one is entitled to receive by statute constitutes a constitutionally-protected property interest." 91 Hawai'i at 10-11, 979 P.2d at 595-96 (cleaned up). The United States Supreme Court has recognized that a state-law cause of action is a

protected property interest for purposes of the federal Due Process Clause. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982) (citing Martinez v. California, 444 U.S. 277, 281-82 (1980) (observing that a state tort claim is a "species of 'property' protected by the Due Process Clause"))).

We hold that Plaintiffs also have a due process property interest under Article I, Section 5 in their cause of action as well as in their damages award. The circuit court determined that Plaintiffs were entitled to \$14,167,354.81 in damages. The circuit court then reduced that recovery by 30%, depriving Plaintiffs of \$4,250,206.44. Because that ruling extinguished a portion of Plaintiffs' adjudicated recovery, it implicated a protected property interest that could not be taken without constitutionally adequate procedures.

ii. Hawai'i's due process clause requires procedures that are fundamentally fair before a protected property interest may be deprived.

Because Plaintiffs possess a protected property interest in their damages award, this court must determine what procedures were constitutionally "required to protect it." Brown, 91 Hawai'i at 10, 979 P.2d at 595. Procedural due process is not "a fixed concept requiring a specific procedural course in every situation." Id. (cleaned up). Rather, "due process is flexible and calls for such procedural protections as the particular

situation demands.” Id. (cleaned up). Nevertheless, “[t]he basic elements of procedural due process of law require notice and an opportunity to be heard at a meaningful time and in a meaningful manner.” Id. (cleaned up).

The legislative history of HRS § 663-10.5 said that the measure was necessary to promote “fairness and equity for government entities” that, because of their perceived “deep pockets,” might otherwise be required to pay more than their fair share when determined to be joint tortfeasors. It can be inferred that the Legislature sought due process for governmental entities. But, as noted, Plaintiffs are also entitled to due process.

To determine the specific procedures required to satisfy due process, Hawai‘i applies a balancing of several factors including (1) the private interest that will be affected; (2) the risk of an erroneous deprivation of that interest through the procedures actually used, and the probable value, if any, of additional or alternative procedural safeguards; and (3) the governmental interest, including the burden that additional procedural safeguards would entail. Id.

First, the private interest affected was significant: the \$4.25 million reduction in Plaintiffs’ damages award.

Second, there was a significant risk of an erroneous deprivation of that interest through the procedure used, which

was to not require any notice or opportunity to be heard at all. The procedure used would have resulted in an absolute deprivation of the damages awarded, but for this judicial review. But due process requires appropriate process at the trial or hearing level.

The probable value of additional procedural safeguards is substantial. Timely notice that the State intended to seek nonparty apportionment would have permitted Plaintiffs to investigate the proposed nonparty tortfeasors, conduct meaningful discovery, and, where appropriate, seek joinder so that liability, apportionment, and damages could be resolved in a single proceeding. Requiring identification of the proposed nonparties with sufficient particularity would also have enabled the parties and the circuit court to determine whether each individual qualified as an "other tortfeasor" under HRS § 663-10.5 before Plaintiffs' recovery was reduced.

Third, the governmental interest likewise favors additional procedural safeguards. HRS § 663-10.5 reflects the legislature's determination that governmental entities generally should be liable only for their proportionate share of fault. Plaintiffs do not challenge that legislative objective. Rather, Plaintiffs seek procedures that ensure fault is allocated accurately before a plaintiff's recovery is reduced. Not

requiring such procedures diminishes public confidence in the justice system, which does not serve the governmental interest.

In addition, requiring appropriate procedures imposes a burden appropriate to the circumstances. Timely notice, identification of the proposed nonparty tortfeasors, allocation of the burden of proof to the party seeking apportionment, and findings supporting the allocation call for orderly litigation of issues underlying any request for nonparty apportionment. Indeed, such timely notice and appropriate litigation measures might even reduce the overall burden on the parties and the courts by permitting joinder of the proposed tortfeasors and resolution of all issues of liability and damages in a single proceeding at the trial level, and not necessitate a lengthy appeals process. Accordingly, the governmental interest does not outweigh Plaintiffs' substantial property interest or the significant risk of erroneous deprivation.

In summary, in balancing the substantial property interests at stake, the significant risk of erroneous deprivation created by the procedures employed, the considerable value of additional safeguards, and the minimal burden those safeguards impose upon the State, we hold that due process requires, at a minimum, the following procedural protections before a plaintiff's recovery can be reduced through the allocation of fault to nonparties under HRS § 663-10.5:

1. **Timely notice**, through the pleadings or a prompt amendment thereto, that a party intends to seek allocation of fault to an identified nonparty, sufficiently in advance of trial to permit meaningful discovery and, where appropriate, joinder of the alleged tortfeasor;

2. **Identification of each proposed nonparty tortfeasor** with sufficient particularity to permit the parties and the court to determine whether the proposed nonparty is legally liable to the plaintiff and otherwise qualifies as an "other tortfeasor" under HRS § 663-10.5;

3. **Placement of the burden on the party seeking apportionment** (as further discussed in Section IV.A.3 below) to establish the legal and factual basis for allocating fault to each proposed nonparty, including that the person qualifies as an "other tortfeasor" under HRS § 663-10.5, and the percentage of fault attributable to that person; and

4. **Findings by the trial court** establishing that each identified nonparty qualifies as an "other tortfeasor" under HRS § 663-10.5 and the percentage of fault attributable to that nonparty before the plaintiff's recovery is reduced.

These procedures would not eliminate nonparty apportionment under HRS § 663-10.5. They would simply ensure that a plaintiff's adjudicated recovery is reduced only after the legal and factual basis for doing so has been meaningfully litigated and established.

Here, those safeguards were absent. Accordingly, the procedures employed here were constitutionally inadequate. Therefore, the circuit court's apportionment must be vacated.

We also specifically note that the reputation of nonparties could be affected by a finding that they are "other tortfeasors." Therefore, although we are not requiring impleader of nonparties at this time for a finding of "other tortfeasor" liability under HRS § 663-10.5, courts should

consider whether, under the circumstances of a particular case, impleader of nonparties should be required. Although, without an opportunity to litigate, there could be no res judicata effect on a nonparty based on an "other tortfeasor" determination, nonparties also have a due process right to their reputational interests.

2. The circuit court erred in determining that the male students were tortfeasors because there was insufficient evidence of their tortfeasor status or degree of fault.

In their second point of error on appeal, Plaintiffs allege the circuit court erred by determining that the male students were tortfeasors because there was insufficient evidence in the record of their tortfeasor status or degree of fault. We agree.

HRS § 663-10.5 permits allocation of fault only to those who qualify as "other tortfeasors." A person is "liable" as a tortfeasor when "the injured person could have recovered damages in a direct action against that party, had the injured person chosen to pursue such an action." Doe Parents No. 1 v. State, Dep't of Educ., 100 Hawai'i 34, 73, 58 P.3d 545, 584 (2002).

In Doe Parents, this court held a dismissed defendant could not be treated as an "other tortfeasor" because his dismissal with prejudice meant the plaintiffs could no longer maintain an action against him. 100 Hawai'i at 73-74, 58 P.3d at 584-85. As such, whether another person contributed to the plaintiff's

injury and whether that person qualifies as an "other tortfeasor" are distinct inquiries; the latter requires that the person be legally subject to liability to the plaintiff.

Here, the circuit court did not determine whether any particular male student was legally liable to Plaintiffs. Instead, it stated that "[t]here were a number of different sexual abuses at different points of time by different individuals," but concluded that HRS § 663-10.5 did not require it "to assign specific percentages of liability between all the various actors." It therefore attributed 30% of the fault collectively to "all the other tortfeasors combined (meaning all persons who abused [Amy] sexually during the relevant time period)."

But the circuit court also noted that there was little to no evidence the boys involved knew any particulars about Amy's cognitive disabilities. The circuit court also found that with the possible exception of the boy who assaulted Amy at Ala Moana, Amy was likely a peer special education student to the boys. The court further found that there was little to no evidence the boys were aware or should have been aware that Amy lacked ability to consent to sex. These findings indicate there was insufficient evidence that the male students qualified as "other tortfeasors."

In addition, the circuit court concluded that "all persons who abused [Amy] sexually during the relevant time period" constituted "other tortfeasors" under HRS § 663-10.5 and collectively allocated 30% of the fault to them and 70% to the State. That collective finding was also insufficient.

The record contained evidence of different conduct by different male students at different times. The circuit court did not determine that any specific male student committed an actionable tort against Amy or was someone from whom Plaintiffs could have recovered damages in a direct action. Without those determinations, there was insufficient evidence that any of the male students were "other tortfeasors" within the meaning of HRS § 663-10.5.

3. The circuit court erroneously shifted the burden of proof on apportionment from the State to Plaintiffs.

In their third point of error, Plaintiffs allege that the circuit court erroneously shifted the burden of proof on apportionment from the State to them. For the following reasons, we also agree with this point of error.

a. Apportionment of liability to a non-party "other tortfeasor" under HRS § 663-10.5 is an affirmative defense.

Preliminarily, Plaintiffs assert that HRS § 663-10.5 creates an affirmative defense. The State disagrees. This court has not addressed whether or not HRS § 663-10.5 is an affirmative defense for a government entity asserting "other

tortfeasor" liability. This is a question affecting pleading and proof burdens.

HRCP Rule 8(c) requires that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively" numerous enumerated defenses, including contributory negligence, release, waiver, and the statute of limitations, "and any other matter constituting an avoidance or affirmative defense." The affirmative defenses listed in the rule are not exclusive. Rule 8(c) expressly provides that "'any other matters constituting an avoidance or affirmative defense' must also be pleaded affirmatively." Touche Ross, Ltd. v. Filipek, 7 Haw. App. 473, 487 778 P.2d 721, 730 (App. 1989).

Generally, an affirmative defense is one that defeats or bars an otherwise valid claim. Bhakta v. Cnty. of Maui, 109 Hawai'i 198, 211, 124 P.3d 943, 956 (2005). But affirmative defenses are not limited to defenses that completely bar recovery.

For example, HRCP Rule 8(c) identifies "payment" as an affirmative defense. Black's Law Dictionary defines "payment" as "[p]erformance of an obligation by the delivery of money or some other valuable thing accepted in partial or full discharge of the obligation." Payment, Black's Law Dictionary (12th ed. 2024). So partial payment is an affirmative defense.

Likewise, HRCP Rule 8(c) identifies contributory negligence as an affirmative defense. Under Hawai'i law, contributory negligence is no longer a complete bar to recovery and has been replaced by comparative negligence, which reduces a plaintiff's recovery when the plaintiff's negligence is not greater than the combined negligence of the defendants. HRS § 663-31(c). Both contributory and comparative negligence are affirmative defenses.

The State contends that HRS § 663-10.5 is not an affirmative defense and is merely a limitation on liability. It cites no authority for that proposition and does not explain why HRS § 663-10.5 should be treated differently from the numerous affirmative defenses that limit or reduce liability.

Also, the State appears to have recognized HRS § 663-10.5 is an affirmative defense because it pled it as such. The fifteenth defense in the State's answer to the first amended complaint says: "The liability, if any, of the DOE, Nakagawa and Jones, any of them or collectively, is limited under HRS §663-10.5." The fourteenth defense preceding this defense alleges that Plaintiffs' claims are barred by the equitable doctrines of estoppel, collateral estoppel, res judicata, laches, and unclean hands, which are affirmative defenses.

Other jurisdictions addressing nonparty apportionment generally recognize that reducing a defendant's liability by

attributing fault to a nonparty constitutes an affirmative defense. Courts have therefore required defendants to provide timely notice and bear the burden of proving the nonparty's fault.

For example, in Hardin v. Manitowoc-Forsythe Corp., 691 F.2d 449, 453 (10th Cir. 1982), the Tenth Circuit addressed whether fault could be allocated to "phantom parties" under Kansas law. In discussing the procedural effect of the defendants' failure to plead phantom-party fault, the court explained that "[t]he policy behind Rule 8(c) is to put plaintiff on notice well in advance of trial that defendant intends to present a defense in the nature of an avoidance." 691 F.2d at 458. It then characterized phantom-party fault as such a defense, stating that "[t]he defense that a phantom party contributed to the plaintiff's injuries is in the nature of an avoidance and normally would be required to be pleaded affirmatively in the answer." Id.

Likewise, in McGraw v. Sanders Co. Plumbing & Heating, Inc., 667 P.2d 289, 295-96 (Kan. 1983), the Kansas Supreme Court held that a defendant seeking to reduce its percentage of fault by attributing fault to another occupies the same burden as the defendant who claims the plaintiff was partially or entirely at fault. 667 P.2d at 295. The court reasoned that the defense that a "'phantom party' contributed to the plaintiff's injuries

is arguably a 'matter constituting an avoidance'" and therefore places the defendant "in the same position as if he were claiming the plaintiff was negligent." Id.

The Florida Supreme Court adopted the same approach in Nash v. Wells Fargo Guard Serv.'s, Inc., 678 So. 2d 1262, 1264-65 (Fla. 1996), holding that "the defendant must plead as an affirmative defense the negligence of the nonparty and specifically identify the nonparty." The court explained that pretrial notice is essential because the assertion that noneconomic damages should be apportioned against a nonparty "may affect both the presentation of the case and the trial court's rulings on evidentiary issues." 678 So. 2d at 1264.

Thus, we hold that where "a government entity is determined to be a tortfeasor" but seeks a determination that it is "liable for no more than that percentage share of the damages attributable to the government entity" due to the alleged liability of a nonparty "other tortfeasor," it is asserting an affirmative defense.

b. A defendant asserting an affirmative defense bears the burden of pleading and proving the defense.

Generally, the defendant has the burden of proof on all affirmative defenses, which includes the burden of proving facts which are essential to the asserted defense. State ex rel. Shikada v. Bristol-Myers Squibb Co., 152 Hawai'i 418, 526 P.3d

395 (2023) (accord and satisfaction is an affirmative defense, and the party asserting it bears the burden of proof). And, generally, a plaintiff is not required to disprove affirmative defenses. U.S. Bank Nat'l Ass'n v. Castro, 131 Hawai'i 28, 41, 313 P.3d 717, 730 (2013).

Courts addressing nonparty apportionment have applied the same principle. In McGraw, the Kansas Supreme Court explained that a defendant seeking to reduce its percentage of fault by attributing fault to another "would have the burden to plead and prove his claims," relying on the general rule that "the burden of proof on any point is upon the party asserting it." 667 P.2d at 295. It ultimately held that "a defendant who seeks to reduce his percentage of fault by comparing the fault of a party joined pursuant to K.S.A. 60-258a(c) has the burden of proving the joined party's fault by a preponderance of the evidence." Id.

Similarly, in Nash, the Florida Supreme Court held that "the defendant has the burden of presenting at trial that the nonparty's fault contributed to the accident" in order to include the nonparty on the verdict form. 678 So. 2d at 1265.

This court's approach to liability apportionment is consistent with HRS § 663-10.5 being an affirmative defense. In Collins v. Greenstein, 61 Haw. 26, 41 n.10, 595 P.2d 275, 284

n.10 (1979), this court quoted the Restatement (Second) of Torts § 433B(2), which states:

Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof as to the apportionment is upon each such actor.

Although this statement appeared in a footnote, it reflects the same allocation of the burden applicable to affirmative defenses generally: when an actor seeks to limit their own liability on the ground that the plaintiff's harm is capable of apportionment, that actor bears the burden of proving the apportionment. Thus, the burden is on the party seeking to reduce their liability through apportionment, rather than requiring the plaintiff to disprove apportionment.

Here, the State sought to limit and reduce its liability. The circuit court determined that the State was liable for Plaintiffs' damages, but reduced the State's share of liability by 30% based on the purported fault of other tortfeasors. Because the State sought to limit its liability through apportionment, it bore the burden of properly pleading and proving the facts necessary to support that reduction.

c. The State failed to carry its burden and waived any apportionment to the male students.

The State generally pled HRS § 663-10.5 as an affirmative defense. But it never specifically asserted that it was seeking to allocate fault to the boys under that statute.

The circuit court's apportionment under the circumstances of this case effectively shifted the State's burden to Plaintiffs. The State never identified the male students as the alleged "other tortfeasors" upon whom its affirmative defense depended. It was not Plaintiffs' burden to prove that unidentified nonparties were not tortfeasors.

Nor did the State make any attempt to establish a percentage of fault attributable to the male students. The State did not identify the students whose fault it sought to allocate, present evidence directed toward establishing their status as "other tortfeasors" (or their respective responsibilities), or propose any percentage of fault attributable to them in its closing argument or proposed findings.

By concluding that "all persons who abused [Amy] sexually during the relevant time period" were "other tortfeasors" and collectively allocating 30% of the fault to them, the circuit court relieved the State of its burden to establish both the

tortfeasor status of the persons upon whom its affirmative defense depended, and the degree of fault attributable to them.

Because the State did not attempt to carry its burden, it waived any argument that its liability should be reduced based on the male students' alleged fault. Therefore, the circuit court erred in apportioning 30% of the fault to the male students.

Properly placing the burden on the party seeking apportionment to establish the legal and factual basis for allocating fault to a nonparty ensures that a plaintiff's recovery is not diminished in violation of due process, as occurred here.

4. The circuit court erred in denying Plaintiffs' motion to amend the judgment.

Plaintiffs' fourth point of error challenges the circuit court's denial of their HRCP Rule 59(e) motion to amend the judgment. In that motion, Plaintiffs asked the circuit court to reverse its apportionment of 30% of the fault to the male students and to amend the judgment accordingly.

For the reasons discussed above, Plaintiffs' motion should have been granted. The State did not assert that the male students were "other tortfeasors" under HRS § 663-10.5, did not meet its burden of establishing their tortfeasor status or degree of fault, and the circuit court could not shift that

burden to Plaintiffs and sua sponte apportion 30% of the fault to the students. The resulting judgment therefore improperly reduced Plaintiffs' damages by 30%, or \$4,250,206.44.

Accordingly, the circuit court erred in denying Plaintiffs' motion to amend the judgment.

B. The State's Cross-Appeal

The State raises three points of error on cross-appeal. The first two concern pretrial orders that denied a HRCF Rule 35 examination and a further deposition of Amy, which we address in reverse order. The third alleges the circuit court's damages award was grossly excessive. None of the points of error have merit.

1. The circuit court did not abuse its discretion by denying a further deposition of Amy.

The State alleges that the circuit court abused its discretion by denying its request to complete Amy's deposition. Discovery rulings are reviewed for abuse of discretion. Kealoha, 74 Haw. at 319, 844 P.2d at 676. Under this standard, we address whether the circuit court clearly exceeded the bounds of reason or disregarded rules or principles of law to the substantial detriment of the State. Id. In general, this court has recognized that discovery rules reflect a policy favoring broad disclosure of relevant information and that "the deposition-discovery rules are to be accorded a broad and

liberal treatment." Appeal of Goodfader, 45 Haw. at 336, 367 P.2d at 472 (citation omitted). HRCF Rule 30 generally permits parties to obtain testimony through oral depositions. HRCF Rule 30. HRCF Rule 30 provides that "[a]fter commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination."

That right, however, is not absolute or without parameters. "[D]iscovery, like all matters of procedure, has ultimate and necessary boundaries." Appeal of Goodfader, 45 Haw. at 336, 367 P.2d at 483 (quoting Hickman v. Taylor, 329 U.S. 495, 507 (1947)). For example, HRCF Rule 26 generally allows courts to limit discovery where the discovery sought is "unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; where the requesting party has already had ample opportunity to obtain the information sought, or where "the burden or expense of the proposed discovery outweighs its likely benefit." HRCF Rule 26 (eff. 2022).

HRCF Rule 26 also authorizes courts to issue protective orders to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Further, HRCF Rule 30 specifically allows for oral depositions to be limited "when it can be shown that the examination is being conducted in bad faith or in such a manner as to annoy,

embarrass or oppress the person subject to the inquiry." HRCF Rule 30(d).

This court has repeatedly recognized that trial courts have considerable latitude and discretion over discovery requests. Kilakila 'O Haleakala v. Bd. of Land & Nat. Res., 138 Hawai'i 383, 401, 382 P.3d 195, 213 (2016). And in exercising that discretion, courts may consider "all factors, including the effect the inquiry might have on the person to be interrogated." Appeal of Goodfader, 45 Haw. at 335, 367 P.2d at 483.

Hawai'i courts have not articulated a specific framework governing when a trial court may limit further testimony from a medically or psychologically vulnerable witness.

However, Hawai'i courts have recognized a close relationship between HRCF Rule 26 and its federal counterpart. See Brende v. Hara, 113 Hawai'i 424, 431, 153 P.3d 1109, 1116 (2007) (observing that HRCF Rule 26(c) is "patterned after Federal Rules of Civil Procedure Rule 26(c)" and "[i]n instances where Hawai'i case law and statutes are silent, this court can look to parallel federal law for guidance."). We have also said that where a Hawai'i civil procedure rule is identical to the federal rule, federal court interpretations of the rule can be highly persuasive. Carvalho v. AIG Hawai'i Ins. Co., 150 Hawai'i 381, 386, 502 P.3d 482, 487 (2022).

Several jurisdictions characterize the complete prohibition of a deposition as requiring "extraordinary circumstances." See Salter v. Upjohn Co., 593 F.2d 649, 651 (5th Cir. 1979) (observing that an order completely prohibiting a deposition is "very unusual" and, absent extraordinary circumstances, would likely constitute error); Dunford v. Rolly Marine Serv. Co., 233 F.R.D. 635, 636 (S.D. Fla. 2005) (recognizing that protective orders prohibiting depositions are "rarely granted absent extraordinary circumstances" and require a heavy showing of good cause); In re McCorhill Publ'g, Inc., 91 B.R. 223, 225 (Bankr. S.D.N.Y. 1988) (explaining that prohibiting an oral deposition is "a very unusual procedure" and that the movant bears a heavy burden of demonstrating good cause).

Some courts have found extraordinary circumstances where the proposed deposition posed a substantial risk of life-threatening physical harm. See Dunford, 233 F.R.D. at 636 (granting a protective order where a treating neurologist attested that the witness suffered from a potentially life-threatening brain disorder); In re McCorhill Publ'g, Inc., 91 B.R. at 225 (granting a protective order where a treating physician testified that an oral deposition could threaten the witness's life because of his medical condition).

Courts have recognized that sufficiently supported psychological harm may likewise justify prohibiting a

deposition. See Campos v. Webb Cnty., 288 F.R.D. 134, 135-36 (S.D. Tex. 2012) (recognizing that competent medical evidence of severe psychological harm may warrant prohibiting a deposition, while concluding that the plaintiff had not yet made the requisite showing).

But courts have required that a request to prohibit a deposition be supported by competent, specific, and documented medical evidence demonstrating that the proposed deposition poses a substantial risk of serious harm. See Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986) (holding that good cause must rest on "a particular factual demonstration of potential harm"); Medlin v. Andrew, 113 F.R.D. 650, 653 (M.D.N.C. 1987) (requiring a "specific and documented factual showing" that a deposition would be dangerous to the deponent's health); Schorr v. Briarwood Estates Ltd. P'ship, 178 F.R.D. 488, 492 (N.D. Ohio 1998) (finding good cause where the plaintiff supported the request with specific documentation from a PTSD expert); Campos, 288 F.R.D. at 136-38 (requiring detailed medical evidence explaining how and why the deposition would cause the predicted harm); Estate of Chen v. Lingting Ye, 208 A.3d 1168, 1176-77 (R.I. 2019) (holding that conclusory predictions of harm are insufficient absent a particularized factual showing).

Cases also hold that where such a showing has been made, trial courts should ordinarily consider whether reasonable accommodations adequately mitigate the identified risk before determining whether further examination should proceed. See Schorr, 178 F.R.D. at 492 (permitting the deposition subject to extensive conditions governing its manner and scope); Estate of Chen, 208 A.3d at 1178-79 (recognizing the trial court's authority to impose reasonable restrictions on depositions); Arcaris v. Superior Court, 160 Ariz. 533 (Ariz. Ct. App. 1989) (approving protective measures designed to facilitate accurate testimony while minimizing harm to a child witness); Ceron v. Belilovsky, 92 A.D.3d 714, 715 (2012) (upholding a protective order prohibiting an oral deposition where expert evidence established that testifying under oath would be detrimental to the child's health, while permitting written interrogatories instead).

Accordingly, we hold that, in general, a party seeking to prohibit a deposition on medical or psychological grounds must present competent, specific, and documented evidence demonstrating that the proposed deposition poses a substantial risk of serious harm. Generalized concerns, conclusory medical opinions, or speculative predictions of future injury are insufficient. Upon such a showing, trial courts should consider whether reasonable accommodations would adequately mitigate the

identified risk while preserving meaningful discovery. If the court determines that appropriate accommodations will sufficiently reduce the risk of harm, it may permit the deposition subject to those conditions. If, however, the court concludes that the demonstrated risk cannot be adequately mitigated through reasonable accommodations, it may limit or prohibit further examination in the exercise of its discretion under HRCP Rule 26.

Here, the circuit court did not abuse its discretion by prohibiting the further deposition of Amy. The State completed two depositions of Amy, one on March 31, 2016, and the second on September 29, 2016. The State successfully completed these two depositions under a protective order that set measures designed to minimize psychological harm. Despite those measures, Amy's symptoms worsened following the depositions, requiring increased medication and raising concerns regarding a potential psychotic episode.

Due to these concerns, the circuit court took the step of appointing a neutral expert psychologist to assess Amy's ability to proceed with the deposition. After an exhaustive review of Amy's medical records and the recordings of Amy's previous depositions, as well as her own clinical examination of Amy, Dr. Higa-Rogers agreed that Amy could not safely undergo further deposition sessions. Only then did the circuit court rule that

no further deposition of Amy could proceed without court approval.

Then, in January 2020, the State again filed a motion to depose Amy. In response, the court ordered Dr. Higa-Rogers to again opine whether Amy could be deposed and if she could undergo a HRCP Rule 35 examination. In July 2020, Dr. Higa-Rogers opined:

As previously noted in my December 2018 report, given the severity [Amy]'s intellectual disability, which is pervasive in nature, she is not expected to show significant improvements in her ability to comprehend the legal process or complex questions, and is more likely to agree when a yes/no question is asked of her and to assent when a suggestion is made to her. Furthermore, there is documentation that following prior depositions [sic] [Amy] experienced an increase in her symptoms and required an increase in her medications to address her nightmares, startle response and fears. The benefits of pursuing further questioning/testing do not appear to outweigh the potential risks to [Amy]'s mental health, limited coping, and is unlikely to yield significant additional information.

Therefore, the circuit court was presented with substantive, specific evidence of actual harm that had already befallen Amy as well as the likelihood of further harm if a further deposition was allowed to take place. The circuit court denied a third and final deposition session only because of consistent medical evidence from multiple treating professionals, a court-appointed neutral evaluator, and the State's own retained expert expressing serious concerns regarding Amy's ability to safely participate in a further examination. The experts opined that Amy's chronic PTSD, severe

intellectual disability, psychotic symptoms, and inability to develop effective coping mechanisms rendered an additional examination likely to cause further serious psychological injury.

The record also supports the circuit court's conclusion that the likely benefit of additional examination was minimal. Medical experts explained that additional questioning was unlikely to be productive. Any information Amy provided might not be reliable because of her disability, which rendered her highly suggestible.

In addition, the State remained free to pursue information from other sources. Although the State argues it required additional testimony regarding Amy's interactions with her neighbor, the record does not reflect that it attempted to depose the neighbor directly. Nor does the record reflect that the State sought testimony from other identified witnesses or pursued less intrusive means of obtaining the information it sought.

Under the circumstances, the circuit court did not abuse its discretion by ruling that the marginal benefit of additional examination did not justify the substantial identified risk and that the risk would not dissipate with time.

2. The circuit court did not abuse its discretion by denying the State's request for a HRCP Rule 35 examination.

The State also alleges that the circuit court abused its discretion by denying its request to conduct a HRCP Rule 35 examination of Amy.

HRCP Rule 35(a) provides, in relevant part, "[w]hen the mental or physical condition . . . of a party . . . is in controversy, the court . . . may order the party to submit to a physical or mental examination." HRCP Rule 35(a). The rule further provides that such an order "may be made only on motion for good cause shown." HRCP Rule 35(a). The ICA has recognized that a Rule 35 motion must "adequately demonstrate the existence of the Rule's requirements of 'in controversy' and 'good cause,'" and that "[t]he movant must produce sufficient information, by whatever means, so that the [trial] judge can fulfill [the] function mandated by the Rule." Glover v. Grace Pac. Corp., 86 Hawai'i 154, 160, 948 P.2d 575, 581 (App. 1997) (citation omitted).

HRCP Rule 35 is almost identical to Rule 35 of the Federal Rules of Civil Procedure. In Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964), the U.S. Supreme Court explained that the "in controversy" and "good cause" requirements are "plainly expressed limitations on the use of the Rule" and "are not met by mere conclusory allegations of the pleadings, nor by mere

relevance to the case.” Instead, each “require[s] an affirmative showing by the movant.” Id.

Here, Amy’s psychological condition was clearly in controversy. And there was good cause for a HRCP Rule 35 examination.

But satisfaction of HRCP Rule 35’s threshold requirements does not end the inquiry. Once the moving party establishes the “in controversy” and “good cause” requirements, HRCP Rule 35 provides only that the court may order the requested examination. HRCP Rule 35(a). The rule therefore authorizes, but does not require, an examination.

Here, the circuit court did not abuse its discretion by denying the HRCP Rule 35 examination. By the time the State sought the examination, the court had spent years attempting to address issues regarding Amy’s continued deposition, as discussed above. The circuit court was well aware of significant concerns regarding the effect of litigation-related questioning on Amy’s mental health.

Most significantly, Dr. Higa-Rogers, the court-appointed neutral medical expert, also recommended that the HRCP Rule 35 exam not proceed due to the risks to Amy’s health. Dr. Higa-Rogers opined that “the benefits of pursuing further questioning/testing do not appear to outweigh the potential

risks to [Amy]'s mental health, limited coping, and is unlikely to yield significant additional information."

The circuit court denied the requested examination after receiving this information, concluding that it posed a "significant risk to [Amy]'s mental health." The circuit court did not err by concluding that the anticipated benefits of a HRCP Rule 35 examination did not justify the risks identified by the medical evidence. It therefore did not abuse its discretion by denying the HRCP Rule 35 examination requested by the State.

Moreover, the denial of the HRCP Rule 35 examination did not result in substantial prejudice to the State.

First, the State was not deprived of information concerning Amy's mental condition. The State had Amy's extensive medical records and reports. Second, the State does not specify what type of otherwise unavailable information a HRCP Rule 35 examination was likely to produce. Finally, the State has not demonstrated that denial of the HRCP Rule 35 examination substantially prejudiced its defense. The State had completed two depositions of Amy before seeking the examination. In addition, the medical evidence consistently established that Amy's severe intellectual disability rendered her highly suggestible and that any additional information obtained through a HRCP Rule 35 examination might also not be reliable.

Under these circumstances, the circuit court did not abuse its discretion by denying the State's request for a HRCF Rule 35 examination.

3. The damages award was not excessive.

Finally, the State asks this court to reverse the circuit court's damages award, contending that the amount was grossly excessive.

Appellate review of a damages award is highly deferential because the assessment of damages lies primarily within the province of the factfinder. See Kang, 59 Haw. at 663, 587 P.2d at 292. A damages award will not be disturbed unless it is "palpably not supported by the evidence" or is "so excessive and outrageous" as to demonstrate that the factfinder acted against the rules of law or was misled by passion or prejudice. Kekona, 135 Hawai'i at 257, 349 P.3d at 364. In a jury-waived case, the inquiry is limited to whether, "upon the evidence adduced, reasonable [people] could have come to the same conclusion as the . . . trial court." Kang, 59 Haw. at 663, 587 P.2d at 292 (citation omitted).

Here, the record contains substantial evidence supporting the award. The court conducted a sixty-six-day bench trial, heard testimony from more than thirty witnesses, and made extensive findings regarding both liability and damages. The record amply supports the damages awards.

Thus, the damages awarded are not excessive.

V. Conclusion

For these reasons, we vacate the November 28, 2022 final judgment to the extent it allocated 30% of the fault to nonparties and reduced Plaintiffs' damages. We remand this case to the circuit for entry of an amended final judgment awarding Plaintiffs the entirety of the damages found by the circuit court. We affirm in all other respects.

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