

NO. 23009

IN THE SUPREME COURT OF THE STATE OF HAWAII

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SIMON A. LI, Individually and as Guardian Prochein  
Ami for Stephen Joseph Li, a minor,  
and JULIAN LI, Plaintiff-Appellants,

vs.

THE ESTATE OF SIDNEY G. PERSHING, M.D.,  
Defendant-Appellee,

and

NORTH SHORE HEALTH CENTER, a sole proprietorship,  
SPECIALTY MEDICAL GROUP, INC., SPECIALTY  
HEALTHCARE MANAGEMENT, INC.; KAHUKU HOSPITAL; THE  
CITY AND COUNTY OF HONOLULU; and JOHN DOES  
1-20, Defendants.

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APPEAL FROM THE FIRST CIRCUIT COURT  
(CIV. NO. 96-1327)

SUMMARY DISPOSITION ORDER

(By: Moon, C.J., Levinson, Nakayama, and Acoba, JJ.,  
and Circuit Judge Ahn, in place of Duffy, J., recused)

Plaintiffs-appellants Simon A. Li, individually and as  
Guardian Prochein Ami for Stephen Joseph Li, a minor (Stephen),  
and Julian Li [hereinafter, collectively, Plaintiffs] appeal from  
the November 30, 1999 judgment of the First Circuit Court, the  
Honorable Sabrina McKenna presiding, entered in favor of  
defendant-appellee The Estate of Sidney G. Pershing, M.D. On  
appeal, Plaintiffs contend that, insofar as Marian Melish, M.D.  
(Dr. Melish) had engaged in unauthorized ex parte communications

with defense counsel regarding Stephen during the discovery phase of the underlying litigation, the trial court erred by failing to: (1) bar Dr. Melish from providing expert opinions regarding Sidney G. Pershing, M.D.'s (Dr. Pershing) treatment of Stephen and (2) exclude Dr. Melish's testimony in its entirety.

Upon carefully reviewing the record and the briefs submitted and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve Plaintiffs' contentions as follows. With respect to Plaintiffs' first point of error, the record reflects that the essence of Plaintiffs' objection at trial was that Dr. Melish should not be permitted to give standard of care opinions regarding the timing and dosage of Valium inasmuch as she was not asked any standard of care questions, and did not give any standard of care opinions, during her deposition and that, in any event, such opinions were cumulative. On appeal, however, Plaintiffs argue that the trial court should have excluded Dr. Melish's opinions on the basis that ex parte communications between a treating physician and defense counsel are prohibited. Having raised a grounds for objection at trial that differ from those now being pressed on appeal, Plaintiffs run afoul of Hawai'i Rules of Evidence Rule 103(a)(1) (1993). Therefore, their first point of error is waived. See Tabieros v. Clark Equip. Co., 85 Hawai'i 336, 379 n.29, 944 P.2d 1279, 1322 n.29 (1997) (citing State v. Wallace, 80 Hawai'i 382, 410, 910 P.2d 695, 723 (1996)) (point of

error waived where appellate challenge to testimony establishing weight of cocaine was premised on questioned accuracy of police scale, but trial objection had raised only relevance); State v. Matias, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) (“[T]here can be no doubt that the making of an objection upon a specific ground is a waiver of all other objections.”) (Citations and internal quotation marks omitted.)). See also State v. Vliet, 91 Hawai‘i 288, 298, 983 P.2d 189, 200 (1999) (point of error waived where grounds for objection on appeal challenging admission of testimony differed from grounds raised, and properly rejected, at trial).

With respect to Plaintiffs’ second point of error, we hold that Plaintiffs are judicially estopped from arguing that Dr. Melish’s testimony, a portion of which was elicited by Plaintiffs themselves, should be excluded in its entirety. See Nelson v. Univ. of Hawai‘i, 99 Hawai‘i 262, 268, 54 P.3d 433, 439 (2002) (“a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his action” (quoting Roxas v. Marcos, 89 Hawai‘i 91, 124, 969 P.2d 1209, 1242 (1998))). Whether for tactical reasons or otherwise, Plaintiffs made a calculated and informed decision to call Dr. Melish as a witness at trial. Therefore,

**\* \* \* NOT FOR PUBLICATION \* \* \***

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IT IS HEREBY ORDERED that the November 30, 1999 judgment from which this appeal is taken is affirmed.

DATED: Honolulu, Hawai'i, December 10, 2003.

On the briefs:

Randall L.K.M. Rosenberg  
and Charles E. McKay (of  
Garcia Rosenberg & McKay),  
and Melvin Y. Agena, for  
plaintiffs-appellants

Arthur F. Roeca, April  
Luria, and Jodie D. Roeca  
(of Roeca Louie & Hiraoka),  
for defendant-appellant The  
Estate of Sidney G.  
Pershing, M.D.