IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

---o0o---

SAMANTHA THERESALYN MEDEIROS,
Respondent/Plaintiff-Appellant,

vs.

BRADLEY KONG CHOY,
Petitioner/Defendant-Appellee.

SCWC-13-0003500

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-13-0003500; CIV. NO. 11-1-2004-09)

APRIL 26, 2018

DISSENTING OPINION BY NAKAYAMA, J.
IN WHICH RECKTENWALD, C.J., JOINS

Respondent/Plaintiff-Appellant Samantha Theresalyn Medeiros (Medeiros) filed a civil tort action in the Circuit Court of the First Circuit (circuit court) against Petitioner/Defendant-Appellee Bradley Kong Choy (Choy). Medeiros sought to recover damages for injuries allegedly sustained in a car accident, during which Choy's vehicle rear-ended another

vehicle, which in turn rear-ended a vehicle driven by Jennalind Aggasid (Aggasid). Medeiros claimed that she was a passenger in Aggasid's vehicle. Following a trial, the jury found that Choy's negligence was not the legal cause of Medeiros's injuries and returned a special verdict in Choy's favor.

Medeiros appealed, arguing that the circuit court erred when it: (1) allowed Choy to comment on Medeiros's motives for filing suit against him without giving Medeiros's requested limiting instruction based upon our decision in Kobashigawa v. Silva, 129 Hawaiʻi 313, 300 P.3d 579 (2013), and (2) denied Medeiros's motion in limine seeking to preclude the parties from introducing testimony that an unrestrained child was in the back seat of the car in which Medeiros was allegedly a passenger. The Intermediate Court of Appeals (ICA) held that the circuit court erred on these two points, vacated the circuit court's judgment, and remanded the case for a new trial.

On certiorari, the Majority affirms the ICA's decision, holding that Medeiros's motives for bringing suit were irrelevant to the merits of her claim and her credibility as a witness, and that the jury should have been instructed to disregard Medeiros's motives for bringing suit. Considering the effect of its holding on retrial, the Majority does not evaluate whether the ICA erred in holding that the probative value of the evidence regarding the

unrestrained child was substantially outweighed by its risk of undue prejudice to Medeiros. To the Majority, because the jury will be instructed not to consider Medeiros's motives in bringing suit on remand, the prejudicial effect that the ICA ascribed to the challenged evidence will no longer be a concern.

Respectfully, I dissent. While I agree with the Majority that, generally, a plaintiff's motive in bringing suit is not relevant, I believe that the present case falls squarely within an exception to this general rule. Under this exception, which has been recognized in other jurisdictions, evidence of a plaintiff's motive in bringing suit may be relevant to a plaintiff's credibility when there is evidence to support that he or she may have filed the lawsuit and sought the requested relief in bad faith or for the purposes of perpetrating fraud. Here, the evidence at trial raised a legitimate question as to whether Medeiros was physically present at the scene of the accident in which she claimed to have sustained her injuries. Accordingly, the evidence supports that Medeiros may have filed suit against Choy in bad faith, seeking to recover monetary damages for injuries she knew that she did not actually sustain in the underlying vehicle collision. Under these circumstances, the circuit court did not err in refusing to give Medeiros's requested instruction based on Kobashigawa.

Furthermore, I would hold that the circuit court did not abuse its discretion in denying Medeiros's motion in limine to exclude evidence of the unrestrained child. The evidence was relevant under Hawaiʻi Rules of Evidence (HRE) Rules 401 and 402 because it bore directly upon Medeiros's presence and/or position in Aggasid's vehicle when the accident took place, and therefore whether Choy's negligence was the legal cause of her injuries, as well as Medeiros's and Aggasid's credibility. Applying the four-factor balancing test governing whether evidence may be excluded under HRE Rule 403, I believe that the ICA erred in holding that the probative value of the testimony regarding the unrestrained child was substantially outweighed by its potential for undue prejudice to Medeiros.

Accordingly, I would reverse the ICA's July 13, 2016 judgment on appeal filed pursuant to its June 16, 2016 memorandum opinion, and affirm the circuit court's August 30, 2013 judgment.

I. DISCUSSION

A. The ICA erred in holding that the circuit court should have given Medeiros's requested jury instruction based on Kobashigawa.

Choy argues that based upon its misinterpretation of our decision in Kobashigawa, the ICA incorrectly held that a jury instruction on motive was necessary in the instant case. Choy asserts that because the facts in this case are distinguishable

from those in Kobashigawa, the comments concerning Medeiros's motives were permissible. Specifically, Choy emphasizes that unlike in Kobashigawa, here, "the jury easily could have concluded that Medeiros failed to make out a case on the facts or assert a valid cause of action because she was not in the vehicle[.]"

Based upon its reading of Kobashigawa and case law from other jurisdictions, the Majority articulates the following rule concerning when evidence of a plaintiff's motive for bringing a civil action may be admissible:

> In sum, evidence of a plaintiff's motive in bringing a civil action is not material to the substantive elements of the cause of action giving rise to the suit in which it is offered. Such evidence may, however, be admissible for impeaching a plaintiff-witness when it tends to prove that the true purpose of the suit is something other than vindicating the alleged injury through the remedy sought.

Majority at 21. Accordingly, the Majority reasons that because "Choy offered no evidence indicating that Medeiros had any motivation for bringing the action other than obtaining the monetary relief she sought," the jury "should not have been permitted to consider Medeiros's motives for bringing suit in its deliberations." Majority at 33. The Majority thus concludes that the circuit court was required to give Medeiros's proposed jury instruction based on Kobashigawa because: (1) the instruction correctly stated the law; (2) the instruction was

"applicable to the issues raised by [this] case" due to "the substantial possibility that the jury would consider the evidence adduced as it related to Medeiros's motives for bringing suit"; and (3) the instruction was not covered by other instructions. Majority at 34-36.

I agree with the Majority to the extent that I also believe that generally, a plaintiff's motive in filing suit is not relevant. However, I part with the Majority insofar as I believe that this case falls directly within an exception to this general rule, which has been recognized by several other jurisdictions. Under this exception, evidence of a plaintiff's motive in bringing suit may be relevant when the evidence suggests that the plaintiff might have filed suit and sought the requested relief in bad faith or for purposes of perpetrating fraud. Thus, I would hold that the circuit court did not err in declining to give Medeiros's requested instruction based upon Kobashigawa.

In Kobashigawa, William Kobashigawa (William) was crossing the street when he was struck and killed by a truck driven by Joseph Silva (Silva). 129 Hawaiʻi at 315, 300 P.3d at 581. William's daughter and wife (the Kobashigawas) filed a complaint against Silva and the City and County of Honolulu for negligence (the City). Id. at 315-16, 300 P.3d at 581-82. Gina

Bailey (Bailey), the only eyewitness to the accident, testified in her deposition that she spoke to William's daughter shortly after the accident. Id. at 316, 300 P.3d at 582. Bailey stated that during this conversation, William's daughter asked Bailey if she would be willing to testify if the Kobashigawas filed a lawsuit. Id. Bailey stated that she was angered by William's daughter's request because she "saw her father's death with money signs in her eyes." Id.

The Kobashigawas filed a motion in limine seeking to preclude the defendants from presenting Bailey's deposition testimony and other evidence regarding the Kobashigawas' motive for bringing the suit. Id. The circuit court denied the motion. Id. at 316-17, 300 P.3d at 582-83. On appeal, the ICA held that the circuit court erred in allowing evidence of the Kobashigawas' motive for filing suit to be presented at trial. Id. at 320, 300 P.3d at 586. This court affirmed the ICA's decision and reaffirmed the long-standing rule that "a plaintiff's motive in filing a lawsuit is irrelevant provided that the plaintiff has established a valid cause of action." Id. at 334, 300 P.3d at 600; see also Carter v. Ah So, 12 Haw. 291, 302 (Haw. Terr. 1899) ("So far as the law is concerned, if the plaintiff has made out a case on the facts, it is immaterial what [the] motive was."); Lucans v. American-Hawaiian Eng'g & Constr. Co., 16 Haw. 80, 85-

86 (Haw. Terr. 1904) ("[T]he weight of authority is that the motives of a taxpayer in bringing a suit can not be inquired into if he has shown that he has the other qualifications to sue.").

The Majority aptly notes that there are exceptions to the general rule established in Kobashigawa, inasmuch as the Majority acknowledges that the foregoing rule "does not bar evidence of a plaintiff's motives in all situations[.]" Majority at 18. The Majority cites to Samsung Electronics Co., Ltd. v. NVIDIA Corporation, No. 3:14CV757, 2016 WL 754547 (E.D.V.A. Feb. 24, 2016), Majority at 19-20, which acknowledged the "generally prevailing" rule that a plaintiff's motive is irrelevant, but also noted the following exceptions:

> [T]his general rule has been held not to apply when a defendant pleads certain equitable defenses such as laches or estoppel, when there are questions about whether a plaintiff is an appropriate representative of a class, or when a plaintiff seeks attorneys' fees for bad faith multiplication of proceedings. Under certain circumstances motive has been found to be admissible for purposes of assessing the credibility of the testifying witness.
>
> Although the Court has not identified any decisions from the Courts of Appeals for the Fourth Circuit or the Federal Circuit on this point, the decisions of other circuit and district courts present a general rule: a plaintiff's motive for bringing suit is irrelevant, except in the face of certain equitable defenses, bad faith, or questions of witness bias.

Samsung, 2016 WL 754547, at *2 (emphasis added) (citations omitted).[1]

[1] The Majority acknowledges that evidence of a plaintiff's motive may "be admissible for impeaching a plaintiff-witness when it tends to prove that the (continued...)

Several other courts have also suggested that evidence of a plaintiff's motive may be relevant when there is evidence to support that the plaintiff may have brought suit in bad faith or to defraud others. See e.g. Valdez v. State ex. rel. Farrior, 194 So. 388, 394 (Fla. 1940) (opining that a court of equity may consider a plaintiff's motive in filing suit in circumstances suggesting that the suit was brought to accomplish an "unholy and base purpose"); Yates v. Sweet Potato Enters., Inc., No. C 11-01950 SBA, 2013 WL 4067783, at *3-4 (N.D. Cal Aug. 1, 2013) (ruling that "Plaintiff's alleged scheme to generate income through the serial filing of [well over one hundred disability] lawsuits," in which he alleged identical injuries, "in an effort to extract settlements from businesses, may, in fact, be probative of his credibility"); Beyar v. City of New York, No. 04-CV-3765(JFB)(KAM), 2007 WL 1959010, at *3-4 (E.D.N.Y. June 29, 2007) (determining that "references to plaintiff being motivated by money" were not improper when, during closing argument,

---

[1](...continued)
true purpose of the suit is something other than vindicating the alleged injury through the remedy sought." Majority at 21 (emphasis added). For example, according to the Majority, if there is evidence to support that a lawsuit for monetary damages is being brought for harassment purposes, then evidence of the plaintiff's motive in filing suit may be admissible for impeachment purposes. See Majority at 20-21 (discussing Montoya v. Vill. of Cuba, No. CIV 11-0814 JB/SMV, 2013 WL 6504291, at *17 (D.N.M. Nov. 30, 2013)).

Respectfully, the exception is not as narrow as the Majority's "true purpose" formulation suggests. Rather, as discussed above, and as recognized in Samsung, to which the Majority cites, the exception is broad enough to encompass bad faith or fraud.

defense counsel argued that plaintiff filed the lawsuit to defraud the City); Caldwell v. Wal-Mart Stores, Inc., No. 99-2272, 2000 WL 1335564, at *5 (10th Cir. Sept. 15, 2000) ("Absent some evidence of fraud on Caldwell's part (and none was proffered) evidence of his financial motivation to bring suit was not relevant to any of the issues in this case."); 1 Am. Jur. 2d Actions § 42 ("The motive of a party in bringing an action generally is immaterial to the question whether the action may be maintained, at least absent bad faith."). Read collectively, the case law from other jurisdictions establishes an exception whereby evidence of a plaintiff's motive in filing suit may be relevant to his or her credibility as a witness when the evidence supports that the plaintiff may have brought suit in bad faith by seeking to dishonestly obtain relief that he or she knew that he or she was not entitled to, and/or to defraud others. See Bad Faith, Black's Law Dictionary (10th ed. 2014) (defining "bad faith" as "[d]ishonesty of belief, purpose, or motive"); cf. Acting in Good Faith, Black's Law Dictionary (10th ed. 2014) (defining "acting in good faith" as "[b]ehaving honestly and frankly, without any intent to defraud or to seek an unconscionable advantage").

Applying this exception to the facts in this case, I believe that the evidence presented at trial indicates that

Medeiros may have brought suit against Choy in bad faith or for purposes of perpetrating fraud. At trial, Medeiros testified that she was sitting in the back seat of Aggasid's vehicle, facing sideways while speaking to another passenger when the accident took place. However, Choy, his wife, and Bernard Jiminez (Jiminez), the driver of the other car involved in the accident, testified that shortly after the accident occurred, they saw two adult-aged women sitting in the front seats, and an unrestrained child moving about the back seat of the vehicle. Further, Officer Kirk Brown (Officer Brown), the officer who responded to the incident, testified that he observed two women, both of whom were at least forty years-old (whereas Medeiros was twenty-five years-old at the time of the accident), sitting in the front seats. None of these witnesses identified Medeiros as one of the passengers in the front seats of Aggasid's vehicle.

The foregoing evidence calls into question whether Medeiros was physically present at the accident scene in the first place, and arguably supports that Medeiros may have filed suit against Choy to recover damages for injuries that she knew that she did not sustain in the accident that Choy was responsible for. Therefore, there is evidence to support that Medeiros may have dishonestly brought suit against Choy in bad faith and to perpetuate fraud, such that evidence of her motive

in filing suit was relevant to her credibility as a witness. I would thus hold that the circuit court did not err in declining to give Medeiros's requested jury instruction based on Kobashigawa, and that the ICA gravely erred in concluding that "the omission of the jury instruction on Medeiros's motivation for bringing her lawsuit . . . was 'prejudicially insufficient.'"

In addressing the arguments above, the Majority construes the foregoing analysis as resting upon the following principle: "[A]llegations of dishonesty regarding aspects of a claim make evidence or consideration of a plaintiff's motive for bringing the lawsuit relevant to the plaintiff's credibility as a witness because money damages create a financial incentive to be untruthful." Majority at 21-22. Such a characterization, however, misconstrues the exception upon which the analysis relies. To be clear, as discussed above, the aforementioned analysis is premised upon a recognized exception whereby evidence of a plaintiff's motive in bringing suit may be relevant for impeachment purposes when the evidence suggests that the plaintiff filed suit and sought the requested relief in bad faith or to perpetuate fraud. In other words, I believe that evidence of a plaintiff's motive in filing suit may be relevant to the plaintiff's credibility in narrow circumstances where there is evidence to support that the plaintiff dishonestly sought relief

that he or she knew that he or she was not entitled to, at the expense of another. I do not believe that evidence of a plaintiff's motive is relevant because a plaintiff who is seeking monetary damages thereby possesses an incentive to be untruthful, as the Majority represents.[2]

The Majority suggests that Kobashigawa completely precludes evidence of a plaintiff's motive from being used to impeach his or her credibility as a witness in all circumstances. Majority at 25-26. Upon a closer examination, Kobashigawa does not appear to stand for the principle that evidence of a plaintiff's motive is categorically irrelevant to the plaintiff's credibility as a witness. In Kobashigawa, the City argued that

---

[2] Additionally, the Majority appears to suggest that the dissent's analysis condones an approach whereby "evidence of a plaintiff's motive for bringing suit is admissible for impeachment purposes whenever a plaintiff seeks monetary damages." Majority at 31. To be clear, I do not support the adoption of a such a broad, sweeping rule.

Rather, as discussed at length above, I agree with the Majority that, generally speaking, evidence of a plaintiff's motive is not relevant to resolving the merits of a claim. Majority at 17-18. However, as the Majority also recognizes, there are exceptions to this general rule. Majority at 18. And, pursuant to a case upon which the Majority itself relies, an exception to the general rule applies "in the face of . . . bad faith." Samsung, 2016 WL 754547, at *2; see Majority at 18-21. The Majority construes this exception narrowly, characterizing as follows: "[C]ourts have in narrow circumstances permitted a plaintiff's motive for bringing suit to be considered to demonstrate bias and undermine the credibility of a plaintiff who testifies--when the evidence demonstrates that the plaintiff brought the lawsuit for an ulterior purpose." Majority at 19-20. While I agree that the "bad faith" exception recognized in Samsung is limited, I do not believe it is as constricted as the Majority represents. See supra note 1. By contrast, I believe that Samsung illustrates the recognition of a narrow exception whereby evidence of a plaintiff's motive can be relevant to a plaintiff's credibility in exceptional circumstances where the evidence supports that the plaintiff filed suit in bad faith or for purposes of perpetrating fraud, which applies to the present case. Id.

"the ICA gravely erred in concluding that the circuit court's cautionary jury instruction[3] on bias, interest, or motive constituted an erroneous statement of the law because, according to HRE Rule 609.1, evidence pertaining to a witness's bias, interest, or motive is always admissible." 129 Hawaiʻi at 333, 300 P.3d at 599. This court rejected the City's argument, explaining:

> [The City's argument] confuses . . . motive evidence permissible under [HRE] Rule 609.1 to impeach the credibility of a witness with evidence of the plaintiff's motive for filing suit, which, as discussed, is [generally] irrelevant [to resolving the merits of the dispute] and thus inadmissible. Under [HRE] Rule 609.1, "[t]he credibility of a witness may be attacked by evidence of bias, interest, or motive" of that witness. A plain reading of the rule does not suggest that testimony of a witness, even a disinterested one such as Bailey here, may somehow be used to suggest that the Kobashigawas had an improper motive in filing suit. Looking beyond the rule, there is also no other authority for the proposition that, pursuant to [HRE] Rule 609.1, the testimony of a witness may be used to question the bias, interest, or motive of the plaintiff bringing the suit.

Id. at 334, 300 P.3d at 600 (seventh alteration in original).

Put succinctly, the Kobashigawa court clarified that:

---

[3] In Kobashigawa, the circuit court issued the following limiting instruction regarding the use of Bailey's deposition testimony:

> You have heard testimony from one witness about certain statements attributed to a Kobashigawa family member following Mr. Kobashigawa's death. Your consideration of this evidence is limited to determining the existence or absence of any possible bias, interest or motive, if any, by plaintiffs in bringing this lawsuit and not for any other purpose. Specifically, you may not consider this evidence of negative character or negative conduct by plaintiffs or for any other purpose.

129 Hawaiʻi at 317, 300 P.3d at 583.

(1) evidence of a witness's bias, interest, or motive, as referenced in HRE Rule 609.1, is not the same as evidence of a plaintiff's motive in filing suit; and (2) HRE Rule 609.1 did not provide that the testimony of a third-party witness could be used to question the propriety of the plaintiff's motive in filing suit. Id. However, this court did not address or conclude that evidence of a plaintiff's motive in bringing suit may never be relevant to the plaintiff's credibility as a witness when the plaintiff testifies at trial. See id. Consequently, I do not believe the exception recognized in numerous other courts, which provides that evidence of a plaintiff's motive in filing suit may be relevant to the plaintiff's credibility as a witness in limited circumstances where the evidence suggests that the plaintiff may have filed suit in bad faith, and/or for purposes of defrauding others, is inconsistent with Kobashigawa.

Furthermore, the Majority is concerned that if this court adopts this exception, evidence of a plaintiff's motive will be deemed relevant in a wide breadth of cases because "the range of cases in which the defendant could argue that there is evidence of bad faith or questions of fraud with respect to the elements of a claim is virtually limitless." Majority at 22. The Majority's concern is based upon its view that a civil defendant can and likely will argue that the plaintiff filed suit

in bad faith or with the intent to defraud whenever there is a factual dispute regarding whether the plaintiff has established all of the elements of a cause of action. See Majority at 22-23.

Quite simply, the circumstances present in this case are distinguishable from those posited by the Majority. There is evidence here from which the jury could reasonably conclude that Medeiros was not even at the scene of the accident. In these extreme circumstances, the exception for bad faith or fraud applies, and the circuit court did not err in refusing the instruction and allowing Choy to argue that Medeiros had brought the case for an improper motive.

Additionally, in my view, the Majority's concern reflects an overly pessimistic view of our civil justice system. An allegation or argument that a party has acted in bad faith is a serious contention that is not to be taken lightly. Such an allegation avers that the party "affirmatively operat[ed] with a furtive design, with some motive of self-interest or ill will, or for an ulterior purpose." 37 Am. Jur. 2d Fraud and Deceit § 3; see also Bank of Hawaii v. Kunimoto, 91 Hawaiʻi 372, 390, 984 P.2d 1198, 1216 (1999) ("Bad faith has also been defined as actual or constructive fraud or a neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive."

(alteration in original) (internal quotation marks omitted) (quoting In re Estate of Marks, 957 P.2d 235, 241 (Wash. Ct. App. 1998)); Ashford v. Thos. Cook & Son (Bankers) Ltd., 52 Haw. 113, 121, 471 P.2d 530, 535 (1970) (commenting that "[b]ad faith is not mere carelessness. It is nothing less than guilty knowledge or willful ignorance," which results in the dishonest disregard of another person's rights).

Therefore, in order to support an allegation that the plaintiff brought suit in bad faith, the evidence must support that in filing suit, the plaintiff deliberately and dishonestly acted in self-interest, and at the expense of another. See id. However, evidence illustrating that there is factual dispute regarding whether the plaintiff has established all of the elements of a cause of action will not necessarily support that the plaintiff mendaciously filed suit against the defendant to obtain relief that, based upon the facts available to him or her, the plaintiff knew he or she was not entitled to. Accordingly, I do not believe that defendants will accuse plaintiffs of filing suit in bad faith and seek to utilize plaintiffs' motive in filing suit for impeachment purposes as freely and ubiquitously as the Majority implies. Rather, I believe that such arguments will only arise in exceptional circumstances where the evidence supports that the plaintiff filed suit with the duplicitous

motive of defrauding another.

Notwithstanding the foregoing, the Majority maintains that evidence of a plaintiff's motive in filing suit will be widely deemed relevant and admissible. Majority at 23-24. The Majority avers that because, under my analysis, Medeiros's motive was relevant to her credibility in this case, where Officer Brown offered testimony that "undermined a core basis of Choy's fraud allegations" by corroborating some aspects of Medeiros's and Aggasid's testimony, "the approach applies in circumstances that are far from 'exceptional' within our legal system." Majority at 23-24. Put differently, the Majority questions whether this case presents a truly "exceptional" circumstance that illustrates the limited application of the exception underlying my analysis. See Majority at 23-24.

While the Majority aptly notes that Officer Brown's testimony conflicts with the testimony of Choy, his wife, and Jiminez, inasmuch as Officer Brown testified that he neither saw a car seat nor a child in diapers in any of the vehicles, the fact remains that the testimony of numerous witnesses, including other portions of Officer Brown's testimony,[4] supports that

[4] Officer Brown testified that he saw two women, both of whom were at least forty years-old, sitting in the front seat of Aggasid's vehicle. However, Medeiros was twenty-five years-old when the accident took place. Furthermore, Officer Brown testified that he did not recognize or identify anyone in the courtroom at trial, including Medeiros, as one of the occupants (continued...)

Medeiros was not physically present at the scene of the minor car collision in which she claimed to have sustained her injuries. In other words, in contrast with the Majority, I believe that this case presents an exceptional circumstance inasmuch as here, there is evidence to support the reasonable conclusion the plaintiff may not have been present at all at the incident in which she claimed that she was injured, and thereby brought suit in bad faith or to defraud the defendant. Thus, I do not agree with the Majority that the application of the exception underlying my analysis to the facts in this case indicates that evidence of a plaintiff's motive in bringing suit will be deemed relevant in a broad spectrum of cases.

To conclude, the evidence in this case suggests that Medeiros may not have been physically present at the underlying car accident for which Choy was responsible. Such evidence reasonably supports that Medeiros may have filed suit against Choy to recover monetary damages for injuries that she knew were not caused by Choy's actions. Consequently, pursuant to an

---

[4](...continued)
of Aggasid's vehicle.

Accordingly, notwithstanding the fact that Officer Brown testified that he did not see a car seat or a child wearing diapers Aggasid's vehicle, Officer Brown testified to other facts that cast doubt upon whether Medeiros was one of the passengers in Aggasid's vehicle. As such, Officer Brown's testimony constitutes further evidence that Medeiros was not physically present at the vehicle collision in which she claimed to have been injured, and brought suit against Choy in bad faith or for the purposes of perpetrating fraud.

exception recognized by other jurisdictions, I would hold that the circuit court did not err in declining to give Medeiros's requested jury instruction based upon Kobashigawa because, in my view, the evidence indicating that Medeiros may have filed suit against Choy in bad faith and for purposes of perpetrating fraud was relevant to her credibility as a witness.

B. The ICA erred when it held that the circuit court abused its discretion in denying Medeiros's motion in limine to exclude evidence of the unrestrained child.

Choy advances two arguments in support of his position that the circuit court correctly denied Medeiros's motion in limine to exclude evidence that an unrestrained child was in the back seat of the car in which Medeiros claimed she was a passenger. First, Choy argues that Medeiros did not object to the admission of evidence about the unrestrained child during trial and, in fact, introduced the evidence herself. Because of this, Choy contends that Medeiros did not preserve this issue on appeal. Second, Choy argues that even if Medeiros did not waive this issue, the evidence of the unrestrained child was relevant and admissible.

Though the Majority acknowledges both of Choy's arguments, the Majority does not address either of them on the merits. According to the Majority, Choy's waiver argument need not be addressed in light of the fact that the case is being

remanded to the circuit court for a new trial. Majority at 37 n.26. Additionally, the Majority does not review whether the ICA correctly concluded that the probative value of the testimony regarding the unrestrained child was substantially outweighed by its potential for unfair prejudice to Medeiros. Rather, noting that the ICA was primarily concerned that the jury would improperly consider the evidence of the unrestrained child as evidence of her motives in bringing suit, the Majority concludes:

> In light of our remand for a new trial, the same consideration should not arise given our ruling that the jury must be instructed to not consider the Plaintiff's motives in bringing the lawsuit. Consequently, the challenged testimony on remand would not be excludable under HRE Rule 403 based solely on the concern that the jury would consider the evidence as it bears on Medeiros's motivation for bringing suit.

Majority at 39.

For the reasons discussed in section I.A, supra, I do not believe that the circuit court was required to provide the jury with Medeiros's requested instruction based upon Kobashigawa. Given that I do not join the Majority's holding set forth in section III.A of its opinion, which, in its view, is dispositive of Choy's arguments concerning the admissibility of the evidence of the unrestrained child, I address the merits of Choy's arguments on this point in turn below. In short, I would hold that: (1) Medeiros did not waive any objection to the circuit court's admission of evidence regarding the unrestrained

child; (2) the evidence of the unrestrained child was relevant under HRE Rules 401 and 402; and (3) the circuit court did not abuse its discretion in ruling that the probative value of the evidence was not substantially outweighed by its risk of undue prejudice to Medeiros.

1. Medeiros did not waive any objection to the circuit court's admission of evidence regarding the unrestrained child.

Generally, "objections not raised or properly preserved at trial will not be considered on appeal." Craft v. Peebles, 78 Hawaiʻi 287, 294, 893 P.2d 138, 145 (1995). However, "when the trial court makes a definitive pretrial ruling that evidence is admissible, the party opposing that ruling need not renew its objection during trial in order to preserve its claim on appeal that the evidence was erroneously admitted." Kobashigawa, 129 Hawaiʻi at 321, 300 P.3d at 587. "A trial court's ruling on a motion in limine is definitive when it 'leaves no question that the challenged evidence will or will not be admitted at trial[.]'" Id. at 329, 300 P.3d at 595 (alteration in original) (quoting Quad City Bank & Trust v. Jim Kircher & Assocs., P.C., 804 N.W.2d 83, 90 (Iowa 2011)).

In this case, Medeiros filed a motion in limine to preclude witnesses from testifying that they saw an unrestrained child in Aggasid's vehicle immediately after the accident. At a

hearing on motions in limine, the circuit court orally denied the motion in the following exchange:

> THE COURT: At this time the Court denies the motion.
>
> . . . .
>
> The Court is though precluding the argument that getting out of the car, getting the -- the observation of getting a car seat out of the car is in any way related to whether or not the Plaintiff was injured in the accident in the absence of an expert testifying that there was some connect.
> [PLAINTIFF'S COUNSEL]: That's fine, Your Honor.
> THE COURT: And, the Court will evaluate the issue of its relevance. The Court understands credibility is at issue always and the position of where she was in the car or and [sic] her position at this juncture the Court is not going to preclude the Defendant from attempting to introduce that evidence and how it relates to the expert's opinion.

On denying Medeiros's motion at the hearing, the circuit court issued a definitive pretrial ruling that evidence of the unrestrained child was admissible. Therefore, Medeiros did not need to renew her objection at trial in order to preserve her claim on appeal that the evidence was erroneously admitted. See Kobashigawa, 129 Hawaiʻi at 321, 300 P.3d at 587.

Additionally, Choy contends that Medeiros waived this issue because Medeiros was the first party to introduce evidence of the unrestrained child at trial. Although Choy is correct in that, generally "a party cannot allege an error on appeal premised on evidence introduced into the record by that party," Kobashigawa, 129 Hawaiʻi at 330, 300 P.3d at 596, this rule does not apply in situations, like here, where the circuit court

admitted evidence despite a party's motion in limine to exclude. See id. at 332, 300 P.3d at 598 ("[O]nce a trial court makes an unequivocal ruling admitting evidence over a party's motion in limine to exclude, that party's subsequent introduction of the evidence does not constitute a waiver of its objection for appellate review."). Because the circuit court denied Medeiros's motion to exclude evidence of the unrestrained child, Medeiros did not waive this objection when she subsequently introduced that evidence.

Thus, Medeiros properly preserved this issue on appeal. As such, her arguments may be reviewed on the merits.

2. Evidence of the unrestrained child was relevant under HRE Rules 401 and 402.

Choy appears to argue that the evidence of the unrestrained child was relevant for two reasons. First, Choy argues that the evidence was relevant because it called into question Medeiros's presence in the vehicle and her claim that she was working at the time of the accident. Second, Choy argues that the evidence was relevant because it raises questions about Medeiros's location in the car and the origin of her injuries.

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." HRE Rule 401. "All relevant

evidence is admissible, except as otherwise provided by the Constitutions of the United States and the State of Hawaii, by statute, by these rules, or by other rules adopted by the supreme court. Evidence which is not relevant is not admissible." HRE Rule 402.

Choy argues that the presence of the unrestrained child in the back seat indicates that Medeiros was not a passenger in Aggasid's vehicle, and therefore, not present at the accident. This argument has merit. Precisely who was in Aggasid's vehicle is in dispute. Medeiros and Aggasid testified that Aggasid, Medeiros, and an elderly adult patient were in Aggasid's vehicle at the time of the accident. By contrast, Choy and his wife both testified that there were two women, neither of whom were Medeiros, and a child in the Aggasid vehicle. Similarly, Jiminez also testified that two women and a young child were in Aggasid's car, but could not identify Medeiros as one of the women. Furthermore, Officer Brown testified that two women, both in their forties (Medeiros was twenty-five at the time of the accident) and either a juvenile or small adult were in Aggasid's vehicle. Thus, the evidence of the unrestrained child was relevant because it suggests that Medeiros was not in Aggasid's car when the accident took place, such that Choy's negligence was not the legal cause of her injuries.

The evidence of the unrestrained child also called into question Medeiros's and Aggasid's credibility. Medeiros and Aggasid testified that Medeiros was working when the accident occurred, as she was supervising an elderly adult patient while en route to a doctor's appointment. However, as discussed above, several other witnesses testified that they saw an unrestrained child, not an elderly adult patient, in the back seat of the car in which Medeiros was allegedly a passenger when the accident took place. Therefore, the evidence of the unrestrained child was relevant to the extent that it directly contradicted both her claim and Aggasid's statement that Medeiros was working at the time of the accident, and thereby bore upon their credibility as witnesses at trial.

Choy's second argument, that the evidence of the unrestrained child was relevant in determining Medeiros's location in the car and the cause of her injuries, is likewise persuasive. Medeiros claimed that she was sitting in the back seat and turned sideways to talk with an elderly adult patient, while Choy alleged there was only an unrestrained child in the back seat. The presence of an unrestrained child casts doubt on Medeiros's averment that she was sitting in the back seat, facing sideways towards another adult passenger at the time of the accident. Because Medeiros's position and the direction of her

body in the car pertained to whether she could have sustained the specific type of injuries that she allegedly suffered as a consequence of the accident, which the parties did not dispute was a minor vehicle collision, the evidence of the unrestrained child's presence in the back seat was relevant to the key issues of causation and damages.

The evidence of the unrestrained child in the back seat was probative in determining both Medeiros's presence and position in the vehicle at the time of the accident. Both of these issues related to whether Choy's negligence was the legal cause of Medeiros's injuries. The evidence was therefore relevant under HRE Rules 401 and 402.

3. Evidence of the unrestrained child was properly admitted over Medeiros's HRE Rule 403 objection.

Choy argues that the ICA erred in holding that the probative value of the testimony regarding the existence of an unrestrained child in the back seat of Aggasid's car was substantially outweighed by the risk of undue prejudice to Medeiros.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." HRE Rule 403. In

making a determination on whether the probative value of evidence is substantially outweighed by its undue prejudicial effect, this court considers four factors: (1) the need for the evidence, (2) the availability of other evidence on the same issue, (3) the probative weight of the evidence, and (4) the potential for creating prejudice against the opponent in the jurors' minds. Samson v. Nahulu, 136 Hawaiʻi 415, 430, 363 P.3d 263, 278 (2015).

Under the first and third factors, evidence of the unrestrained child supported Choy's theory that Medeiros was not in the back seat of the vehicle, and possibly not in the vehicle at all. The evidence therefore called into question the nature and cause of Medeiros's injuries. Additionally, the testimony about the unrestrained child cast doubt upon whether Medeiros was working when the accident took place as she claimed, and related to her credibility. In light of the purposes for which it was used, the testimony about the unrestrained child constituted a crucial aspect of Choy's defense.

Under the second factor, other evidence on the same issue could have been used instead of evidence about the unrestrained child. For instance, Choy, his wife, and Jimenez testified that they witnessed two adult women in Aggasid's car, and that both were sitting in the front seat. Neither Choy nor his wife could identify Medeiros as one of the women who was

sitting in Aggasid's car. This evidence, on its own, could have been used to illustrate that Medeiros was not a passenger in Aggasid's car, or alternatively, even if she was in the car, she was not sitting in the back seat when the accident happened.

However, the testimony about the unrestrained child uniquely related to whether Medeiros working at the time of the accident, and sitting in the back seat of Aggasid's vehicle, as she and Aggasid claimed. If there was a child instead of an elderly adult patient in the vehicle, then a valid question is raised as to whether Medeiros's and Aggasid's accounts of the accident were credible. Thus, while other evidence could have been used to show that Medeiros was not involved in the accident or that she was sitting in the front seat, the evidence about the child observed by two unrelated parties specifically called into question her and Aggasid's credibility by directly contradicting a key part of their recollections of the accident.

Finally, under the fourth factor, while the evidence of the unrestrained child may have had a potential for creating prejudice against Medeiros, its probative value was not substantially outweighed by its undue prejudicial effect. See Samson, 136 Hawaiʻi at 430, 363 P.3d at 278 ("Probative evidence always 'prejudices' the party against whom it is offered since it tends to prove the case against that person." (quoting State v.

Klafta, 73 Haw. 109, 115, 831 P.2d 512, 516 (1992)). Choy made no allegations that Medeiros was the mother of the child, and thus responsible for the child's safety. Additionally, it is undisputed that Aggasid, and not Medeiros, was driving the vehicle and thus ultimately responsible if there were in fact an unrestrained child within it. Thus, while driving a vehicle with an unrestrained child is generally considered both dangerous and illegal, it is unclear how that evidence would be unfairly prejudicial to Medeiros when no familial or legal connections were drawn between Medeiros and the child.

In sum, in considering the four factors of the balancing test, it does not appear that the circuit court "clearly exceed[ed] the bounds of reason or disregard[ed] rules or principles of law or practice to the substantial detriment" of Medeiros. Samson, 136 Hawaiʻi at 425, 363 P.3d at 273 (quoting Tabieros v. Clark Equip. Co., 85 Hawaiʻi 336, 351, 944 P.2d 1279, 1294 (1997)). HRE Rule 403 evidentiary decisions require the circuit court to make a "judgment call," which is reviewed for an abuse of discretion. State v. Richie, 88 Hawaiʻi 19, 37, 960 P.2d 1227, 1245 (1998). Because the balancing test supports that the circuit court exercised sound judgment in denying Medeiros's motion in limine, I would hold that the circuit court did not abuse its discretion in this regard, and that the ICA erred in

holding otherwise.

II. CONCLUSION

For the foregoing reasons, I respectfully dissent. I would reverse the ICA's July 13, 2016 judgment on appeal filed pursuant to its June 16, 2016 memorandum opinion, and affirm the circuit court's August 30, 2013 judgment.

/s/ Mark E. Recktenwald

/s/ Paula A. Nakayama