DISSENTING OPINION BY REIFURTH, J.

I respectfully dissent. Because the circuit court's ruling on Pflueger's evidentiary objection is reviewed under an abuse of discretion standard, and because the basis for the court's ruling is heavily dependent on the arguments advanced (and not advanced) by the parties, particular attention to the facts of the case is warranted.

I. Background

A. Pflueger submitted its claim to its insurance broker, Noguchi, for coverage under its Directors and Officers liability insurance policy, but Noguchi did not forward the claim to Pflueger's insurer.

National Union issued Directors and Officers liability insurance policies to Pflueger, its officers, and its directors via Pflueger's long-time insurance broker, Noguchi, for policy periods covering September 27, 2007 to September 27, 2008, and September 27, 2008 to September 27, 2009 (collectively, the "Policies"). The Policies required that National Union defend and indemnify Pflueger against covered claims.

On or about May 22, 2008, grand jury subpoenas were issued on behalf of the Internal Revenue Service and the IRS's ongoing investigation involving Pflueger, its subsidiaries, and its officers and directors. The subpoenas demanded that a Pflueger representative appear and produce certain company records.

Pflueger's then Chief Financial Officer testified that he met with Noguchi representatives on or about that same day, and claims to have presented them with copies of the grand jury subpoenas in order to inform Noguchi of the grand jury proceeding's existence and to discuss how to proceed in obtaining the relevant documents. Pflueger and Noguchi had developed a practice over the years that if Pflueger had questions about whether or not a possible insurance claim would be covered, Pflueger was to inform Noguchi, and if the claim was likely covered, Noguchi would instruct Pflueger on how to properly file the claim. Noguchi declined to forward Pflueger's claim for reimbursement of fees/costs related to the grand jury subpoenas to the insurer, stating, however, that the claims were not

covered under the Policies until indictments might be handed down.[1]

On or about February 11, 2009, Pflueger tendered each of the grand jury subpoenas directly to AIU,[2] which is National Union's "authorized representative", stating that its tender was effective as of the May 22, 2008 meeting with Noguchi. On or about April 29, 2009, AIU, in a letter written by Van Dina, stating that AIU's "preliminary coverage position" was that "no coverage is afforded for this matter" because the claims "w[ere] made outside the Policy Period." Furthermore, the letter stated that even if the matter "was both made and reported as per the requirements of the Policy," the subpoenas "would not constitute a Claim." According to AIU, "an indictment, information or similar document is necessary for a Claim as defined" in the Policies.

Pflueger sued AIU, National Union, and Noguchi, alleging counts for declaratory relief (AIU/National Union), Negligence (Noguchi), Negligent Misrepresentation (Noguchi), and Breach of the Duty of Good Faith and Fair Dealing (AIU/National Union). Pflueger and AIU/National Union settled outside of court , and Pflueger and Noguchi proceeded to trial in late July, 2013. On July 10, 2013, the circuit court issued an "Order Granting in Part and Denying in Part Plaintiff Pflueger Inc.'s Motion for Partial Summary Judgment, Filed on May 15, 2013," in which it ruled that the May 22, 2008 grand jury subpoenas directed at Pflueger did, in fact, constitute a "claim" under the Policies.

B. Pretrial proceedings.

On June 28, 2013, Noguchi filed its designation of excerpts from Van Dina's March 30, 2012 deposition for use at

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[1/] The IRS issued additional grand jury subpoenas to Pflueger on July 2, 2008; July 10, 2008; July 18, 2008; and October 29, 2008. Although the record reveals that an indictment was eventually handed down, further details of the IRS dispute are irrelevant to the instant disposition.

[2/] AIU Holdings, Inc. was at different times a corporate affiliate of American Insurance Group ("AIG"). National Union was a subsidiary of AIG.

trial in lieu of Van Dina's live testimony.[3] That same day, Pflueger and Noguchi each filed similar designations with regard to Ngeo's July 22, 2011 deposition testimony. On July 12, 2013, Pflueger filed its objections to Noguchi's designation of the Van Dina deposition. Based on the circuit court's subsequent ruling on Pflueger's motions in limine, the court allowed the deposition designations of Van Dina because they were relevant to the issue of proximate cause.

C. The circuit court sustained Pflueger's objection at trial that the deposition testimonies of Van Dina and Ngeo were inadmissible as hearsay.

During trial, Pflueger objected to the introduction of Van Dina's deposition testimony on the basis that it was hearsay in violation of Hawai‘i Rules of Evidence Rule 802 that did not qualify for an exception under Rule 804 because Noguchi had, to that point, failed to establish the foundational fact that the witness was unavailable to testify. In response, Noguchi did not contest that it had failed to demonstrate unavailability and made no attempt to demonstrate unavailability, but argued instead that the testimony was admissible as an "admission[] by a party

[3/] Noguchi sought to introduce excerpts from Van Dina's March 30, 2012 deposition at the following pages and relating to the following subjects (including exhibits referenced therein) (page:line): 6:9–7:3 (name, residence address, business address, current and prior employer); 7:11–7:25 (law degree and work history; 12:6–13:10 (law school, undergraduate, and work chronology); 18:17–19:5 (chronology of early employment with AIG/AIU); 24:12–24:19 (types of claims handled in early years at AIG/AIU); 26:22–27:10 (history of handling Pflueger claims for AIG/AIU); 30:7–31:14 (attempt to place this case within the context of any other Pflueger claims that he handled); 63:4–65:7 (February 11, 2009 letter from Pflueger to AIG (Exh. 5); relationship between that letter and coverage opinions dated April 29, 2009 and May 13, 2009 (Exh. 12)); 71:4–72:15 (industry meaning of "tendered" and "covered matters"); 73:3–74:2 (further discussion of "tendered" within context of Pflueger letter of February 11, 2009 and a "duty to defend" insurance policy); 74:18–76:23 (explanation of what it means when Pflueger tenders the claim to AIG/AIU; coverage versus defense; limited recollection of what happened after presentment of letter except that coverage was declined); 80:16–82:4 (limited recollection of his review of attached grand jury subpoenas; explanation of what's relevant in such cases to determine coverage); 106:2–106:10 (he wrote Exh. 10); 112:7–112:19 (even if the claim had been timely, he may not have viewed it as a claim because it was a subpoena and not an indictment); 126:2–126:10 (why he contends that a grand jury investigation is not a criminal proceeding); 135:19–137:7 (he believed at the time that there were two bases for denying coverage, untimely and not a claim, and he still believes that).

opponent" under HRE Rule 803(a)(1).[4]

The circuit court agreed that the testimony would be admitted on that basis *if* Noguchi could establish the required elements of the admission-by-a-party-opponent exception: (1) "[t]hat the statement was made by a party to the litigation," and (2) "[t]hat the statement now be offered against that party." However, Ngeo and Van Dina are National Union's (i.e., the "carrier's") representatives and Noguchi offered their testimonies against *Pflueger*, so the circuit court sustained Pflueger's objection and held that the evidence should not be admitted at trial.[5] In support of its ruling, the circuit court explained that Noguchi's response to the objection had been limited to the admission-by-a-party-opponent argument, which the court found to be insufficient.[6] Nonetheless, the court explicitly offered Noguchi the opportunity to reconsider its response and to make an alternative argument that the court promised to entertain. Moreover, later that day, the circuit

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[4/] HRE Rule 803, unlike Rule 804, does not require a showing of unavailability. *Compare* Haw. R. Evid. 803 ("The following are not excluded by the hearsay rule, even though the declarant is available as a witness . . . ."), *with* Haw. R. Evid. 804(b) (stating in part (b) that "[t]he following are not excluded by the hearsay rule if the declarant is unavailable as a witness . . . ," and defining "Unavailability as a witness" in part (a)).

[5/] Specifically, the court explained:

> Okay. So plaintiff's objection at this point is that it's hearsay. You're saying this evidence is admissible under [HRE Rule] 803(a)(1) as an admission . . . by a party opponent, but that party opponent is no longer in the litigation. They have settled, and so for that -- if you're offering it under [HRE Rule] 803(a)(1), I'm inclined to sustain the objection, because I understand at the time it was taken, they were a party opponent, but they are no longer a party opponent, and this evidence . . . still has to be offered, . . . it has to be admissible . . . under a rule.

(Format altered.)

[6/] Noguchi then argued that the objection was untimely and a surprise, explaining that, in an earlier order by the circuit court, the court had set a deadline for objections to deposition designations which, Noguchi contended, had not been met. The court replied that it considered the objection to be evidentiary in nature, and that objections of that sort were not waived by any failure to make the objection as part of the designation/counter-designation process: "We don't need to raise each and every evidentiary objection before trial, whether it's through a motion in limine or through objecting to depo designations." Accordingly, it determined, the objection was not untimely.

court reminded Noguchi that it had merely sustained the objection with regard to the deposition testimonies on hearsay grounds, but that it was not precluding Noguchi from calling Van Dina or Ngeo as witnesses. Nonetheless, Noguchi never re-offered the deposition testimony under any other exception to the general rule against hearsay,[7] *see generally* Haw. R. Evid. Rule 802, and it never called either Van Dina or Ngeo as witnesses at trial.

The jury found in favor of Pflueger on the issues of negligence and negligent misrepresentation and the circuit court denied Noguchi's subsequent motion for a new trial. Noguchi timely appealed and, among other arguments on appeal, contends that Pflueger's hearsay objection should have been overruled pursuant to HRCP Rule 32(a) because Van Dina and Ngeo were out-of-state at the time of trial and were therefore unavailable to testify.

II. Discussion

The majority holds that the circuit court's decision to exclude deposition testimony of Van Dina and Ngeo was reversible error that warrants a new trial. Specifically, the opinion holds that (A) the circuit court erred by concluding that the entire deposition testimony was hearsay not falling within any exception to the rule against hearsay, and (B) that such error was not harmless. I disagree as to both conclusions.

A. The deposition testimonies were not admissible as admissions of a party opponent, and the circuit court therefore did not abuse its discretion in declining to admit them at trial on that basis.

It was not an abuse of discretion for the trial court to exclude the deposition testimony when Noguchi's only argument

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[7/] Rather, Noguchi argued that it was being prevented from presenting evidence of a one-time co-defendant's (i.e., the carrier's) wrong, in violation of *Adams v. Yokooji*, 126 Hawai‘i 420 (App. 2012). The circuit court explained that *Yokooji* was inapplicable under the circumstances of this case, where the question was whether Van Dina's deposition testimony constituted an admission of a party opponent. (Citing to the commentary to HRE Rule 803(a) and *Kekua v. Kaiser Foundation Hospital*, 61 Haw. 208, 217, 601 P.2d 364, 371 (1979).) Thus, the court's ruling was based on the requirement that parties lay a proper foundation for the admission of evidence under HRE Rule 803(a)(1).

in response to Pflueger's objection was that the deposition testimony should be admissible as an admission by a party opponent under HRE Rule 803(a)(1). The testimony, however, was not made by either of the remaining parties to the litigation (i.e., Pflueger or Noguchi) as required. *See* Commentary to HRE Rule 803(a) (citing *Kekua*, 61 Haw. at 217, 601 P.2d at 371). Instead, the deposition testimony at issue was made by a representative of National Union, which had settled out of the case before trial.

As noted above, the circuit court took care to explain that the admission-by-a-party-opponent exception did not apply in this case. And, to that end, the court gave Noguchi multiple opportunities to present it with the *proper* response to the objection. Indeed, the evidence should probably have been admitted into evidence under HRE Rule 804(b)(1), which allows courts to admit former-testimony hearsay if the declarant is unavailable as a witness, but Noguchi failed to make that argument. *See* Commentary to Haw. R. Evid. R. 804(b)(1) ("Depositions of parties to the litigation may be usable as admissions under Rule 803(a)(1); as to other deponent-declarants, the requirement of unavailability and the conditions of this exception govern.").

As such, the circuit court neither abused its discretion by denying Noguchi's Rule 803(a)(1) argument, nor did it abuse its discretion by failing to raise Rule 804(b)(1) *sua sponte*.[8] *State v. Matias*, 57 Haw. 96, 101, 550 P.2d 900, 904 (1976) ("[T]his court [has] observed that 'there can be no doubt that the making of an objection upon a specific ground is a waiver of all other objections.'" (quoting *Choy v. Otaguro*, 32 Haw. 543, 556 (1932))); *State v. Gray*, No. 29051, 2009 WL 1204948, at *1 (Haw. Ct. App. Apr. 29, 2009) ("A specific objection waives other objections not made." (citing *State v. Vliet*, 91 Hawai‘i 288, 298-99, 983 P.2d 189, 199-200 (1999))); *Tabieros v. Clark Equip. Co.*, 85 Hawai‘i 336, 379 n.29, 944 P.2d

[8/] Nor does the fact that Van Dina's deposition transcript established that Van Dina lived and worked in New York satisfy Noguchi's obligation to bring that information to the court's attention under HRCP Rule 32(a)(3)(B), or to argue that Van Dina was therefore unavailable.

1279, 1322 n.29 (1997) ("Waiver will also occur when the trial objection, properly overruled, differs from that pressed on appeal." (emphasis omitted) (quoting A. Bowman, *Hawaii Rules of Evidence Manual* 7-9 (1990))); *accord State v. Winfrey*, No. 28737, 2009 WL 1144409, at *1 (Haw. Ct. App. Apr. 29, 2009) (citing *Vliet*, 91 Hawai‘i at 298-99, 983 P.2d at 199-200). *See generally State v. Moses*, 102 Hawai‘i 449, 456, 77 P.3d 940, 947 (2003) ("As a general rule, if a party does not raise an argument at trial, that argument will be deemed to have been waived on appeal; this rule applies in both criminal and civil cases." (citing other sources)); *accord Asato v. Procurement Policy Bd.*, 132 Hawai‘i 333, 354 n.22, 322 P.3d 228, 249 n.22 (2014) (citing *Moses*, 102 Hawai‘i at 456, 77 P.3d at 947).

This would normally be the end of the matter except that, while appellate courts "need not consider a point that was not presented in the trial court in an appropriate manner," they "may [also] correct any error appearing on the record" under the doctrine of *plain error*. Haw. Rev. Stat. § 641-2 (Supp. 2014); *see* Haw. R. App. P. Rule 28(b)(4) ("Points not presented in accordance with this section will be disregarded, except that the appellate court, at its option, may notice a plain error not presented."). *Cf. Matias*, 57 Haw. at 101, 550 P.2d at 904 (noting that, while the doctrine of plain error constitutes an exception to the general rule prohibiting appellate courts from considering grounds urged by a party that were not raised when the party made its initial objection below, but stating that plain error would not apply in the case at hand because admission of the evidence at issue depended on balancing probative value and prejudicial effect, which is the province of the trial court (citing *State v. Iaukea*, 56 Haw. 343, 349, 537 P.2d 724, 729 (1975)).

Appellate courts consider three factors to determine whether justice requires review of an issue not raised below for plain error: (1) "whether the issue is of great public import"; (2) "whether consideration of the issue . . . requires additional facts"; and (3) "whether its resolution will affect the integrity of the trial court's findings of fact." *In re Pub. Utils.*

Comm'n, 125 Hawai‘i 210, 218, 257 P.3d 223, 231 (App. 2011) (quoting *Okada Trucking Co. v. Bd. of Water Supply*, 97 Hawai‘i 450, 458, 40 P.3d 73, 81 (2002)) (explaining that courts should only invoke the doctrine of plain error "sparingly" in civil cases)*; see also Liftee v. Boyer*, 108 Hawai‘i 89, 98, 117 P.3d 821, 830 (App. 2004) (declining to exercise plain error review where one of the three *Okada* factors was not present).

Here, plain error review is unwarranted. First, the issue presented is not one of "great public import" because the exclusion of Van Dina's deposition testimony did not affect the public interest. *Alvarez Family Trust v. Ass'n of Apartment Owners of Kaanapali Alii*, 121 Hawai‘i 474, 491, 221 P.3d 452, 469 (2009) ("[I]n civil cases, an issue is of 'great public import' for the purposes of plain error review only when such issue affects the public interest.").[9] Second, the parties conceded that Noguchi never established "unavailability" of the deposition witnesses pursuant to HRE Rule 804(a), so "consideration of the issue not raised at trial requires additional facts." *Liftee*, 108 Hawai‘i at 98, 117 P.3d at 830; *cf.*, *State v. Lee*, 83 Hawai‘i 267, 925 P.2d 1091 (1996) (finding that prosecution's speculation about difficulty of locating witness did not relieve it of its obligation to attempt to show legal "unavailability"). Third, in this case, resolution of the non-raised issue (i.e., by ruling that the deposition testimony should have been admitted under HRE Rule 804(b)(1)) is unlikely to "affect the integrity of the [jury]'s findings," *Liftee*, 108 Hawai‘i at 98, 117 P.3d at 830, but only because, as explained below, the testimony was redundant. Consequently, Noguchi was not prejudiced by its exclusion, and plain error review is unwarranted.

[9/] *Compare Montalvo v. Lapez*, 77 Hawai‘i 282, 291, 884 P.2d 345,354 (1994) (holding that the court's failure to instruct the jury on the correct meaning of an element was so essential as to threaten the integrity of our jury system); *and Fujioka v. Kam*, 55 Haw. 7, 9, 514 P.2d 568, 570 (1973) (constitutionality of a statute was a matter of "great public import"); *and Kobashigawa v. Silva*, 126 Hawai‘i 62, 66, 266 P.3d 470, 474 (App. 2011) (trial court's "incorrect statement of the law in its instruction to the jury" was an issue of great public import), *aff'd*, 129 Hawai‘i 313, 300 P.3d 579 (2013); *with Cnty. of Haw. v. C & J Coupe Family Ltd. P'ship*, 124 Hawai‘i 281, 305, 242 P.3d 1136, 1160 (2010) ("Whether the court correctly valued the property in Condemnation 2 is not of general public importance.").

B. Even if the circuit court erred in excluding the hearsay evidence, any error in doing so was harmless because Noguchi experienced no prejudice as a result.

The majority notes that Van Dina testified in his deposition that, if AIU had timely received notice of the IRS subpoena in May 2008 instead of February 2009, "AIU would still not have covered Pflueger because a Grand Jury subpoena is not a 'claim' within the meaning of the AIU policy." Based on this, the majority concludes that, "[b]y excluding the[deposition] testimony, the circuit court disregarded rules or principles of law to Noguchi's substantial detriment."[10] However, even if the circuit court erred in sustaining Pflueger's objection and excluding Van Dina's deposition testimony, I would still hold that the error was not prejudicial where the relevant details from that testimony were put before the jury through other admitted evidence. *See State v. Rivera*, 62 Haw. 120, 128, 612 P.2d 526, 531-32 (1980) ("[E]ven where error occurs, there will be no reversal where on the record as a whole, no prejudice to appellant has resulted." (citing *Kekua v. Kaiser Found. Hosp.*, 61 Haw. 208, 218, 601 P.2d 364, 371 (1979))).

Indeed, "[e]ven an erroneous exclusion of relevant evidence does not necessarily call for reversal of the trial court, if no prejudice results[; a]nd where essentially the same evidence is given by other witnesses or other means, the trial court's exclusion of the relevant evidence consitutes harmless error." *Wakabayashi v. Hertz Corp*., 66 Haw. 265, 272, 660 P.2d 1309, 1314 (1983) (citing *Kekua*, 61 Haw. at 218–19, 601 P.2d at 371); *see also Ching v. Valencia*, No. 27331, 2008 WL 3919892, at *1 n.12 (Hawai‘i Aug. 27, 2008) (citing HRS § 641-16 (1993); *State v. Rivera*, 106 Hawai‘i 146, 165-66, 102 P.3d 1044, 1063-64

[10/] Furthermore, although the majority observes that Ngeo testified in her deposition that she agreed with Van Dina's opinion "that there's no claim," Ngeo's referenced testimony appears irrelevant to the argument since the circuit court ruled initially, before subsequently granting Pflueger's hearsay objection, that any potential Ngeo testimony would be limited to the AIU corporate structure because Ngeo had not reviewed the Pflueger submission contemporaneously with Van Dina. Thus, Ngeo would not have been permitted to offer the referenced testimony.

Noguchi does not address Pflueger's harmless error/cumulative argument. The majority states that Van Dina and Ngeo's testimonies "directly contradict" the claim.

(2004), *abrogated on other grounds by State v. Maugaotega*, 115 Hawai‘i 432, 168 P.3d 562 (2007); and *Wakabayashi*, 66 Haw. at 272, 660 P.2d at 1314). Here, Noguchi's own expert, Schratz, testified that he had reviewed Van Dina's letter in addition to his review of the deposition transcripts.[11] The majority recognizes that Schratz's testimony referenced Van Dina's conclusion—that AIU would not have recognized the grand jury subpoenas as a claim under the Policies even if they were submitted at the time that Pflueger submitted them to Noguchi—and concludes that AIU still would have been incorrect in denying coverage on that basis.

It is not clear why Schratz's testimony, which describes and discusses Van Dina's conclusion, "does not adequately substitute [for] the testimony likely to have been provided by Van Dina . . . [and] is insufficient to render the exclusion of Van Dina's . . . testimon[y] as non-prejudicial" merely because it criticizes Van Dina's conclusion. Moreover, Noguchi's defense depended on Schratz's conclusion that Van Dina was wrong and on other exhibits establishing that AIU would likely have denied coverage regardless of when Pflueger tendered the subpoenas. Indeed, these facts arose multiple times throughout the trial. So too did the fact that the circuit court made a pre-trial ruling that the grand jury subpoenas were claims under the Policies. Therefore, since the sum of that evidence was already before the jury, I would hold that Noguchi was not prejudiced by the trial court's decision to exclude the proposed designations from Van Dina's deposition testimony.

Based on the foregoing, I would affirm the circuit court's July 11, 2014 Amended Final Judgment as to All Claims and All Parties.

Associate Judge

[11] Specifically, during Schratz's trial testimony, he confirmed that he reviewed the Van Dina and Ngeo depositions and that his opinions were based on those depositions.