DISSENTING OPINION OF RAMIL, J.

I respectfully dissent because I disagree that the allegations concerning the factual basis for our determination that Dr. McCurdy was grossly negligent are not also law of the case. As noted by the majority, "the disputed passage . . . examines whether there was sufficient evidence to support a finding of liability for punitive damages." Majority at 14. This court concluded that "there was an abundance of clear and convincing evidence" for the jury to find Dr. McCurdy grossly negligent. Ditto v. McCurdy, 86 Hawai'i 84, 92, 947 P.2d 952, 960 (1997) [hereinafter Ditto I]. In the absence of an affirmance by this court that the facts as determined by the jury are clearly erroneous, this court could not have properly determined that the plaintiff is entitled to punitive damages. Cf. Ditto I, 86 Hawai'i at 92, 947 P.2d at 960 ("We hold, therefore, that the trial court properly allowed the issue of punitive damages to be considered by the jury and that the jury did not abuse its discretion in making the award.") Thus, the factual basis for this court's conclusion must also be law of the case.

The Georgia Court of Appeals decided a case similar to the present case. In Kent v. A.O. White, Jr. Consulting Engineer, P.C., 238 Ga. App. 792, 520 S.E.2d 481 (1999) [hereinafter Kent I], the Court of Appeals held that "Kent was liable in some amount of punitive damages, which [was] conclusive

of the issue of liability for punitive damages in some amount and [could not] be re-litigated." Kent v. A.O. White, Jr. Consulting Engineer, P.C., 2002 WL 109341, at *1 (Ga. App. Jan. 29, 2002) [hereinafter Kent II]. Thus, the court "returned the case for jury determination of the amount of punitive damages to be awarded in the enlightened conscience of fair and impartial jurors." Id. After the re-trial, Kent appealed to the Court of Appeals, arguing that "the trial court erred in reading to the jury a portion of the [appellate court's] opinion in explaining and limiting the issues that they were to decide on the re-trial." Id. The court reasoned that

> In this case, the trial court read the law and facts to the jury from the [sic] this Court's prior opinion as determined applicable for this case and thus, limited and defined this jury's special duties and responsibility on retrial of damage issues only. The reading from this Court's opinion defined for the jury what their limited role would be and did not involve facts that they were to decide in this new trial . . . .

Thus, the court rejected Kent's argument, and held that "[t]o charge the jury on the law, and even the facts, as affirmed on appeal is not reversible error where such facts have been precluded from re-litigation under the law of the case." Id.

The present case is entirely analogous to the case before the Georgia Court of Appeals. The trial judge read the law and the facts to the jury from this court's prior opinion, which limited the jury's role on remand to determination of the amount of punitive damages owed. This court's prior opinion thereby precluded re-litigation of the facts, and thus also

became law of the case. Accordingly, as reasoned in Kent II, the trial court's reading of the law and the facts from this court's prior opinion does not constitute reversible error.

I also note that even without characterizing the facts as law of the case, this court cannot properly hold that the trial court erred. This is because, assuming that the disputed passage does not conclusively establish the facts of the case, the trial court's recitation to the jury did not present the allegations any differently than we did in our opinion. In fact, the trial court emphasized that the facts may not have been conclusively established. The trial court stated, "And so at this time, the Court will read from page 92 of the [Supreme] Court's decision, a limited passage relating to the circumstances, the factual bases that could have -- the facts which could have provided the factual basis for the punitive damage award." See majority at 6 (emphasis added). In reading the passage, the trial court quoted our opinion verbatim: "For example, there was substantial evidence produced at trial, which, if believed, revealed that the medical history portion of Dr. McCurdy's consultation was woefully inadequate." See majority at 7 (emphasis added). Thus, the majority's characterization directly contradicts the majority's interpretation that "the disputed passage in Ditto I did not conclusively establish that the allegations were true . . . ." majority at 16; see also id. at 15 ("This court did not expressly

affirm a finding that all of the allegations discussed had in fact occurred, or, for that matter, that any particular allegation discussed had occurred."). It is inconceivable how on one hand, the passage does not conclusively establish the allegations as true, but on the other hand, reading the passage to the jury does.

Furthermore, the majority improperly relies on Ditto's use of the passage to find error with the trial court's taking of judicial notice. See majority at 17 ("[T]he trial court erred in . . . permitting Ditto to present the evidence in that discussion as conclusively determined facts."). Whether the court erred in permitting Ditto to present the disputed passage as conveying conclusively determined facts is not an issue on appeal, nor was there even an objection voiced at the trial. Interestingly, the majority conceded that "[i]n a broad sense, then, HRE Rule 202(b)(1) mandates that the trial court was required to take judicial notice of Ditto I." Majority at 18. An alleged subsequent misuse of the dispute passage does not discharge the trial court from its initial and separate duty to take judicial notice.

Finally, it is difficult to argue that the excerpt did not adequately place the facts in context. In fact, before the court read the passage to the jury, the trial counsel for Defendant stated, "I don't object to the specific passage. I object to the reading of anything; but if something is going to

be read, I have no objection to that passage." Tr. 6/3/99 at 104.

Accordingly, I would hold that the trial court did not err in taking judicial notice of our opinion in Ditto I.