***** FOR PUBLICATION *****

CONCURRING AND DISSENTING OPINION BY ACOBA, J.,
WITH WHOM CIRCUIT JUDGE CHAN JOINS

I respectfully dissent to the majority's decision to "overrule the holding of Salavea v. City & County of Honolulu, 55 Haw. 216, 221, 517 P.2d 51, 54-55 (1973)[.]"[1] Majority opinion at 4. The effect of the decision is to abrogate, without a showing of compelling justification, a thirty-year rule of law establishing that tort claims against a county are subject to the two-year statute of limitations set forth in Hawai'i Revised Statutes (HRS) § 662-4 of the State Tort Liability Act (STLA). The decision reinstates HRS § 46-72, which, under Salavea, was superceded by HRS § 662-4. 55 Haw. at 220, 517 P.2d at 54. The consequence of overruling Salavea is to raise questions with respect to the status of existing and pending claims and to wreck havoc with future claims, which would have been governed by the two-year limitations period until the case at hand.

With all due respect, the majority's holding ignores prudential and pragmatic considerations against reversing Salavea as well as the great weight to be accorded the legislature's acquiescence in the Salavea rule. While I agree that the statute of limitations on the claim of plaintiff-appellant Brandzie Kahale (Brandzie) is tolled, and that the claims of plaintiffs-

[1] Salavea involved a claim against the City and County of Honolulu. "City" and "county" are used interchangeably as they relate to Honolulu.

appellant Francis Kahale, Jr. and Rachel Kahale (collectively the Plaintiffs) are barred, I reach these conclusions on different grounds, and in consonance with long held precedents.

I.

First, it is worth noting that both parties maintain that Salavea should not be overturned and that HRS § 46-72 should not be reinstated as the applicable statute of limitations for the counties.[2] The Plaintiffs posit that HRS § 662-4 effectively creates a six month statute of limitations on claims against the City, which would "contradict the modern trend in American tort law of 'the steady eradication of sovereign immunity'." [PSB at 1](quoting Salavea, 55 Haw. at 220, 517 P.2d at 54). The Plaintiffs further explain that "the eradication of sovereign immunity of which the Court spoke in Salavea was the trend in 1973 when the opinion was written, and even now 31 years later that trend has not appeared to have been reversed." [PSB at 1]

Similarly, the City urges us not to overrule Salavea. It notes that we have stated that this court "should not depart from the doctrine of stare decisis without some compelling

[2] The parties did not challenge, on appeal or in the court below, that "HRS § 662-4 is the applicable statute of limitations" with respect to tort claims against the counties, as established in Salavea. 55 Haw. at 221, 517 P.2d at 54-55. As a general rule, legal issues not raised at trial are waived for the purposes of appeal. State v. Moses, 102 Hawai'i 449, 456, 77 P.3d 940, 947 (2003). By order of this court, the parties were required to file supplemental briefs to address the question of whether the holding of Salavea should be overturned.

justification," and that "there is no indication that circumstances warrant a reversal of Salavea," in the present case. The City further submits that "[i]f at all, the policy behind the statute of limitations require [sic] adherence to Salavea." [City SB at 9]

The City astutely points out a literal interpretation of HRS § 662-4 as only applying to the State and not to the City (such as that adopted by the majority), "does not end the analysis." [City SB at 9] The City maintains that this court has recognized that departure from a literal construction of a statute "is justified when such construction would produce an absurd and unjust result and the literal construction in the particular action is clearly inconsistent with the purposes and policies of the act." Franks v. City and County of Honolulu, 74 Haw. 328, 341, 843 P.2d 668, 674 (1993). The City declares that application of a six month statute of limitations under § 46-72 would produce "absurd and unjust results." Id. The City asserts this is because as the majority in Salavea noted, "it would be unreasonable to hold that a party's right to recover damages in tort from the City and County of Honolulu, a subdivision of the State, created by the legislature, is more restricted than [her or] his right to recover from the State itself." Salavea, 55 Haw. at 220, 517 P.2d at 54.

II.

Second and importantly, "[a]s a general rule, we do not lightly disregard precedent" for "great consideration should always be accorded precedent, especially one of long standing and general acceptance." State v. Jenkins, 93 Hawai'i 87, 112, 997 P.2d 13, 38 (2000)(citation omitted and emphasis added). Precedent is an "adjudged case or decision of a court, considered as furnishing an example of authority for an identical or similar case afterwards arising of a similar case of law. The policy of courts to stand behind precedent and not disturb settled points is referred to as the doctrine of stare decisis." Garcia, 96 Hawai'i 200, 205, 29 P.3d 919, 924 (2001) (citation, brackets, and internal quotation marks omitted) (emphasis added). Stare decisis "operates as a principle of self-restraint . . . with respect to the overruling of prior decisions. The benefit . . . is that it furnishes a clear guide for the conduct of individuals, . . . eliminates the need to relitigate every proposition in every case; and . . . maintains public faith in the judiciary as a source of impersonal and reasoned judgments." Id. at 205-06, 29 P.3d at 924-25 (citation, brackets, and internal quotation marks omitted).

This court has warned that "we should not change a case law just for the sake of change." McBryde Sugar Co., Ltd., v. Robinson, 54 Haw. 174, 180, 504 P.2d 1330, 1335 (1973). Although we have acknowledged that "there is no necessity or

sound legal reason to perpetuate an error under the doctrine of stare decisis," we have agreed "with the proposition expressed by the United States Supreme Court that a court should not depart from the doctrine of stare decisis without some compelling justification." Id. at 206, 29 P3d at 92S. (citation, brackets, and internal quotation marks omitted) (emphasis added). Hence, when "the court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."[3] Id. (citation, brackets, and internal quotation marks omitted).

A.

There is no such "compelling justification" to justify overruling Salavea in the present case. See majority opinion, p. 13, note 7 (providing examples of cases in which justification did exist for overruling precedent, based on the specific facts of each case). The majority claims the reasoning of the Salavea majority "is analytically bankrupt" and contends that such

[3] The majority states that this "dissent makes no attempt to defend Salavea's central premise." Majority opinion pp. 13 note 7. As to this point, the majority misses the mark. It is not this court's role to "defend" or retry cases that have previously been decided by this court. Rather what is at issue is the wisdom of overturning a prior judicial decision.

reasoning constitutes a "compelling justification" for overruling Salavea. Majority opinion at 13.[4] But in assessing "respective costs," the symmetry obtained by overruling Salavea is far outweighed by the detriment that results. Id. The detrimental effects of reinstating HRS § 46-72 and overruling Salavea are great.

Nullifying Salavea provides little benefit inasmuch as the concerns posed by the dissents of Justices Levinson and Marumoto[5] in the Salavea decision were answered in the subsequent case of Orso v. City & County of Honolulu, 56 Haw. 241, 247, 534 P.2d 489, 493 (1975). Orso held that only the limitations section of HRS § 662-4 applied to the city, and that there was "no valid reason to extend the applicability of any other provisions of HRS Chapter 662 to the [City]." Id. As such, the fears of the dissenters that Salavea would result in the extensions of "numerous . . . restrictions on liability" in HRS chapter 662, or in eliminating "jury trials" in tort suits

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[4] We note that this court has also said that precedent may be overruled "if unintended injury would result by following the previous decisions." Jenkins, 93 Hawai'i at 112, 997 P.2d at 38 (quoting Francis v. Lee Enters., Inc., 89 Hawai'i 234, 236, 971 P.2d 707, 709 (1999)(emphasis added). Thus, this court must not overrule precedent unless there is a "compelling justification," or to prevent "unintended injury." As discussed, the majority has not demonstrated the justification for overruling 30 years of established precedent.

[5] Specifically, Justice Levinson warned in his dissent that the STLA "contains numerous procedural and substantive restrictions on liability, which, if applicable to cities and counties, severely undercut the rights of private litigants in tort suits against these governmental subdivisions" Salavea, 55 Haw. at 222, 517 P.2d at 55 (Levinson, J., dissenting). Justice Marumoto feared the "serious consequence to one who has a tort claim against a county, for under STLA there can be no jury trial. Id. (Marumoto, J., dissenting).

against the counties never came to fruition. The perceived need, then, for revision of this court's holding in Salavea was eliminated, and reversing Salavea is a failure in the "pruden[t]" exercise of our discretion. Garcia, 96 Hawai'i at 206, 29 P.3d at 925.

On the other hand, pragmatic considerations counsel against overriding the case. Over thirty years of established precedent has "furnished a clear guide" for the courts, the counties, and the public as to the applicable statute of limitations for torts suits against the counties. Garcia, 96 Hawai'i at 205, 29 P.3d at 924. Abrogation of a statute of limitations relied on for thirty years places into question the status of existing and potential claims. Even if applied prospectively, the resulting upheaval will raise questions about the application and impact of such a rule. Reviving the counties' six-month notice requirement will bar potentially meritorious claims in the future, for persons who fail to bring their claims against the counties within six months will be deprived of their day in court.[6]

[6] The majority questions why overruling Salavea will wreck havoc. Majority opinion at 14. However, the various detrimental effects of reviving HRS § 46-72 are evident, as discussed herein. (i.e. noting that those who fail to bring their claims against the counties within six months will be deprived their day in court; the six month notice serves no real beneficial use, but acts as a trap for the unwary; the revival of HRS § 46-72 may violate the equal protection clause).

B.

Without doubt, the six-month limitation period of HRS § 46-72 invites untoward results. As explained in Salavea, "the notice requirements of the Charter of the City and County of Honolulu set forth a limitations period much shorter than that in HRS § 662-4." Salavea, 55 Haw. at 218, 517 P.2d at 53. Specifically, HRS § 46-72 effectively bars any claims for personal or property injuries if the claimant does not notify the City of such a claim within "six months." This court explained that HRS § 46-72 and Section 12-106 of the Charter of the City and County of Honolulu both involve notice of claim requirements which this court decided "operate[], in reality, as . . . statute[s] of limitations." Id. In describing the harsh effect of a similar six-month notice requirement, the Supreme Court of Nevada observed that the notice "statutes serve no real beneficial use but they are indeed a trap for the unwary." Turner v. Staggs, 89 Nev. 230, 235 (1973).

C.

Additionally, the doctrine of stare decisis carries "special force" in the present case. Garcia, 96 Hawai'i at 206, 29 P.3d at 925. For, "unlike in the context of constitutional interpretation," when "statutory interpretation" is involved, (as in this case, the interpretation of HRS § 662-4 and HRS § 46-72,) the "legislature remains free to alter" what this court has done.

Id. The legislature was free to amend the statutes and, thus, to effectively overrule Salavea, but has never done so in the thirty years since Salavea was decided.

Instead, the legislature has left the two-year statute of limitations rule from HRS § 662-4 intact. In doing so, the legislature has implicitly acquiesced to this court's application of 662-4 to the counties. As this court has said, "'where the legislature fails to act in response to our statutory interpretation, the consequence is that the statutory interpretation of the court must be considered to have the tacit approval of the legislature and the effect of legislation.'" Ross v. Stouffer Hotel Co., 76 Hawai'i 454, 458, 879 P.2d 1037, 1041 (1994) (quoting State v. Dannenberg, 74 Haw. 75, 83, 837 P.2d 776, 780 (1992)).

Against this background, the majority claims that "the legislature's amendment of HRS § 46-72 in 1998 would have acted as an 'implied reenactment' of [HRS § 46-72]." Majority opinion at 13. However, Act 124, did not make any significant substantive changes to HRS § 46-72. Instead its purpose was to amend several of the "Hawai'i Revised Statutes,[7] for the purpose of "replac[ing] references to county boards of supervisors with references to the council of each county" and other minor stylistic changes, such as changing the term "chairman" to

[7] In addition to making the aforementioned stylistic changes to HRS § 46-72, Act 124 also included similar changes to the following statutes: HRS § 54-52, HRS § 54-54, HRS § 54-59, HRS § 54-61, HRS § 54-64, HRS § 88-185, and HRS § 105-7.

"chairperson". See Hse. Conv. Comm. Rep. No. 86, in 1998 House Journal, at 985; 1998 Haw. Sess. L. Act. 124, § 1 at 479. Thus to claim that Act 124 had impliedly addressed the substantive content of HRS § 46-72 is inaccurate.

On the other hand, the legislature has never disturbed the rule established by Salavea "that HRS § 662-4 is the applicable stature of limitations superceding HRS § 672." Since this rule's inception in 1973, there is nothing in legislative history to support the view that the legislature has diverged from the holding in Salavea that "the provisions of HRS § 46-72 are inconsistent with [HRS] § 662-4 and invalid." 55 Haw. at 219, 517 P.2d at 54.[8]

D.

Furthermore, such a reversal, unsupported by substantial justification, has a deleterious effect on the "public faith in the judiciary as a source of impersonal and reasoned judgements." Garcia, 96 Hawai'i at 205, 29 P.3d at 924. The subsequent case law that evolved from Salavea evidences that this court and the public "'have acted in reliance on [this] previous decision[.]'"[9] Id., at 206, 29 P.3d at 925. Thus,

[8] In this light, the present case is not resolved by reference to the legislature, as suggested by the majority. See majority opinion pp. 14-15 note 8. The legislature is free to amend any statute. The issue at hand is whether compelling justification exists for overruling Salavea.

[9] Several cases have relied upon and cited to Salavea. See Ruf. v. Honolulu Police Dept., 89 Haw. 315, 326 972 P.2d 1081, 1092 (1999); Hays v. City and County of Honolulu, 81 Haw. 391, 392, 917 P.2d 718, 719 (1996); (continued...)

"'overruling the decision [will] dislodge settled rights and expectations.'" Id. (quoting Hilton v. South Carolina Pub. Ry. Comm'n, 502 U.S. 197, 202 (1991) (positing that adherence to stare decisis has added force when the legislature and the citizens have acted in reliance on prior decisions) (brackets omitted). "In light of this history" that spans the last thirty years, I believe the majority has failed to "muster[] a 'compelling justification' for departing from the doctrine of stare decisis." Id. at 207, 29 P.3d at 926 (citing Hilton, 502 U.S. at 202).

III.

Inasmuch as the majority revives HRS § 46-72 by overruling Salavea, I believe it raises the potential question of whether HRS § 46-72 violates the equal protection clause of our constitution.[10] Under the equal protection doctrine, HRS § 46-72

[9](...continued)
Whittington v. State,72 Haw. 77, 78, 806 P.2d 957, 958 (1991); Cootey v. Sun Inv. Inc., 68 Haw. 480, 483, 718 P.2d 1086, 1089 (1986); First Ins. Co. of Hawai'i, Ltd. v. Int'l Harvester Co., 66 Haw. 185, 189, 659 P.2d 64, 67 (1983); Orso v. City and County of Honolulu, 56 Haw. 241, 247, 534 P.2d 489, 493 (1975); Kelley v. Kokua Sales and Supply Ltd., 56 Haw. 204, 209, 532 P.2d 673, 677 (1975); Sherry v. Asing, 56 Haw. 135, 142, 531 P.2d 648, 654 (1975).

[10] Article I, section 5 of the Hawai'i Constitution provides that:

> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.

"must satisfy either strict scrutiny or rational basis review. . . . Strict scrutiny is ordinarily applied where laws involve suspect classifications of fundamental rights, and rational basis review is traditionally applied in all other classifications." SCI Mgmt. Corp. v. Sims, 101 Hawai'i 438, 458, 71 P.3d 389, 409 (2003) (Acoba, J., dissenting). In cases similar to present one, "where suspect classifications or fundamental rights are not at issue, this court has traditionally employed the rational basis test." Id. "'Under the rational basis test, we inquire as to whether a statute rationally furthers a legitimate state interest. Our inquiry seeks only to determine whether any reasonable justification can be found for the legislative enactment." Id. (quoting Baehr v. Lewin, 74 Haw. 530, 571, 852 P.2d 44, 63 (1993)). HRS § 46-72 establishes a class of tort claimants and does not involve any of the "suspect classifications" protected by the Hawai'i Constitution. Id.

HRS § 46-72 creates a separate class of persons damaged by a tort committed by a municipal entity and who must give six months notice of their claim or else be barred from further action. HRS § 662-4 creates a separate class of persons damaged by a tort committed by a state entity and who must institute proceedings against the state within two years.[11] Application of

[11] In addition, a third class exists, namely victims of torts caused by private tort-feasors, as included under HRS § 657-7. The two-year statute of limitations under HRS § 657-7 applies to all "[a]ctions for the recovery of compensation for damage or injury to persons or property[.]" Thus, claimants of torts caused by private entities must institute proceedings (continued...)

HRS § 46-72 and HRS § 662-4, then, results in two separate classes of aggrieved parties. But those persons injured by torts committed by the county are far more limited in their ability to seek redress under HRS § 46-72, for they are faced with a six-month statute of limitations as opposed to a two-year statute.

Under HRS § 46-72, then, persons are subject to the shorter and, accordingly, harsher limitation period on the mere fact that it was the county, and not a state entity that committed the tort against them. It is not rational that the legislature would, on the one hand, place the state on equal footing with private tortfeasors who are subject to a two-year statute of limitations, see supra note 11, but on the other hand, extend to municipalities a much shorter statute of limitations. The justifications for notice of claim provisions, which operate as "statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. Statutes of limitations attempt to protect against the difficulties caused by lost evidence, faded memories and disappearing witnesses.'" Eto v. Muranaka, 99 Hawai'i 488, 499, 57 P.3d 413, 424 (2002) (quoting Shin v. McLaughlin, 89 Hawai'i 1, 6, 967 P.2d 1059, 1064 (1998)) (brackets omitted).

In light of such purpose, no rational basis exists for

[11](...continued)
within two years. Although not relevant under the equal protection analysis, this third class further illustrates the arbitrary nature of HRS § 46-72.

subjecting claimants to two unequal, separate classifications on the basis of whether the tort was committed by a municipality as opposed to the State. As such, HRS § 46-72 arbitrarily subjects claimants of municipal torts to a six-month limitations period, while the claimants of state torts do not suffer from the same bar. Whereas no "'reasonable justification'" can explain why the county notice claim provision should not, at a minimum, equal that of the State, it cannot pass the "'rational basis'" test as required under the equal protection clause of our constitution. SCI, 101 Hawai'i at 458, 71 P.3d at 409 (quoting Baehr, 74 Haw. at 571, 852 P.2d at 63).

IV.

It was not necessary for the majority to reverse Salavea to reach the same result in the present case. This case should be decided on the following established case law.

On appeal, Plaintiffs emphasize that this action is brought against the City pursuant to HRS § 657-7 (1993). [OB at 4.] HRS § 657-7 states in its entirety that "[a]ctions for the recovery of compensation for damage or injury to persons or property shall be instituted within two years after the cause of action accrued, and not after, except as provided in section 657-13." (Emphasis added.) HRS § 657-13 states, in pertinent part, as follows:

> If any person entitled to bring any action specified

> in this part[12] . . . is, at the time the cause of action accrued, . . . :
>
> (1) Within the age of eighteen years; . . .
>
> . . . .
>
> such person shall be at liberty to bring such actions within the respective times limited in this part, after the disability is removed or at any time while the disability exists.

(Emphases added.) Plaintiffs claim that the court erred in ruling that the statute of limitations on Plaintiffs' claims was not tolled by HRS § 657-13(1). [OB at 2.]

The two-year limitation period in the STLA, HRS § 662-4, was held applicable to the City in Salavea. In Salavea, a minor and his parents sued the City for injuries sustained by the minor. 55 Haw. at 216, 517 P.2d at 52. The City moved for summary judgment pursuant to Section 12-106 of the Charter of the City and County of Honolulu and HRS § 46-72,[13] claiming that the plaintiffs had failed to comply with the six-month notice requirement, barring the suit. Id. at 216-17, 517 P.2d at 52-53. This court disagreed, deciding that HRS § 662-4 superceded HRS § 46-72 and Section 12-106 of the Honolulu Charter. Id. at 219-21, 517 P.2d at 54-55. It was reasoned that the STLA was "a law of general application throughout the State of Hawai'i on a matter of state-wide interest and concern," while Section 12-206 of the Honolulu Charter was "not a provision affecting the

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[12] This refers to Part I, entitled "Personal Actions," of Chapter 657, entitled "Limitations of Actions," under Title 36 of the Hawai'i Revised Statutes, entitled "Civil Remedies and Defenses and Special Proceedings."

[13] HRS § 46-72 and Section 12-106 of the Charter of the City and County of Honolulu both involve notice of claim requirements which this court decided "operates, in reality, as a statute of limitations." Salavea, 55 Haw. at 218, 517 P.2d at 53.

organization or governmental structure of the City and County," and, therefore, HRS § 662-4 was the applicable statute. Id. at 219, 517 P.2d at 53-54. This court also held that because HRS § 662-4 was enacted after HRS § 46-72, it impliedly repealed § 46-72 and was the controlling statute. Id. at 219, 517 P.2d at 54.

Applying the precepts of Salavea, two years expired before Francis and Rachael filed claims on their own behalf for loss of consortium and infliction of emotional distress; thus those claims are barred by the two-year statute of limitations. The derivative claims filed by Francis and Rachael are considered separate, procedurally, from the underlying claim. See Yamamoto v. Premier Ins. Co., 4. Haw. App. 429, 435, 668 P.2d 42, 48 (1983) (indicating that wife's derivative claim for damages is separate from her spouse's tort claim); see also Terry v. Sullivan, 58 P.3d 1098, 1102 (Colo. Ct. App. 2002) (permitting tolling for an inmate's claim while incarcerated, but disallowing tolling for the loss of consortium claim of the inmate's wife, who was free to file suit within the limitations period); Elgin v. Bartlett, 994 P.2d 411, 416 (Colo. 1999) (recognizing tolling provisions for a child in a medical malpractice suit, but barring the loss of consortium action of the child's parents due to the running of the statute of limitations).

Since Francis and Rachael suffered no disability with regard to their claims, their action is not tolled. See Emerson v. Southern Ry. Co., 404 So. 2d 576, 580 (Ala. 1981) (setting

forth that a parent's or spouse's loss of consortium action will not enjoy tolling applicable to the originating action); see also Smith v. Long Beach City Sch. Dist., 276 A.D.2d 785, 785, (N.Y. App. Div. 2000) (dismissing parents' negligent infliction of emotional distress claims as time barred and indicating that "the infancy toll is personal to the infant and does not extend to the parents' derivative claims."). Accordingly Francis' and Rachael's claims are barred by the statute of limitations.

The only issue remaining, then, is whether the limitations statute is tolled with respect to the claim brought on behalf of Brandzie.

V.

Subsequent to the Salavea decision, in Orso, this court decided it was pertinent to determine, in light of Salavea, whether an action brought against the City would be subject to other provisions of the STLA. 56 Haw. at 247, 534 P.2d at 493. In Orso, an action was brought against the City for defamation of character, false arrest, false imprisonment and malicious prosecution. Id. It was held, pursuant to Salavea, that the limitations section in HRS § 662-4 was applicable to the City, but there was "no valid reason to extend the applicability of any other provisions of HRS Chapter 662 to the [City.]" Id.; see also Breed v. Shaner, 57 Haw. 656, 660, 562 P.2d 436, 439 (1977) (holding, pursuant to Orso, that the rule in Salavea is limited

only to the applicability of HRS § 662-4 to the City, and is "not authority to support a total extension of the [STLA] to the County").

Later, in Whittington, this court ruled that "the extension for minors allowed in HRS § 657-13 is not applicable to actions against the State brought under Chapter 662." 72 Haw. at 78, 806 P.2d at 958. It was observed that the STLA was modeled on the federal act, and that "[f]ederal cases have refused to recognize minority tolling in federal tort actions." Id. at 78, 806 P.2d at 957. Federal statutes contain a six-year statute of limitations with express minority tolling for actions other than those based in tort, and there is no express minority tolling for tort claims. Id. Similarly, the HRS expressly allow for minority tolling for non-tort claims against the State, but the STLA does not. Id.

The City argues that the instant case involves a tort claim against the City, which, according to Salavea, is governed by the limitations section in the STLA, [AB at 4 (citing Orso, 56 Haw. at 247, 534 P.2d at 493,)] and that under the reasoning in Whittington, HRS § 657-13 does not apply to an action against the City. [AB at 4 (citing Whittington, 72 Haw. at 78, 806 P.2d at 958.)] But in Whittington, it was concluded that "[a]ctions brought under HRS Chapter 662 however, are not actions specified in Part I of Chapter 657, and accordingly, the extension for minors allowed in HRS § 657-13 is not applicable to actions

against the State brought under Chapter 662 and HRS § 662-4 bars this suit." Id. at 78, 806 P.2d at 958 (emphasis added).

Thus, by its terms, the holding in Whittington concerned a claim raised against the State and not against the City. Hence, Whittington is not dispositive. Rather, as Plaintiffs contend, "[a]bsent any law expressly extending not only the [STLA]'s two year statute of limitations, but also its [(HRS § 662-4)] proscription against tolling, to the counties, the [court] should not have [granted summary judgment] in this case[]" with respect to Brandzie's claims. [OB at 5.]

VI.

In federal cases, it is well established that the limitations period under the Federal Tort Claims Act (FTCL) is not tolled during a claimant's minority. See Papa v. United States, 281 F.3d 1004, 1011 (9th Cir. 2002); Macmillan v. United States, 46 F.3d 377, 380 (5th Cir. 1995); Zavala ex rel. Ruiz v. United States, 876 F.2d 780, 783-84 (9th Cir. 1989); Landreth ex rel. Ore v. United States, 850 F.2d 532, 534 (9th Cir. 1988); Robbins v. United States, 624 F.2d 971, 972 (10th Cir. 1980); Pittman v. United States, 341 F.2d 739, 741 (9th Cir. 1965); Brown v. United States, 353 F.2d 578, 579 (9th Cir. 1965). In Pittman, a nine-year old child had been struck by a Naval motor vehicle on a Navy installation. See Pittman, 341 F.2d at 740. In view of the absence of a minority tolling provision in the

FTCA, the plaintiff argued that "to deprive [minors] of rights (because of the possibility that no adult will initiate proceedings) violates due process and equal protection[.]" Id. at 741. The Ninth Circuit concluded, however, that the FTCA did not permit such dispensation.

> We think that the concept still adheres that the Federal Tort Claims Act was a waiver of government immunity. There are decisions that say that the act should be liberally construed. We think that may be true as to what injuries are within the act. But as to time, one can see that the Congress was alarmed about stale claims when it passed the Act and provided that there should be only a period of one year during which an action could be brought. (This was later changed to two years.) This is because of the big thing that government is and because of its difficulty in meeting stale claims . . . . We do not believe that the Congress could have intended that infants have up to 21 years for a statute of limitations.

Id. The Eleventh Circuit Court of Appeals explained in Maahs v. United States, that, under the statute of limitation of the FTCA, "the very right to sue evaporates" after the two-year limitation period. 840 F.2d 863, 866 n.4 (11th Cir. 1988). It was said that the principal distinction between the two-year limitation period in the FTCA and other limitations statutes is that the FTCA created a previously non-existent right to sue the government in tort. See id.

The STLA was adopted in 1957. See 1957 Haw. Sess. L. Act. 312, at 384. The legislative history of the Act does not offer insight as to the absence of a minority tolling provision in actions against the State. However, the STLA is modeled on the FTCA. See Rogers v. State, 51 Haw. 293, 296, 459 P.2d 378, 381 (1969). Therefore, the reasoning attributed to Congress for

not including a minority tolling provision in the FTCA may be imputed to the Hawai‘i legislature in light of its enactment of the STLA with respect to State claims. Cf. Helbush v. Mitchell, 34 Haw. 639, 648 (1938) ("It is a generally accepted rule of statutory construction that where the legislative body adopts a law of another State all changes in words and phraseology will be presumed to have been made deliberately and with a purpose to limit, qualify or enlarge the adopted law to the extent that the changes in words and phrases imply.")

The lack of a minority tolling provision in the FTCA and the STLA is justified by sovereign immunity. In adopting the acts, Congress and the State legislature, respectively, waived immunity that they were not required to waive. The lack of a minority tolling provision in these acts, then, is a retention of immunity to that extent.

VII.

As indicated, supra, the rationale precluding minority tolling under federal and state tort liability acts rests largely in sovereign immunity doctrine. It was established in Kamau v. County of Hawai‘i, 41 Haw. 527, 552 (1957), that a municipality, such as Defendant, is not entitled to sovereign immunity.

Prior to 1957, the Supreme Court of the Territory of Hawai‘i followed the general rule that a municipality was immune from tort liability for actions involving governmental functions,

but not immune for those arising out of its private or corporate functions. See id. at 528. With no bright line method of determining which municipal functions were "governmental" and which were "private," "cases [were] in hopeless confusion and even in the same jurisdiction often impossible to reconcile." Mark v. City and County, 40 Haw. 338, 340 (1953). For example, in determining the City's liability for an accident involving a garbage truck, a distinction was made between the removal of "wet garbage" and "rubbish," the former being designated a governmental function and the latter a non-governmental one. Make v. City and County, 33 Haw. 167, 179 (1934).

In Kamau, the Supreme Court of the Territory of Hawai'i overturned six previous decisions that had adhered to the dichotomy drawn between governmental and private functions. The territorial court held that "where [a municipality's] agents are negligent in the performance of their duties so that damage results to an individual, it is immaterial that the duty being performed is a public one from which the municipality derives no profit or that it is a duty imposed upon it by the legislature." 41 Haw. at 552.

Relevant to this case, the Kamau decision established that a municipality does not enjoy the sovereign immunity that the State does. Quoting Justice Holmes in Kawananakoa v. Polybank, 205 U.S. 349 (1907), the Kamau court affirmed the principle that "[a] sovereign is exempt from suit, not because of

any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kamau, 41 Haw. at 538. It was pointed out that "[t]he immunity of the sovereign State rests on the doctrine that the State which makes the laws is immune to suit, but no such reasoning can be indulged in on behalf of a municipal corporation." Id. at 542. Consequently, because the City is a municipal corporation, see Revised Charter of Honolulu § 1-101 (2000) ("The people of the City and County of Honolulu shall be and continue as a body politic and corporate by the name of 'City and County of Honolulu.'"), it is not entitled to the sovereign immunity inhering in the State.

VIII.

A.

Whereas the City is not protected by sovereign immunity, it is subject, like any other tortfeasor, to tort laws. See Kaczmarczyk v. City and County of Honolulu, 65 Haw. 612, 614-17, 656 P.2d 89, 91-94 (1982) (determining that alleged tort victim was entitled to present its case against the City, even though the same claim was dismissed against the State); see also, Wong v. Hawaiian Scenic Tours, Ltd., 64 Haw. 401, 403-06, 642 P.2d 930, 931-33 (1982) (per curium) (permitting recovery from tortfeasor City and County of Honolulu); Littleton v. State and

City and County of Honolulu, 66 Haw. 55, 67-68, 656 P.2d 1336, 1344-46 (1982) (applying traditional tort analysis to a claim against the City). The City, then, is subject to the provisions of HRS § 657-7, which pertain generally to actions for personal injury. Correlatively, the tolling provisions in HRS § 657-13 would apply to the City as it would in an action involving any other alleged tortfeasor for personal injury brought pursuant to HRS § 657-7.

B.

The tolling provision for legal disability, which includes statute of limitations exceptions for infancy, insanity, and imprisonment, has been a part of Hawai‘i state law since 1859.[14] HRS § 657-13 reflects public policy favoring minority tolling. In enacting this statute, the legislature adopted a policy of treating minors as a "protected class for purposes of extending the time limitation of their right to bring suit." Gorospe v. Matsui, 72 Haw. 377, 381, 819 P.2d 80, 82 (1991) (discussing the rationale for enacting HRS § 657-13). As noted in the legislative history of HRS § 657-7, under which this claim is brought, "the two-year statute of limitations should not properly run against an infant, an insane person or a person in prison during the period of his disability but that the statute should toll during such disability, as in other cases." Sen.

[14] HRS § 657-13 was originally § 1039 of the 1859 Hawai‘i Civil Code.

Stand. Com. Rep. No. 835, in 1957 House Journal, at 877. This court, in Hun v. Center Props., examined HRS § 657-13 and affirmed that "it is the role of the courts to protect the interests of minors who become parties to litigation." 63 Haw. 273, 283, 626 P.2d 182, 189 (1981).

Therefore, the minority tolling provision of HRS § 657-13 tolled the running of the two-year statute of limitations as to Brandzie's claims and, thus, such claims could have been brought at any time during her minority, see HRS § 657-13, as happened here.

IX.

Inasmuch as (1) the concerns expressed by the Salavea dissents have been eliminated by Orso,(2) there is no "compelling justification" for overruling thirty years of established precedent, Garcia, 96 Hawai'i at 205, 29 P.3d at 924, (3) the potential harm caused by overruling Salavea is great, (4) the revival of HRS § 46-72 raises serious questions of equal protection violation, and (5) the same result may be reached on existing precedents, I respectfully dissent with the majority's rationale and overruling of Salavea. On the grounds previously stated, I would (1) affirm the court's September 29, 2000 summary

judgment order and its November 9, 2000 final judgment as to the claims brought by Francis and Rachael and (2) vacate the summary judgment order and judgment as to the claims brought on behalf of minor Brandzie and remand such claims for further proceedings.