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

CONCURRING AND DISSENTING OPINION BY ACOBA, J.

In determining that (1) the policies of discouraging abusive litigation practices, encouraging settlement, reinforcing the finality of judgments, and limiting collateral attacks upon judgments, see majority opinion at 19-23, 25-30, militate against an extension of the litigation privilege,[1] and (2) as a result, Hawai‘i law does allow a subsequent, independent action for fraud based upon litigation misconduct in a prior, related action, see majority opinion at 31, the majority has adopted the position I had set forth as to certified questions one and two; therefore, I set out my position in detail.[2]

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[1] This jurisdiction has recognized a litigation privilege in libel actions. In Ferry v. Carlsmith, 23 Haw. 589 (1917), this court adopted a litigation privilege and held that "attorneys, in the conduct of judicial proceedings, are privileged from prosecution for libel or slander in respect to words or writings, used in the course of such proceedings, . . . when such words and writings are material and pertinent to the question involved." Id. at 591; see also Abastillas v. Kekona, 87 Hawai‘i 446, 447, 958 P.2d 1136, 1137, (noting that the Intermediate Court of Appeals affirmed the circuit court's granting of summary judgment of a libel action against an attorney "in connection with his [prior] representation . . . on the basis of absolute immunity"), reconsideration denied, (1998).

Defendant E.I. du Pont de Nemours & Company argues that this court should expand its application of the litigation privilege to preclude a suit based upon litigation misconduct in a prior case. Following this reasoning, if the litigation privilege were to be applied in the instant case, this suit, which is based upon litigation misconduct that occurred in a prior suit, would be prohibited. Conversely, if the litigation privilege is held not to apply, a subsequent suit may proceed.

[2] As a matter of policy, and with all due respect, when a separate position is already written, but later adopted by the majority, it would appear self-evident and of accepted practice that the separate opinion announce the majority opinion. Any other course only results in unnecessary delay as the majority incorporates the separate position into a new or previously written opinion. Inasmuch as the resulting delay, which can be substantial, impacts the parties and our disposition of cases, I cannot agree with a procedure that results in such delay. Cf. State v. Yamada, 99 Hawai‘i 542, 557, 57 P.3d 467, 482, (Acoba, J., concurring) ("Inasmuch as the majority agrees with and has adopted my position that the court's Special Instruction No. 1 was erroneous, I set out my position in detail."), reconsideration denied, 100 Hawai‘i 295, 59 P.3d 930 (2002); State v. Faria, 100 Hawai‘i 383,

(continued...)

In my view, where matters relevant to prior litigation procedures were concealed to fraudulently induce settlement of a case, the injured party is entitled to bring an independent post-settlement action for fraud. This rule is consistent with recent decisions, reason, and policy. Accordingly, I would answer the first and second certified questions in the negative.[3]

As to the first certified question, I believe (1) four policy concerns underlying the litigation privilege favor affording Plaintiffs a separate action for fraud, (2) Hawai‘i Rules of Civil Procedure (HRCP) Rule 60(b)(3) relating to fraud on the court should not govern the outcome of this case, (3) a separate action would not cause substantial delay and prolong litigation, and (4) a separate action to remedy fraudulent inducement perpetuated in a prior case, is supported by case law, reason, and policy. As to the second certified question, I disagree with the majority that a plaintiff must show reasonable reliance instead of actual

[2](...continued)
394-95, 60 P.3d 333, 344-45 (2002) (Acoba, J., Concurring in part with Ramil, J. and Dissenting to the decision of Moon, C.J.) ("Chief Justice Moon's opinion adopts and incorporates the initial position of Justice Ramil . . . . Inasmuch as Justice Ramil's position set forth the ultimate majority result, I believe his opinion should have announced the majority disposition in this case."); State v. Enriquez, No. 22023, 2002 WL 31873604, at *2 (Haw. Dec. 20, 2002) (unpublished opinion) (Acoba, J., concurring) (stating that "inasmuch as the majority agrees with and has adopted this concurring opinion's rationale in reaching the majority's conclusion, I set out the facts and law that support the propositions the majority agrees with and has adopted"), available at http://www.state.hi.us/jud/22023con.htm.

[3] As to the third certified question, in my view, inasmuch as Plaintiffs are entitled to an independent action for fraud, it is not necessary to address the third certified question. Evidence of spoilation, if produced at trial, may be addressed by a variety of trial devices such as appropriate instructions, striking of defenses, limitation of testimony, etc.

reliance when proceeding in a cause of action for fraud. See majority opinion at 33.

I.

The first certified question asks: "Under Hawai'i law, is a party immune from liability for civil damages based on that party's misconduct, including fraud, engaged in during prior litigation proceedings?" There are eight policy concerns or criteria associated with the litigation privilege. It is posited that arguably four of the policies, that of discouraging abusive litigation practices, encouraging settlement, reinforcing the finality of judgments, and limiting collateral attacks upon judgments, weigh against, rather than for, an independent action for fraud as a remedy that Plaintiffs may invoke. In my view the four criteria do not weigh in favor of a litigation privilege but, instead, count in favor of recognizing an independent action for fraud.

First, as to the policy of discouraging abusive litigation practices, the contention that this factor favors application of the litigation privilege because there are already adequate criminal and civil remedies, including HRCP Rule 60(b) (2002),[4] to deter litigation misconduct would be wrong. Criminal

[4] HRCP Rule 60(b) provides relief from a judgment or order and provides, in relevant part, as follows:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a

(continued...)

law remedies are irrelevant to the compensatory and punitive damages sought by Plaintiffs. Civil law provisions appear largely inadequate as post-judgment remedies. See discussion infra section II. For, the alleged concealment of incriminating test results by Defendant were largely undiscovered by Plaintiffs until well after Plaintiffs' claims had been terminated by settlement and Plaintiffs were no longer parties to the suit.

Second, the policy of encouraging settlements weighs not against, but heavily in favor of, permitting Plaintiffs to file an independent action. See discussion infra section IV, subsection C. Third, when judgments are tainted by fraud, the policy of reinforcing the finality of judgments is outweighed by this court's preference for judgments on the merits. See generally Lesser v. Boughey, 88 Hawai'i 260, 261, 965 P.2d 802, 803 (1998) (noting that "this court has a policy 'to permit litigants to appeal and to have their cases heard on the merits'"

[4](...continued)

> final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. . . .

(Emphasis added.)

(quoting O'Connor v. Diocese of Honolulu, 77 Hawai'i 383, 385, 885 P.2d 361, 363, reconsideration denied, 77 Hawai'i 489, 889 P.2d 66 (1994)) (emphasis omitted)); Long v. Long, 101 Hawai'i 400, 405, 69 P.3d 528, 533 (App. 2003) (noting "strong policy favoring resolution of cases on their merits"). Fourth, the strong policy against collateral attacks on judgments has never been absolute as evidenced by the fact that HRCP Rule 60(b)(3) specifically allows a judgment procured by fraud to be set aside. See generally In re Genesys Data Techs., Inc., 95 Hawai'i 33, 37, 18 P.3d 895, 899 (2001) ("Pursuant to HRCP Rule 60(b)(3), 'on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment . . . for . . . fraud[.]'" (Brackets omitted.)). Hence, this criterion, when fraud is alleged, weighs like the others, on the side of allowing an independent action to proceed.

II.

In my opinion, HRCP Rule 60(b)(3) relating to fraud on the court would be an inadequate remedy in this case. In Kawamata Farms, Inc. v. United Agri Prods., 86 Hawai'i 214, 948 P.2d 1055 (1997), this court acknowledged that the parallel federal rule, Federal Rules of Civil Procedure Rule 60(b)(3), had limited application, having been interpreted by the federal courts as "available only to set aside a prior order or judgment; [and that] a court may not use Rule 60 to grant affirmative

relief in addition to the relief contained in the prior order or judgment." Id. at 256, 948 P.2d at 1097 (citations and internal quotation marks omitted). The circuit court in Kawamata Farms had sanctioned defendant by, inter alia, awarding the other parties "additional attorneys' fees and costs incurred throughout the pretrial, trial, and post-trial proceedings relating to the misconduct that had not been previously been awarded as sanctions[.]" Id. at 257, 948 P.2d at 1098.

However, after considering the "egregious nature of the fraud by [defendant]," this court "construe[d] the HRCP so as not to disallow a remedy under HRCP Rule 60(b)(3) when there is a post-judgment discovery of fraud supported by clear and convincing evidence." Id. Thus, the circuit court's sanctions and award of attorneys' fees and costs were sustained because this court construed HRCP Rule 60(b)(3) "to allow for affirmative relief in th[at] case and because attorneys' fees and costs were allowed by" HRS §§ 603-21.9(1) and (6) (1993). Id. at 258, 948 P.2d at 1099. Nevertheless, HRCP Rule 60(b)(3) would not provide adequate recourse.

A.

Under HRCP Rule 60(b)(3), the court may relieve a party from a final judgment, order, or proceeding for fraud. See supra note 4. If the only remedy available to Plaintiffs is to return to state court, to move to set aside the settlement agreement,

and to reopen the case for fraud, Plaintiffs are faced with the HRCP Rule 60(b) requirement that such a "motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken." (Emphasis added.)

In Kawamata Farms, the theory that the plaintiffs relied on for their HRCP 60(b)(3) motion is unclear. However, it is evident that this court affirmed the circuit court's allowance of affirmative relief under HRCP Rule 60(b)(3) based on "discovery fraud perpetuated against the court." 86 Hawai'i at 257, 948 P.2d at 1098 (emphasis added). The one-year time limitation imposed on HRCP Rule 60(b)(3)[5] would not present an obstacle to relief in a motion based on fraud on the court. See Schefke v. Reliable Collection Agency, Ltd., 96 Hawai'i 408, 431 n.42, 32 P.3d 52, 75 n.42 (2001) (stating that "courts place no time limit on setting aside a judgment on th[e] ground" of fraud on the court" (citations omitted)). But, fraud on the court is not fraud on a party, as is the gravamen of Plaintiffs' claim. See id. at 431, 32 P.3d at 75 ("[Fraud on the court] must be a direct assault on the integrity of the judicial process. Courts have required more than nondisclosure by a party or the party's attorney to find fraud on the court." (Citations and internal quotation marks omitted.)).

[5] See supra note 4.

In the case at bar, fraud was allegedly committed against the parties. Hence, if HRCP Rule 60(b)(3) were to be applied, Plaintiffs would seem to be foreclosed from obtaining relief under HRCP Rule 60(b)(3) because the one-year limitation period has run.[6] Plaintiffs settled their case on April 26, 1994, and their claims were dismissed on November 23, 1994. More than two years later, on December 10, 1996, Plaintiffs filed their complaint for relief based on fraud. Inasmuch as Plaintiffs' complaint was filed more than one year after the settlement, Plaintiffs may be precluded from the dispensation afforded by HRCP Rule 60(b)(3). See In re Genesys Data Techs., Inc., 95 Hawai'i at 37, 18 P.3d at 899 (noting that one-year limitation of HRCP Rule 60(b) barred plaintiff from seeking relief under HRCP Rule 60(b)(3) because plaintiff failed to timely request relief); Dillingham Inv. Corp. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 235, 797 P.2d 1316, 1320 (1990) (holding that relief under HRCP Rule 60(b)(1), which is confined by the same statute of limitations as HRCP Rule 60(b)(3), was "unavailable to Appellants because they failed to file their motion within one year of the entry of the Judgment"). Because fraudulent concealment of discovery matters may not be discovered within one year, HRCP Rule 60(b)(3) is limited in scope and may preclude an otherwise just claim from recognition.

[6] Defendant argued, in its reply brief, that "the one-year period [under HRCP Rule 60(b)] runs from the discovery of the facts giving rise to the request for relief from the judgment."

B.

Additionally, Kawamata Farms only approved of affirmative relief as a limited modification of the reach of HRCP 60(b)(3). The remedies extended essentially to attorneys' fees and costs supported not only by HRCP Rule 60(b)(3), but by attorney's fees statutes. Kawamata Farms did not imply that compensatory and punitive damages might also be obtained under HRCP 60(b)(3) because this court further admonished that "the power to sanction a party for discovery misconduct is within the exclusive province of the circuit court, not the jury." 86 Hawai'i at 244, 948 P.2d at 1084. Thus, insofar as HRCP 60(b)(3) limits the parties to judicial sanctions, it would not provide adequate relief to Plaintiffs.

C.

As mentioned, this court, in acknowledging the limited scope of HRCP Rule 60(b)(3), sanctioned affirmative relief in the form of attorney's fees and costs. Yet, in the present case, the parties would be entitled to a jury trial with respect to issues of fact, i.e., fraud on Plaintiffs and of damages, i.e., compensatory and punitive. See Housing Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 90, 979 P.2d 1107, 1116 (1999) ("[J]uries in actions at law have historically determined issues of fact . . . and money damages in particular[.]" (Citations omitted.)); State Farm Fire & Cas. Co. v. Pacific Rent-All, Inc.,

90 Hawai‘i 315, 327, 978 P.2d 753, 765, ("[Q]uestions of fact [are] for the determination of the jury." (Citations and internal marks omitted.)), reconsideration denied, 90 Hawai‘i 315, 978 P.2d 753 (1999); Watson v. Brown, 67 Haw. 252, 258, 686 P.2d 12, 16 (1984) ("[Q]uestions of fact [are] for the jury to decide[.]"). Accordingly, HRCP 60(b)(3) would not provide an adequate basis for resolving the fraudulent conduct alleged.

D.

Finally, if Plaintiffs were to pursue their remedies in federal court, Plaintiffs would be faced with the obstacle acknowledged by Kawamata Farms. That is, that federal courts do not afford affirmative relief under FRCP Rule 60(b)(3) of the kind awarded in Kawamata Farms, i.e., attorney's fees and costs, much less an action for compensatory and punitive damages.

III.

I also do not believe that a subsequent independent proceeding for fraudulent inducement would result in substantial delay and prolong litigation.

There is no dispute that neither Plaintiffs nor their attorney learned of Defendant's concealment of part of the Alta test results and all of the Costa Rica field study until 1997. Plaintiffs filed their initial complaint on December 10, 1996, and their first amended complaint on January 31, 1997. In 1997,

the federal district court concluded that Plaintiffs' complaint was barred by their settlement agreements with Defendant. In 1998, Plaintiffs appealed to the Ninth Circuit. See Matsuura v. Alston & Bird, 166 F.3d 1006 (9th Cir. 1999). On February 2, 1999, the Ninth Circuit reversed and remanded the case to the district court. On March 1, 2001, Plaintiffs moved to preclude Defendant from re-litigating the issues of fraud, discovery abuse, and intentional withholding of evidence in Kawamata Farms on the ground of collateral estoppel. On May 10, 2001, Defendant filed a motion requesting the district court to certify questions to this court. On June 18, 2001, the district court granted the motion. The present litigation has been ongoing since the discovery that information had been concealed.

Hence, there was no undue delay in the resolution of the present case. Based on the allegations, whatever delay there was stems largely from Defendant's efforts to conceal the deception or fraud. Had Defendant acted in good faith in settling the case with Plaintiffs, the present litigation would not have found itself before this court some eight years after the settlement agreement. Taking Plaintiffs' allegations as true, delay was substantially attributable to Defendant's scheme to hide the incriminating evidence, and not to the proceedings brought to vindicate Plaintiffs' rights. Therefore, there is no justifiable reason for denying Plaintiffs the election of filing an independent action.

IV.

In my view, allowing Plaintiffs the election to sue post-settlement in an independent action for fraud is supported by case law, reason, and policy.

A.

In another Benlate case, the Delaware Supreme Court held that a party fraudulently induced to execute a release may file an independent suit as a remedy. See E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage, 744 A.2d 457, 458 (Del. 1999), rehearing denied (2000) [hereinafter Florida Evergreen II]. In Florida Evergreen II, as in this case, the plaintiffs entered into a settlement agreement in May 1994 with Defendant and executed a release. About four years later, on September 3, 1998, the plaintiffs filed an action for fraudulent inducement in the federal district court.

The plaintiffs alleged that Defendant implemented a fraudulent scheme to induce them to settle "for less than they would have otherwise . . . insisted upon." Id. at 459. The alleged scheme consisted of fraud in withholding from discovery, material scientific data and information and giving false testimony in other Benlate cases. See id. Similar to this case, the federal district court certified to the Delaware Supreme Court the question, "'Under Delaware law, does the release in

these settlement agreements bar Plaintiffs' fraudulent inducement claims?'" Id.

As it does in this case, Defendant asserted that an independent cause of action for settlement fraud based on prior litigation misconduct should not be allowed. See id. It maintained that "the only remedy for a fraudulently induced release is rescission with restoration of the proceeds of the settlement." Id. at 459-60. The Delaware Supreme Court disagreed and held that, in the "absence of a specific reference to the actionable fraud" in the release, the plaintiffs may elect an independent action for fraud. Id. at 462.

Objecting to the independent suit option, Defendant raised the same protest it raises here, i.e., that such an option spawns "collateral litigation." Id. In response, the Delaware Supreme Court pointed out that a settlement agreement is in effect a contract, and that contract remedies allowed for rescission or an action for fraud. See id. at 463.

B.

Matsuura[7] involved a federal appeal in this case. The allegations, as noted by the Ninth Circuit, were that Plaintiffs

[7] The plaintiffs in Matsuura v. Alston & Bird, 166 F.3d 1006 (9th Cir. 1999) are the same plaintiffs in the case at bar. DuPont and Alston & Bird, a law firm, are also named as defendants in Matsuura.

were fraudulently induced into settling with Defendant.[8] See 166 F.3d at 1007. The district court for the district of Hawai‘i ruled that the settlement releases barred Plaintiffs from bringing suit. See id.

On appeal, the Ninth Circuit held that the releases did not bar an independent action alleging fraudulent inducement. See id. After analyzing the relevant Delaware case law,[9] the Ninth Circuit reversed the district court, holding that "parties who have been fraudulently induced to enter into a contract have a choice of remedies: they may rescind the contract or they may affirm the contract and sue for fraud." Id. at 1008. Also surveying decisions from other jurisdictions, the Ninth Circuit decided that "the weight of authority favors according defrauded tort plaintiffs an election of remedies." Id.

C.

As in Delaware, settlement agreements in Hawai‘i are viewed as contracts. See e.g., State Farm Fire & Cas. Co., 90 Hawai‘i at 323, 978 P.2d at 761 ("[A] settlement agreement is an agreement . . . ." (Citations and internal quotation marks omitted.)). Any contract entered through fraud is vitiated as

[8] For consistency, although DuPont and Alston & Bird are defendants in the federal proceeding, "Defendant" hereinafter refers to the defendants in the federal proceeding and Defendant in the case at bar, unless otherwise indicated.

[9] Delaware law governs the Matsuura case because the releases signed by the plaintiffs and the defendant "provide that they are to be 'governed and construed' according to Delaware law." 166 F.3d at 1008 n.3.

between the parties. See Fujimoto v. Au, 95 Hawai‘i 116, 157, 19 P.3d 699, 740 ("Fraud vitiates all agreements as between the parties affected by it." (Quoting Peine v. Murphy, 46 Haw. 233, 239, 377 P.2d 708, 712 (1962). (Internal quotation marks and citation omitted.)), reconsideration denied, (2001).

In an action for fraudulent inducement, the plaintiff is entitled to rescission. See Peine, 46 Haw. at 239, 377 P.2d at 712 (holding that party "who was induced to enter into the joint adventure agreement by fraudulent representations . . . may . . . obtain a decree rescinding or cancelling the agreement *ab initio*" (italicized font in original)). It is basic contract law that a party may either rescind the contract or affirm the contract and bring a suit for damages. See DiSabatino v. United States Fidelity & Guar. Co., 635 F. Supp. 350, 356 (D. Del. 1986) (defrauded party may "rescind the contract or . . . affirm it and sue for damages resulting from the fraudulent misrepresentation[]"); Baeza v. Robert E. Lee Chrysler, Plymouth, Dodge, Inc., 309 S.E.2d 763, 766 (S.C. Ct. App. 1983) (a party alleging fraudulent inducement may affirm the contract and sue for damages or rescind the contract); Dallas Farm Machinery Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957) (a defrauded party may "stand to the bargain and recover damages for the fraud, or . . . rescind the contract[]").

Hence, there is no reason for limiting the remedies available in post-settlement cases where fraud has induced the

contract. See Lemle v. Breeden, 51 Haw. 426, 436, 462 P.2d 470, 475 (holding that remedies available for breach of contractual relationship "are the basic contract remedies of damages, reformation, and rescission"), rehearing denied, 51 Haw. 478 (1969). As Matsuura held, in cases where a party is allegedly defrauded, the majority of the jurisdictions allow the defrauded party an election of remedies. Accordingly, Plaintiffs should be allowed to file an independent action for fraud.

V.

Second, an independent action best serves the policy of encouraging parties to voluntarily settle their cases, thereby avoiding prolonged litigation. See Collins v. South Seas Jeep Eagle, 87 Hawai‘i 86, 90, 952 P.2d 374, 378 (1997) ("The purpose of [Hawai‘i Rules of Civil Procedure (HRCP)] Rule 68[, which governs offers of settlement or judgment,] is to encourage settlement and avoid protracted litigation."); Sylvester v. Animal Emergency Clinic of Oahu, 72 Haw. 560, 565-66, 825 P.2d 1053, 1056 (1992) ("[A settlement] is an amicable method of settling or resolving bona fide differences or uncertainties and is designed to prevent or put an end to litigation." (Citation and internal quotation marks omitted.)); Arakaki v. Arakaki, 54 Haw. 60, 64, 502 P.2d 380, 383 (1972) (purpose of bill concerning property settlements during divorce proceedings was to conserve judicial resources), rehearing denied, 54 Haw. 298 (1973); Page

v. Domino's Pizza, 80 Hawai'i 204, 209 n.6, 908 P.2d 552, 557 n.6 (App. 1995) ("[S]ettlement provides a quick resolution of a case[.]").

In discussing the policy rationale for allowing the plaintiffs to bring an independent action for fraud, post-settlement, the Florida Evergreen II court observed that "[c]andor and fair-dealing are, or should be, the hallmark of litigation and required attributes of those who resort to the judicial process." 744 A.2d at 461. According to that court, if a settling party cannot rely on the good faith of the other party, "the policy of encouraging the settlement of cases is in jeopardy." Id. The Florida Evergreen II court reasoned that to hold otherwise would "seriously undermine the requirement of *bona fide* in the execution of contracts and undermine confidence in the dispute resolution goal of promoting settlement of litigation." Id. at 462 (emphasis in original).

Similarly, in Matsuura, the Ninth Circuit also observed that allowing Plaintiffs to bring an independent action would "further Delaware's policy favoring voluntary settlement of legal disputes." 166 F.3d at 1012. The Ninth Circuit reasoned that "finality of settlements is based on the assumption that the parties have freely bargained to exchange the costs, risks and potential rewards of litigation for the certainty of a settlement that seems fair in light of facts known at the time." Id. (citing In re Appraisal of Enstar Corp., 593 A.2d 543, 548 (Del.

Ch. 1991) (citing cases), rev'd on other grounds, 604 A.2d 404 (Del. 1992). Hence, "[s]ettlements induced by fraud are set aside . . . because the defrauded party has not freely bargained, but has been induced to settle by affirmative misrepresentations by the other party." Id. (citing In re Appraisal of Enstar Corp., 593 A.2d at 549).

On the other hand, "[e]nforcing [a fraudulent] settlement would undermine the policy of encouraging voluntary settlement of disputes: if litigants cannot assume [that] the disclosures and representations of the opposing party are made in good faith, they will be reluctant to settle." Matsuura, 166 F.3d at 1012. As a result, "[d]enying the Matsuuras any further remedy would undermine rather than further [the] policy of encouraging voluntary settlement of claims." Id.

Like Delaware, our jurisdiction favors the settlement of disputes. See Associates Fin. Servs. Co. of Hawaii, Inc. v. Mijo, 87 Hawai'i 19, 30, 950 P.2d 1219, 1230 (1998) ("[A] judge should encourage settlement throughout the case and particularly on the eve of trial."); Gossinger v. Association of Apartment Owners of the Regency of Ala Wai, 73 Haw. 412, 424 n.5, 835 P.2d 627, 634 n.5 (1992) ("Public policy favors the settlement of disputes without resort to the courts, provided such settlements are fairly reached." (Citation and internal quotation marks omitted.)); Sylvester v. Animal Emergency Clinic of Oahu, 72 Haw. 560, 566, 825 P.2d 1053, 1056 (1992) (stating that "this court's

policy [is] to foster amicable, efficient, and inexpensive resolutions of disputes" through compromise or settlement rather than by litigation).

Therefore, considerations enumerated by the Delaware Supreme Court and the Ninth Circuit apply here. Where disclosures and representations are not made in good faith, the parties "will be reluctant to settle." Matsuura, 166 F.3d at 1012. The "[a]ssurance of an adversary's good faith is particularly critical when parties are attempting to resolve a dispute amicably." Id. Thus, when the parties distrust each other, "the policy of encouraging the settlement of cases" is jeopardized. Florida Evergreen II, 744 A.2d at 461. In that regard, the availability of an independent action for fraudulent inducement would deter a potential fraudfeasor. The party whose misconduct has "vitiate[d] an amicable resolution of the dispute" would not be rewarded. Id. Consequently, the policy of encouraging settlements weighs in favor of allowing a subsequent independent fraud action. In sum, permitting Plaintiffs to file such an action would further the policy of encouraging settlements. See Matsuura, 166 F.3d at 1012.

VI.

A.

The second certified question asks:

> Where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of

> prior, related litigation, are plaintiffs thereafter precluded as a matter of law from bringing a cause of action for fraudulent inducement to settle because they should not have relied on the [d]efendant's representations?

The majority answers the second certified question as requiring that Plaintiffs prove that "their reliance on the defendant's representations was reasonable." Majority opinion at 42. As mentioned, I would answer the certified question in the negative. In this regard, I do not agree with the majority's belief that "reasonable reliance" must be shown by Plaintiff under the circumstances of this case.

It is well settled in this jurisdiction that in order to establish an action for fraud, a plaintiff must prove that "(1) false representations were made by defendant[], (2) with knowledge of their falsity (or without knowledge of their truth or falsity), (3) in contemplation of plaintiff's reliance upon these false representations, and (4) plaintiff did rely upon them." Shoppe v. Gucci Am., Inc., 94 Hawai'i 368, 386, 14 P.3d 1049, 1067 (2000) (quoting TSA Int'l Ltd. v. Shimizu Corp., 92 Hawai'i 243, 251, 990 P.2d 713, 725 (1999)) (emphasis added); see also Shanghai Inv. Co. v. Alteka Co., 92 Hawai'i 482, 497, 993 P.2d 516, 531 (2000), overruled on other grounds by, Blair v. Ing, 96 Hawai'i 327, 329, 31 P.3d 184, 186 (2001); Hawaii's Thousand Friends v. Anderson, 70 Haw. 276, 286, 768 P.2d 1293, 1301 (1989); Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 289 (1978); Eastern Star, Inc., S.A. v. Union Bldg. Materials Corp., 6 Haw. App. 125, 140, 712 P.2d 1148, 1158 (1985); Wolfer

v. Mutual Life Ins. Co. of New York, 3 Haw. App. 65, 70, 641 P.2d 1349, 1353 (1982). Defendant argues that Plaintiffs were unreasonable in relying on its representations during settlement negotiations because Plaintiffs knew about allegations that Defendant had engaged in dishonest conduct in discovery.

Essentially, Defendant asserts that the "reliance" in a fraud action must be "justifiable" or "reasonable." Defendant relies on Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co., 135 F. Supp. 2d 1271 (S.D. Fla. 2001) [hereinafter Florida Evergreen I]. The federal district court in that case held that, where the plaintiffs monitored the Benlate litigation in other courts, and had knowledge of Defendant's alleged fraud and dishonesty, the plaintiffs' reliance on Defendant's misrepresentations and omissions in deciding to settle was unreasonable as a matter of law. See id. at 1295.

I would not agree with the rationale in Florida Evergreen I. As between a fraudfeasor and an arguably negligent person, the law should not reward the fraudfeasor in light of the greater culpability inhering in fraudulent conduct. Cf. Restatement (Second) of Contracts, § 172, Reporter's Note cmt. a., at 471 (1979) (The shift in ethical standards accepted by the community and the . . . shift in the law of fraud are . . . illustrated . . . by the change in the law's requirement of diligence . . . . The great weight of authority today holds that ordinary contributory negligence is no defense to any action

grounded on intentional fraud." (Quoting James & Gray, Misrepresentation--Part II, 37 Md. L. Rev. 488, 511 (1978).)).

B.

1.

As is evident from the elements of an action for fraud in this jurisdiction, the question is whether "plaintiff did [in fact] rely upon [the false representations]." Shoppe, 94 Hawai'i at 386, 14 P.3d at 1067. As such, the law in this jurisdiction requires only actual reliance, not reasonable reliance. See Hawaii's Thousand Friends, 70 Haw. at 286, 768 P.2d at 1301 (requiring "that plaintiff did rely upon . . . [the] false representations"); Kang v. Harrington, 59 Haw. 652, 656, 587 P.2d 285, 289 (1978) (requiring "that plaintiff did rely upon . . . [the] false representations"); Peine, 46 Haw. at 238, 377 P.2d at 712 ("The [complaining] party must have relied and acted upon . . . the fraudulent representations[.]").

It is undisputed that Plaintiffs "relied in fact on [Defendant's] misrepresentations[]" in their settlement negotiations. Thus, in the absence of Plaintiff's bad faith, i.e. actual knowledge that the subject facts were misrepresented, I believe only actual reliance is required. Therefore, in my view, Plaintiffs are not, as a matter of law, precluded from instituting a cause of action for fraudulent inducement based on Defendant's misrepresentations.

2.

Public policy requires the same result. As stated previously, a settlement agreement assumes that the parties have engaged in a fair and freely-bargained exchange. See Matsuura, 166 F.3d at 1012. Even if Plaintiffs knew about some of Defendant's prior fraudulent representations, Defendant did not disclose the Costa Rica field tests at the time of the settlement. Here, based on the allegations, Plaintiffs can hardly be said to have "freely bargained." The "[a]ssurance of an adversary's good faith is particularly critical when parties are attempting to resolve a dispute amicably." Id. The availability of a potential fraudulent inducement action, then, would encourage settlements, aid in deterring misconduct, and thus avoid extended litigation.

In light of the foregoing, when Plaintiffs have been misled by Defendant's fraud and dishonesty during the course of prior, related litigation, Plaintiffs are not precluded as a matter of law and policy from instituting a cause of action for fraudulent inducement to settle based on Plaintiffs' reliance on Defendant's misrepresentations.