DISSENTING OPINION BY FUJISE, J.

I must respectfully dissent. The Majority reverses the August 1, 2005 Order For Protection relying in the main on the case of Morneau v. Stark Enterprises Ltd., 56 Haw. 420, 422-23, 539 P.2d 472, 474-75 (1975). Slip op. at 6. With Morneau, I have no quarrel, as far as it goes. There, the Hawai‘i Supreme Court affirmed the dismissal of a second personal injury case against certain apartment developers and architects who were joined as third-party defendants in a previous personal injury action for the same injury sued for by the same plaintiff. Although the plaintiff could have, but did not, name these third-party defendants as party defendants in the previous action, they were all eventually dismissed out of the previous action and plaintiff "through his own choosing is now precluded in the present action under the doctrine of collateral estoppel from relitigating the same issue which was determined by the judgment in the first action." Morneau, 56 Haw. at 424, 539 P.2d at 476.

However, in my view, this appeal turns, not on whether the May 2005 incident should have been litigated in Petitioner-Appellee Renee A. Tortorello's (Renee) June 28, 2005 petition (First Petition), but whether, having effectively prevented her from presenting evidence of any incidents not included in the First Petition, Respondent-Appellant Wilson A. Tortorello, Jr. (Wilson) effectively waived reliance on the defense of *res judicata* to prevent the consideration of Renee's July 19, 2005 Petition (Second Petition) which relied primarily on the May 2005 incident of physical abuse. Based on the record and the relevant

case authority in this jurisdiction, I would affirm the trial court's consideration of the Second Petition.

It appears that Wilson waived his *res judicata* defense insofar as he now argues it is a complete bar to Renee's Second Petition, for two reasons: (1) the record does not reveal that he argued for a complete bar below[1] and (2) a party who actively prevents the litigation of certain claims in the first action should not be heard to complain when a second action is brought to litigate those claims.

In Solarana v. Indus. Elecs., Inc., 50 Haw. 22, 428 P.2d 411 (1967), the first action was dismissed for insufficient evidence supporting the plaintiff's claim that he was owed a specified amount for "goods sold and delivered on or about January 11, 1964." Id. 50 Haw. at 23, 428 P.2d at 413 (internal quotation marks omitted). The plaintiff's theory of his case was

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[1] Prior to the hearing on Petitioner-Appellee Renee A. Tortorello's (Renee) July 19, 2005 Petition (Second Petition), Respondent-Appellant Wilson A. Tortorello, Jr. (Wilson) filed a memorandum in opposition on July 27, 2005, arguing, in pertinent part,

> This Petition is wife's attempt to revisit and relitigate the unfounded allegations already heard and rejected by the family court. All matter previously litigated on 7/12/05 should be excluded from evidence at the August 1, 2005 hearing on Petitioners [sic] Motion [sic]. Further, as the allegations contained in the Petition have had a full hearing and have been found wanting, this matter is res judicata[.]

At the August 1, 2005 hearing on the Second Petition, Wilson asserted:

> This is pretty much a rehash. And at least of all of those allegations that we've already litigated that contained in, um, well, that last hearing (inaudible) excluded from consideration. And the only thing the court should hear at this point is anything that happened after July 12, 2005 [sic].

Neither of these formulations state the position Wilson takes now, that the adjudication of the First Petition precludes consideration of the Second Petition in its entirety.

that the sale was consummated on January 11, 1964, as reflected in a document of even date, entitled "special billing," although the goods had been delivered earlier. The trial court agreed with the defendant's argument that the special billing was irrelevant and should be excluded because anything delivered before that date was immaterial to the complaint and "unless it is a delivery on or about January 11, it is purely irrelevant and immaterial." Id., 50 Haw. at 23, 428 P.2d at 413 (internal quotation marks omitted). The court also denied the plaintiff's motion for leave to amend his complaint based on defendant's objection. The question of whether the goods were sold or delivered on earlier dates was not considered and it does not appear that the plaintiff appealed from this dismissal.

The plaintiff brought a second action for the same amount, this time alleging that the sales of goods took place between October 11, 1961 and March 9, 1963. The second action was dismissed, upon the defendant's motion, on the grounds of *res judicata* based on the dismissal of the first action.

In considering the plaintiff's appeal from the dismissal of the second action, the Hawai‘i Supreme Court examined the case of Carr v. Preslar, 73 S.D. 610, 47 N.W.2d 497 (1951). There, the court prevented the plaintiffs -- although there was no express objection by the defendant but rather an argument for a decision on the current state of the pleadings -- from adding a claim to their first complaint. As a result, plaintiffs' claim was never tried on the merits. No appeal was

taken from the judgment. Instead, a second action, based on the unadjudicated claim, was dismissed by the trial court. The defendant argued on appeal that, even if the first judgment was in error, plaintiffs' remedy was an appeal from that judgment, and the unchallenged first judgment stood as a bar to the second suit. The South Dakota Supreme Court concluded:

> The doctrine of res judicata which [the defendant] would now employ to bar such a trial has been said to rest on two maxims, viz., 'A man should not be twice vexed for the same cause' and 'it is for the public good that there be an end to litigation.' Freeman on Judgments, § 626; Fayerweather v. Ritch, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193. To permit the present use of the doctrine does more than protect [the defendant] from being twice vexed. It makes it possible for him to succeed in defeating [the plaintiffs] in their efforts to secure a fair opportunity to place their claim in litigation on its merits. In our opinion neither justice nor sound public policy would be served by such a ruling. We therefore hold that the trial court erred in sustaining the defense of res judicata.

Carr, 73 S.D. at 619-20, 47 N.W.2d at 502-03. Finding the Carr case "in point," the Hawai‘i Supreme Court in Solarana adopted "the waiver doctrine" and noted that its application did not depend on a representation by either counsel or the trial court that "another suit would lie, where as here that is the implication." 50 Haw. at 27, 428 P.2d at 415. It should be noted that in neither Solarana, nor Carr or United Bank & Trust Co. of California v. Hunt, 1 Cal. 2d 340, 34 P.2d 1001 (1934) upon which the court in Solarana relied, was there an express agreement that the plaintiffs would be allowed to bring another lawsuit on their related claims or evidence. Indeed, the Solarana court quoted with approval language in United Bank: "The course pursued by court and counsel . . . was tantamount to an express determination on the part of the court with the

consent of opposing counsel to reserve the issues involved for future adjudication. . . . Litigants cannot successfully assume such inconsistent positions." Solarana, 50 Haw. at 27, 428 P.2d at 415 (internal quotation marks omitted). In resolving its own case, the Solarana court concluded:

> it cannot have been contemplated that the bar of res judicata would be invoked in another suit, causing plaintiff to suffer the forefeiture [sic] of his right to a hearing on his claim that sales occurred at dates earlier than January 11, 1964, which date was deemed determinative of the scope of the then pending suit.
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> We therefore are of the opinion that contrary to defendant's contentions the equities do not lie with it. Under the circumstances of this case we sustain plaintiff's contention that: 'A judgment is not res judicata as to issues raised in a previous case which were . . . matters which a court expressly refused to determine.'

Solarana, 50 Haw. at 27-28, 428 P.2d at 415-16.

Renee's First Petition alleged incidents that occurred on June 14 and 24, 2005[2] as her basis.[3] At the hearing on the First Petition, Wilson objected to Renee's testimony regarding the "line of questioning" concerning the frequency and nature of the physical abuse and the first trial court ruled that, as there were no allegations of physical abuse in the petition, the evidence would be limited to those allegations stated in the petition. As a result, Wilson, who was well aware of the limitation placed on Renee's proof, was able to argue that the

[2] Although the dates specified for the incidents of abuse in the June 28, 2005 petition (First Petition) were "6.24.05" and "6.14.05," the testimony by both Renee and Wilson was largely about events occurring on June 14, 2005.

[3] Renee's First Petition consisted of a preprinted form which was filled in by hand. The section that provided for the factual basis for the petition as set out in the Majority's opinion, slip op. at 8, only asks for the "Last Date" for each type of conduct and nowhere states that all prior examples of domestic abuse must be reflected on this form. Although Renee apparently obtained some assistance filling out the form, it is unclear from the record who provided this assistance, except that the person was not an attorney, or what the assistance consisted of.

evidence Renee presented did not show "physical abuse. There's none alleged here. There's none that's been admitted into evidence today so there's no issue of him hurting her physically," and consisted of "one incident." Ultimately, the court denied the First Petition, for a failure of proof, as so limited. In defending against the Second Petition, Wilson sought to prevent relitigation of the matters considered in the First Petition and that request was granted by the second trial court.[4] See n.1 supra. To the extent Wilson's intent was to preclude any consideration of the Second Petition, the trial court properly rejected this position, limiting Renee's presentation to those matters not previously raised in the First Petition.

Finally, my resolution of this case would require the consideration of Wilson's third point of error. Relying on Doe v. Doe, 98 Hawai‘i 144, 44 P.3d 1085 (2002), Wilson argues that the trial court abused its discretion by limiting the presentation of evidence in the hearing on the Second Petition to thirty minutes per side. However, the court in Doe expressly held that, absent plain error, "if counsel believe that relevant evidence must be heard after the time set for the hearing has expired, they must move for an extension of time."[5] Doe, 98

[4] After comparing the First Petition with the Second Petition, the second trial court ruled that it would consider allegations in sections IV (A), (B)(2), (C), and V as they differed from the allegations presented in the First Petition. Where dates were given, the matters the second trial court considered were alleged to have occurred in May and July 2005.

[5] The court in Doe v. Doe, 98 Hawai‘i 144, 44 P.3d 1085 (2002), held that the trial court erred by denying the appellant's motion to reopen proceedings for the purpose of presenting the appellant's previously excluded witnesses. While both parties were given equal time in their examination of the witnesses that were heard, appellee, who had four different witnesses and two more in common with appellant, had all of his witnesses heard. Based on the evidence presented, the trial court found that the evidence of the alleged abuse by appellee was "inconclusive."

Hawai‘i at 154, 44 P.3d at 1095. Wilson did not so move the second trial court, nor does he claim plain error on appeal. As in Doe, Wilson has failed to show the second trial court erred in so limiting the presentation of evidence.

I would affirm.