WRITTEN TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-NINTH LEGISLATURE, 2018

ON THE FOLLOWING MEASURE:
S.B. NO. 2740, S.D. 1, MAKING APPROPRIATIONS FOR CLAIMS AGAINST THE STATE, ITS OFFICERS, OR ITS EMPLOYEES.

BEFORE THE:

SENATE COMMITTEE ON WAYS AND MEANS

DATE: Thursday, March 1, 2018 **TIME:** 10:45 a.m.

LOCATION: State Capitol, Room 211

TESTIFIER(S): **WRITTEN TESTIMONY ONLY.**
(For more information, contact Caron M. Inagaki, Deputy Attorney General, at 586-1300)

Chair Dela Cruz and Members of the Committee:

The Department of the Attorney General supports this bill.

The purpose of this bill is to seek appropriations to satisfy claims against the State, its officers, or its employees, including claims for legislative relief, judgments against the State, settlements, and miscellaneous claims.

The bill contains nine (9) claims that total $2,259,312.84. Six (6) claims are general fund appropriation requests that total $870,000.00, and three (3) claims are appropriation requests from departmental funds that total $1,389,312.84. Attachment A provides a brief description of each claim in the bill.

Since the bill was last amended, two (2) new claims have been resolved for an additional $207,500.00. The claims are general fund appropriations. Attachment B provides a brief description of the new claims.

Including the new claim, the appropriation requests total $2,466,812.84 allocated among eleven (11) claims. Of this total $1,077,500.00 are general fund appropriation requests, and $1,389,312.84 are appropriation requests from departmental funds.

The Department has had a longstanding policy of advising agencies as to how to avoid claims such as those in this bill. The Department has also complied with section

37-77.5, Hawaii Revised Statutes, which requires the Attorney General to develop and implement a procedure for advising our client agencies on how to avoid future claims.

We respectfully request passage of this bill with the additional appropriations and amendments.

ATTACHMENT "A"

DEPARTMENT OF EDUCATION:

Clark, et al. v. Department of Education, et al. **$ 35,000.00** ***(General Fund)***
Civil No. 15-1-2486-12, First Circuit **Settlement**

A.G., a fourth grade student at the A+ Program at Noelani Elementary School, was playing a game of dodge ball, and she was struck in the head with a ball as she bent over to pick up another ball. Presumably because of the lack of significant initial symptoms, the incident was never documented, and the A+ staff do not have any independent recollection of anything that happened on that date. Per Plaintiffs, her symptoms of the alleged injury did not manifest until four days later when she began complaining of pain after going over a speed bump as a passenger in a car being driven by her father. Eventually she was diagnosed with atlantoaxial rotary subluxation, a rare condition typically characterized by rotation and tilt of the head and painful limitation of movement of the head. The case proceeded to the Court Annexed Arbitration Program, which resulted in an award of $77,081.65. The case later settled for $35,000.00.

In addition to numerous sessions of physical therapy and follow up visits, A.G. was twice admitted to the Kapiolani Hospital. The first visit in April 2014 attempted non-surgical reduction. At the second visit in October 2014, surgical traction with a halo was applied.

DEPARTMENT OF HAWAIIAN HOME LANDS:

Arthur, et al. v. State of Hawaii, et al. **$ 200,000.00** ***(General Fund)***
Civil No. 05-1-1981-11, First Circuit **Settlement**

On November 10, 2003, Mrs. Moana Arthur died from head injuries she sustained on her property. No one knows how she fell, but she was found lying in the concrete ditch on her property with severe head wounds. She was originally responsive but then slipped into a coma while waiting for the ambulance to arrive. She was in a coma for several weeks before passing away. Her husband found her and is the named plaintiff in the lawsuit. The Arthur property is located within the Kalawahine Streamside Housing Development, which is Department of Hawaiian Home Lands (DHHL) property that was developed from unimproved land into homestead lots. Defendant Kamehameha Investment Corporation ("KIC") was hired by DHHL to be the developer of the project, and KIC in turn hired the other various defendants to this lawsuit to carry out the design and construction of the project.

The issue in this lawsuit is that many of these properties in the development, including the Arthur property, had significantly steep hillsides for which the homeowners were responsible for maintaining. There is a fence that separates the steep hillside from the rest of the property, and is intended to prevent debris from collecting in the concrete ditch. During the planning phase of the project, DHHL approved a reduction in height of that fence from four feet to two feet, to allow the homeowners to access the hillside for

maintenance by climbing over the fence. Plaintiff alleges that the reduction in height from four feet to two feet was unsafe and caused Mrs. Arthur to fall and hit her head on the concrete ditch, whereas if it had been four feet then she would not have fallen over the fence or otherwise would not have had such a severe impact. It was anticipated that at trial the other defendants were going to blame DHHL for the decision to reduce the fence.

This case results from a November 10, 2003 incident, but was pending trial because the Hawaii Supreme Court vacated the prior entry of summary judgment against the Plaintiffs in its June 27, 2016 decision. DHHL originally tendered its defense to KIC, the developer on the project, which in turn tendered its own defense and DHHL's defense to the contractors, subcontractors, and designers on the project. At first DHHL's defense was funded through Pacific Fence, Inc, which was a subcontractor responsible for building the debris fence, by its insurer Island Insurance. As a result of the Hawaii Supreme Court decision, however, it was also determined that Pacific Fence did not have to pay for the State's defense. Island Insurance withdrew DHHL's defense and initiated a reimbursement claim for the return of funds spent on DHHL's defense.

DEPARTMENT OF HUMAN SERVICES:

Kalili v. Department of Human Services, et al. **$ 115,000.00** ***(General Fund)***
Civil No. 13-1-0171, Third Circuit **Settlement**

Plaintiff alleges that she was repeatedly sexually assaulted when she was a minor of 11 and 12 years old by Defendant Cardines, who was the former boyfriend of her father's (Defendant Roy Kalili) live-in girlfriend, that the sexual abuse was reported to the Department of Human Services and the police by Plaintiff's mother (Cross-claim Defendant Doe Parent No. 1), and the Department of Human Services failed to protect her. The case proceeded to mediation, which resulted in the settlement.

Lahti, et al. v. State of Hawaii, et al. **$ 450,000.00** ***(General Fund)***
Civil No. 08-1-0132(3), Second Circuit **Settlement**

This case involves a young girl, S.R., who suffered a near fatal beating by her mother's boyfriend, Francisco Ramirez. S.R. was taken to Maui Memorial Hospital where her life was saved and she began the long road to what appears to be a remarkable recovery. S.R.'s mother was a drug addict who had neglected her child such that S.R. was taken away and placed in foster care by Child Welfare Services ("CWS"). The child's natural father was serving a prison term and was neither able nor inclined to support and protect his child.

Shortly before the incident and while the boyfriend was not living with them, CWS had determined that the mother had made sufficient progress that parental custody could be restored to her. At the time of the tragedy, the mother and child were living in a

transitional shelter, Na Hale O Wainee, a co-defendant in this case. The shelter had strict rules for residents, one of which prohibited felons and other categories of people from being on the property. Ramirez, who met all of these exclusionary categories, was known to the shelter and had recently moved in with the mother at the shelter. The shelter neither enforced its rules by excluding Ramirez, nor did it report to authorities Ramirez's presence at the shelter or his interactions with S.R. even though shelter personnel had seen that the child was clearly afraid of him.

As stated above, S.R. was known to CWS and had been in and out of foster care prior to the tragedy. While in foster care, S.R. was placed with her (now deceased) paternal grandmother, Cheryl Ann Oelrich. Although there were no negative reports about the care S.R. received in Mrs. Oelrich's care, Mrs. Oelrich purposely did not report clear signs of abuse she observed on the child to either CWS, Maui police, medical personnel at Maui Memorial, or Dr. Pierre Y.D. Langeron, the child's pediatrician. At her deposition she stated that she did not report those signs of abuse for fear that she would either lose her foster custody of the child, or visitation of the child, or both.

Dr. Langeron and Maui Memorial Hospital are also co-defendants. Dr. Langeron, a mandated reporter by law, is alleged to have observed signs that were highly suspicious of child abuse, but did not report them. Maui Memorial Hospital staff allegedly failed to get a report into S.R.'s records that would have been clearer evidence of abuse, which then presumably would have led Dr. Langeron to make a report.

Plaintiffs settled with Dr. Langeron, Maui Memorial Hospital, and Na Hale O Wainee before reaching this settlement with the State Department of Human Services Child Welfare Services with the assistance of a mediator.

DEPARTMENT OF PUBLIC SAFETY:

Hopfe v. State of Hawaii, et al. **$ 20,000.00** ***(General Fund)***
Civil No. 16-1-0645-04, First Circuit **Settlement**

An inmate who was incarcerated at the Halawa Correctional Facility developed an infection of his left second toe. Dr. Michael Hegmann, a Public Safety Department physician, treated the infection with oral antibiotics and daily cleaning and bandage changes. The Plaintiff had a history of diabetic foot ulcers and open wounds that were difficult to heal due to neuropathy and poor circulation. Despite the treatment, the Plaintiff's infection became much more severe, affecting the entire foot and spreading to the bones of the toe.

Although Dr. Hegmann ordered that the Plaintiff be referred to a higher level of care at Queen's Medical Center or a general surgeon, that referral was not done on an emergent basis. When the Plaintiff was sent to the hospital and evaluated by a surgeon, the Plaintiff's toe was deemed "unsalvageable" due to infection and

osteomyelitis and amputated. The amputation site had a prolonged and complicated course of healing due to the Plaintiff's preexisting poor health. The case proceeded to the Court Annexed Arbitration Program, which resulted in an award of $21,096.13. The case later settled for $20,000.00.

Smith v. State of Hawaii, et al. **$ 50,000.00** ***(General Fund)***
Civil No. 14-00432 LEK-KSC, USDC **Settlement**

Plaintiff alleges that on March 11 and 25, 2012, she was sexually assaulted by ACO Irwin Ah-Hoy in the bathroom of a WCCC control station. Although Ah-Hoy denied the allegations at all times, he pled no contest to two criminal charges of sexual assault and was sentenced to serve an eighteen-month jail term.

DEPARTMENT OF TRANSPORTATION, HIGHWAYS DIVISION:

Claim of Garrison Property and Casualty Insurance Company USAA **$ 19,312.84** ***(Department Appropriation)*** **Settlement**

On March 14, 2016, at approximately 8:10 a.m., a Department of Transportation employee was driving a Ford F-150 flat bed truck on Kamehameha Highway, in the vicinity of the Pali Golf Course. The State-owned flat bed truck rear-ended a Ford van, operated by USAA insured, Matthew Bickel, that was stopped in traffic. This rear-end collision started a four-vehicle chain reaction accident with other vehicles that were also stopped in traffic. Garrison Property and Casualty Insurance Company (part of USAA Property and Casualty Insurance Group) asserted a subrogation claim, seeking reimbursement for payments made to or on behalf of its insured. The claim arises out of a multi-vehicle motor vehicle accident in which USAA's insured was rear-ended by a vehicle owned by the State of Hawaii, Department of Transportation, and operated by a DOT employee.

Imada v. State of Hawaii, et al. **$1,300,000.00** ***(Department Appropriation)***
Civil No. 14-1-0401K, Third Circuit **Settlement**
and
Ocampo v. State of Hawaii, et al.
Civil No. 16-1-234K, Third Circuit

On July 23, 2014, there was a two-car collision on Hawaii Belt Road Route 11. The collision occurred at approximately Mile Post 98.3. The Imadas and Ocampos had just completed the San Francisco portion of their vacation and had just begun the Hawaii portion. Mr. Imada's parents, aunt, and 14-year-old sister were in the first vehicle heading toward Volcano. Nineteen-year-old Mr. Imada was in the rear passenger seat of the second vehicle that his uncle was driving. His grandmother and two cousins were also passengers.

After the paramedics arrived, Mr. Imada was taken by ambulance to Kona Hospital. When the medical staff determined that Imada had sustained a severe spinal cord injury he was then transported to the Queen's Medical Center (QMC). When he was stable enough to travel, he was transferred to the Craig Hospital in Colorado. A more detailed chronology of Imada's injuries and treatment are provided below under the section, "Position Regarding Damages."

At the time of the accident, Imada was a 19-year-old engineering student at Stuttgart University in Germany. According to Mr. Imada, his major is "mechatronics," which is an interdisciplinary degree that combines mechanical and electrical engineering. He hopes to continue his studies toward a master's degree in that field after he completes his undergraduate studies. Before his university studies, he was an excellent student who graduated from the Mexican-German elementary and secondary school system. He was a good athlete. He was asked to try out for the London Olympics in Taekwondo but declined when he decided instead to begin his studies in engineering.

QMC medical staff diagnoses were C5-6 burst fracture, T2-4 compression fracture, and mild TBI with intracranial hemorrhage. Craig medical staff added the diagnoses of neurogenic bladder and bowel, orthostatic hypotension, and deep vein thrombosis. After his release from Craig, he participated in physical therapy in Mexico, and Cuba, and continues therapy in Germany. In Germany, he sees an urologist every six months, a neurologist every three months, and participates in physical therapy and rehabilitation twice weekly. He has not sought any psychological counseling. He appears to have adjusted as well as any quadriplegic in his condition could hope to adjust. He is currently taking medications for his neurogenic bladder, spasticity, and urinary tract infections.

He does not have professional assistance in the home. Instead, his mother moved from Mexico to Germany to assume the role of the in-home health care assistant when Mr. Imada returned to Germany to resume his studies. She manages all of her son's care in the home setting, including changing his catheter, bathing her son, and cooking for him.

Plaintiffs' life care planner Kirsten Turkington generated a detailed plan for Imada's care. The estimate of future lifetime medical costs for Mr. Imada is in excess of $7,600,000 if United States costs are used. Plaintiffs' economic loss expert George McLaughlin determined future lost earnings of $2,400,000.

The State's own physical and rehabilitation medicine expert confirmed that Mr. Imada sustained a C4 ASI B spinal cord injury (incomplete quadriplegia – sensory function but not motor function is present below C4), and has permanent neurological deficits that will result in the need for medical care throughout his lifetime. The State's own life care planner estimated future medical expenses in excess of $5,000,000 if United States costs are used.

As mentioned above, Maria Imada De Ita provides nearly all of her son's in-home quasi-nursing assistant home-care. When her son returned to school in Germany, she left her daughter and her husband in Mexico and gave up her own career and business in order to care for her son. We have not yet been provided the information relating to their loss of business profit claim. She and her husband are jointly seeking to recover the past medical expenses incurred on behalf of their son.

Ms. De Ita will make a very good witness. Although she and her husband continue to live apart (she in Germany with their son and now daughter who attends secondary school in Germany), she said that the marriage is strong.

Mr. Imada's father, Alfredo Baron Ocampo will also make a very good witness. He remains in Mexico to service the contracts that he and his wife's engineering firm still have. He testified that because she has the engineering degree and that he left university before obtaining his degree, his wife was the draw and rain-maker for their clients. He said that because his wife is no longer involved in the business, the business is winding down. He said that it is difficult for him to be separated (geographically) from his family, but that they have a close family.

Both of Mr. Imada's parents were at the accident scene. In their depositions, they testified that they were in their vehicle just ahead of the vehicle in which their son was riding, when they saw the Ako-Morris vehicle swerving past them. Both parents will have viable emotional distress claims.

Mr. Imada's general damages alone will likely be in excess of $5,000,000. Both parents' general damages will likely be in the $1,000,000 range. The future medical expenses of $5,000,000 to $7,600,000, some future loss earnings, plus the potential general damages of $7,600,000 results in a possible judgment in excess of $15,000,000 that will not be reduced for any comparative fault.

However, because Plaintiffs are Mexican nationals and may have to convert their future medical care costs into foreign costs, with the assistance of the mediator, we were able to use this to reduce the settlement amount from $15,000,000 to $1,300,000.

Van Vleet v. Costales, et al. **$ 70,000.00** ***(Department***
Civil No. 17-1-0951-06, First Circuit **Settlement** ***Appropriation)***

On Saturday, October 3, 2015, Plaintiff Anthony Van Vleet was riding his Harley motorcycle on Kamehameha Highway in the Waiahole-Waikane area, traveling south-bound. A State Department of Transportation (DOT) maintenance crew was in a Ford F350 truck initially traveling north-bound on Kamehameha Highway. The truck attempted to make a left turn into a church parking lot. The truck was essentially perpendicular to the motorcycle's path of travel when the motorcycle struck the right

rear panel of the truck. The highway is straight and level with no crests or troughs that would have obstructed Mr. Van Vleet's view of the left turning truck, or impeded his ability to slow or stop in time to avoid the accident. However, the left turning DOT driver should have yielded to the right-of-way of the on-coming driver. The DOT driver misjudged his ability to complete the left turn into the driveway, and his negligence in the operation of the truck would likely be found to be a legal cause of the accident. The driver also likely blocked both the north-bound and south-bound lanes of travel for at least several seconds before the collision as he attempted to maneuver the truck to avoid hitting the utility pole and complete the turn into the parking lot. Mr. Van Vleet sustained multiple pelvic fractures. He stayed at Queen's Medical Center for one day, and was transferred to Kaiser, where he stayed for approximately one week until he was discharged to home. His medical bills were in excess of $55,000. He was out from work as a Department of Defense technician for approximately five weeks. The case proceeded to mediation, which resulted in the settlement.

ATTACHMENT "B"

DEPARTMENT OF ACCOUNTING AND GENERAL SERVICES:

Carrancho, et al. v. City and County of Honolulu, et al., Civil No. 16-1-0246-02, First Circuit — **$ 52,500.00** ***(General Fund)*** **Settlement**

Plaintiff was walking in the Puea Cemetery located on School Street in Honolulu when he tripped over a pipe. The pipe was approximately 12 inches in height, and it was sticking out of the ground in the area of the cemetery owned by the State and maintained by the Department of Accounting and General Services. Plaintiff sustained a tear in his left shoulder rotator cuff that required surgical repair. Plaintiff's wife alleges loss of consortium as a result of his injuries. The case proceeded to the Court Annexed Arbitration Program, and the arbitrator awarded the Plaintiff a total of $118,142.49, which reflects Plaintiff's comparative fault of ten percent. The case later settled for $52,500.00.

HAWAII STATE PUBLIC LIBRARY SYSTEM:

Woolpert v. State of Hawaii, et al. Civil No. 15-1-0923-05, First Circuit — **$ 155,000.00** ***(General Fund)*** **Settlement**

A woman who was a patron of the Kaimuki Public Library, parked her car in the covered parking area of the library. As the woman exited and walked to the back of her car, she stepped into an uncovered 5 ½-inch-deep drain opening in the pavement. She felt her ankle twist hard, and fell to the ground. She sustained a left ankle fracture dislocation, which required an open reduction internal fixation surgery. The case proceeded to the Court Annexed Arbitration Program where the arbitrator found the State liable and awarded damages totaling $325,000.00. The arbitrator reduced this award by twenty five percent for Plaintiff's comparative negligence resulting in a total award to Plaintiff in the amount of $243,750.00. The State appealed the arbitration award and was subsequently able to settle the case for $155,000.00.

BICKERTON ■ DANG
A LIMITED LIABILITY LAW PARTNERSHIP

February 27, 2018

Senator Donovan M. Dela Cruz, Chair
415 S Beretania St # 208
Honolulu, HI 96813

RE: **Written Testimony for SB2740 re: *Johnson v. Rainbow Rehab. Svcs. Inc., et.al.***

Dear Mr. Dela Cruz:

I am writing to respectfully request your consideration to provide funding for the above referenced matter. On January 26, 2018, after two appeals, the Intermediate Court of Appeals filed its opinion affirming the trial court's November 16, 2015 Final Judgment in the amount of $1,575,806 (plus interest). Please see Summary Disposition Order in *Johnson v. Rainbow Rehab. Svcs., Inc., et.al.*, No: CAAP-15-0000938.

Please note that the judgment on appeal has not yet been entered, but is expected to be entered this week. We do not believe that any further applications for review are likely, so the judgment will become enforceable before the session is over. I am concerned that failing to include my client's judgment in this year's bill will cause great prejudice to a young man who is in dire need of medical treatment. I have alerted the acting Attorney General Russell Suzuki that I am making this request and have been informed that the AG's office is presently reviewing the matter.

This legislative funding request seeks to remedy the sexual abuse of a minor that occurred in 2002 at the hands of a State-sanctioned mental health worker who, in reality, was a sexual predator with no mental health credentials. My client, Michael Johnson was just 15 years-old and already suffering from a wide array of psychological and behavioral conditions when his purported therapist, Jason Mossholder-Brom, sexually assaulted him over the course of many months. This sexual assault happened at a critical stage in Michael's sexual and behavioral development and had the effect of instilling in him dangerous sexual compulsions.

Michael was put into contact with Mossholder-Brom by being placed in a residential mental health group home called the Rainbow House by the State of Hawai`i Department of Health. Mossholder-Brom was a purported therapist employed at the home. He had no therapy credentials and was a sexual predator set loose amongst easy prey.

After the sexual abuse of Michael came to light, suit was filed on his behalf against the State. At the bench trial in September, 2009 there was evidence that Michael needed long-term residential treatment (between four and eight years) that would cost between $1,575,806 and

$3,046,603. The trial court generally found in favor of Michael, but did not award any damages for the recommended residential treatment, despite awarding $4,000 in special damages to pay for neuropsychological testing that would conceivably reveal a need for such residential treatment.

Michael appealed the trial court's finding. The Intermediate Court of Appeals held that the evidence at trial was overwhelming that Michael required residential treatment, and remanded for further proceedings on the issue of special damages.

The date of the remand was May 7, 2013, 11 years after Michael was sexually abused, and he had yet to receive any treatment.

Back at the trial level, a new judge awarded Michael $1,575,806 in special damages specifically for residential treatment. This time, the State appealed, despite the prior ICA decision that remanded so that the appropriate special damages for treatment could be determined, and the overwhelming evidence that Michael needed treatment.

Plaintiffs prevailed on the second appeal. The ICA affirmed the trial court's award of $1,575,806 in special damages against the State on January 26, 2018.

Now, over 15 years after Michael suffered horrific sexual abuse, his day of justice may be near. To this day, he has never received any of the long term residential treatment that he needs. If the State does not apply for a writ of certiorari in this case or cert. is denied, this case will be finalized this year. We are currently working these issues out with the AG's office and are hopeful that this final judgment can be finalized shortly. Michael's justice has been denied too long and he should receive closure without further delay.

With that said, I am respectfully requesting your consideration to allow for the funding of my client. Your time and consideration is greatly appreciated. Thank you.

Sincerely,

James J. Bickerton

Enclosures

NO. CAAP-15-0000938
IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAI'I

ROBERT D. JOHNSON, JR., as guardian of the person of MICHAEL A. JOHNSON, an incapacitated adult, Plaintiff-Appellee, v. RAINBOW REHABILITATION SERVICES, INC., a Hawai'i corporation, dba RAINBOW HOUSE; JASON J. MOSSHOLDER-BROM, Defendants-Appellees, and STATE OF HAWAI'I, Defendant-Appellant, and JOHN DOES 1-10; JANE DOES 1-10; DOE CORPORATIONS 1-10; DOE PARTNERSHIPS 1-10, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE FIRST CIRCUIT
(CIVIL NO. 07-1-1855)

SUMMARY DISPOSITION ORDER
(By: Leonard, Presiding Judge, Reifurth and Chan, JJ.)

Defendant-Appellant the State of Hawai'i (State) appeals from the November 16, 2015 Final Judgment Following Remand (**2015 Final Judgment Following Remand**), and challenges the May 4, 2015 Amended Findings of Fact and Conclusions of Law Following Remand (**FOFs and COLs Following Remand**), both entered by the Circuit Court of the First Circuit (**Circuit Court**).[1]

On appeal, the State contends that the Circuit Court erred in awarding an additional $1,575,806.00 in special damages

[1] The Honorable Virginia Lea Crandall presided.

to Plaintiff-Appellee Robert D. Johnson, Jr. (Johnson), as co-guardian of M.J., an incapacitated adult.

Upon careful review of the record and the briefs submitted by the parties, and having given due consideration to the arguments advanced and the issues raised by the parties, we resolve the State's point of error as follows:

The State argues that the Circuit Court erred in its additional award because it was for a proposed residential psychosexual treatment program, which the State asserts was "to treat a condition the trial court concluded [M.J.] neither had nor was likely to have - a conclusion which the Intermediate Court of Appeals left undisturbed." This argument is without merit.

First, we recognize that, in our May 7, 2013 Amended Memorandum Opinion (Memo Op), we concluded that the Circuit Court did not clearly err in finding that "[M.J.] is not now (and not likely to become) a sexual predator." In this subsequent appeal, however, the State seemingly disregards this court's holding that "the uncontradicted evidence that [M.J.'s]'s psychosexual injuries required treatment" and the numerous unchallenged findings and other evidence cited by this court. It is clear from the unchallenged findings before this court on the first appeal, as well as the additional findings by the Circuit Court on remand, as well as the entire evidentiary record before the Circuit Court, that the expert testimony concerning the appropriate treatment for M.J. constituted substantial evidence

in support of the need for residential treatment to prevent M.J. from being further victimized, as well as, *inter alia*:

> Reducing the sexual acting-out behavior and the paraphilic behavior that [M.J.] has been engaging in or is likely to engage in, to improve anger management skills, to improve his relationships with others, particularly by teaching him ways of -- of handling situations that don't require making suicide attempts or threats, and improving his dealings with the environment in -- in that way, learning to -- to modulate his own moods so that he doesn't require other people around to comfort, to soothe himself, and to reduce his dependence.

The State offers no argument and cites no evidence that the residential treatment was not needed to address M.J.'s treatment needs, notwithstanding the Circuit Court's refusal to find M.J. to be, or likely to become, a sexual predator. In addition, neither this court's Memo Op nor the Circuit Court's earlier findings precluded the Circuit Court from finding on remand that there was still a risk (*i.e.*, a less than 50% chance) of M.J. becoming a sexual predator. Indeed, on remand the Circuit Court found:

> 71. According to Dr. Matthews, as a result of being sexually molested by a person of trust [M.J.] was <u>at risk</u> for engaging in behavior as a sexual predator and as a sexual victim himself.

(Emphasis added).

Substantive evidence in the record supports the finding that there was some level of risk that M.J. might engage in predatory behavior. Dr. Darryl B. Matthews (**Dr. Matthews**) testified that as a result of the sexual abuse suffered by M.J., M.J. developed paraphilic interests in violence and sex with teenage boys. Dr. Matthews also testified that M.J. told him that "[M.J.] does not initiate contact with school children when he's hanging out at schools" only because "the people around him

prevent him from doing that." The evidence of this risk and the evidence regarding the other treatment purposes of residential treatment support the Circuit Court's finding that residential treatment was necessary, and the award of additional special damages.

Finally, the award of $1,575,806.00 was reasonably determined from the evidence.

"Special damages are those damages which can be calculated precisely or can be determined . . . with reasonable certainty from the evidence." HI R CIV JURY Instr. 8.2.; see, e.g., Kometani v. Heath, 50 Haw. 89, 95, 431 P.2d 931, 936 (1967) (allowing the jury to consider the reasonable value of future medical expenses reasonably certain to be required was not error where sufficient evidence showed an injury). Here, Dr. Matthews testified that the need for residential treatment was solely caused by the molestation at Rainbow House. Karen Klemme (Klemme), a board-certified nurse and life-care planner who worked with Dr. Matthews to create treatment recommendations for M.J., testified that she was familiar with an appropriate residential treatment program called Casa Colina, she had visited the facility, and she had spoken with the vice president regarding the cost of the program. She stated that the program cost was between $900.00 and $1,000.00 per day for the first four to eight years, and with progress the cost might be reduced to $4,500.00 per month. Based on all of the testimony presented, the Circuit Court found that the cost of Casa Colina was reasonable compared to other similar residential facilities,

perhaps even more reasonable, and that the total cost of the treatment plan ranged between $1,575,806.00 and $3,046,603.00. The Circuit Court's additional award was based on this evidence and the State presented no evidence of any kind on these issues. Therefore, we conclude that the award of $1,575,806.00 was reasonably determined from the evidence.

For these reasons, the Circuit Court's November 16, 2015 Final Judgment Following Remand is affirmed.

DATED: Honolulu, Hawai'i, January 26, 2018.

On the briefs:

Caron M. Inagaki,
Kendall J. Moser,
Deputy Attorneys General,
for Defendant-Appellant.

James J. Bickerton,
Nathan P. Roehrig,
(Bickerton Dang LLP),
for Plaintiff-Appellee.

Presiding Judge

Associate Judge

Associate Judge