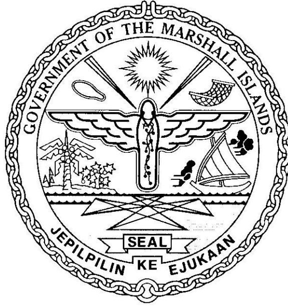

REPUBLIC OF THE MARSHALL ISLANDS LAW REPORTS DIGEST FOR MILR

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Carl B. Ingram
Chief Justice, High Court
P.O. Box B
Majuro, MH 96960, Marshall Islands
Tel. 692-625-3201/3297; Fax 692-625-3323
Email: Marshall.Islands.Judiciary@gmail.com

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MILR DIGEST

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A

ABATEMENT OF ACTIONS

Nature and Grounds

A second suit will be abated by a first only if there are the same parties, the same rights asserted, and the same relief prayed for, which must be founded on the same facts or essential basis. (*Clanton v. MI Chief Elec. Off. (3)*, 1 MILR (Rev.) 167, 170 (1989))

"Same" as used in stating and applying principles of abatement does not mean "identical" causes of action and relief sought. It means the "essential basis" must be the same. (*Clanton v. MI Chief Elec. Off. (3)*, 1 MILR (Rev.) 167, 170 (1989))

APPEAL AND ERROR

Abandonment

Issues insufficiently briefed are deemed abandoned on appeal. (*Kramer and PII v. Are and Are*, 3 MILR 56, 69 (2008))

Affirm, Grounds for

An appellate court can affirm a trial court on any ground supported by the record. This rule has been applied to criminal proceedings. (*RMI v. Lemark,* 3 MILR 19, 27 (2006))

Assignment of Errors
— Objections

Counsel has a duty to protect his record by timely objection is one such rule. (*RMI v. Menke*, 1 MILR (Rev.) 36, 37 (1986))

When error is claimed in receipt of evidence or in any other ruling by the trial court, it is counsel's duty to protect his record, and preserve the question for appellate review, by timely objection. (*Lokkon v. Nakap*, 1 MILR (Rev.) 69, 70 (1987))

Chief Electoral Officer

The Supreme Court will not to substitute its judgment for that of the Chief Electoral Officer based on the information submitted to him unless his decision is a clear departure from statutory requirements, is fraudulent or in bad faith, arbitrary, capricious, without basis in the evidence, or his decision is one which no reasonable mind could have reached. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 96 (1997))

If the record supports the Chief Electoral Officer's decision, it is conclusive upon the court and the respondent's action must be sustained and will not be disturbed by the court. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97 (1997))

Criminal Sentence

The court reviews sentence appeals under the "abuse of discretion" standard. (*RMI v Elanzo*, 3 MILR 51, 53 (2008))

The court gives great deference and weight to the trial judge's sentencing decision so long as it is within the statutory range of permissible sentence and is not arbitrary or capricious, and will not substitute its judgment for that of the trial judge merely because it could have balanced the factors differently and could have arrived at a lesser sentence. (*RMI v Elanzo*, 3 MILR 51, 53 (2008))

Provided the trial judge fully considered the factors relevant to imposing sentence, the appellate court will generally conclude there was no abuse of discretion. (*RMI v Elanzo*, 3 MILR 51, 53 (2008))

The reviewing court may not change or reduce a sentence imposed within the applicable statutory limits on the ground that the sentence was too severe unless the trial court relied on improper or unreliable information in exercising its discretion or failed to exercise any discretion at all in imposing the sentence. (*RMI v Elanzo*, 3 MILR 51, 53 (2008))

Decisions Reviewable

— Decisions on Appeal to High Court

An appeal as of right from any final decision of the High Court in the exercise of its appellate jurisdiction will lie only if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the Constitution. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 150)

The filing of an appeal in the manner provided by the present Rules of Appellate Procedure sufficiently invokes the power of the Court to determine whether jurisdiction lies under any of the three provisions of Article VI, § 2 of the Constitution to review a decision of the High Court made in the exercise of the High Court's appellate jurisdiction. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 150 (1989))

The Supreme Court's discretion to grant, or indeed to order up, an appeal pursuant to Article VI, § 2(2)(c) of the Constitution appears to be unfettered, but exercising discretion imports a reasoned, mature, and responsible exercise of judicial authority. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 150 (1989))

— Finality of Determination

An Order for Possession issued by the High Court in an eminent domain proceeding is not a final order and is not appealable. (*RMI v. Balos, et al. (1)*, 1 MILR (Rev.) 53, 53 (1986))

An order declining to certify a matter to the Traditional Rights Court is not a final appealable order. (*Bokmej v. Lang and Jamore*, 1 MILR (Rev.) 85, 85 (1987))

Under Article VI, § 2(2) of the Constitution of the Marshall Islands, an appeal may be taken to the Supreme Court only from any final decision of the High Court, as of right, or from any final decision of any court in the discretion of the Supreme Court. (*Piamon v. Lanitur-Bulele*, 1 MILR (Rev.) 129, 129 (1989))

A final judgment or order is one that disposes of the case, whether before or after trial. After such an order or judgment, there is nothing further for the trial court to do with respect to the merits and relief requested. (*Lemari, et al., v. Bank of Guam*, 1 MILR (Rev.) 299, 300 (1992))

The Constitution, statutes, rules and case law in this jurisdiction establish that only a final adjudication, however styled, can be appealed. Article VI, Section 2(2) of the Constitution states that appeals lie to the Supreme Court only from "final decision(s)." (*Lemari, et al., v. Bank of Guam*, 1 MILR (Rev.) 299, 301 (1992))

The Supreme Court has consistently held that appeals from interlocutory orders will not be entertained. (*Lemari, et al., v. Bank of Guam*, 1 MILR (Rev.) 299, 301 (1992))

Insofar as an order of the High Court denies a motion for summary judgment, it is interlocutory only. (*Labwidrik, et al. v. Candle*, 2 MILR 1, 2 (1993))

Insofar as an order of the High Court grants a motion for summary judgment, the order is a final decision of the High Court. (*Labwidrik, et al. v. Candle*, 2 MILR 1,2 (1993))

Except with respect to (1) matters removed by the High Court to the Supreme Court pursuant to Article VI, § 2(3) of the Constitution, and (2) review of orders granting, dissolving or denying an injunction issued by the Nuclear Claims Tribunal or the Special Tribunal, pursuant to 42 MIRC Ch. 1, § 6(3), the Supreme Court is without power to entertain interlocutory appeals. *(Labwidrik, et al. v. Candle*, 2 MILR 1,2 (1993))

To the extent that an appeal is from that part of the order granting the motion for summary judgment, it will be allowed only if the High Court certifies to this Court within 30 days of filing of this Order or such longer time as the High Court may request, that the claims of Plaintiff with respect to which the High Court granted summary judgment against Plaintiff-Appellant are: (a) severable from and may be considered without reference to (i) the other claims of Plaintiff and (ii) the claims of other parties, and (b)

there is no just reason to delay consideration of the order on appeal. Absent such certification by the High Court, which the Supreme Court requires as assurance that hearing the appeal will neither confuse nor delay the determination of the remaining claims by the High Court, any appeals must await entry of final judgment by the High Court on all claims of all parties. (*Labwidrik, et al. v. Candle*, 2 MILR 1, 2 (1993))

An appeal shall lie only from a final decision. (*RMI v. ATC, et al. (1)*, 2 MILR 133, 133 (1999); *AMI v. Dornier (1)*, 2 MILR 180, 180 (2001))

Only final judgments are reviewable. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 186 (2002))

Voluntary dismissals, granted without prejudice are not final decisions and do not transform an earlier partial dismissal or partial summary judgment order into a final decision. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 186 (2002))

Dismissal, Grounds for

— Failure to Identify Errors

The notice of appeal must contain a "concise statement of the questions presented by the appeal." The Court may decline to hear an appeal where it cannot be determined from the notice of appeal what the alleged error was. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 4 (1984))

The notice of appeal must identify the errors claimed. (*Jerilong, et al., v. Hazzard*, 1 MILR (Rev.) 90, 91 (1988))

Failure to include a concise statement of the questions presented, in the notice of appeal, is grounds for dismissal. (*Korok v. Lok*, 1 MILR (Rev.) 93, 95 (1988))

Failure to include in the notice of appeal a concise statement of the questions presented is grounds for dismissal. (*Rang, et al., v. Lajwa*, 1 MILR (Rev.) 214, 214 (1990))

The Court may decline to hear an appeal where it cannot be determined from the notice of appeal what the alleged error was. (*Bulale and Jamore v. Reimers and Clarence*, 1 MILR (Rev.) 259, 260 (1992))

— Failure to Designate Record

Appellant's failure to designate the record is grounds for dismissal. (*RMI v. Laibwij*, 1 MILR (Rev.) 208, 208 (1990))

Appellant's failure to in a timely manner either order from the reporter a transcript of such parts as the trial court proceedings that appellant deemed necessary or to certify that no parts of the proceedings will be ordered and file a statement of points of error is grounds for dismissal. (*Konou v. Konou*, 2 MILR 101, 101 (1997))

Appellant's failure to in a timely manner either order from the reporter a transcript of such parts as the trial court proceedings that appellant deemed necessary or to certify that no parts of the proceedings will be ordered and file a statement of points of error is grounds for dismissal. (*In the Estate of Harry Anjen*, 2 MILR 103, 103 (1997))

— Noncompliance with the Rules

Rule 20(a) provides that failure of appellant to comply with the rules after filing notice of appeal is ground for dismissal of the appeal. (*Lorennij v. Muller*, 1 MILR (Rev.) 21, 22 (1985))

Appellant filed the notice of appeal before the appellate court rather than the trial court as required by rule. (*MIDC and Leon v. MALGOV and RMI (1)*, 1 MILR (Rev.) 135, 136 (1989))

— Failure to Pay Fees and Costs

Rule 16 of Appellate Rules of Procedure allows thirty (30) days from service of notice of estimated cost of transcription for appellant to make payments. (*Lorennij v. Muller*, 1 MILR (Rev.) 21, 22 (1985))

Failure to timely pay the cost of the transcript of trial court proceedings is grounds for dismissal. (*Leon, et al., v. Balos*, 1 MILR (Rev.) 55, 55 (1986))

Failure to timely pay estimated cost of transcript does not affect jurisdiction to hear appeal, but may be grounds for dismissal. (*Korok v. Lok, et al.*, 1 MILR (Rev.) 93, 94 (1988))

Appellant's failure to timely pay costs for production of the transcript of trial court proceedings. (*Jacob v. MI Chief Elec. Off.*, 1 MILR (Rev.) 128, 128 (1989))

— Failure to Timely File Notice

Timely filing of the notice of appeal is necessary for the appellate court to have jurisdiction to hear the appeal. (*RMI v. Balos, et al. (3)*, 1 MILR (Rev.) 120, 121 (1988))

Rule 4 of the Appellate Rules of Procedure and 6 TTC § 352 require an appeal to be filed within thirty (30) days. Timely filing is jurisdictional. (*Jejo v. Lobo (2)*, 1 MILR (Rev.) 127, 127 (1989))

Failure to timely file a notice of appeal is grounds for dismissal. (*Edwin v. Elbi*, 2 MILR 26, 26 (1994))

The Supreme Court on its on motion dismissed the appeal for the failure to timely file a notice of appeal. (*Jack v. Langidrik*, 2 MILR 76, 76 (1996))

— Failure to Timely File Opening Brief

Appellant's failure to timely file an opening brief is grounds for dismissal. (*Adding v. MI Chief Elec. Off.*, 1 MILR (Rev.) 126, 126 (1989); *Premier Film and Eq. v. Mc Quinn*, 1 MILR (Rev.) 131, 131 (1989); *Konelios v. MI Chief Elec. Off.*, 1 MILR (Rev.) 132, 132 (1989); *RMI v. Lang*, 1 MILR (Rev.) 207, 207 (1990); *Neylon v. Jeik*, 1 MILR (Rev.) 237, 237 (1991); *Majuwi v. Jorauit, et al.*, 1 MILR (Rev.) 238, 238 (1991); and *In the Matter of the Estate of Zaion*, 2 MILR 118, 119 (1998))

Under Section 206(4) of the Judiciary Act and SCRP Rules 30 and 42(b), the failure to file an opening brief within the required time is grounds for dismissal. (*Alik v. PSC*, 3 MILR 13, 16 (2006))

Injunction Pending Appeal

The standard for granting a preliminary injunction governs a motion for stay or injunction pending appeal under Rule 8, Supreme Court Rules of Procedure. (*Nuka v. Morelik, et al.*, 3 MILR 39, 41 (2007))

Mootness

An appellate court should retain jurisdiction in the face of mootness when the matter involves a recurring controversy of great public interest. (*Heine v. Radio Station WSZO and GM*, 1 MILR (Rev.) 122, 124 (1988))

Nuclear Claims Tribunal and Special Tribunal

Section 6(3) of the Marshall Islands Nuclear Claims Tribunal Act (1987), as amended, clearly speaks in the disjunctive, permitting the Supreme Court to entertain an appeal from the final determination of the Tribunal <u>or</u> a Special Tribunal. It does not authorize a single appeal from both a final determination of the Special Tribunal the determination of the Tribunal declining to review it. (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992))

The Supreme Court's current tentative view is that an appeal from a final determination of a Nuclear Claims Special Tribunal should not be entertained unless it suffers from one or more of the defects specified in the Marshall Islands Administrative Procedures Act 1979, §§ 17(7)(a) through (f). (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 285 (1992))

The Supreme Court has tentatively concluded that probably it should not entertain an appeal from the Nuclear Claims Tribunal or Special Tribunal unless it appears likely that the action appealed from suffered from one or more of the defects specified in § 17(7)(a) through (f) of the Marshall Islands Administrative Procedures Act 1979, 6 MIRC Ch. 1. (*Defender of the Fund*, *et al.*, *v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289, 291 (1992))

— Standard of Review

The standard for Supreme Court review of a finding by the Nuclear Claims Tribunal that the decision of a Special Tribunal did not involve a matter of public importance would be *de novo* if it is a mixed question of law and fact or clearly erroneous if it is a question only of fact. (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992))

The standard for Supreme Court review of the action of the Nuclear Claims Tribunal in declining to exercise its discretion in favor of reviewing the decision of a Special Tribunal is abuse of discretion. (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992))

Parties
— Amicus Curiae

The function of a friend of the court is to assist in assuring that the court is fully advised. He is expected to and usually does take an adversary position. (*Clanton, et al. v. MI Chief Elec. Off (2)*, 1 MILR (Rev.) 156, 158 (1989))

Questions Reviewable
— Asserted Below

Matters as to which no objection was made at trial will not be considered on appeal. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 10 (1984))

An appellate court cannot rule on the merits of a question that was neither presented to, nor decided by, the officer, body or court appealed from. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 153 (1989))

The Supreme Court cannot decide on appeal a question or claim not raised or asserted in the court below. (*Jeja v. Lajimkam, et al.*, 1 MILR (Rev.) 200, 205 (1990))

As a general rule, an appellate court will not consider any matter that was not raised by way of an objection in the trial court. (*RMI v. de Brum (1)*, 2 MILR 223, 226 (2002))

The decision of whether to reach the merits of an issue not raised below is a decision within the discretion of the court. (*RMI v. de Brum (1)*, 2 MILR 223, 226 (2002))

It is well settled in this jurisdiction, as elsewhere, that issues or questions not raised or asserted in the court below are waived on appeal. (*Tibon v. Jihu et al.*, 3 MILR 1, 5 (2005))

The general rule is that issues not raised below are waived on appeal unless necessary to prevent manifest injustice. (*Kramer and PII v. Are and Are*, 3 MILR 56, 64 (2008))

Failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal. (*Kramer and PII v. Are and Are*, 3 MILR 56, 69 (2008))

It is well settled in this jurisdiction, as elsewhere, that issues or questions not raised or asserted in the court below are waived on appeal. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 88 (2008))

Without a record of what took place during hearings in the case, the court must consider an objection to be waived. In order for the Supreme Court to consider claims properly, the parties must provide a record sufficient for the Court to determine that an objection was properly raised. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 88-89 (2008))

A constitutional challenge not raised in the trial court is deemed waived on appeal. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 121 (2009))

— Contained in Notice

Rule 3 of the Rules of Appellate Procedure provides that "only questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." (*Lokkon v. Nakap*, 1 MILR (Rev.) 69, 70 (1987))

Rule 3 of the Marshall Islands Supreme Court Rules of Procedure makes it clear that *only* those questions set forth in the notice of appeal or fairly comprised therein will be considered by the Supreme Court. (*Kelet, et al., v Lanki & Bien*, 3 MILR 76, 80 (2008))

Only in rare instances when the interest of justice requires will the Supreme Court consider an issue outside the notice of appeal. (*Kelet, et al., v Lanki & Bien*, 3 MILR 76, 81 (2008))

— Cross Appeal

In the absence of a timely filed cross appeal, the Supreme Court will not rule upon a claimed error of the High Court raised in the brief of the Appellee. (*MIDC and Leon v. MALGOV and RMI (2)*, 1 MILR (Rev.) 209, 210 (1990))

An appellee need not cross-appeal from a judgment in order to assert an argument which supports the judgment as entered, even where the argument being raised has been explicitly rejected by the lower court. (*Abija v. Bwijmaron*, 2 MILR 6, 13 (1994))

— Questions of Law

Generally, the Supreme Court will not consider a matter which has not been raised by way of objection in the trial court; however, an appellate court may take up a question of

law on its own motion, if there is a basis for it in the record. (*RMI v. Digno*, 1 MILR (Rev.) 18, 19 (1984))

Supreme Court is free to consider questions of law not considered in briefs or argument. The Court is free to recognize clear error. (*RMI v. Kabua*, 1 MILR (Rev.) 39, 40 (1986))

When a decision is presented to the appellate court, that court is required to reach the appropriate legal conclusion. Whether the trial court has made a proper or an improper decision on an issue of law is irrelevant. (*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 125 (1998))

An appellate court may take up a question of law, on its own motion, if there is a basis for it in the record. (*RMI v. de Brum (1)*, 2 MILR 223, 226 (2002))

Appellate review of a claim raised for the first time on appeal is permitted if: (1) there are "exceptional circumstances" why the issue was not raised at trial; (2) the new issue arises while the appeal is pending because of a change in the law; (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue at trial; or (4) plain error has occurred and injustice might otherwise result. (*RMI v. de Brum (1)*, 2 MILR 223, 227 (2002))

The Supreme Court may affirm a dismissal on any ground supported by the record, whether or not the High Court relied on other grounds or reasoning. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 241 (2004))

Record and Proceedings Not in Record

An appeal is on the record. Neither enlargement of the grounds for complaint nor the presentation of additional evidence nor a hearing *de novo* is encompassed within the ordinary meaning of appeal. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 151 (1989))

Facts outside that record, unless subject to judicial notice, will not be considered. (*Maj. Stev. & Ter. Co., Inc., v. Alik and Alik*, 1 MILR (Rev.) 257, 257 (1992))

Appeals are on the record, without reference to current circumstances, other than those that render the appeal moot or otherwise justify departure from consideration of the record alone. (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 287 (1992))

An appeal is limited to the record of evidence introduced and proceedings taken in the lower court. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 64 (1995))

An appeal is on the record; it is not a new trial. Additional evidence, including statements of purported fact in counsel's argument, will neither be accepted nor considered. (*Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995))

It is well settled that an appeal is on the record which existed at the time the appeal was taken. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97 (1997))

Review

— Discretionary Matters

Under the abuse of discretion standard, the reviewing court will reverse only where no reasonable person would have acted as the trial court did. (*Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36-37 (2007))

— — Motions In General

The standard of review of the High Court's order denying the motions may be reversed only for an abuse of discretion. (*RMI v. ATC, et al. (3)*, 2 MILR 170, 171 (2001))

The standard of review for the denial of a motion to reopen discovery is abuse of discretion. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 193 (2002))

The proper standard of review for a single Supreme Court judge's order is "abuse of discretion. (*Alik v. PSC*, 3 MILR 13, 16 (2006))

— — Continuances

Abuse of discretion is the standard of review of trial court's declining to grant a continuance and allowing a trial assistant to sit at counsel table with appellee's counsel. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 10 (1984))

The decision to grant or deny a requested continuance is within the trial court's discretion and will not be disturbed on appeal absent clear abuse of that discretion. (*RMI v. Lemark*, 3 MILR 19, 23 (2006))

— — Default Judgments

Whether to grant a motion to set aside a default judgment is within the discretion of the trial court. Abuse of discretion is the standard of review. (*TT Soc. Sec. Sys. Board v. Kabua*, 1 MILR (Rev.) 83, 84 (1987))

The standard of review for a High Court's refusal to set aside a default judgment under MIRCP Rule 48(a) is abuse of discretion. (*Stanley v. Stanley*, 2 MILR 194, 198 (2002))

— — Dismissals

An appellate court can only reverse a trial court's decisions to dismiss a case for failure to prosecute if the appellate court finds the trial court abused its discretion and its decisions is "clearly erroneous." (*Lokot and Kabua v. Kramer, et al.*, 2 MILR 89, 92 (1997))

It is presumed the trial judge acted reasonably and reversal may occur only if it is plain either that the dismissal was a mistake or that the Judge did not consider factors essential to the exercise of a sound discretion. (*Lokot and Kabua v. Kramer, et al.*, 2 MILR 89, 92 (1997))

— — Disqualification of Attorneys

The Standard of Review of a court's ruling on a motion for an attorney's disqualification is whether the ruling was an abuse of discretion. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 110 (1988))

The standard of review of a court's ruling on a motion for an attorney disqualification is abuse of discretion. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 61 (1995))

— — Evidentiary Matters

The trial court's decision regarding evidentiary matters will be reviewed only for an abuse of discretion. (*Elmo v. Kabua*, 2 MILR 150, 154 (1999))

The standard for review of evidentiary ruling is abuse of discretion. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 187 (2002))

— — Motion to Vacate Judgement

The reviewing court reviews the denial of a Rule 60(b) motion for an abuse of discretion. (*Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007))

Because review of the denial of Rule 60(b) relief is deferential, the reviewing court must affirm if the trial court adequately considered the reasons for neglect and the reasons did not compel a finding of excusable neglect. (*Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 37 (2007))

— — Rule of Procedure

The proper standard of review for the High Court's interpretation of Traditional Rights Court Rule 9 is "clearly erroneous." (*Dribo v. Bondrik, et al.*, 3 MILR 127, 135 (2010))

A high degree of deference is given to a trial court's interpretation of its own rules. The appropriate standard of review in such a case is "abuse of discretion." (*Dribo v. Bondrik, et al.*, 3 MILR 127, 135 (2010))

Under the "abuse of discretion" standard, the court will reverse only where no reasonable person would act as the trial court did. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 136 (2010))

Interpreting Traditional Rights Court Rule 9 to require a trial before the High Court on issues already fully litigated before the Traditional Rights Court and High Court sitting

jointly would undermine the constitutional assignment of roles between the Traditional Rights Court and the High Court. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 137 (2010))

— Findings of Fact

Findings of fact by the trial court will not be set aside unless clearly erroneous. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 5 (1984))

Findings of fact of the High Court cannot be set aside unless clearly erroneous, P.L. 1983-18. (*RMI v. Menke*, 1 MILR (Rev.) 36, 37 (1986))

An appellate court will not set aside findings of fact of a trial court unless they are "clearly erroneous." (*RMI v. Langley*, 1 MILR (Rev.) 45, 46 (1986))

Findings of fact of the High Court in trials before it shall not be set aside by the Supreme Court unless clearly erroneous. (*Lokkon v. Nakap*, 1 MILR (Rev.) 69, 72 (1987))

Findings of fact by the High Court are not to be set aside by the Supreme Court unless found to be clearly erroneous. (*Mwedriktok v. Langijota and Abija*, 1 MILR (Rev.) 172, 174 (1989))

Findings of fact are reviewed to determine if they are clearly erroneous. (*Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991); *Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 233 (1991))

The Findings of Fact by the High Court are not to be set aside by the Supreme Court unless found to be clearly erroneous. (*Elmo v. Kabua*, 2 MILR 150, 153 (1999))

Findings of fact are reviewed for clear error. (*Stanley v. Stanley*, 2 MILR 194, 199 (2002))

If the alleged error is based upon factual findings, the court will reverse or modify if the findings are clearly erroneous. (*Jack v. Hisaiah*, 2 MILR 206, 209 (2002))

A finding of fact as to the custom is to be reversed or modified only if clearly erroneous. (*Tibon v. Jihu et al.*, 3 MILR 1, 6 (2005))

The Supreme Court will not interfere with a finding of fact if it is supported by credible evidence. In determining whether the High Court has made a mistake in the finding of a fact, the Supreme Court will not interfere with the finding if it is supported by credible evidence, must refrain from re-weighing the evidence, and must make every reasonable presumption in favor of the trial court's decision. (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008))

Errors of fact are reviewed for clear error. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 87 (2008))

The appellate court views the evidence in the light most favorable to the trial court's ruling and must uphold any finding that is permissible in light of the evidence. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 134 (2010))

— — Clearly Erroneous

A finding of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the court below made a mistake. (*Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991); *Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 233 (1991))

Where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous. (*Kramer and PII v. Are and Are*, 3 MILR 56, 68 (2008))

A Findings of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the Court below made a mistake (*Elmo v. Kabua*, 2 MILR 150, 153 (1999))

"A Finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (*Elmo v. Kabua*, 2 MILR 150, 153 (1999))

A finding is clearly erroneous when the entire record produces a definite and firm conviction that the court below made a mistake. (*Jack v. Hisaiah*, 2 MILR 206, 209 (2002))

A finding of fact is "clearly erroneous" when a review of the entire record produces "a definite and firm conviction that the court below made a mistake." (*Tibon v. Jihu et al.*, 3 MILR 1, 6 (2005))

Findings of fact by the High Court will not be set aside unless clearly erroneous. A finding of fact is "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008))

A finding of fact is clearly erroneous when a review of the entire record produces a definite and firm conviction that the court below made a mistake. (*Thomas v. Samson v. Alik*, 3 MILR 71, 73 (2008))

A finding of fact is clearly erroneous when a review of the entire record produces a definite and firm conviction that the court below made a mistake. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 87 (2008))

The clearly erroneous standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently; the reviewing court's function is not to decide the factual issues de novo. (*Bulele v. Morelik, et al.*, 3 MILR 96,100 (2009))

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, having reviewed all of the evidence, is left with the definite and firm conviction that a mistake has been committed. (*Bulele v. Morelik, et al.*, 3 MILR 96,100 (2009))

The Court applies the "clearly erroneous" standard to review of factual determinations of the High Court, under which the trial court's findings of fact are presumptively correct. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 134 (2010))

A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 134 (2010))

The "clearly erroneous" standard does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently; the reviewing court's function is not to decide the factual issues *de novo*. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 134 (2010))

— Harmless Error

Errors by the court below are not grounds for an appellate court to disturb a judgment unless refusal to do so would be inconsistent with substantial justice. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 5 (1984))

To warrant appellate intervention, error in admitting or excluding evidence, or in any ruling or order of the court must be so prejudicial to the rights of a party as to be inconsistent with substantial justice, 6 TTC Section 351. (*RMI v. Menke*, 1 MILR (Rev.) 36, 37 (1986))

Improper admission of evidence is not grounds for reversal if it appears there is sufficient evidence to justify the decision, independently of the evidence to which objection was made. (*Bulale and Jamore v. Reimers and Clarence*, 1 MILR (Rev.) 259, 262 (1992))

Assuming the evidence was improperly admitted, such admission "is not grounds for reversal if it appears there is sufficient evidence to justify the decision, independently of the evidence to which the objection was made." Further any such error must affect "a substantial right of the party" otherwise it will be deemed harmless error. (*Elmo v. Kabua*, 2 MILR 150, 154 (1999))

— Presumptions

Appellate court has a duty to make every reasonable presumption in favor of the correctness of the decision of the lower court. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 10 (1984))

— Questions of Fact

Appellate courts will not interfere with findings of the trial court which are supported by credible evidence. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 9 (1984))

An appellate court does not weigh the evidence. (*RMI v. Langley*, 1 MILR (Rev.) 45, 46 (1986))

An appellate court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision. (*Les Nor. Boat Repair, et al., v. O/S Holly, et al.*, 1 MILR (Rev.) 176, 179 (1989))

Appellate Courts will not interfere with the findings of the trial court which are supported by credible evidence. (*Elmo v. Kabua*, 2 MILR 150, 153 (1999))

An Appellate Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision. (*Elmo v. Kabua*, 2 MILR 150, 153 (1999))

There is credible evidence to support the findings of the trial court and this court will not re-weigh the evidence, but must make every reasonable presumption in favor of the trial court's decision. (*Elmo v. Kabua*, 2 MILR 150, 154 (1999))

— Questions of Law

Matters of law are reviewed *de novo*. (*Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991))

A question concerning waiver of affirmative defenses, and specifically *res judicata* and collateral estoppel, involves the interpretation of Rule 8(c) of the Marshall Islands Rules of Civil Procedure and thus it is a question of law reviewed *de novo*. (*Abija v. Bwijmaron*, 2 MILR 6, 14 (1994))

The High Court's interpretation of the Marshall Islands Constitution is a question of law which is reviewed *de novo*. (*Abija v. Bwijmaron*, 2 MILR 6, 15 (1994))

The appellate court reviews questions of law, such as *res judicata*, *de novo*. (*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 125 (1998))

Both issues [the right to counsel and the constitutionality of an Act] are questions of law which are reviewed *de novo*. (*In the Matter of P.L. No. 1995-118*, 2 MILR 105, 106 (1997))

Purely or predominantly legal issues are reviewed *de novo*. (*Stanley v. Stanley*, 2 MILR 194, 199 (2002))

Although typically the standard of review for a denial of a motion to vacate a judgment under MIRCP Rule 48(a) is abuse of discretion, where the motion to vacate is based on an assertion of a void judgment under MIRCP Rule 48 (a)(4), the standard of review is *de novo*. (*Stanley v. Stanley*, 2 MILR 194, 199 (2002))

The standard of review for this Court is if the alleged error is one of law, the court will review the matter *de novo*. (*Jack v. Hisaiah*, 2 MILR 206, 209 (2002))

The Court reviews the denial of a motion to dismiss based upon a claim of foreign sovereign immunity *de novo*. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 248 (2004))

The High Court's interpretation of the Marshall Islands Constitution is a question of law which is reviewed *de novo*. (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008))

Errors of law are reviewed *de novo*. (*Thomas v. Samson v. Alik*, 3 MILR 71, 73 (2008))

Errors of law are reviewed *de novo* (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 86 (2008))

Issues of law are reviewed *de novo*. (*Bulele v. Morelik, et al.*, 3 MILR 96,100 (2009))

Purely or predominately legal issues are reviewed *de novo*. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 135 (2010))

— — Dismissal of Complaint

The Court reviews dismissal of a complaint *de novo*. (*Rosenquist v Economou, et al.*, 3 MILR 144, 151 (2011))

In reviewing complaints on a motion to dismiss, plaintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered. Inferences that are not objectively reasonable cannot be drawn in the plaintiff's favor. (*Rosenquist v Economou, et al.*, 3 MILR 144, 151 (2011))

— — Failure to State a Claim

The Supreme Court reviews *de novo* a dismissal of a complaint for failure to state a claim. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 241 (2004))

— — Lack of Jurisdiction

The Supreme Court reviews *de novo* a dismissal of a complaint for want of jurisdiction. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 241 (2004)

— — Summary Judgment

The standard of review of the trial court's grant or denial of summary judgment is *de novo*. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 22 (1994))

The standard of review for summary judgment is *de novo*. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 189 (2002))

The Supreme Court reviews the High Court's summary judgment *de novo*. (*Jalley v Mojilong*, 3 MILR 106, 109 (2009))

Appeals from summary judgment, which are solely questions of law, are reviewed *de novo. (In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 117 (2009))

— Traditional Rights Court

The High Court and Supreme Court must give proper deference to the decision of the Traditional Rights Court in cases that involve customary law. (*Thomas v. Samson v. Alik*, 3 MILR 71, 73 (2008))

A finding of fact as to custom made by the Traditional Rights Court is to be reversed only if clearly erroneous. (*Thomas v. Samson v. Alik*, 3 MILR 71, 73 (2008))

The High Court must adopt a decision of the Traditional Rights Court unless it is clearly erroneous or contrary to law. (*Kelet, et al., v Lanki & Bien*, 3 MILR 76, 78 (2008))

On appeal of the High Court's judgment concerning a determination of the Traditional Rights Court, the Supreme Court reviews the High Court's factual findings for clear error and its decision of law *de novo*. (*Kelet, et al., v Lanki & Bien*, 3 MILR 76, 78 (2008))

The High Court and Supreme Court must give proper deference to the decision of the Traditional Rights Court in cases that involve customary law. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 87 (2008))

A finding of fact as to custom made by the Traditional Rights Court is to be reversed only if clearly erroneous. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 87 (2008))

Whether the High Court properly affirmed the Traditional Rights court's determination of a certified question is a purely legal issue, reviewed by the Supreme Court *de novo*. (*Bulele v. Morelik, et al.*, 3 MILR 96,100 (2009))

The Traditional Rights Court's determination of a certified question of Marshallese custom is given substantial weight, and will be upheld unless it is clearly erroneous or contrary to law. (*Bulele v. Morelik, et al.*, 3 MILR 96,100 (2009))

The Constitution, Article VI, section 4(5) requires the High Court to adopt the decision of the Traditional Rights Court unless that decision is "clearly erroneous" or contrary to law. (*Dribo v Bondrik, et al.*, 3 MILR 127, 134 (2010))

The Constitution limits the High Court's role in determination of questions within the Traditional Rights Court's jurisdiction, and it is the duty of the High Court to adopt the decision of the Traditional Rights Court unless that decision is "clearly erroneous or contrary to law." (*Dribo v. Bondrik, et al.*, 3 MILR 127, 136 (2010))

The courts afford the findings of the Traditional Rights Court proper deference, even if they would have resolved the case differently, because of the unique position and specialized knowledge the Traditional Rights Courts judges have concerning custom and traditional practice. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 140 (2010))

APPEAL TO THE HIGH COURT

Decisions of Chief Electoral Officer

Reviews by the High Court of the decisions of the Chief Electoral Officer pursuant to 2 MIRC Ch. 1, § 81(1) are performed by the High Court in the exercise of its appellate jurisdiction. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 149 (1989))

APPEARANCE

Distinction Between General and Special Abolished

The provision of Rule 12(b) of the Marshall Islands Rules of Civil Procedure, that defenses or objections are not waived by joinder with other defenses or objections, abolished the distinction between general and special appearances. (*Gushi Bros. Co. Hawaiian Flour Mills, et al.*, 1 MILR (Rev.) 239, 241 (1991))

ARBITRATION

Agreement to Arbitrate

It is well-settled that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. (*AMI v. Dornier (2)*, 2 MILR 211, 216 (2002))

The existence of an agreement to arbitrate must be determined by the court. (*AMI v. Dornier (2)*, 2 MILR 211, 216 (2002))

ATTORNEYS

Agent for Client

Parties are liable for the violations of their attorneys. (*Lokot and Kabua v. Kramer, et al.*, 2 MILR 89, 91 (1997))

Disqualification

— Code of Professional Responsibility

Disciplinary Rule 7-104 clearly proscribes negotiations by any lawyer with another person who is represented by counsel without first obtaining the permission of that person's lawyer. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 111 (1988))

— Communicating With Other Counsel's Client

In determining whether an attorney should be disqualified because of an alleged violation of Disciplinary Rule 7-104, three competing interests must be balanced: (1) the client's interest in being represented by counsel of its choice; (2) the opposing party's interest in a trial free from prejudice due to disclosures of confidential information; and (3) the public's interest in the scrupulous administration of justice. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 111 (1988))

— Opposing Former Client

Where the cause of action or matters involved in a former suit are substantially related to the present action, an attorney who represented a client in that former suit should not represent his adversary in the present action. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 111 (1988))

— Prejudice

An attorney is not disqualified if his previous representation of the opposing party did not involve disclosure to him of confidential information prejudicial to that party in the pending case. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 61 (1995))

Duty to Client

— Client's Funds

The RMI Legal Aid Office also has the duty not to commingle public funds with its client's funds. ABA Model Code of Professional Responsibility Canon 9, EC 9-5. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 87 (1997))

— Confidences and Secrets

ABA Model Code of Professional Responsibility, Canon 4 (1980 version) provides that "[a] lawyer should preserve the confidences and secrets of a client." DR 4—101 (A) defines "confidence" and "secret": "Confidence" refers to information protected by the

attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 85 (1997))

It is not an ethical violation to disclose a client confidence or secret if required by law. *See* DR 4-101 (c)(2). (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 85 (1997))

Fees

Under "common law" attorney's fees are not awarded to the prevailing party in the absence of an agreement between the parties or a statute authorizing the award of attorney's fees. (*Anitok v. Binejal*, 2 MILR 114, 117 (1998))

Privileges, Disabilities, and Liabilities
— Requirement to Associate Local, Licensed Co-counsel

Absent a duly adopted universal rule to that effect, conditioning an attorney's right to appear before the Nuclear Claims Tribunal upon his associating local, licensed co-counsel, requires that the attorney be accorded due process. (*Brown v. NCT*, 1 MILR (Rev.) 264, 268 (1992))

Representation

A corporation represented by a non-attorney throughout the trial and appellate proceeding cannot claim error for such representation where the question was not presented to or decided by the lower court. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 64 (1995))

Suspension and Disbarment
— Complaints

An order of the Nuclear Claims Tribunal referring an attorney to the Marshall Islands Standing Committee on Professional Conduct is not appealable. (*Brown v. NCT*, 1 MILR (Rev.) 264, 268 (1992))

B

BROADCAST COMMUNICATIONS

Candidates Programs
— Regulations

35 TTC § 51 requires that "free access" be given to any candidate for public office, and that any "program . . . shall be broadcast as submitted without any preview or censorship." 35 TTC § 52 provides that each station may promulgate rules which limit the duration of programs. (*Heine v. Radio Station WSZO and GM*, 1 MILR (Rev.) 122, 123 (1988))

C

CIVIL PROCEDURE

Claims

— When Made

As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because he did not set forth in the complaint a theory on which he could recover, "provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits." (*Anitok v. Binejal*, 2 MILR 114, 116 (1998))

Default Judgments

— Burden of Proof to Set Aside

When a default judgment has been entered, the party seeking to set aside the judgment bears the burden of proving that MIRCP Rule 48(a) relief is justified and that a meritorious defense exists. (*Stanley v. Stanley*, 2 MILR 194, 198 (2002))

— Disposition on the Merits Preferred

A trial on the merits is favored over default judgment and that close cases should be resolved in favor of the party seeking to set aside default judgment. (*Stanley v. Stanley*, 2 MILR 194, 198 (2002))

— Entry of Default

No notice or hearing is required for entering default. (*AMI v. Dornier (2)*, 2 MILR 211, 221 (2002))

— Grounds to Set Aside

The factors to be considered in determining "good cause" under FRCP 55(c) [MIRCP44] and "excusable neglect" under FRCP 60(b) [MIRCP48(a)] are the same; a court will deny relief if (l) there was culpable conduct by the defaulting party causing the default, (2) the defaulting party had no meritorious defense, or (3) such relief will prejudice the non-defaulting party. A court may deny relief even if only one of the above elements exists. (*AMI v. Dornier (2)*, 2 MILR 211, 219 (2002))

Defendant's failure to answer complaint was culpable when defendant had filed motions to extend their time to answer, indicating an ability to deal with legal requirements. (*AMI v. Dornier (2)*, 2 MILR 211, 219 (2002))

To show the existence of meritorious defense, the defaulting party must make a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party. (*AMI v. Dornier (2)*, 2 MILR 211, 220 (2002))

With respect to prejudice to the non-defaulting party, the standard is whether plaintiff's ability to pursue its claim will be hindered. (*AMI v. Dornier (2)*, 2 MILR 211, 220 (2002))

Discovery

— Production of Documents

Orders for production of documents are discretionary and will not normally be interfered with on appeal, unless the action was improvident and affected substantial rights. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 54 (1995))

Dismissal, Grounds for

Two related doctrines prevent parties from revisiting previously decided matters; res judicata and collateral estoppel. (*Ueno v. Abner and Hosia, et al.*, 3 MILR 29, 31 (2007))

Indispensable Parties

— Dismissal for Failure to Join

The determination and propriety of a dismissal of an action for failure to join an indispensable party is within the discretion of the trial court and the standard of review is abuse of discretion. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 104 (1988))

A court must first order joinder of indispensable parties, and only if plaintiff then fails to comply with the order is the court justified in dismissing the action. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 107 (1988))

Joinder of Parties

— Compulsory

MIRCivP Rule 19 mirrors Rule 19 of Federal Rules of Civil Procedure and as such MIRCivP Rule 19 carries the construction placed upon it by the Federal Courts. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 104 (1988))

— Burden of Persuasion

The party asserting the necessity of joinder of indispensable parties must identify them and has the burden of persuading the court that they are actually indispensable. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 105 (1988))

— Requirements

MIRCivP Rule 19 requires a trial court to engage in a two-step analysis. The first step is to consider whether nonjoinder would prevent the award of complete relief, or the absentee's interest would otherwise be prejudiced or the persons already parties would be subject to a substantial risk of double or inconsistent obligations. The second step is to decide under MIRCivP Rule 19(b) whether "in equity and good conscience" a court should proceed without absent parties. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 105 (1988))

Motions
— Continuance

A motion for continuance is addressed to the sound discretion of the court. (*Lokkon v. Nakap*, 1 MILR (Rev.) 69, 70 (1987))

— Summary Judgment

Summary judgment is determined on the basis of the record, including affidavits. Unsworn statements of counsel will not be considered. (*USA Small Bus. Adm. v. Trans Atoll Ser. Corp.*, 1 MILR (Rev.) 57, 58 (1986))

— — Proof of Damages

Without a reasonable methodology, summary judgment against the Government is appropriate because the jury is left with no proper proof of damages. *City of Vernon v. Southern Gal. Edison Co.*, 955 F.2d at 1372. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 192 (2002))

— — Record

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, collectively, are the record of the case. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 22)

Summary judgment is determined on the basis of the record. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 22 (1994))

— — Unsworn Statements

Un-sworn statements and arguments in a memorandum of counsel, filed with a Motion For Summary Judgment, cannot be considered as establishing fact. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 23 (1994))

Parties
— Proceeding Anonymously

Marshall Islands Rule of Civil Procedure Rule 10's counterpart in the Federal Rules of Civil Procedure has been construed to permit a plaintiff to proceed anonymously under special circumstances, e.g., to avoid retaliation, to avoid disclosure of HIV-positive status, and in abortion and birth control cases. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 242 (2004))

— Substitution

Although MIRCP 25(a)(1) could be clearer, a careful reading of the rule coupled with an understanding of its function leads to the conclusion that the rule requires two affirmative steps in order to trigger the running of the 90 day period. First, a party must formally suggest the death of the party upon the record. Second, the suggesting part must serve other parties and nonparty successors or representatives of the deceased with a suggestion

of death in the same manner as required for service of the motion to substitute. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 88 (2008))

Pleadings
— Amendments

Because the complaint was a nullity, it could not be amended. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 242 (2004))

— Affirmative Defense or Avoidance

The general rule regarding *res judicata* and collateral estoppel is that they must be pleaded in the answer or other responsive pleading or they are waived. Marshall Islands Rules of Civil Procedure, Rules 8(c), 12(b). (*Abija v. Bwijmaron*, 2 MILR 6, 14 (1994))

Rules
— Construction

When a federal rule imposes requirements not contained in its RMI counterpart, cases interpreting the federal rule are inapposite and not instructive in interpreting the RMI rule. (*RMI v Kijiner*, 3 MILR 43, 46 (2007))

Service of Process
— Service by Publication

Where plaintiff's attempts to serve defendant at his last know address are to no avail, service by publication is the only option remaining and is therefore appropriate. (*Stanley v. Stanley*, 2 MILR 194, 200 (2002))

Service of process by court ordered service by publication is effective and proper under 27 MIRC § 255. (*Stanley v. Stanley*, 2 MILR 194, 200 (2002))

Sanctions
— Dismissal of Action

Dismissal of an action under MIRCivP Rule 11 must be predicated on findings of subjective bad faith in bringing the action and severe prejudice to, or misleading of, the party against whom the action was brought. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 96, 108 (1988))

CLERKS OF COURTS

Duties
— Performance

Complaints concerning failure of or refusal by the Clerk of Courts to accept a Notice of Appeal or to certify the record should be presented to the Supreme Court by a motion, supported by affidavit and exhibits, and proposed order. (*Kabua v. H. Ct. Chief Justice, et al.*, 1 MILR (Rev.) 27, 29 (1986))

COLLATERAL ESTOPPEL

Distinguished from Res Judicata

The doctrine of collateral estoppel is different from the doctrine of *res judicata* in that, instead of preventing a second assertion of the same claim or cause of action, the doctrine of collateral estoppel prevents a second litigation of issues between the same parties or their privies even in connection with a different claim or cause of action. (*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 235 (1991))

Effect

Collateral estoppel bars subsequent suits based on issues that were already actually decided in a prior action. (*Ueno v. Abner and Hosia, et al.*, 3 MILR 29, 31 (2007))

Timeliness

The affirmative defense of collateral estoppel may not be raised for the first time on appeal. (*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 236 (1991))

COMMON LAW

In General

The Supreme Court is obliged to follow common law in the absence of any provision in the Republic of the Marshall Islands Constitution, or in any custom or traditional practices of the Marshallese people or act of the Nitijela to the contrary. (1 TTC 103). (*RMI v. Waltz*, 1 MILR (Rev.) 74, 77 (1987))

Constitutional Law
— Continuance of Common Law

The framework of governance provided by the Constitution continued the common law in effect as the governing law, in the absence of customary law, traditional practice or constitutional or statutory provisions to the contrary. (*Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995))

CONFLICTS OF INTEREST

Attorneys
— Multiple clients

No lawyer can represent parties whose interests are in direct conflict. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 45 (1995))

A lawyer cannot, without violating the standards of conduct pertaining to conflicts of interest, represent multiple clients who assert claims in an aggregate amount exceeding the amount of the fund from which those claims are to be satisfied. Reason dictates the same result if the possibility exists that the fund might prove to be inadequate or it is

probable that lengthy delay in obtaining payment from the fund will be encountered. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 46 (1995))

CONSTITUTIONAL LAW

Constitutionality of Statutes
— P.L. 1993-56

P.L. 1993-56, insofar as it prohibits claimants from retaining private legal counsel in connection with claims brought under the NCT Act and limits them to utilization of the services of the Public Advocate, deprives claimants of timely, effective and conflict-free representation. It is, therefore, in violation of the due process guarantee of Article II, Section 4(1) of the Constitution and is void. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 47 (1995))

— P.L. 1994-87

P.L. 1994-87 does not prevent any person, other than the administrator of an estate, from employing counsel and asserting whatever rights he claims with respect to the assets and obligations of the estate. The statute prohibits only the administrator, in his fiduciary capacity, from employing private counsel. If and to the extent that the administrator, in his personal capacity, is interested in the estate, the statute is inapplicable to that interest, which also may be protected through the use of private counsel. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 38 (1995))

The limited interference in the administration of certain estates, with the right of a party to a civil action to be represented by counsel of his choice, effected by P.L. 1994-87, does not offend the guarantee of due process in Article II, Section 4(1) of the Constitution. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 29 (1995))

— Government Liability Act, Section 23

The claims procedure set forth in Section 23 of the Government Liability Act does not appear to be unreasonable on its face, nor can it be said that it discriminates among citizens. (*Bujen and Wase v. RMI, et al.*, 3 MILR 8, 11 (2005))

Construction
— Article I, Section 4(c) and Article II, Section 14(1)

Taken together, RMI Const. Art. I, Sec. 4(c) (denying sovereign immunity) and RMI Const., Art. II, Sec. 14(1) (guaranteeing access to the court system) guarantee the citizens of RMI the right to sue their government in a court of law. (*Bujen and Wase v. RMI, et al.*, 3 MIRC 8, 9 (2005))

— Article VI

Article VI, section 4(5) mandates that when a question has been certified to the Traditional Rights Court for its determination, its resolution of the question shall be given substantial weight in the certifying court’s disposition of the legal controversy before it,

which means that the certifying court is to review and adopt the decision of the Traditional Rights Court unless that decision is clearly erroneous or contrary to law. (*Abija v. Bwijmaron*, 2 MILR 6, 15 (1994))

It is well settled that it is the High Court's duty to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law. (*Tibon v. Jihu et al.*, 3 MILR 1, 6 (2005))

— Article VIII

The word "public" in Article VIII, Section 13 of the Constitution does not necessarily limit the word "accounts." (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 83 (1997))

There is no constitutional restriction prohibiting the audit by the Auditor General of the accounts of statutory authority such as the Office of Legal Aid. There is a constitutional requirement that the Auditor General shall perform such an audit and report any irregularities in the account to the Nitijela, Article VIII, Section 15(4). (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 83 (1997))

Client trust accounts of the RMI Legal Aid Office, even if containing private funds, are "relevant" and "related to" the Auditor General's investigation of RMI Legal Aid's use of public funds. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 86 (1997))

The Auditor General has the authority to audit a government program, such as RMI Legal Aid, to determine whether the desired results or benefits of the program are being achieved, (*In the Matter of the Audit of the RMI Legal Aid Office*, 1 MILR (Rev.) 80, 87 (1997))

— Rules of Interpretation

Article I, § 3(1) mandates that the courts of the Marshall Islands, in interpreting and applying the Constitution, shall look to the decisions of courts of countries having constitutions similar in the relevant respect. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 184 (1989))

In the event that the constitutions of other countries are not sufficiently similar in relevant respect to provide guidance, the court may consider provisions of constitutions of states that are part of a federation that has adopted common law, if those constitutional provisions are similar in relevant respect to the Constitution of the Republic of the Marshall Islands. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 251 (1991))

Under Article I, § 3(1) of the RMI Constitution, the Court may look to court decisions of the United States as well as generally accepted common law principles for guidance. (*In the Matter of P.L. No. 1995-118*, 2 MILR 105, 109 (1997))

In the absence of some textual or logical support, the Supreme Court will not read into the Constitution a provision not contained therein. (*In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 140 (1999))

In examining constitutional provisions, the court's task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language. If the language of a provision is unambiguous, it must be given its literal meaning and there is neither the opportunity nor the responsibility to engage in creative construction. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 117 (2009))

The court must read all provisions of the constitution together and harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 118 (2009))

In construing a constitution, the court must lean in favor of a construction that will render every word operative, rather than one which will make some words idle or nugatory. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 119 (2009))

The duty and function of a court is to construe, not to rewrite, a constitution. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 119 (2009))

— Construction of Statutes

The Constitution is the supreme law of the Republic and any statute that is inconsistent with it is void to the extent of the inconsistency. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 34 (1995))

The presumption of constitutionality is a strong one, and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 34 (1995))

The Court is entitled to look to, without being bound by, the decisions of United States courts for guidance in determining the effect of the Constitution on challenged statutes when the challenges are based on provisions in the Constitution that are similar to provisions in the United States Constitution. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 35 (1995))

Disqualification of Judge

Article VI, § 1(6) of the Constitution requires a judge to recuse himself if he previously played a role in the case or he is disabled by any conflict of interest. (*Balos, et al., v. H.Ct. Chief Justice*, 1 MILR (Rev.) 137, 147 (1989))

Due Process
— In General

The concept of due process protects rights that cannot be denied without violating fundamental principles of liberty and justice. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

Beyond the fundamental requirements of notice and an opportunity to be heard, due process is flexible and calls for such procedural protections as the particular situation demands. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 139 (2010))

— Accused's Right to Counsel

Few constitutional protections are as fundamental to ensuring a fair trial for the accused as the right to the assistance of counsel. This right is guaranteed by Article II, § 4(4) of the Constitution. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 184 (1989))

— Presumptions and Burden of Proof

The "conclusive evidence" clause of § 12(3)(b) of the Commissions of Inquiry Act 1986 runs directly contrary to the guarantees of the Constitution of presumption of innocence and rights against self-incrimination, confrontation of witnesses and compelling attendance of witnesses. (*Balos, et al., v. H.Ct. Chief Justice*, 1 MILR (Rev.) 137, 142 (1989))

— Procedural

Constitutional due process in contempt proceedings requires that the defendant be given reasonable notice of the charges and opportunity to be heard. (*Balos, et al., v. H.Ct. Chief Justice*, 1 MILR (Rev.) 137, 141 (1989))

Due process requires, at a minimum, that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing. (*Navarro and Velasco v. Chief of Police*, 1 MILR (Rev.) 161, 165 (1989))

The minimum elements of due process guaranteed by Article II, § 4(1) of the Constitution are notice and the opportunity to be heard. (*Brown v. NCT*, 1 MILR (Rev.) 264, 268 (1992))

Procedural "due process" only requires adequate notice and an opportunity to be heard. (*Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007))

— Right to Counsel

It has long been recognized that in criminal proceedings, due process includes the right to the assistance of counsel of one's choice. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

Recent cases have recognized that the right to counsel is also preserved by the due process clause in civil cases. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

It is also established that the right to counsel preserved by the due process clause extends to administrative proceedings as well as to courtroom proceedings. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

Even in a criminal case the right to have a particular attorney is not absolute, and in civil cases a party's right to choose its own counsel can be overridden. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

The right to counsel in civil matters ordinarily includes the right to retain counsel of one's choice. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

A private company has a due process right to counsel of its choice. (*In the Matter of P.L. No. 1995-118*, 2 MILR 105, 112 (1997))

Equal Protection

Equal protection of the laws is expressly guaranteed by the Constitution, Article II, Section 2(1), and is also inherent in the due process guarantee of Article II, Section 4(1). (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 39 (1995))

— Constitutionality of P.L. 1994-87

P.L. 1994-87 is social legislation with a classification based on value. That classification is rationally related to a legitimate state interest, preserving cash from awards made by the NCT. The Equal Protection challenge to the statute, therefore, must fail. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 40 (1995))

— Tests for Measuring

The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate government interest. When social or economic legislation is at issue, wide latitude is allowed. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 39 (1995))

When a statute classifies by race, alienage or national origin, or impinges on personal rights protected by the Constitution, it will be subjected to strict scrutiny and will be sustained only if suitably tailored to serve a compelling government interest. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 39 (1995))

Nitijela

— Enactments

The plain language of the Constitution unambiguously provides the Nitijela with broad powers to declare the customary law, and affords the Nitijela correspondingly broad discretion in its exercise of that power. (*Lekka v. Kabua, et al.*, 3 MILR 167, 172 (2013))

Where the Nitijela has exercised its Constitutional duties, the Supreme Court must defer to its specific findings unless a claimant clearly establishes a violation of Article II. (*Lekka v. Kabua, et al.*, 3 MILR 167, 172 (2013))

— Vote of No Confidence

Members of the Nitijela are under an obligation to vote on a motion of no confidence once noticed. The language of Article 1, § 2(2) that requires the vote to be held not earlier than 5 days nor later than 10 days is not permissive and suggests that prompt action by the Nitijela is not only recommended but required. (*In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 140 (1999))

— Privacy

Both ordinary and truncated estate administration procedures are in a public forum and open to inquiry by anyone interested. The inclusion of NCT awards in an estate so administered does not violate any right of privacy assured by Article II, Section 13 of the Constitution. (*In the Matter of P.L. Nos. 1993-56 and 1994-87*, 2 MILR 27, 37 (1995))

Unreasonable Search and Seizure

— Exclusion of Evidence

Since an unlawful arrest is a violation of Article II, Section 3(1) and (2) of the Republic of the Marshall Islands Constitution, all evidence obtained through that arrest is inadmissible (Art. II, Sec. 3(5), RMI of the Marshall Islands Constitution). (*RMI v. Waltz*, 1 MILR (Rev.) 74, 79 (1987))

CONTEMPT

Nature and Elements

Contempt is civil in nature if sanctions are remedial and conditional upon compliance and is criminal if punitive and unconditional. (*Balos, et al., v. H.Ct. Chief Justice*, 1 MILR (Rev.) 137, 142 (1989))

CONTRACT

Construction

The long recognized general rule is that where the language used in a lease is controverted, the controlling factor is the intent expressed in the language of the written document itself, not the intention of which may have existed in the minds of the parties at the time they entered into the lease, nor the intention the court believes the parties ought to have had. (*Kramer and PII v. Are and Are*, 3 MILR 56, 65 (2008))

If there is a written lease, the provisions of the lease are conclusive and govern the rights of the parties. (*Kramer and PII v. Are and Are*, 3 MILR 56, 65 (2008))

The general rule is that all pre-contract negotiations and oral discussions relating to a lease of land are deemed to be merged into, embodied, and superseded by the terms of the executed written lease, and in the absence of fraud or mistake, may not be considered as evidence of the terms and conditions upon which the property was demised. (*Kramer and PII v. Are and Are*, 3 MILR 56, 65 (2008))

CORPORATIONS

In General

The Marshall Islands National Telecommunication Authority is a private corporation, and is not an instrumentality or agent of the RMI government because: (1) it is not wholly owned by the RMI, that is, the government does not own all assets of NTA or all the stocks of NTA [28% of the issued stock has been purchased by private individuals, (Ex. B)]; (2) it is operated for profit; (3) it is not primarily engaged or even engaged at all, in the administration of government; (4) the board of NTA is not exclusively controlled by the government; (5) and, the government is not entitled to all profits and does not risk all losses of NTA, rather private shareholders' money is also at risk. Even though NTA provides telecommunication to the public at large, it remains a private corporation. (*In the Matter of P.L. No. 1995-118*, 2 MILR 105, 111 (1997))

Shareholder Derivative Action

Under Marshall Islands law, a shareholder asserting claims derivatively on behalf of a corporation shall first make a demand on the board of directors to initiate the litigation. Where a shareholder plaintiff fails to make such a demand, he must allege "with particularity" the reasons why that demand would have been futile. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 151 (2011))

Law Applicable: Marshall Islands law requires the courts to look to Delaware corporate law. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 151 (2011))

Where a plaintiff fails to make a demand on the board of directors to initiate litigation, courts apply a two-part test, and must determine whether, under the particularized fact alleged, a reasonable doubt is created that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 151 (2011))

In determining whether presuit demand is excused, the court must accept as true the well pleaded factual allegations in the complaint, but the pleadings must set forth particularized factual statements that are essential to the claim. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 152 (2011))

Futility, as required to excuse presuit demand, is gauged by the circumstances existing at the commencement of a derivative suit. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 152 (2011))

“Disinterested” means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which evolves upon the corporation or all stockholders generally. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 153 (2011))

A plaintiff must rebut the presumption of the business judgment rule that sophisticated business people with years of experience acted with independence. “Independence” means that a director’s decision is based on the corporate merits of the subject before the board, rather than extraneous considerations or influences. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 154 (2011))

A stockholder’s control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholders. A plaintiff must allege particularized facts showing that the other directors would be more willing to risk their reputation than risk the relationship with the interested director. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 155 (2011))

In order to establish a reasonable doubt that the challenged transactions were the product of a valid exercise of business judgment, as required to excuse presuit demand, a plaintiff must set forth particularized facts rebutting the presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. This presumption protects decisions unless they cannot be attributed to any rational business purpose, and imposes a high burden to overcome. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 159 (2011))

The court will not second-guess business decisions. Rather than question the merits of Board decisions, courts question the informational component of the directors' decision-making process and the motivations or the good faith of those charged with making the decision. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 160 (2011))

This Court will not second-guess the Board's decision unless that decision “cannot be 'attributed to any rational business purpose.” (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 160 (2011))

The size and structure of executive compensation are inherently matters of business judgment. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 164 (2011))

A transaction constitutes "waste" if it is an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration. (*Rosenquist v. Econonou, et al.*, 3 MILR 144, 165 (2011))

COURTS

Composition

A trial court not constituted as required by law lacks jurisdiction determine cases before it. (*RMI v. Digno*, 1 MILR (Rev.) 18, 20 (1984))

High Court

A High Court judge who was not present at a hearing before the Traditional Rights Court may nevertheless render a final judgment based on the findings of the Traditional Rights Court. (*Abija v. Bwijmaron*, 2 MILR 6, 16 (1994))

Jurisdiction
— Nitijela Proceeding Non-justiciable

Procedural matters, as distinguished from legislative acts, are committed to the discretion of the Nitijela are not subject to judicial review. (*In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 139 (1999))

The process by which an Act of the Nitijela becomes a law is within the sole province of the Nitijela not subject to judicial review. (*Kabua, et al., v. Speaker of the Nitijela*, 2 MILR 143, 148 (1999))

Internal matters of voting and procedure (i.e., voting by secret ballot or roll call) appear to be easily resolvable by the Nitijela according to its own procedural rules, without the assistance of the Court, and indeed, considerations of separation of powers leaves the matter exclusively in the hands of the Nitijela. (*In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134, 141 (1999))

Supreme Court
— Jurisdiction

Article VI, § 2(2) of the Constitution provides that an appeal lies only from a final decision of the High Court or any court. (*RMI v. Balos, et al. (2)*, 1 MILR (Rev.) 67, 68 (1987))

A single judge of the Supreme Court has not authority or lacks "jurisdiction" to vacate the decision previously entered by the fully comprised three-member Supreme Court. (*RMI v. de Brum (3)*, 2 MILR 254, 255 (2004))

The Supreme Court's discretion to grant an appeal pursuant to Article VI, § 2(2)(c) of the RMI Constitution is unfettered, but must be a reasoned, mature, and responsible exercise of judicial authority. (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 178 (2014))

Exercising its discretion to grant an appeal pursuant Article VI, § 2(2)(c) of the RMI Constitution allows the Supreme Court to decline jurisdiction where a case concerns a straightforward application of clear statutory language. (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 178 (2014))

The RMI Supreme Court, in contrast to the High Court, is by nature much more deliberative, with unique administrative prerequisites before it convenes (e.g., selection and designation of Acting Associate Justices). (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 179 (2014))

— — Election Challenge

The Supreme Court need not accept jurisdiction in every election challenge, especially one involving only a basic application of legal principles in a statutory regime that should be strictly construed. (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 180 (2014))

There is good reason for the Supreme Court to decline further review where one level of careful appellate review has already occurred specifically in election cases, which must be decided accurately, but also without undue delay. (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 179 (2014))

Treating a second level of appeal to the Supreme Court from an appellate decision of the High Court as truly discretionary serves the goals of avoiding election uncertainty and providing a swift resolution of election contests. (*Matthew, Zackios, and Note v. CEO*, 3 MILR 174, 180 (2014))

— — Motions Pending Appeal

Application under Supreme Court Rule 9(b) for release pending appeal from a judgment of conviction must first be made to the High Court. Only after the High Court takes action may further action be requested of the Supreme Court. (*Fu v RMI*, 3 MILR 47, 48 (2008))

When a motion for release pending appeal from judgment of conviction is not first made in the High Court, the Supreme Court has no informed written decision to review, has no means of assessing facts or the myriad other considerations available to the trial judge in making a release decision, and is unable to make the findings required by Supreme Court Rule 9(b), on which the appellant bears the burden of proof. (*Fu v RMI*, 3 MILR 47, 50 (2008))

Traditional Rights Court

— Qualification of Judges

After issues referred to the Traditional Rights Court have been tried and decided, it is too late to object to the qualifications of the judges. (*Jeja v. Lajimkam, et al.*, 1 MILR (Rev.) 200, 201 (1990))

— Jurisdiction

The Traditional Rights Court should not have decided the MIRCP 25 motion, as the motion was not a question of customary law or traditional practice and therefore was outside its jurisdiction. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 87 (2008))

CRIMINAL LAW AND PROCEDURE

Arrests

— Duty to Advise of Right to Counsel

The duty to advise arrested persons of their right to counsel does not obligate the police to persuade an accused that he needs counsel, but simply to advise of his right to the assistance of counsel. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 186 (1989))

— Without Warrants

Arrests without warrants in felony cases were justified at common law on the theory that dangerous criminals and persons charged with heinous offenses should be incarcerated with all possible haste in the interests of public safety. Whereas the necessity for prompt on the spot action in suppressing and preventing disturbances of the public peace was the factor which justified arrest without warrant in misdemeanor cases involving breaches of the peace. (*RMI v. Waltz*, 1 MILR (Rev.) 74, 78 (1987))

The rule that a private person may, without a warrant, arrest only for a felony committed, or about to be committed or renewed, in his presence, or for a misdemeanor involving a breach of the peace committed, or about to be committed or renewed, in his presence is the rule we adopt here which is in accord with the overwhelming weight of authority. (*RMI v. Waltz*, 1 MILR (Rev.) 74, 78 (1987))

Continuance

— Denied

— — Effect

When a motion for continuance to obtain witnesses is denied, the prosecution generally has two options available: (1) it can file a nolle prosequi to the charges, having the ability to refile at some later time within the speedy trial period; or (2) proceed to trial then and there without its witnesses. Should the prosecution proceed to trial and fail to present a prima facie case, it runs the risk that the charges will be dismissed for lack of sufficient evidence. (*RMI v. Lemark*, 3 MILR 19, 27 (2006))

Convictions

The High Court erred in finding the defendant guilty of multiple offenses, Sodomy and Assault and Battery, from what was, in fact, a single act. (*RMI v. Kabua*, 1 MILR (Rev.) 39, 42 (1986))

— Double Jeopardy

Due to the concept of "double jeopardy" the defendant cannot be retried because of the error in the prosecution's case, in failing to present all the necessary evidence, unless a conviction after trial has been reversed on the Defendant's appeal. (*RMI v. de Brum (2)*, 2 MILR 233, 237 (2003))

Crimes
— Elements
— — Receipt of a Check

Receipt of a check is not the equivalent to receiving money. A check is merely an offer to pay the amount when it is tendered for payment. (*RMI v. de Brum (2)*, 2 MILR 233, 237 (2003))

— Sodomy

The Sodomy statute, 11 TTC § 1303, which defines sodomy as "sexual relations of an unnatural manner" and proscribes, as included within the term sodomy, "any and all parts of the sometimes abominable and detestable crime against nature" is sufficient to withstand constitutional challenge. (*RMI v. Kabua*, 1 MILR (Rev.) 39, 40 (1986))

The Sodomy statute, 11 TTC § 1303, which defines sodomy as "sexual relations of an unnatural manner" and proscribes, as included within the term sodomy, "any and all parts of the sometimes abominable and detestable crime against nature" does not include digital manipulation. (*RMI v. Kabua*, 1 MILR (Rev.) 39, 42 (1986))

Dismissal
— For Want of Prosecution

The court has the inherent discretion to dismiss criminal cases, with or without prejudice, for want of prosecution. (*RMI v. Lemark*, 3 MILR 19, 26 (2006))

The power to dismiss a case for want of prosecution exists even if the delay does not rise to the level of a violation of the defendant's constitutional right to a speedy trial. (*RMI v. Lemark*, 3 MILR 19, 26 (2006))

The trial court's authority to dismiss a case for want of prosecution is not limited by either the RMI Constitution, Art. I , Sec. 4 or by 32 MIRC 155. (*RMI v. Lemark*, 3 MILR 19, 26 (2006))

Jury Instructions
— Lesser Included Offense

Where there is overwhelming evidence to support the verdicts rendered, the High Court's failure to include in the jury instructions a lesser included offense is not reversible error. (*RMI v. Langley*, 1 MILR (Rev.) 45, 51 (1986))

Pleas

The accused may not be called upon to plead at a preliminary hearing. 32 MIRC Ch. 1, § 40. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 188 (1989))

Before a plea of guilty is accepted, the trial court must ascertain from the accused's own statements in court that he is voluntarily making the plea and understands the nature and general effect of the plea. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 188 (1989))

— Withdrawal of Guilty Plea

Withdrawal of a plea of guilty should be allowed when the court cannot conclude that it was given advisedly and without fear or ignorance. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 191 (1989))

Record

Rules 2b(1) and 17b(1) of the Marshall Islands Rules of Criminal Procedure impose on the trial court the duty to make a record which is more than merely a summary of the proceedings. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 186 (1989))

The duty to make a proper record of the proceedings is not discretionary. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 186 (1989))

Rights of the Accused

— Advice of Rights

The official at a preliminary hearing is under an affirmative duty to advise an accused during such hearing of his right to the assistance of counsel. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 187 (1989))

Sentencing

The High Court is not authorized to suspend sentence on one count until the sentence on another count is served. (*RMI v. Kabua*, 1 MILR (Rev.) 39, 42 (1986))

Where the trial court did not impose the maximum sentences authorized by law nor make the sentences imposed to run consecutively, the trial court's failure to grant the defendant credit for pre-sentence detention, in the absence of a statute requiring such a credit, was not error. (*RMI v. Langley*, 1 MILR (Rev.) 45, 51 (1986))

A defendant is not entitled to a lesser sentence on counts he is convicted of merely because he was found not guilty of a more serious offense. (*RMI v Elanzo*, 3 MILR 51, 54 (2008))

— Conditions for Suspension

The trial court cannot impose as a condition of the suspension of a sentence restitution in an unrelated case. (*Republic v. Bokmej*, 1 MILR (Rev.) 87, 88 (1987))

Statutes
— Construction

31 MIRC Ch. 1, §§ 5 and 38 are clear in their intent and purpose in describing criminal conduct and thus said statutes, and the Information based on said statutes, met the "due process" test of Article II, § 4(4) of the Marshall Islands Constitution. (*RMI v. Timothy*, 1 MILR (Rev.) 270, 272 (1992))

MIRC Ch. 1, § 70 does not deprive the Supreme Court of jurisdiction in an appeal of a criminal conviction merely because the sentence is vacated pursuant to the terms of the statute prior to the conclusion of the appeal. (*RMI v. Timothy*, 1 MILR (Rev.) 270, 272 (1992))

Waivers
— Awareness and Competence

Waiver of the right to counsel must be knowingly and affirmatively made by an accused competent and completely aware of the right being waived and must appear on the record. (*RMI v. Sakaio*, 1 MILR (Rev.) 182, 190 (1989))

CUSTOM

Burden of Proof

It is axiomatic that a party relying on a rule of custom has the burden of proving its existence and substance at trial. (*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 232 (1991); *Tibon v. Jihu, et al.*, 3 MILR 1, 5 (2005))

Every inquiry into custom involves two factual determinations: first, is there a custom with respect to the subject of the inquiry? If so, what is it? (*Kramer and PII v. Are and Are*, 3 MILR 56, 64 (2008))

Factual Inquiry

Every inquiry into custom involves two factual determinations: first, is there a custom with respect to the subject matter of the inquiry; and, if so, second, what is it? (Lobo v. Jejo, 1 MILR (Rev.) 224, 226 (1991); *Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 231 (1991))

Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense. (*Jack v. Hisaiah*, 2 MILR 206, 209 (2002))

To the extent a party relies on a recently evolved traditional custom or practice, that party bears the burden of showing that there is a custom and what it is. (*Kramer and PII v. Are and Are*, 3 MILR 56, 64 (2008))

D

DAMAGES

Generally

A court cannot hold defendants liable for engaging in lawful activities (i.e., selling and distributing cigarettes in the Marshall Islands). Without evidence linking defendants' allegedly illegal activities to claims of damages, the Court declined to consider the plaintiff's claims beyond summary judgment. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 191 (2002))

Pain and Suffering

When the undisputed evidence establishes as a fact that the wrongdoer caused physical and mental suffering, that there was damage to tissue and loss of blood, and that the battery resulted in a lasting, if not indeed, permanent psychological disorder, the victim is entitled to such an award of money damages as in the reasonable judgment of the trier of fact is appropriate to make the victim as whole as possible by the imperfect means of a money judgment. (*Antolok and Antolok v. The Estate of Lakbel*, 2 MILR 160, 161 (2000))

The award of damages for pain and suffering, physical or mental, will be left to the sound judgment of the trial judge. (*Antolok and Antolok v. The Estate of Lakbel*, 2 MILR 160, 162 (2000))

Proof of Amount

Although the amount of damages need not be certain or definite, the evidence must nevertheless provide the jury with some guidance on damage estimates. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th C ir. 1988); *see also* Restatement (Second) of Torts § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages . . . if, but only if . . . he establishes . . . the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."). (*RMI v. ATC, et al. (4)*, 2 MILR 181, 192 (2002))

Punitive Damages
— in General

Punitive damages cannot be awarded when not asked for in the pleadings, but only in argument after the close of evidence. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 56 (1995))

In the absence of a finding of fraud, the court did not error in not awarding punitive damages. (*AMI v. Dornier (2)*, 2 MILR 211, 222 (2002))

— Contract Actions

In an action for breach of contract, punitive damages may be awarded only if the conduct constituting the breach is also a tort for which punitive damages are recoverable. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 56 (1995))

— Tort Actions

In tort actions, punitive damages are awarded to punish a person for his outrageous conduct and to deter him and others like him from similar conduct in the future. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 56 (1995))

— — Outrage

Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, those damages can be awarded only for conduct involving some element of outrage similar to that usually found in crime. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 56 (1995))

E

ELECTIONS AND VOTING

Conduct of Elections

— Recounts

The Chief Electoral Officer must be persuaded that there is a substantial possibility that the election result would be affected by a recount, or he must reject a petition for a recount. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 152 (1989))

Presumptions

Every reasonable presumption will be indulged in favor of the validity of an election. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97 (1997))

The voters are presumed to know the law. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 99 (1997))

Special Elections

In the absence of any explicit constitutional requirement that a special election be held in the event of a vacancy occasioned by the death of the incumbent, a special election is not required. *(In the Mat. of the Vacancy of the Mayoral Seat*, 3 MILR 114, 120 (2009))

Voters Eligibility

— Challenges

Failure to obtain a ruling on the qualifications to vote of an absentee voter who votes at a special polling place, prior to that voter's ballot being accepted and tallied, defeats a

challenge later made. (*Clanton, et al. v. MI Chief Elec. Off (2)*, 1 MILR (Rev.) 156, 159 (1989))

Challenge could be made at the special polling place or when the Chief Electoral Officer examines absentee voters' affidavits. (*Clanton, et al. v. MI Chief Elec. Off (2)*, 1 MILR (Rev.) 156, 159 (1989))

The Chief Electoral Officer is not required to refer to the High Court a challenge to the rights to vote of a class of voters, as distinguished from the right to vote of a single identified individual. (*Clanton, et al. v. MI Chief Elec. Off (2)*, 1 MILR (Rev.) 156, 159 (1989))

EQUITY

Principles
— Estoppel

Equitable estoppel precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by acts, deeds or representations, either express or implied. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 24 (1994))

EVIDENCE

Affidavits
— In General

Affidavits must be based on facts and not belief. (*Lokkar v. Kemoot*, 2 MILR 165, 166 (2000))

Burden of Proof
— Sovereign Immunity

Once the plaintiff offers evidence that a Foreign Sovereignty Immunity Act exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 249 (2004))

The foreign state has no obligation to affirmatively eliminate all possible exceptions to sovereign immunity, only those exceptions specifically raised by the plaintiff. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 249 (2004))

Discretion of Court

Generally evidentiary matters are said to he committed to the discretion of the trial court. (*Elmo v. Kabua*, 2 MILR 150, 154 (1999))

Expert Testimony

Before admitting expert testimony, trial courts have a unique obligation to inquire into the reliability of the expert's methodology, considering factors as: whether the proffered theory or technique has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error; the standards for controlling the technique's operation; and the degree to which it is accepted as reliable within the relevant scientific community. *Kumho Tire*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. 592-94). (*RMI v. ATC, et al. (4)*, 2 MILR 181, 188 (2002))

Contradictory opinions from an expert is an acceptable ground for disqualification. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 189 (2002))

Mere speculations by an expert, however, do not make them expert opinion. *See Stokes v. L. Geismar, S.A.*, 815 F.Supp. 904, 910 (E.D. Va. 1993), *aff'd*, 16 F.3d 411(4th Cir. 1 994) ("the proffering of an expert . . . who will bless a guess-based theory will not suffice to withstand summary judgment."). The courtroom is not the appropriate venue for casual musings of scientists. (*RMI v. ATC, et al. (4)*, 2 MILR 181, 189 (2002))

Hearsay
— Exceptions
— — Statements by Persons Incapable of Testifying

Section 31, Evidence Act 1986, sets forth circumstances in which statements by persons incapable of testifying may be received in evidence. (*Bulale and Jamore v. Reimers and Clarence*, 1 MILR (Rev.) 259, 261)

Presumptions

The presumption always is that officials have done what the law requires. (*Clanton, et al., v. MI Chief Elec. Off.* (1), 1 MILR (Rev.) 146, 153 (1989))

The law presumes that election officers perform their duty honestly and faithfully. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 97 (1997))

Privileges
— Attorney-Client

The attorney-client privilege rules only protects (1) "confidential communications," (2) "made by a client to an attorney," (3) "to obtain legal advice or assistance." (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 83 (1997))

The attorney-client privilege does not protect all communications between a lawyer end client but, rather, hinges upon the client's belief that he/she is consulting a lawyer in order to seek confidential legal advice. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 84 (1997))

Since the attorney-client privilege works to suppress otherwise relevant evidence and forestall a search for the truth, the limitations which restrict its operation must be

assiduously heeded. In other words, the privilege must be strictly limited to the purpose for which it exists. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 84 (1997))

The purpose for which the attorney-client privilege exists is to protect disclosures between client and attorney to obtain legal advice, which might not be given in the absence of the privilege. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 84 (1997))

Deposits and disbursements (and records of deposits and disbursements) from a client's trust account cannot be characterized as "confidential communications" within the meaning of the rule. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 84 (1997))

Monies or fees collected from clients to cover publication expenses and the like are also not confidential. (*In the Matter of the Audit of the RMI Legal Aid Office*, 2 MILR 80, 84 (1997))

Unsworn Statements

Statements in pleadings or argument, whether oral or written, do not themselves constitute evidence. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 51 (1995))

Weight and Sufficiency

Judgment of the trial court will not be reversed for paucity of evidence unless said judgment is "clearly erroneous." (*RMI v. Timothy*, 1 MILR (Rev.) 270, 273 (1992))

A conviction is supported by the sufficiency of the evidence when, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*RMI v Kijiner*, 1 MILR 123, 125 (2010))

In viewing the evidence in the light most favorable to the prosecution, the court may not ask whether a finder of fact could have construed the evidence produced at trial to support acquittal. Instead, it must construe evidence in a manner favoring the prosecution. Only then may the court determine whether the evidence at trial, including any evidence of innocence, could allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. (*RMI v Kijiner*, 1 MILR 123, 125 (2010))

I

INJUNCTION

Preliminary Injunction

A party seeking a preliminary injunction must fulfill one of two standards: "traditional" or "alternative." Under the traditional standard, a court may issue preliminary relief if it finds that (1) the moving party will suffer irreparable injury if the relief is denied; (2) the moving party will probably prevail on the merits; (3) the balance of hardships favors the moving party; and (4) the public interest favors granting relief. Under the alternative standard, the moving party may meet its burden by demonstrating either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions exist and the balance of hardships tips sharply in its favor. (*Nuka v. Morelik, et al.*, 3 MILR 39, 41 (2007))

Mere financial injury does not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation. (*Nuka v. Morelik, et al.*, 3 MILR 39, 42 (2007))

IMMIGRATION AND EMIGRATION

Removal or Deportation
— Due Process Requirements

Section 4(10) of Article II of the Constitution requires that a person be afforded the protection of procedural due process before he is detained. (*Navarro and Velasco v. Chief of Police*, 1 MILR (Rev.) 161, 164 (1989))

The overwhelming weight of authority holds that an alien, once he has entered a country, is indeed entitled to due process of law before he may be detained and deported. (*Navarro and Velasco v. Chief of Police*, 1 MILR (Rev.) 161, 164 (1989))

J

JUDGES

Disqualification to Act

Article VI, § 1(6) of the Constitution and § 67 of the Judiciary Act 1983 prohibit a judge from taking part in a decision of any case in which he is disabled by any conflict of interest. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 248 (1991))

At common law a judge was not disqualified merely by reason of relationship to an attorney in the cause before him. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 249 (1991))

Powers and Functions
— Ruling on Motions

A judge has a duty to decide motions that are properly submitted to him, but he is not required to decide them within a time which suits the convenience of counsel nor is he

required to rule on motions or issues which have been rendered moot by time or events. (*In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995))

— Single Supreme Court Judge

A single judge of the Supreme Court has the authority both to deny a request for relief and to dismiss an appeal for failure to comply with the rules of appellate procedure. (*Alik v. PSC*, 3 MILR 13, 17 (2006))

Under Section 206(4) and SCRP Rule 32, a single judge of the Supreme Court acting alone has the authority to dismiss an appeal for the failure to file an opening brief within the time required. (*Alik v. PSC*, 3 MILR 13, 17 (2006))

JUDGMENTS

In General

Judgment may be entered only upon a record sufficient to support it. (*MIDB v. Alik and Alik*, 1 MILR (Rev.) 193, 195 (1989))

Absent a stipulation that an agreement is valid, the High Court must, before rendering judgment on an agreement, find that it is valid under contract law and has not been superseded by any subsequent agreement. (*MIDB v. Alik and Alik*, 1 MILR (Rev.) 193, 198 (1989))

Conclusiveness and Finality

— dismissal with prejudice

As the trial court noted, it is well established that a stipulation of dismissal with prejudice is a final judgment on the merits and operates the same as any other final judgment for purposes of *res judicata*. (*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 123 (1998))

— Fees and Costs

A judgment is final notwithstanding fees and costs have not been settled. (*RMI v. Balos, et al. (3)*, 1 MILR (Rev.) 120, 121 (1988))

Grounds to Vacate

— MIRCP Rule 48(a)

The factors to be considered in determining "good cause" under FRCP 55(c) [MIRCP44] and "excusable neglect" under FRCP 60(b) [MIRCP48(a)] are the same; a court will deny relief if (l) there was culpable conduct by the defaulting party causing the default, (2) the defaulting party had no meritorious defense, or (3) such relief will prejudice the non-defaulting party. A court may deny relief even if only one of the above elements exists. (*AMI v. Dornier (2)*, 2 MILR 211, 219 (2002))

Defendant's failure to answer complaint was culpable when defendant had filed motions to extend their time to answer, indicating an ability to deal with legal requirements. (*AMI v. Dornier (2)*, 2 MILR 211, 219 (2002))

To show the existence of meritorious defense, the defaulting party must make a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party. (*AMI v. Dornier (2)*, 2 MILR 221, 220 (2002))

With respect to prejudice to the non-defaulting party, the standard is whether plaintiff's ability to pursue its claim will be hindered. (*AMI v. Dornier (2)*, 2 MILR 211, 220 (2002))

— MIRCP Rule 48(a)(1)

The High Court has the discretion to deny a MIRCP Rule 48(a)(1) motion if (1) the defendant's culpable conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside. (*Stanley v. Stanley*, 2 MILR 194, 202 (2002))

Defendant's actual or constructive notice of the filing of an action and his failure to answer is culpable conduct that precluded relief from default judgment under MIRCP Rule 48(a)(1). (*Stanley v. Stanley*, 2 MILR 194, 202 (2002))

— MIRCP Rule 48(a)(3)

In order to obtain relief under MIRCP Rule 48(a)(3), the moving party must demonstrate misconduct, like fraud and misrepresentation, by clear and convincing evidence, and must than show that the misconduct foreclosed full and fair preparation or presentation of his case. (*Stanley v. Stanley*, 2 MILR 194, 204 (2002))

— MIRCP Rule 48(a)(4)

Judgment may be vacated as void under MIRCP Rule 48(a)(4) only if the rendering court lacked personal jurisdiction, subject matter jurisdiction, or acted in a manner inconsistent with due process of law. (*Stanley v. Stanley*, 2 MILR 194, 199 (2002))

— MIRCP Rule 60(b)

A trial court has the discretion to deny a Rule 60(b) motion to vacate a default judgment if (1) the plaintiff would be prejudiced if the judgment is set aside, (2) defendant has no meritorious defense, or (3) the defendant's culpable conduct led to the default. This tripartite test is disjunctive. (*Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36 (2007))

On Trial of Issues

A trial court can only decide issues of fact on the basis of evidence whether written or oral introduced before it. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 51 (1995))

JURISDICTION

Case and Controversy

To establish High Court jurisdiction, a controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 241 (2004))

— Unknown Persons

A complaint filed on behalf of unknown persons cannot establish a "definite and concrete" controversy because there is only a possibility that a plaintiff will come forward and agree to litigate. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 241 (2004))

Challenges

It is unnecessary for a defendant to abstain from asserting other defenses while at the same time attacking jurisdiction over his person. (*Gushi Bros. Co. v. Hawaiian Flour Mills, et al.*, 1 MILR (Rev.) 239, 241 (1991))

— Waiver of Objection

If it is clear that the objection has been preserved, neither going to trial after a challenge to jurisdiction has been overruled nor going to trial after it has been upheld, but proper service has not yet been effected, constitutes a waiver of the objection. (*Gushi Bros. Co. v. Hawaiian Flour Mills, et al.*, 1 MILR (Rev.) 239, 242 (1991))

Subject Matter

The High Court acted properly in dismissing *sua sponte* the complaint. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 242 (2004))

— Failure to Contest

A defendant's failure to contest a jurisdictional defect in the complaint cannot confer subject matter jurisdiction any more than a defendant could consent to subject matter jurisdiction. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 242 (2004))

— Lack of

If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities. (*Momotaro, et al., v. Chief Elec. Off.*, 2 MILR 237, 242 (2004))

L

LACHES

Discretionary

Whether laches bars an action depends upon the facts and circumstances; the decision to apply laches is primarily left to the discretion of the trial court. (*Langijota v. Alex*, 1 MILR (Rev.) 216, 222 (1990))

Requirements

To apply laches, the court must find (1) lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. (*Langijota v. Alex*, 1 MILR (Rev.) 216, 222 (1990))

Constitutional and Statutory Law

The doctrine of laches is a well-established part of the common law. There are no statutory or constitutional provisions that preclude application of the doctrine of laches, even to cases involving land titles. (*Likinbod and Alik v. Kejlat*, 2 MILR 65, 66 (1995))

LAND MANAGEMENT

Regulation No. 1

— Finality of Determinations

Courts will not be bound by the finality provisions of Land Management Regulation No. 1. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 11 (1984))

LAND RIGHTS

Alap

— Powers and Obligations

An alap has no authority to unilaterally and without notice cut off the inheritance rights of her bwij. (*Tobeller v. David*, 1 MILR (Rev.) 81, 82 (1987))

It is contrary to custom for an alap to change rights and responsibilities with respect to land without any reference to the iroij or anyone else. (*Lejeman v. Laakbel*, 1 MILR (Rev.) 117, 119 (1988))

The amounts and timing of distributions of the alap's share among the members of his bwij entitled thereto is in the discretion of the alap. (*Lobo v. Jejo*, 1 MILR (Rev.) 224, 226 (1991))

Notice to members of the alap's bwij is not necessary for the alap to convey his or her alap rights. It is sufficient that the iroij, iroijedrik where necessary, alap and senior dri jerbal approve of any such alienation or disposition of land rights. (*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 125 (1998))

— Succession to Rights

Marshallese customary pattern provides for matrilineal descent of land rights. (*Lokkon v. Nakap*, 1 MILR (Rev.) 69, 71 (1987))

Disposition on Merits Preferred

This court agrees with the High Court that the land rights of the Marshallese people are of extreme importance and that the drastic procedure of preventing a full hearing in court

should be avoided if at all possible. (*Lokot and Kabua v. Kramer, et al.*, 2 MILR 89, 91 (1997))

Distribution of Land Use Payments

Allocating equal thirds of payments for land use and in lieu of copra to the iroijlaplap, alap and dri jerbal is consistent with Marshallese practice. *(Mwedriktok v. Langijota and Abija*, 1 MILR (Rev.) 172, 175 (1989))

Drekein Jenme

A seventy-year time period is more than sufficient to invoke the Marshallese custom of "never moving or disturbing the *drekein jenme*." (*Thomas v. Samson v. Alik*, 3 MILR 71, 74 (2008))

Although Marshallese custom presumes the decisions of a Leroijlablab are reasonable unless it is clear they are not, the doctrine of *drekein jenme* may be applied to contravene an unreasonable decision of the Leroijlablab. (*Thomas v. Samson v. Alik*, 3 MILR 71, 75 (2008))

Iroij

— Powers and Obligations

An iroij must notify and consult with his successor and/or Bwij, before executing a testamentary statement allocating a certain amount to be paid to another from the iroij's share of land use payment. (*Elmo v. Kabua*, 2 MILR 150, 154 (1999))

— Decisions

The determinations of iroij are presumed to be reasonable unless it is clear that they are not. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 7 (1984))

Kalimur

A kalimur is not a will, but is a determination of land rights under custom. The word kalimur can have many meanings not exactly encompassed in the English concept of a "will." (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 89 (2008))

A kalimur can be a determination by the iroijlaplap of the present rights in land rather than an actual transfer of property to occur at death. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 89 (2008))

Because a kalimur is not the same as a will, there may be procedural irregularities that would invalidate a will under common law and the probate code but would not necessarily invalidate a kalimur. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 89 (2008))

Whether those who inherit land title under a kalimur are adopted children is irrelevant when the kalimur was created by the iroijlaplap and approved by lineage members. (*Nashion and Sheldon v. Enos and Jacklick*, 3 MILR 83, 91 (2008))

Katleb

As a matter of customary law, a katleb was given to only one person, not two. (*Thomas v. Samson v. Alik*, 3 MILR 71, 73 (2008))

Kitre (gift land)

— Conditions of Gift

The husband who makes the kitre can attach conditions to it. (*Bulale and Jamore v. Reimers and Clarence*, 1 MILR (Rev.) 259, 262 (1992))

— Succession to Rights

It is proper and normal for kitre land to pass to the bwij of the recipient. (*Bulale and Jamore v. Reimers and Clarence*, 1 MILR (Rev.) 259, 262 (1992))

Morjinkot

Rights in Morjinkot land, a gift from an Iroij as reward for bravery in battle, remain in the bwij and are inherited in the maternal line. (*Tobeller v. David*, 1 MILR (Rev.) 81, 82 (1987))

— Termination of Rights

In order to change rights in Marjinkot lands, in absence of consent, good cause must be shown. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 7 (1984))

Possession

Possession or use of land does not, in itself, convey any rights in the land under the custom. (*Abner, et al., v. Jibke, et al.*, 1 MILR (Rev.) 3, 7 (1984))

Statute of Frauds

The statute of frauds does not apply to a document that is a determination of inheritance. (*Thomas v. Samson v. Alik*, 3 MILR 71, 74 (2008))

LANDLORD AND TENANT

Breach

The general rule is that a non-party to a lease lacks standing to challenge noncompliance with a lawful lease. (*Kramer and PII v. Are and Are*, 3 MILR 56, 66 (2008))

Lease

— Constitutional

The constitutional requirement set forth in RMI Constitution, Article X, Section 1(2), that any alienation or disposition of land be approved by those recognized by Marshallese custom to represent all persons with an interest in that land, is satisfied when approval is given under a Special Power of Attorney, absent evidence that the Special Power of Attorney is invalid under Marshallese custom or tradition. (*Kramer and PII v. Are and Are*, 3 MILR 56, 61 (2008))

The constitutional requirement set forth in RMI Constitution, Article X, Section 1(2), that any alienation or disposition of land be approved by those recognized by Marshallese custom to represent all persons with an interest in that land, is not violated by an assignment of the lease, when the original lease, signed by landowners, specifically authorized the lessee to assign her interest under the lease. (*Kramer and PII v. Are and Are*, 3 MILR 56, 63 (2008))

Tenancy at Sufferance

A tenancy by sufferance is terminated by a proper demand for possession and can be put to an end whenever the landlord, acting promptly, wishes. (*Kramer and PII v. Are and Are*, 3 MILR 56, 66 (2008))

Tenancy at Will

The general common law rule is that a tenancy at will cannot be conveyed or assigned; it does not pass with the alienation of the underlying estate. (*Kramer and PII v. Are and Are*, 3 MILR 56, 66 (2008))

When title to property is passed by deed or lease, a tenancy at will is terminated, and the tenant becomes a tenant at sufferance. (*Kramer and PII v. Are and Are*, 3 MILR 56, 66 (2008))

M

MARITIME LIENS

Enforcement

— Laches

Absence of a vessel from home waters operates to relieve the lienor, to some extent, from laches; but the question in each case against a subsequent owner who acquired in good faith and without notice is whether the high degree of diligence in the enforcement of lien rights has been shown. (*Les Nor. Boat Repair, et al., v. O/S Holly, et al.*, 1 MILR (Rev.) 176, 180 (1989))

Whether laches applies in a given case depends upon the circumstances of the case and is primarily addressed to the trial court's discretion. (*Les Nor. Boat Repair, et al., v. O/S Holly, et al.*, 1 MILR (Rev.) 176, 180 (1989))

— Allocation of Costs

Trial court has discretion to allocate wharfage charges and costs of government custody of vessels among lienor claimants and holders of mortgages as it thinks appropriate, but portion allocable to lienor who established a lien should be charged against proceeds of sale of the vessels. (*Les Nor. Boat Repair, et al., v. O/S Holly, et al.*, 1 MILR (Rev.) 176, 180 (1989))

MORTGAGES

Construction and Operation

— Substitution of New Mortgagor

A substitution of the primary obligor does not invalidate or necessarily subordinate the priority of the lien on the security. (*Les Nor. Boat Repair, et al., v. O/S Holly, et al.*, 1 MILR (Rev.) 176, 179 (1989))

N

NITIJELA

Powers and Procedures

Article IV, § 12(2) of the Constitution provides for automatic dissolution on the thirtieth day of September in the fourth year after the year in which the last preceding general election was held. (*In Re Nitijela Dis. Act of 1981*, 1 MILR (Rev.) 1, 2 (1982))

The proviso in Article IV, § 12(2) of the Constitution applies only in the event of a general election pursuant to Article IV, § 13(3) that occurs before the thirtieth day of April. (*In Re Nitijela Dis. Act of 1981*, 1 MILR (Rev.) 1, 2 (1982))

Rules

— Certification of Acts

Pursuant to Rule 8 of the Nitijela Rules of Procedure, the Speaker is authorized to certify passage of a legislative enactment. (*Kabua, et al., v. Speaker of the Nitijela*, 2 MILR 143, 147 (1999))

— Conflicts of Interest

Pursuant to Rules 8 and 29 of Nitijela Procedure, the Speaker is authorized to raise and rule upon a question of conflict of interest (*Kabua, et al., v. Speaker of the Nitijela*, 2 MILR 143, 147 (1999))

NUCLEAR CLAIMS TRIBUNAL

Powers and Duties

— Authority to Halt Distribution of Borrowed Funds

The Tribunal has broad authority with respect to local distribution authorities, including the power to halt distribution by a local distribution authority of borrowed funds representing an advance against future proceeds. (*Defender of the Fund*, *et al.*, *v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289, 297 (1992))

— Review of Special Tribunal's Ruling

Under § 31(q) of the Marshall Islands Nuclear Claims Tribunal Act (1987), as amended, a refusal of the Tribunal to review the conclusions of a Special Tribunal would be based either upon (a) a finding by the Tribunal that the decision did not involve a matter of public importance, or (b) the Tribunal declining to exercise its discretion in favor of reviewing the decision. (*Samson, et al., v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992))

— Review of Transfers of Funds

If a sound basis exists for the Tribunal to invalidate an assignment or proposed assignment of funds, independent of the question whether the purpose of the assignment is consistent with the Section 177 Agreement, the Tribunal has the duty and power to make that determination. (*Defender of the Fund*, *et al.*, *v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289, 292 (1992))

Rules and Procedures

— Public Notice of Assignments of Funds

Section 12(d) of the Nuclear Claims Tribunal Act and § 404 of the regulations adopted by the Tribunal require each local distribution authority to put all proposed assignments of future proceeds in writing and give public notice of the same at least 75 days prior to consummation of the proposed assignment. (*Defender of the Fund*, *et al.*, *v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289, 293 (1992))

— Public Notice of Regulations

The Tribunal does not have to give advance public notice of, or to have a hearing on, proposed regulations. The regulations become effective upon adoption by affirmative vote of the Chairman and one member of the Tribunal. They are thereafter to be published and made available to the public in printed form. (*Defender of the Fund*, *et al.*, *v. Rongelap Atoll LDA*, 1 MILR (Rev.) 289, 294 (1992))

P

PARTIES

Appearing Pro Se
— Compliance with Rules

An unrepresented litigant appearing *pro se* is not entitled to any different treatment in the application of Rules of Evidence and Procedure than is a litigant represented by counsel. (*Guaschino v. Reimers and Reimers*, 2 MILR 49, 51 (1995))

PUBLIC OFFICERS

Presumptions
— Duties Performed

Absent evidence to the contrary, a court can presume that Trust Territory officials did their duty; that is, did the things a Regulation required them to do. *(Langijota v. Alex*, 1 MILR (Rev.) 216, 221 (1990))

R

RES JUDICATA

General

Res judicata refers to the preclusive effect of a former adjudication on a subsequently-filed action, and encompasses two separate preclusion doctrines: claim preclusion and issue preclusion. (*Jalley v Mojilong*, 3 MILR 106, 109 (2009))

Claim Preclusion

Claim preclusion prevents parties from re-litigating the same claim that was previously available in a prior proceeding between them, regardless of whether the claim was asserted or determined in the prior proceeding. (*Jalley v Mojilong*, 3 MILR 106, 109 (2009))

A "claim" refers to the violation of a legally cognizable right. (*Jalley v Mojilong*, 3 MILR 106, 110 (2009))

Determinations by Land Title Officers

Trust Territory Office of Land Management Regulation No. 1 provided sufficient procedural safeguards to hold administrative determinations thereunder to be *res judicata* as to persons who participated in the proceedings and those in privity with them. (*Langijota v. Alex*, 1 MILR (Rev.) 216, 219 (1990))

Effect

The doctrine of *res judicata* bars a second action between the same parties on the same subject matter directly involved in the prior action. (*Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 234 (1991))

Res judicata bars further claims by parties or their privies against the same defendants based on the same cause of action. (*Ueno v. Abner and Hosia, et al.*, 3 MILR 29, 31 (2007))

Issue Preclusion

Issue preclusion binds parties in a subsequent action, whether on the same or different claim, when an issue of fact or law raised in the subsequent action was actually litigated and decided after a full and fair opportunity for litigation. In both the offensive and defensive use situations, the party against whom issue preclusion is asserted has litigated and lost in an earlier action. (*Jalley v Mojilong*, 3 MILR 106, 109 (2009))

An "issue" is a question of law or fact presented as part of a party's broader claim. (*Jalley v Mojilong*, 3 MILR 106, 110 (2009))

Requirements

Application of the doctrine of *res judicata* requires both identity of parties and identity of issues in the earlier and subsequent actions. (*Jeja v. Lajimkam, et al.*, 1 MILR (Rev.) 200, 203 (1990))

The final judgment on the merits in a previous action involving the same parties and substantially the same issues precludes litigating issues that were or should have been presented in the previous action. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 61 (1995))

A party seeking to rely on the doctrine of *res judicata*, or claim preclusion, must prove that: 1) there has been a final judgment on the merits in a prior suit; 2) the prior suit involves the same parties or their privies; and 3) the causes of action are the same as in the prior suit. (*Gushi Bros Co. v. Kios, et al.*, 2 MILR 120, 123 (1998))

S

SERVICE OF PROCESS

Constructive Service

Service on opposing party is valid where statutory and rule procedures are fully complied with. (*So. Seas Marine Corp. v. Reimers*, 2 MILR 58, 63 (1995))

STARE DECISIS

The doctrine of stare decisis, now commonly called following precedent, is concerned with determination of points of law, not with conclusions of fact. (*Ammu v. Ladrik, et al.*, 2 MILR 20, 23 (1994))

STATUTES

Construction and Operation

Title 8, § 1 of the Trust Territory Code provides every judgment for the payment of money bears an interest rate of 9% a year from date it is entered. (*Carolson Com. Corp. v. Sawej Bros. Co.*, 1 MILR (Rev.) 24, 25 (1986))

Neither 8 TTC § 55 nor 8 TTC § 75 authorizes a court to forgive any part of a judgment obligation absent consent of the holder of the judgment. (*Carolson Com. Corp. v. Sawej Bros. Co.*, 1 MILR (Rev.) 24, 25 (1986))

Statutes are to be construed according to their plain and obvious meaning, absent some indication of legislative intent to the contrary. (*Clanton, et al., v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 151 (1989))

Courts should give great deference to the interpretation given statutes and regulations by the officials charged with their administration. (*Bien v. MI Chief Elec. Off.*, 2 MILR 94, 99 (1997))

Section 174(d) of the Compact is analogous to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602(a)(2), which provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." Due to the similarity in language, the legislative history and judicial interpretation of FSIA § 1602(a)(2) guide the analysis of what constitutes "commercial activity" under Section 174(d) of the Compact. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 251 (2004))

— Based Upon

The phrase "based upon" means something more than a mere connection with, or relation to, commercial activity. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 251 (2004))

— Commercial Activity

The analysis of whether the "commercial activity" exception applies must begin with identifying the particular conduct "upon" which the action is "based." (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 251 (2004))

Conduct by a state is considered "commercial activity" where the state exercises "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 252 (2004))

Operation of military bases, including control of access thereto, is universally considered a purely governmental function and, as such, sovereign in nature, as opposed to commercial. (*Pac. Int'l, Inc., v. U.S.A. and U.S. Dept. Of the Army*, 2 MILR 244, 252 (2004))

— Rules of Interpretation

The courts may look to dictionary definitions when ascertaining the plain and ordinary meaning of undefined terms in a statute. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 137 (2010))

The definition of "trial" for purposes of Traditional Rights Court Rule 9 is broad enough to include a procedure where the evidence produced before the Traditional Rights Court is examined by the High Court and a determination made whether that evidence supports the Traditional Rights Court's opinion in answer to the question certified to it, as the parties were afforded the right to be heard on whether the evidence supported the Traditional Rights Court's decision prior to the High Court's entry of final judgment. (*Dribo v. Bondrik, et al.*, 3 MILR 127, 138 (2010))

It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results, and courts are to avoid constructions that are "inconsistent with common sense" or produce "odd" or "absurd results." (*Dribo v. Bondrik, et al.*, 3 MILR 127, 138 (2010))

The preeminent canon of statutory interpretation requires the court to presume that the legislature says in a statute what it means and means in a statute what it says. (*Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013))

If statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease. Resorting to legislative history as an interpretive device is inappropriate if the statute is clear. (*Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013))

When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions. (*Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013))

The statutory language of 39 MIRC § 403 is clear: with respect to lands in the Ralik Chain (excluding Ujelang), there are four separate Iroijlaplap domains and titles to be held and exercised only by the successors of the four named Iroijlaplaps. (*Lekka v. Kabua, et al.*, 3 MILR 167, 171 (2013))

Repeal

— Incorporated Statute

Repeal of a statute that re-enacted, through incorporation by reference, a repealed statute, effects a repeal of the statute incorporated by reference. (*MIDC and Leon v. MALGOV and RMI (2)*, 1 MILR (Rev.) 209, 211 (1990))

T

TORTS

Government Liability Act
— In General

The Act did not grant a right to sue, but, to the contrary, severely limited the pre-existing constitutional right of an individual to seek judicial redress against the Government or its agent. (*Enos and Enos v. RMI, et al.*, 1 MILR (Rev.) 63, 64 (1987))

— Procedural Requirements

Because of problems encountered in attempting to timely file a claim, the six-month time limitation in § 9 is unduly restrictive and therefore unconstitutional. (*Kabua v. H. Ct. Chief Justice, et al.*, 1 MILR (Rev.) 33, 35 (1986))

— Scope

The Act does not address the issue whether government has sole liability for torts of its employees. It was error to dismiss action as to employees. (*Leon v. RMI, et al.*, 1 MILR (Rev.) 59, 60 (1987))

— Severability

Section 9 with the six-month limitation is severable from the balance of the Act and may be stricken while leaving the balance of the Act intact. (*Enos and Enos v. RMI, et al.*, 1 MILR (Rev.) 63, 66 (1987))

Negligence
— General

Negligence is the omission to do something an ordinarily prudent person would have done or the doing of something which an ordinarily prudent person would not have done under such circumstances. (*Anitok v. Binejal*, 2 MILR 114, 116 (1998))

— Breach of Duty

Whether there was a breach of a duty is usually a question of fact. Whether a breach of duty caused damages is also a fact issue. (*Kramer and PII v. Are and Are*, 3 MILR 5, 67 (2008))

Medical malpractice
— Time claim accrues

Rule established by the U.S. Supreme Court in *United States v. Kubrick*, 444 U.S. 111, 62 L.Ed. 2d 259, 100 S.Ct. 352 (1979), that cause of action accrued when claimant knew both the existence and the cause of injury, is not inflexible. It must necessarily be applied to varying fact situations. (*Leon v. RMI, et al.*, 1 MILR (Rev.) 59, 61 (1987))

TRIAL ASSISTANTS

Suspension and Disbarment

Criminal conviction of violation of 31 MIRC Ch. 1, §§ 5 and 38 involves actions of sufficient moral turpitude as to clearly violate Rule 6 of the "Order Creating Standing Committee on Professional Conduct." *(In re: The Matter of Timothy*, 1 MILR (Rev.) 275, 277 (1992))

The findings and recommendations of a trial court in a disciplinary proceeding will be set aside only when "clearly erroneous." *(In re: The Matter of Timothy*, 1 MILR (Rev.) 275, 277 (1992))

The fact that a criminal conviction under 31 MIRC Ch. 1, §§ 5 and 38 is vacated pursuant to 37 MIRC Ch. 1, § 70(4) and (5) does not negate disciplinary findings based on said conviction and does not render appeal moot. *(In re: The Matter of Timothy*, 1 MILR (Rev.) 275, 278 (1992))

TRUST TERRITORY COURTS DECISIONS

Precedential Value

In some circumstances, the value of Trust Territory court decisions as precedent will exceed the precedential value of cases from non-Pacific Islands jurisdictions. (*Langijota v. Alex*, 1 MILR (Rev.) 216, 218 (1990))

Stare Decisis

Decisions of Trust Territory courts do not have *stare decisis*, as distinguished from *res judicata*, effect in courts of the Marshall Islands. (*Langijota v. Alex*, 1 MILR (Rev.) 216, 218 (1990))

W

WAR CLAIMS ACT

Judicial Review of Awards

Although the War Claims Act contains provisions that make all awards final, not subject to judicial review, this finality provision applies only as to claims against the United States. The court cannot be precluded from determining who actually owned the land, or was entitled to share in the claim. (*Ebot v. Jablotok*, 1 MILR (Rev.) 8, 11 (1984))

WITNESSES

Continuance
— Grounds

When a continuance is sought to obtain witnesses, the party seeking the continuance must show that the witnesses can probably be obtained if the continuance is granted and that "due diligence" has been used to obtain their attendance on the day set for trial. (*RMI v. Lemark*, 3 MILR 19, 23 (2006))

Court generally deny requests for continuances based on the nonappearance of a witness unless the litigant can show "due diligence" in attempting to subpoena the witness. (*RMI v. Lemark*, 3 MILR 19, 24 (2006))

The trial court is under no obligation to grant continuances until a non-subpoenaed witness finally arrives. (*RMI v. Lemark*, 3 MILR 19, 25 (2006))

WRITS, EXTRAORDINARY

Power to Issue

The power of the Supreme Court to issue writs is not unlimited or without boundaries, but is limited to cases where they are necessary to aid its appellate or other jurisdiction or to enforce the Constitution. (*Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (1986))

The power to issue writs is discretionary and it is sparingly exercised. (*Kabua, et al., v. H.Ct. Chief Justice, et al.*, 1 MILR (Rev.) 33, 34 (1986))

The constitutional grant of power to each court to issue all writs, in Article VI, § 1(2), confers original jurisdiction on the Supreme Court to issue writs in appropriate cases. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 252 (1991))

The constitutional grant of appellate jurisdiction carries with it all the common law writs necessary to the proper exercise of appellate jurisdiction and does not require an additional grant of power to issue all writs. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 252 (1991))

Section 63 of the Judiciary Act of 1983, 27 MIRC Ch. 2, underscores the Supreme Court's constitutional power to issue writs in the first instance. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 252 (1991))

Mandamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. (*In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995))

A writ of prohibition is to be used with great caution and forbearance and should be issued only in cases of extreme necessity. (*In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995))

The writ of prohibition is not a writ of right but is a discretionary writ which issues only in cases of public importance or of an exceptional character where the law affords no adequate remedy on appeal. (*Kayser-Schillegger and Kayser v. Ingram, et al.*, 3 MIRL 93, 95 (2008))

Requirements
— In General

In order for the Court to issue these prerogative, discretionary writs, the petitioner must show that respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law, and that it would result in injury for which there is no other adequate remedy. (*Kabua, et al., v. H.Ct. Chief Justice, et al.*, 1 MILR (Rev.) 33, 34 (1986))

For a writ of *mandamus* to issue there must be a clear showing of the existence of a nondiscretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed, and a lack of any other sufficient remedy. (*Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 253 (1991))

For a writ of *mandamus* to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. (*In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995))

For a writ of prohibition to issue to a judge, it must be shown that the respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law and that it would result in injury for which there is no other adequate remedy. (*In the Matter of the Estate of Peter*, 2 MILR 68, 74 (1995))

Where the petition is directed against the lower court's interlocutory order, the requirement for obtaining the writ is even stricter, because of the general rule that interlocutory orders are not appealable. The Court must consider the strong legislative policy against piecemeal appeals, the policy against obstructing ongoing judicial proceedings by interlocutory appeals, and the unfortunate result that when such a writ is directed against the trial judge it makes that judge a party litigant whereby he must seek his own counsel and prepare his own defense. (*Kayser-Schillegger and Kayser v. Ingram, et al.*, 3 MIRL 93, 95 (2008))

Where a trial judge has discretion to act, mandamus (or prohibition) clearly will not lie to interfere with or control the exercise of that discretion, even when the judge has acted erroneously, unless the judge has exceeded his jurisdiction, has committed a flagrant and manifest abuse of discretion, or has refused to act on a subject that is properly before the court under circumstances in which it has a legal duty to act. (*Kayser-Schillegger and Kayser v. Ingram, et al.*, 3 MIRL 93, 95 (2008))

Where the jurisdiction of a trial court depends upon a factual determination, a writ of prohibition will not lie. (*Kayser-Schillegger and Kayser v. Ingram, et al.*, 3 MIRL 93, 96 (2008))

— Matters of Public Importance

Writs of *mandamus* and prohibition are discretionary and generally will be issued only in cases of public importance or of exceptional character or to enforce a prior order of the court. (*Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (1986))

The Supreme Court will hear writs of *mandamus* or prohibition challenging High Court action in cases of extraordinary public importance. (*RMI v. ATC, et al. (2)*, 2 MILR 167, 168 (2001))

— No Other Adequate Remedy

Writs of *mandamus* and prohibition may not be used as substitutes for appeal. Further, they generally will be not issued unless there is no adequate remedy available on appeal. (*Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (1986))

The party seeking a writ of *mandamus* or prohibition must show there is no other means of obtaining the desired relief and has the burden of showing his right to the writ is clear and indisputable. (*Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (1986))

The party seeking an extraordinary writ must show that there is no other means of obtaining the relief desired and must bear the burden of showing that his right to issuance of the writ is "clear and indisputable." (*Kayser-Schillegger and Kayser v. Ingram, et al.*, 3 MIRL 93, 95 (2008))

Writs In Lieu of Interlocutory Appeals Disfavored

Wise and practical policies dictate that requirements for obtaining writs directed against interlocutory orders are even stricter. (*Kabua v. High Court, et al. (2)*, 1 MILR (Rev.) 27, 30 (1986))

Interlocutory rulings of the trial court can be assigned as error on appeal from a final judgment. (*RMI v. ATC, et al. (2)*, 2 MILR 167, 168 (2001))

Assuming that the writ procedure can sometimes be utilized as a substitute for an interlocutory appeal, in the rare case where such an appeal is available, it should be noted that interlocutory appeals are not favored. (*RMI v. ATC, et al. (2)*, 2 MILR 167, 169 (2001))

Common law courts have learned from experience that interlocutory and piecemeal appeals in most cases are wasteful of both time and judicial resources. Extraordinary writ practice employed in lieu of an interlocutory appeal suffers from many of the same infirmities. (*RMI v. ATC, et al. (2)*, 2 MILR 167, 169 (2001))