REPUBLIC OF THE MARSHALL ISLANDS LAW REPORTS VOLUME 3

Opinions and Selected Orders 2005 through 2014

Published by:

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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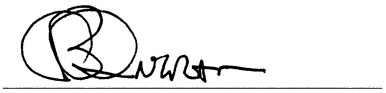
Publisher's 2007 Note to the Marshall Islands Law Reports Vol. 3

This collection of Marshall Islands Supreme Court decisions for 2005 through 2007 makes up the third volume of the Marshall Islands Law Reports. The first two volumes covered periods of about 12 and 11 years. It is the undersigned's intention to close this volume after 10 years with the 2014 cases. Until 2014, the High Court will publish updates of Volume 3 from time-to-time.

My thanks goes to Law Clerk Arsima Muller for her assistance with headnotes, summaries, and proof-reading decisions from 2005 through mid 2007.



Carl B. Ingram
Chief Justice, High Court

Publisher's 2015 Note to the Marshall Islands Law Reports Vol. 3

This collection of Marshall Islands Supreme Court decisions for 2005 through 2014 makes up the third volume of the Marshall Islands Law Reports. The first two volumes covered periods of about 12 and 11 years. The undersigned will start on a fourth volume with 2015 cases.

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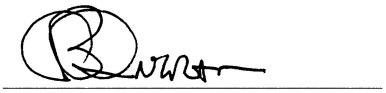

Carl B. Ingram
Chief Justice, High Court

TABLE OF CASES

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

EJLA TIBON,

Plaintiff-Appellee,

-v-

MONEN JIHU, TELLA JIHU, and LIONRAK GEORGE,

Defendants-Appellants.

and

MONEN JIHU and TELLA JIHU,

Plaintiffs-Appellants,

-v-

LININMETO ALIK and LIONRAK GEORGE,

Defendants-Appellees.

S.CT. CIVIL NO. 03-01
(High Ct. Civil Nos. 2001-218 and 2002-063 (consolidated))

APPEAL FROM THE HIGH COURT

APRIL 5, 2005

CADRA, C.J.
GOODWIN, A.J. pro tem[1], and KURREN, A.J. pro tem[2]

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[1]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

Argued and Submitted March 23, 2005

SUMMARY:

This was a dispute over the alap and dri jerbal rights and titles to Uninak, Wojajokar, Lornien, and Lobat wetos on Eneko Island, Majuro Atoll (also known as "Jitaken Wetos"). Appellants claimed that a written will or *kalimur* transferring the interests to these wetos to an adopted son was invalid under Marshallese custom because *bwij* consent had not been obtained. Appellants, who were grandchildren of the testator, also claimed that the *kalimur* did not comply with the requirements for a holographic will under Title 25 of the MIRC (the Probate Code), and that the *kalimur* wrongfully disinherited them. After hearing the evidence, the Traditional Rights Court determined that the Jitaken Wetos were not *bwij* lands, but had been given as *kitre*. Because these lands were given as *kitre*, *bwij* consent was not necessary. The Traditional Rights Court, therefore, found that the *kalimur* was valid under custom. The High Court held that this finding was not "clearly erroneous," and entered judgment consistent with this finding. The Supreme Court affirmed. The Supreme Court also determined that appellants' argument that the *kalimur* was not a valid holographic will was without merit because it was in writing, signed by the testator and witnessed.

DIGEST:

1. 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 v. Peter*, 1 MILR (Rev.) 228, 232 (1991).

2. APPEAL AND ERROR – *Questions Reviewable – Asserted Below*: 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. *Jeja v. Lajikam*, 1 MILR (Rev.) 200, 205 (1990).

3. CONSTITUTIONAL LAW – *Construction – Article VI*: 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. *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

4. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Facts*: A finding of fact as to the custom is to be reversed or modified only if clearly erroneous. *Zaion*, 1 MILR (Rev.) 233; *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225-226 (1991).

5. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact – Clearly*

Erroneous: 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." *Zaion*, 1 MILR (Rev.) 233.

OPINION OF THE COURT BY CADRA, C.J.

This is an appeal from a judgment of the High Court declaring that Ejla Tibon holds the Alap and dri jerbal rights and titles to Uninak, Wojajokar, Lornien, and Lobat wetos on Eneko Island, Majuro Atoll (also known as the "Jitaken Wetos"). In reaching its judgment, the High Court adopted, in its entirety, the opinion of the Traditional Rights Court which found that a written will or *kalimur* by Bilimon Bowod transferring these interests to his adopted son, appellee Ejla Tibon, was valid under Marshallese custom. Appellants Monen and Tella Jihu, the grandchildren of Bilimon, appeal contending that the will or *kalimur* is contrary to Marshallese custom, that the will does not comply with the requirements for a valid holographic will under Title 25 of the MIRC (the Probate Code), and that the will or *kalimur* wrongfully disinherits appellants. As discussed below, we conclude that the findings of the Traditional Rights Court are not "clearly erroneous" and, therefore, affirm the High Court's judgment.

I.

On September 27, 2001, plaintiff-appellants Monen Jihu and Tella Jihu (the Jihus) filed Civil Case No. 2001-218 against defendants Lininmeto Alik and Lionrak George. In their Complaint, the Jihus alleged that, as the rightful successors of Bilimon Bowod, they were the proper persons to hold the Alap and dri jerbal rights, respectively, to the "Jitaken Wetos." Lininmeto and Lionrak filed an Answer generally denying the Jihu's claims and seeking a determination that they were the proper persons to hold the Alap and dri jerbal rights, respectively, to these four wetos.

On March 21, 2002, appellee Ejla Tibon commenced Civil Case No. 2002-063 against the Jihus and Lionrak[3] claiming that he was the proper person to hold the Alap and dri jerbal rights to

[3]Lininmeto passed away prior to institution of suit.

the Jitaken wetos. Ejla claimed he was the adopted son of Bilimon and had been given the rights to these wetos through a *kalimur* executed by Bilimon in 1988.

The High Court consolidated these two cases which were then referred to the Traditional Rights Court to determine who, pursuant to Marshallese custom, was the proper person(s) to hold the Alap and dri jerbal rights to the "Jitaken wetos." A two day trial was held before the Traditional Rights Court on November 4 and 5, 2002.

On December 4, 2002, the Traditional Rights Court issued its determinations that, under custom, Ejla Tibon was the proper person to be Alap and dri jerbal on the "Jitaken wetos." The Traditional Rights Court found that Bilimon's *kalimur* transferring these rights to Ejla Tibon was valid and proper. The Traditional Rights Court found that the Jitaken wetos were not *bwij* lands but had been given as *kitre*[4] by Iroijlaplap Jebrik to his wife, Litakbwij. Litakbwij, in turn gave these lands to her adopted son, Bilimon, who, under custom, "had the right and discretion to name his successor." Bilimon exercised that right by transferring the Alap and dri jerbal interests in these wetos to his adopted son, Ejla Tibon, by his *kalimur*. Ejla had lived with and taken care of Bilimon prior to Bilimon's death in 1989. The Traditional Rights Court further noted that Bilimon could have given his rights in these wetos to his natural daughter, Teline, but did not do so.

The High Court held a Traditional Rights Court Rule 14 hearing on February 11, 2003. That day the High Court issued its judgment adopting the Traditional Rights Court's opinion in its entirety, finding that the Traditional Rights Court's decision and factual findings were not "clearly erroneous." The High Court, accordingly, adjudged that Ejla Tibon was the proper person to hold the Alap and dri jerbal rights on these wetos to the exclusion of Lionrak and the Jihus. The Jihus filed a timely notice of appeal. Lionrak did not appeal.

II.

[4] "*Kitre*" is defined as a gift from husband to wife. *Makroro v. Kokke*, 5 TTR 465, 469 (Tr. Div. 1971).

Appellants argue that the Traditional Rights Court erred in determining that the will or *kalimur* of Bilimon Bowod was valid under Marshallese custom. Appellants contend that, under Marshallese custom, a transfer of an interest in land must be consented to by the lineage and approved by the Iroijlaplap. Since the Jitaken wetos are on "Jebdrik's side" and there is no Iroijlaplap, appellants assert in their briefing that the consent of the Iroij edrik and grandchildren of Bilimon should have been obtained. Such consent was not obtained and appellants, therefore, conclude that Bilimon's *kalimur* transferring his interests in this wetos to his adopted son, Ejla, was invalid.

In support of this argument appellants cite the case of *Makroro v. Kokke*, 5 TTR 465 (Tr. Div. 1971). *Makroro* recognized that a holder of an interest in land may not transfer those interests without first obtaining consent of the lineage and approval of the iroijlaplap or the person or group exercising iroijlaplap authority. *Id.* at 468. While this holding may be a generally true statement of Marshallese custom, the *Makroro* opinion itself recognizes an exception where land is given as *kitre*. *Id*. at 469. The facts of the case at bar are clearly distinguishable from those the Trial Division considered in *Makroro*. *Makroro* did not address the factual pattern raised in the instant case and neither the Traditional Rights Court nor the High Court were bound to follow its holding.

[1,2] It is undisputed that the Jitaken wetos were given as *kitre* by Jebdrik to Litakbwij and then given by Litakbwij to Bilimon. It is also undisputed that these wetos were not *bwij* lands. Since these lands were not *bwij* lands, one might reasonably question why *bwij* consent would be necessary for Bilimon to dispose of this property as he saw fit. If, as urged by appellants, the custom is that *bwij* consent was necessary for Bilimon to transfer his interests in these wetos to Ejla, it was incumbent on the Jihus to prove what the custom was. It is axiomatic that a party relying on a rule of custom has the burden of proving its existence and substance at trial. *Zaion v. Peter*, 1 MILR (Rev.) 228, 232 (1991). Appellants had the opportunity to produce evidence before the Traditional Rights Court of the alleged custom on which they now rely. Having considered the evidence before it, the Traditional Rights Court determined that *bwij* consent was

not necessary for Bilimon to transfer his interests in this land by *kalimur* to Ejla. Appellants also argue that the Jitaken wetos are *ninnin* lands and that the interests in that land should have passed from Bilimon to his biological daughter, Teline, and then to her children, the Jihus. There was, however, no evidence adduced at trial concerning the classification of these wetos as *ninnin* lands. 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. *Jeja v. Lajikam*, 1 MILR (Rev.) 200, 205 (1990). Since the issue was not raised before the Traditional Rights Court, we do not reach it on appeal. Moreover, the Traditional Rights Court found these wetos were not *bwij* land so it is unclear how *ninnin* would apply.

Finally, appellants argue that Bilimon's *kalimur* was not a valid holographic will. We find this argument without merit. It is clear that the *kalimur* was in writing, signed by the testator and witnessed. Appellee did not seek to introduce the *kalimur* as a holographic will. The Traditional Rights Court found the *kalimur* was valid under custom. We will not disturb that finding.

III.

[3,4,5] 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. *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994). The High Court found that the Traditional Rights Court's decision and findings were not "clearly erroneous" and, accordingly, entered judgment consistent with that decision. As noted in *Zaion v. Peter*, the Traditional Rights Court is in a unique position to determine matters of custom and tradition. The judges are conditioned in Marshallese culture thereby bringing specialized knowledge of custom and traditional practice to the dispute resolution process. It is for that reason, that both the High Court and this Court are to give proper deference to the decisions of the Traditional Rights Court. Accordingly, a finding of fact as to the custom is to be reversed or modified only if clearly erroneous. *Zaion, supra*, at 233; *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225-226 (1991). 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." *Zaion, supra*, at 233.

A review of the record relied upon by appellants does not produce "a definite and firm conviction that the court below made a mistake." We, therefore, affirm the Traditional Rights Court's and High Court's determination that Bilimon's *kalimur* was valid under custom and was, therefore, effective to transfer the alap and dri jerbal rights in the Jitaken wetos to appellee Ejla Tibon.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BUJEN and WASE,

Plaintiffs-Appellants,

-v-

REPUBLIC OF THE MARSHALL ISLANDS, *et al.*,

Defendant-Appellees.

S.CT. CIVIL NO. 04-01
(High Ct. Civil No. 2003-172)

APPEAL FROM THE HIGH COURT

APRIL 5, 2005

CADRA, C.J.
GOODWIN, A.J. pro tem[1], and KURREN, A.J. pro tem[2]

Argued and Submitted March 23, 2005

SUMMARY:

This is an appeal from an order of the High Court dismissing the appellants' wrongful discharge action against the government of the RMI. Appellants argued that the statute of limitations in the Government Liability Act, 3 MIRC Chapter 10, § 23, is unconstitutional because it restricts in a discriminatory manner their constitutional right of access to the courts. The Supreme Court affirmed the High Court's decision, finding that all plaintiffs who choose to assert claims against the government are treated equally.

DIGEST:

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[1]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

BUJEN and WASE v. RMI

1. CONSTITUTIONAL LAW – *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.

2. CONSTITUTIONAL LAW – *Constitutionality of Statutes – 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.

OPINION OF THE COURT BY GOODWIN, A.J.

This appeal is taken from an order of the High Court dismissing the appellants' wrongful discharge action against the government of RMI. The appellants argue that the applicable statute of limitations provision, Government Liability Act, 3 MIRC, Chapter 10, § 23, is unconstitutional because it restricts in a discriminatory manner their constitutional right of access to the courts.

I.

Plaintiffs and appellants ("Appellants") were formerly police officers employed by the Department of Public Safety in RMI. More than a year after their discharge, Appellants filed a wrongful discharge claim with the Attorney-General. After nearly nine months, the Attorney-General rejected the claims. Eleven months after the rejection, Appellants filed the present wrongful discharge action against RMI. On the government's motion, the High Court dismissed the action because it was not filed within the statute of limitations period prescribed by the Government Liability Act, 3 MIRC, Chapter 10, § 23 ("Section 23").

II.

[1] The RMI Const., Art. I, Sec. 4(c) provides: "[T]he Government of the Marshall Islands and any local government shall not be immune from suit in respect of their own actions or those of their agents. . . ." The Constitution also guarantees its citizens access to the court system. RMI Const., Art. II, Sec. 14(1) ("Every person has the right to invoke the judicial process as a means of vindicating any interest preserved or created by law. . . ."). Taken together, these

provisions guarantee the citizens of RMI the right to sue their government in a court of law.

The legislative power of RMI is vested in the Nitijela, which is charged with the power "to make all other laws which it considers necessary and proper. RMI Const., Art. IV, Sec. 1(c). Relevant here, the Nitijela adopted the Government Liability Act, 3 MIRC, Ch. 10, which prescribes the scope of governmental liability for contract and tort claims, and sets forth the procedure citizens must follow in asserting such claims.

Set against this constitutional backdrop, the question posed by Appellants is whether the Nitijela abused its power by adopting a special set of rules to be followed by citizens suing the government of RMI. The short answer is no.

III.

Appellants challenge Section 23 of the Government Liability Act, which provides:

> Every tort or contract action [against the Government] is barred unless commenced within one year from the date the claim was filed with the Attorney-General under Section 7 of this Act, or within six (6) months from the date of notification of rejection of the claim under Section 15 of this Act, whichever is sooner.

3 MIR, Ch. 10, § 23.

There is no question that Section 23 bars the instant action. But Appellants contend that Section 23 should be invalidated because it violates Article II, Section 14(l) of the RMI Constitution. That section provides:

> Every person has the right to invoke the judicial process as a means of vindicating any interest preserved or created by law, subject only to regulations which limit access to courts on a *non-discriminatory* basis.

RMI Const., Art. II, Sec. 14(1) (emphasis added). Appellants seek to have Section 23 declared to be discriminatory—and therefore unconstitutional. They argue in effect that because citizens suing the government have more steps to follow, and less time to take those steps, than citizens who choose to sue each other, the law discriminates against plaintiffs and in favor of the government.

Appellants' argument finds no support in other provisions of the RMI Constitution. In particular, Article II, Section 12, entitled "Equal Protection and Freedom from Discrimination," provides, in relevant part:

> (1) All persons are equal under the law and are entitled to the equal protection of the laws.
> (2) No law and no executive or judicial action shall, either expressly, or in its practical application, discriminate against any person on the basis of gender, race, color, language, religion, political or other opinion, national or social origin, place of birth, family status or descent.

RMI Const., Art. II, Sec. 12.

[2] Appellants have failed to show that the statutory procedure for filing a claim against the government discriminates in any manner prohibited by Section 12. Appellants have treated the government as a person, and then stated that the government as a defendant, has greater rights than a citizen would have as a defendant. But the statutory scheme, which may have imperfections that are not before the court in this case, does not discriminate among plaintiffs who chose to assert claims against the government. All such plaintiffs are treated equally. In one case cited by the Appellants, we did hold that Section 9 of the GLA, as applied in that case, was unconstitutional because it made it virtually impossible for a claimant living on a remote atoll to process a claim. *See Enos and Enos, v. RMI*, 1 MILR (Rev.) 63 (1987). No such problem is before the court in this case. Nor do the appellants cite any reason why they could not have filed their action during the six months after the attorney general denied their claim at the administrative level. They waited eleven months after the claim was rejected. They offer no supporting rationale for this court to declare that the legislative branch was unreasonable in choosing to allow six months from the date of administrative rejection of a claim for the claimant to file an action in court. As long as all plaintiffs are treated equally in the processing of such claims, no violation of equal protection can be maintained. The Nitijela's choice of restrictions applicable to suits against the government of RMI does not appear to be unreasonable on its face,

nor can it be said that the choice discriminates among citizens. We therefore decline Appellants' invitation to disturb the power and authority of the Nitijela in this matter.

The decision of the High Court is AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

ALEE ALIK,

Plaintiff-Appellant,

-v-

PUBLIC SERVICE COMMISSION,

Defendant-Appellee.

S.CT. CIVIL NO. 01-13
(High Ct. Civil No. 1995-100)

MAY 23, 2006

INGRAM, C.J. pro tem[1]
GOODWIN, A.J. pro tem[2], and KURREN, A.J. pro tem[3]

Argued and Submitted May 17, 2006.

SUMMARY:

Appellant sought to vacate two single-judge Supreme Court orders: one that denied his third request for an extension of time to file an opening brief, and one that dismissed his appeal for failing to file an opening brief. The Supreme Court determined that a single judge has the authority to deny a request for relief and to dismiss an appeal for failure to comply with the rules of appellate procedures. It found that the single judge had not abused his discretion in denying the request for an extension of time and in dismissing the appeal, because he had given appellant ample time to file an opening brief. The Supreme Court denied appellant's application to vacate the two single-judge orders, and affirmed the dismissal of the appeal.

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[1]Honorable Carl B. Ingram, Chief Justice, Marshall Islands High Court, sitting by designation of the Cabinet.

[2]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[3]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

DIGEST:

1. JUDGES – *Powers and Functions – 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.

2. APPEAL AND ERROR – *Review – Discretionary Matters – Motions in General*: The proper standard of review for a single Supreme Court judge's order is "abuse of discretion."

3. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Timely File Opening Brief*: 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.

4. JUDGES – *Powers and Functions – Single Supreme Court Judge*: Under Section 206(4) of the Judiciary Act 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 required time.

ORDER OF THE COURT BY INGRAM, C.J. pro tem

On April 14, 2005, plaintiff-appellant Alee Alik ("Alik") applied under Rule 27(c) of the Supreme Court Rules of Procedure ("SCRP") to vacate two single-judge Supreme Court orders: (1) then Chief Justice Allen Fields's May 21, 2002 order denying Alik's third request to extend time to file an opening brief and (2) Justice Fields's July 25, 2003 order dismissing Alik's appeal for failing to file an opening brief. In support of his application, Alik claimed that if the relief is granted, he will be able to get a lawyer for his case; that there is good cause for the extension; and that Justice Fields "just ignored it."

I. FACTUAL AND PROCEDURAL HISTORY

In January 1993, defendant-appellee Public Service Commission ("PSC") advertised for applicants to fill the vacant position of Clerk of the Council of Irioj. Alik applied, but the PSC hired the only other applicant. In 1995, Alik sued the PSC for back wages arguing that of the two applicants, only he met the PSC's announced employment qualifications. After a trial on the matter, the High Court on September 19, 2001, rejected Alik's claim and issued a judgment for the PSC.

Alik filed a timely appeal. Upon certification of the record, Alik's opening brief was due 40 days later, on January 14, 2002. However, on December 10, 2001, Alik, citing and complying with SCRP Rule 29, requested a 60-day extension. In a supporting affidavit, Alik stated that he needed to raise money and get a lawyer. On February 4, 2002, Justice Fields issued an order granting the first extension.

On March 27, 2002, eight days after the first extension had expired, Alik requested a second 60-day extension, an extension until May 20, 2002. On March 15, 2002, Justice Fields issued an order granting a second extension. The opening brief was now due May 20, 2002.

On May 20, 2002, Alik requested a third 60-day extension. On May 21, 2002, Justice Fields issued an order denying the requested extension. However, Justice Fields did not immediately dismiss the appeal.

Almost 14 months later, on July 17, 2003, the clerk of the court issued a notice to Alik stating that unless Alik filed his opening brief on or before noon on July 25, 2003, his appeal would be dismissed. On July 24, 2003, Alik sent a letter to the clerk requesting a two-week extension to find legal counsel. On July 25, 2003, Justice Fields dismissed the appeal for failure to file an opening brief.

Almost 20 months later, on March 15, 2005, Alik filed the application that is now before this Court.

II. APPLICABLE LAW

Under SCRP Rule 28(b), an appellant must file an opening brief within 40 days of the filing of the record on appeal. Under SCRP Rule 29, "[a] party may extend time for the filing of a brief only if the party has first obtained an order signed by a justice allowing extension." Under SCRP Rules 30 and 42(b), the Supreme Court may dismiss an appeal when the appellant does not file an opening brief within the time required.[4]

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[4]The Supreme Court has held many times that the failure to file an opening brief is grounds for dismissing an appeal. *Adding v MI Chief Elec. Off*, 1 MILR (Rev.) 126, 126 (1989); *Premier Film and Eq. v. McQuinn*, 1 MILR (Rev.) 131, 131 (1989); *Konelios v. All Chief Elec.*

[1] 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. Section 206(4) of the Judiciary Act 1983, 27 MIRC Chp. 2, in relevant part provides that "a single judge may make all necessary orders concerning any appeal prior to the hearing and determination thereof, and may dismiss an appeal for failure to take any steps in accordance with the law or rules of procedure applicable in that behalf, or the request of the appellant." SCRP Rule 32 provides: "A justice of the Supreme Court may make all necessary orders concerning any appeal prior to the hearing and determination thereof and may dismiss an appeal for failure to take any steps in accordance with the law or applicable rules of procedure." Also, SCRP Rule 27(c) in part provides: "In addition to the authority expressly conferred by these rules or by law, a single justice of the Supreme Court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion before the Supreme Court. . . . Any party adversely affected by an action of a single justice may, by application to the Court, request rehearing, vacation or modification of such action."

III. STANDARD OF REVIEW

[2] As suggested by both counsel during oral argument, the proper standard of review for a single Supreme Court judge's order is "abuse of discretion." As a general rule, the Supreme Court has held that the standard of review for the High Court's denial of a motion is "abuse of discretion."[5] With respect to the High Court's denial of a continuance (i.e., an extension of

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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); *In the Matter of the Estate of Zaion*, 2 MILR 118, 119 (1998); *Lokkar v. Kemoot*, 2 MILR 165, 165-6 (2000).

[5]*See Rep Mar v. ATC, et al. (3)*, 2 MILR 170, 171 (2000) (citing *Thomassen v United States*, 835 F.2d 727 (9th Cir. 1987)).

time), the Supreme Court has also adopted the "abuse of discretion" standard.[6] Further, with respect to the High Court's dismissal of a case for the failure to prosecute, the Supreme Court has adopted the "abuse of discretion" standard.[7]

IV. APPLICATION

[3,4] Under Section 206(4) of the Judiciary Act and SCRP Rules 30 and 42(b), Alik's failure to file an opening brief within the required time is grounds for dismissal. Under Section 206(4) and SCRP Rule 32, Justice Fields had the authority to dismiss the appeal.

Prior to dismissing the appeal, Justice Fields granted Alik two 60-day extensions. Although Justice Fields denied Alik's request for a third extension, he did not dismiss Alik's appeal until almost 14 months had passed and then upon 8-days' notice. The day before Justice Fields dismissed the appeal, Alik requested a two-week extension. However, Alik did not explain what efforts he had taken to retain counsel over the preceeding 18-month period, why he thought he could secure counsel and file a brief within two weeks, or why he did not himself file a simple brief to preserve his appeal. The motions and other papers Alik has prepared and filed in the courts evidence the knowledge, skill, and experience to file a simple brief. For example, Alik's notice of appeal and requests for extensions of time correctly cite and comply with the Supreme Court rules of procedure. In short, Alik did not demonstrate that there was good cause to grant him any further extensions.

Further, Alik has not shown that Justice Fields abused his discretion by denying a third extension and dismissing the appeal. Justice Fields gave Alik ample time to secure counsel or file a brief himself. At some point in time, the opposing party's right to a timely resolution of the case and a final judgment are impaired, and the integrity of the judicial process is undermined.

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[6] *See Ebot v Jablotok*, 1 MILR (Rev.) 8, 10 (1984); *Lokkon v. Nakap*, 1 MILR (Rev.) 69, 70 (1987).

[7] *See Lokot and Kabua v. Kramer, et al*., 2 MILR 89, 92 (1997).

Justice Fields afforded Alik ample opportunity to file an opening brief. If you sleep on your rights, you can lose them.

V. CONCLUSION

Alik's application to vacate the Court's May 21, 2002 order denying his request to extend time to file an opening brief and the Court's July 25, 2003 order dismissing Alik's appeal for failing to file an opening brief are DENIED. The Court's dismissal of the appeal is AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

Appellant,

-v-

RENE LEMARK,

Appellee.

S.CT. CRIMINAL NO. 04-03
(High Ct. Crim. No. 2004-034)

APPEAL FROM THE HIGH COURT

JUNE 14, 2006

CADRA, C.J.
GOODWIN, A.J. pro tem[1], and KURREN, A.J. pro tem[2]

SUMMARY:

This is an appeal from an order of the High Court denying the prosecutor's request for a continuance and dismissing the criminal proceedings for want of prosecution. The Supreme Court held that the High Court acted within its discretion in denying the request for a continuance because the prosecutor's failure to subpoena essential witnesses constituted a lack of diligence. Because the prosecutor failed to produce witnesses and to make out a prima facie case of the offense charged, the High Court also acted within its discretion in dismissing the criminal proceedings with prejudice. The dismissal was, therefore, affirmed.

DIGEST:

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[1]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

1. APPEAL AND ERROR – *Review – Discretionary Matters – Continuances*: 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.

2. 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.

3. WITNESSES – *Continuance – Grounds*: Courts 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.

4. WITNESSES – *Continuance – Grounds*: The trial court is under no obligation to grant continuances until a non-subpoenaed witness finally arrives.

5. CRIMINAL LAW AND PROCEDURE – *Dismissal – For Want of Prosecution*: The court has the inherent discretion to dismiss criminal cases, with or without prejudice, for want of prosecution.

6. CRIMINAL LAW AND PROCEDURE – *Dismissal – For Want of Prosecution*: 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.

7. CRIMINAL LAW AND PROCEDURE – *Dismissal – For Want of Prosecution*: 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.

8. CRIMINAL LAW AND PROCEDURE – *Continuance – Denied – Effect*: When a motion for continuance to obtain witnesses is denied, the prosecution generally has only 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.

9. APPEAL AND ERROR– *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.

PER CURIUM

RMI v. LEMARK

This is an appeal from an order of the High Court dismissing criminal proceedings for want of prosecution. Finding no abuse of discretion, we affirm.

I. FACTUAL/ PROCEDURAL BACKGROUND

On June 15, 2004, appellee Rene Lemark was charged by criminal information with a single count of violating sections 10 and 30 of the Adoption Act of 2002. The criminal information alleged that from on or about April to December, 2003, Rene Lemark unlawfully solicited Judy Liet to travel outside of the Republic for purposes of placing her then unborn child for adoption.

The criminal information was supported by an affidavit given by Terry Gross. While Mr. Gross' affidavit references three children he parented with Judy Liet, the allegations of the criminal information only concern the couple's second child, Eloney. Mr. Gross averred that Judy Liet became pregnant with Eloney in March, 2003, and that he believed he was the father. During Liet's pregnancy, Gross observed Rene Lemark frequently visiting with Judy Liet at their (Gross and Liet's) home. Liet allegedly told Gross that she had been paid $2,000 for the adoption of Eloney. Gross further averred that he had been told that Rene Lemark had purchased tickets for Liet, Liet's mother and an individual believed to be an adoption facilitator for purposes of travel to Hawaii. On December 19, 2003, Judy Liet traveled to Hawaii for purposes of placing Eloney for adoption. Eloney was born in Hilo on March 27, 2004, and was placed by Liet with a single woman in the State of Maine. Interestingly, nowhere in the affidavit does Gross state this placement or adoption of Eloney was without his consent.

In the supporting affidavit, Gross expressed his concern that his first child, Terry Lynn Gross, was going to be taken out of the Marshall Islands by Liet for adoption by the same woman who had adopted Eloney. Liet had threatened that she would take Terry Lynn to the United States on May 7, 2004. The affidavit, however, contains no allegations that Rene Lemark was involved in this threatened adoption and the criminal information does not charge any unlawful acts over that time frame.

Lemark was arraigned on August 27, 2004. A plea of "not guilty" was entered to the single count of the criminal information. A trial date of September 22, 2004, at 9:00 am. was subsequently set by the trial court upon stipulation of the parties.

Trial commenced on September 22, 2004, at 10:15 am. At that time, the prosecutor advised the court that he was able to proceed, that there were two witnesses present and he believed two of the Republic's other witnesses (Terry and Judy Gross) were on their way. After answering ready, the Republic immediately made a motion for a thirty minute continuance. Upon questioning by the court, the prosecutor admitted that neither missing witness had been subpoenaed to appear.[3] The court thereupon denied the requested continuance. The Republic then advised the court that the two missing witnesses "should not delay us, better than 11:00 o'clock." The Republic proceeded with its opening statement and called the two witnesses then present, Michael Jenkins and Steven Abwe.

Michael Jenkins, director of the Central Adoption Agency, testified that he had received a complaint from Mr. Terry Gross that his daughter Terri Lynn Gross had been scheduled to travel outside of the Republic of the Marshall Islands for purposes of being "adopted out internationally." Jenkins further testified that no application for adoption of Terri Lynn Gross had been received by the Agency.[4]

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[3]The following exchange occurred:

> Court: Mr. Togame, were these witnesses subpoenaed?
>
> Mr. Togame: The witnesses we have interviewed, the witnesses yesterday, Your Honor, and 10:00 o'clock was arranged and transportation has been sent. In time, they should be here shortly, Your Honor.
>
> Court: Were they subpoenaed? Can I issue a bench warrant for their arrest for their failure to attain the court as subpoenaed, or were they not subpoenaed?
>
> Mr.Togamae: They were not subpoenaed, Your Honor.

[4]There appears to be a variance between Jenkins's testimony and the crime charged by the Republic. The criminal information charges that Lemark had unlawfully solicited Liet to place her unborn child for adoption between April and December, 2003. The affidavit of Terry Gross indicates that Terri Lynn was born on March 28, 2001, and that the unborn child, Eloney, was the child which was taken to Hawaii over the time frame alleged in the criminal information.

Steven Abwe, an investigator with Public Safety, Criminal Investigation Division, merely testified that Lemark declined to provide a statement after being read her Miranda rights.

Upon conclusion of Jenkins's and Abwe's testimony, the Republic advised the court that no further witnesses were available. The court adjourned stating that it would give the Republic five minutes to locate its missing witnesses.

While it is unclear how long the adjournment actually lasted, the transcript indicates the court went back on record at 11:00 a.m. The Republic made a motion for a further continuance which was denied. Defense counsel then moved to dismiss for want of prosecution on the grounds that Lemark's right to a "speedy and fair trial" had been violated. The trial court granted the motion, entering an order of dismissal with prejudice for want of prosecution. This appeal followed.

II. DISCUSSION

A. The Issues Presented by this Appeal.

On appeal, the Republic argues that the trial judge abused his discretion in entering the order of dismissal because (1) Lemark's constitutional right to a speedy trial was not violated, and (2) 32 MIRC, sec. 155 allows the court to dismiss a criminal action only if there is unnecessary delay in bringing the accused to trial.

While we may agree with the Republic that Lemark's constitutional right to a speedy trial was not violated, we disagree with the Republic's contention that a criminal case can be dismissed only for unnecessary delay in bringing the accused to trial.

The proper analysis under the circumstances presented by this case is not whether Lemark was denied her constitutional right to a speedy trial but, rather, whether the trial court erred in denying the requested continuances. If the continuances were properly denied then it necessarily follows, under the peculiar facts presented by this case, that dismissal was warranted.

B. The Trial Court Acted Within Its Discretion in Denying the Requested Continuances because the Republic Failed to Exercise "Due Diligence" in Securing the Presence of its Essential Witnesses.

[1,2] 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. *United States v. Hoyos*, 573 F.2d 1111, 1114 (9th Cir. 1978); *United States v. Hernandez-Berceda*, 572 F.2d 680 (9th Cir. 1978); *United States v. Thompson*, 559 F.2d 552 (9th Cir. 1977). 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. *Hoyos, supra*, at 1114; *United States v. Clinger*, 681 F.2d 221, 223 (4th Cir. 1982),

[3] Courts 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. *United States v. Oliver*, 683 F.2d 224, 228 (7th Cir. l982) (failure to subpoena a witness or request a continuance undermines claim of due diligence); *United States v. Shaw*, 920 F.2d 1225, 1230 (5th Cir. 1991) (failure to subpoena important defense witness when available constitutes lack of due diligence); *United States v. Ouinn*, 901 F.2d 522, 528 (6th Cir. 1990) (government's issuance of a subpoena on Thursday before Monday trial, despite one month notice of trial date, held unreasonable); *Triplett v. State*, 666 So.2d 1356, 1361 (Miss. 1995) (failure to subpoena important defense witness when available constitutes lack of due diligence).

"Due diligence" in the context of requests for continuances has been defined as follows:

> It must affirmatively appear that [counsel] exercised due diligence in procuring process for witnesses to appear at trial and delay showing lack of diligence may preclude his securing a continuance because of their absence. If, however, the delay is due to the negligence of the sheriff or other officer, accused will not be affected thereby.
> Due diligence requires that [counsel] should have subpoenas issued in ample time to procure service, or to take depositions if attendance cannot be had, and delay for varying periods after indictment has been held, under the circumstances of the particular case to show lack of diligence. . . .
> It has been held that diligence is not shown where [counsel] waits to secure issuance of process for absent witnesses until the date the case is called for trial, or until the trial has actually begun, or until an unreasonably short time before the trial is scheduled to begin.

Elam v. State, 50 Wis.2d 383, 390, 184 N.W.2d 176 (1971) (quoting 22A C.J.S. Criminal Law, Sec. 503b(2) (1971)).

In this case, the Republic failed to exercise due diligence in obtaining the presence of its essential witnesses at trial by its failure to issue subpoenas compelling their attendance. Absent a subpoena, the Grosses were under no legal compulsion to appear and testify. The trial judge was consequently hampered in his ability to proceed with trial in a timely fashion. The judge had no authority to compel the Grosses to appear at trial by issuing a bench warrant or order to show cause because there was no subpoena to enforce.

While the prosecutor advised the court that two employees from the Central Adoption Authority had been dispatched to pick up the Grosses, those employees had no authority to compel these witnesses' attendance at trial. This case does not present the situation noted in *Elam, supra*, where nonappearance can be attributed to neglect of a sheriff or other officer charged with the responsibility of making service of a subpoena or securing the presence of witnesses for trial.

The Republic also failed to show that the Grosses could be produced within a reasonable period of time even if the requested continuances had been granted. Trial had been set to commence at 9:00 am. The Grosses had not appeared at the time trial actually commenced at 10:15 a.m. The prosecutor after requesting the initial thirty minute continuance advised the trial court that securing the presence of these witnesses "should not delay us, better than 11:00 o'clock." Yet the record reveals that the Grosses still had not arrived by 11:00 a.m. when Lemark made the motion to dismiss. Thus, even if the initial continuance had been granted, the continuance would have been insufficient in securing the Grosses' presence at trial.

[4] The trial court is under no obligation to grant continuances until a non-subpoenaed witness finally arrives. We find that the failure to serve a subpoena on these two essential witnesses constitutes a lack of due diligence by the Republic. We therefore conclude that the trial court acted within its discretion in denying the Republic's repeated requests for a

continuance. The issue then becomes whether the trial court's order of dismissal with prejudice was appropriate.

C. The Court did not Abuse its Discretion in Granting the Motion to Dismiss.

1. The trial court has the inherent authority to dismiss a criminal prosecution, at any stage of the proceedings, for want of prosecution.

The Republic is mistaken in its contention that a trial court can only dismiss a criminal case on speedy trial grounds. The inherent authority of the trial court to dismiss a criminal proceeding for failure to prosecute is well established.

[5] The court has the inherent discretion to dismiss criminal cases, with or without prejudice, for want of prosecution. *See, e.g., State v. Mageo*, 889 P.2d 1092, 1096 (Haw. App. 1995). This power emanates from the trial court's power to administer justice.

> "From time immemorial, certain powers have been conceded to courts because they are courts. Such powers have been conceded because without them they could neither maintain their dignity, transact their business, nor accomplish the purposes of their existence. These powers are called inherent powers." *Wisconsin v. Cannon*, 221 NW 603, 603 (Wis. 1928).

[6,7] 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. *See, e.g., United States v. Hattrup*, 763 F.2d 376, 377 (9th Cir. 1985). The inherent power of the court to dismiss for want of prosecution is much broader and serves a purpose other than merely effectuating a defendant's right to a speedy trial. The trial court's authority to dismiss a case for want of prosecution is not limited by either the RMI Constitution, Art. 1, Sec. 4 or by 32 MIRC 155.

The inherent power to dismiss a case for want of prosecution being established, the issue becomes whether the trial court abused that power.

A case which is closely analogous to the instant case is *State v. Glaindez*, 346 A.2d 156 (Del. Supr. 1975). In *Glaindez*, the court affirmed the dismissal of a criminal indictment based upon the State's failure to secure the attendance of a vital witness. The State made no attempt to ascertain whether the witness had been served with a subpoena until the day before trial. Having

failed to secure the presence of a vital witness prior to trial, the case was dismissed for want of prosecution.

In this case, the Republic failed to secure the presence of its vital witnesses by use of subpoenas. Since the Republic's vital witnesses did not appear for trial and since the court had no means of compelling their attendance at that late date, the trial court had few options but to dismiss. We find no abuse of discretion in dismissing the charges for want of prosecution under the unique facts presented in this case. The issue reduces to whether dismissal with prejudice was proper.

> 2. The dismissal with prejudice was proper because the Republic failed to prove its case at trial.

[8] When a motion for continuance to obtain witnesses is denied, the prosecution generally has only 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. *See, e.g., State of Florida v. S.M.F.*, 546 So.2d 20 (Fla. 1989).

In this case, the first option was not available to the prosecution since trial had commenced and jeopardy had attached. The Republic chose the second option by proceeding with trial and, therefore, ran the risk that charges could be dismissed for lack of evidence.

At the conclusion of Jenkins's and Abwe's testimony, the trial court would have been justified in simply closing the Republic's evidence, allowing Lemark to put on her case (if any), making a finding of "not guilty" if the Republic had failed to meet its burden of proof and entering a judgment of acquittal.

[9] An appellate court can affirm a trial court on any ground supported by the record. *City Solutions, Inc. v. Clear Channel Communications*, 365 F.3d 835, 842 (9th Cir. 2004) (quoting *Dixon v. Wallowa County*, 336 F.3d 1013, 1018 (9th Cir. 2003)). This rule has been applied to criminal proceedings. *See, e.g., United States v. Mendoza-Acevedo*, 950 F.2d 1 (1st Cir. 1991)

citing, J.E. Riley Investment Co. v. Commissioner of Internal Revenue, 311 U.S. 55, 59 (1940) ("Where the decision below is correct it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action.")

We have reviewed the transcript of the trial and find that the Republic failed to make out even a prima facie case of the offense charged by the criminal information. The testimony of Jenkins and Abwe, as summarized above, did not address any of the acts allegedly committed by Lemark as charged in the criminal information. We find that the record supports a judgment of acquittal and, therefore, affirm the dismissal with prejudice which is functionally equivalent to a judgment of acquittal.

III. CONCLUSION

The trial court is under no obligation to grant continuances once a trial has commenced when the prosecution has failed to exercise due diligence in securing the presence of its essential witnesses by subpoena. While dismissals should be entered with caution, the trial court was left with no option but to dismiss when the Republic was unable to produce its witnesses and had failed to prove its case at trial. Finding no abuse of discretion, we AFFIRM.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

HARRY UENO,

Plaintiff-Appellant,

-v-

CRIMSON HOSIA, NEKIM HILAI, SALLY ZACKIOS, and KIOLYNN SAMUEL,

Defendants-Appellees.

S.CT. CIVIL NO. 05-04
(High Ct. Civil No. 2005-077)

APPEAL FROM THE HIGH COURT

MAY 17, 2007

CADRA, C.J.
GOODWIN, A.J. pro tem[1], and KURREN, A.J. pro tem[2]

SUMMARY:

Appellant had moved to intervene in a previous case in which the iroijerik interest to Lojourok Weto was at issue. Appellant's motion was denied, and appellant did not appeal. Appellant then sought to bring a new case to claim that same iroijerik interest. The High Court dismissed appellant's suit on the grounds of prior adjudication and laches. Appellant challenged the dismissal of his suit in this appeal. The Supreme Court found that because appellant failed to appeal the denial of his motion to intervene in the previous case, the denial became a final judgment, and appellant was now collaterally estopped from relitigating the same issue. The dismissal was affirmed.

DIGEST:

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[1]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

1. CIVIL PROCEDURE – *Dismissal, Grounds for*: Two related doctrines prevent parties from revisiting previously decided matters: res judicata and collateral estoppel.

2. RES JUDICATA – *Effect*: Res judicata bars further claims by parties or their privies against the same defendants based on the same cause of action.

3. COLLATERAL ESTOPPEL – *Effect*: Collateral estoppel bars subsequent suits based on issues that were already actually decided in a prior action.

OPINION OF THE COURT BY KURREN, A.J. pro tem

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff-Appellant Harry Ueno ("Ueno") appeals the High Court's order dismissing his present action on the grounds of prior adjudication and laches.

The present dispute begins with an action filed in the High Court by Jelke Jenre ("Jenre") on October 1, 1990, requesting that the court determine her the rightful owner of a piece of land known as Lojourok Weto. On July 10, 1992, the High Court ordered that public notice be given that anyone objecting to Jenre's claim needed to file such an objection by October 16, 1992, and that any person who failed to submit a written objection by that date would be forever barred from claiming any right or interest in Lojourok Weto.

On July 31, 1992, Crimson Hosia, Nekim Hilai, Josie Hosia, Sally Zackios, and Kiolynn Samuel filed an objection claiming an interest in Lojourok Weto. On October 15, 1992, Johnny Tibiej also filed an objection claiming an interest in Lojourok Weto. No other objections were submitted.

On November 6, 1992, the High Court ordered Jenre to file an amended complaint naming the objecting claimants. Jenre did so, and on September 12, 2001, the High Court determined that Crimson Hosia, Nekim Hilai, Josie Hosia, Sally Zackios, and Kiolynn Samuel were entitled to receive the 1/3 iroijedrik share of all past, present, and future rental payments on Lojourok Weto, but that they would not hold title to Lojourok Weto. Following the death of the last survivor among them, the obligation of the title-holder to pay rental proceeds would cease.

UENO v. ABNER and HOSIA, et al.

On March 20, 2002, Harry Ueno ("Ueno") filed a motion to intervene, claiming portion of this Iroijedrik interest. The High Court denied Ueno's motion to intervene, and ruled that "any claims by Harry Ueno . . . to iroijedrik titles and rights in and to Lojourok Weto, Rita Island, Majuro Atoll, are extinguished for failure, to assert said claims to this action." (Answering Brief at 3.) The High Court cited the "common knowledge in the Majuro community that the iroij titles to this land have been in dispute for decades" and that "[t]hose claiming Iroij titles [to this land] are on notice to exercise diligence in protecting and preserving their claims to such titles." (Answering Brief at 3.) Ueno did not appeal this order, and the case was finally terminated on June 25, 2004.

On March 14, 2005, Ueno filed the present action, seeking to assert a right to the iroijedrik interest retained by Crimson Hosia, Nekim Hilai, Sally Zackios, and Kiolynn Samuel. The High Court dismissed this action on June 16, 2005, based on the principles of res judicata and laches. Ueno now appeals that dismissal. For the reasons set forth below, the Court AFFIRMS the decision of the High Court dismissing Ueno's case.

DISCUSSION

The High Court properly found that Ueno's present action seeking to assert an interest in Lojourok Weto was barred by its previous determination that any rights Ueno might have had in Lojourok Weto were extinguished.

[1,2,3] Two related doctrines prevent parties from revisiting previously decided matters: res judicata and collateral estoppel. Res judicata bars further claims by parties or their privies against the same defendants based on the same cause of action. *Montana v. U.S.,* 440 U.S. 147, 153 (1979). Collateral estoppel bars subsequent suits based on issues that were already actually decided in a prior action. *Id.* 153.

Here, Appellees argue that Ueno's present action is an impermissible collateral attack on the High Court's judgment in the previous case that determined the parties' respective interests in Lojourok Weto. They argue that Ueno had the opportunity to intervene in a timely manner, but

did not do so. Therefore, they argue, the High Court judgment issued on September 12, 2001, is binding on Ueno.

Appellees cite to *Nat'l Wildlife Fed'n v. Gorsuch*, 744 F.2d 963 (3rd Cir. 1984) in support of their position. In *Gorsuch*, a party who was not allowed to intervene in one action was precluded from collaterally attacking the consent decree in a subsequent action. Appellees argue that the circumstances here are the same and so Ueno should likewise be barred from attacking the Court's prior decision.

Unfortunately for Appellees, however, the approach taken in *Gorsuch* was implicitly overruled by the United States Supreme Court in *Martin v. Wilks*, 490 U.S. 755, 762 (1989). In *Wilks*, a party who failed to timely intervene in an action was allowed to collaterally attack the result of that action in a subsequent suit. The court there ruled that "a judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.* *Gorsuch* involved a nearly identical set of facts; therefore, it provides no support to Appellees.[3] Ueno's challenge to the September 12, 2001 judgment is not prohibited under the doctrine of collateral estoppel.

This does not end the inquiry however. Here, the proper "judgment" that is to be analyzed for the purposes of collateral estoppel is not the High Court's disposition of the iroijedrik interest in Lojourok Weto, but the High Court's decision that Ueno no longer had any cognizable legal interest in Lojourok Weto. Although Ueno may have been a stranger to the larger proceeding, he was very much a participant in the brief proceeding in which the High Court made a determination of his particular legal rights with respect to Lojourok Weto, namely,

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[3]In *Wilks*, the United States Supreme Court affirmed the Eleventh Circuit's ruling that a group of firefighters who had failed to intervene in an action between other firefighters and the city were not barred from challenging the Consent decree that resulted from the first action. *Wilks* implicitly overruled the approach taken by many other circuits, including the approach taken by the Third Circuit in *Gorsuch*, where a party who failed to fully pursue its intervention (by not appealing) was barred from later attacking the consent decree that resulted from the principal action.

his motion to intervene. There, the High Court ruled that any claims he might have to the land were extinguished. When Ueno failed to appeal this ruling, it became a final judgment. Because the issue of Ueno's interest in Lojourok Weto is one that has been actually decided by the Court, collateral estoppel prohibits Ueno from now attempting to relitigate this issue, which is precisely what Ueno seeks to do in his present action. The High Court was correct in dismissing Ueno's present action. We need not reach the issue of whether the High Court properly applied the doctrine of laches.

Accordingly, the judgment of the High Court is AFFIRMED and this appeal is DISMISSED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

PACIFIC BASIN, INC.,

Plaintiff-Appellant,

-v-

MAMA STORE,

Defendant-Appellant.

S.CT. CASE NO. 06-07
(High Ct. Civil No. 2005-056)

APPEAL FROM THE HIGH COURT

MAY 17, 2007

CADRA, C.J.
GOODWIN, A.J. pro tem[1], and KURREN, A.J. pro tem[2]

Argued and Submitted March 14, 2007

SUMMARY:

On the date set for trial, Defendant failed to appear, and default judgment was entered for Plaintiff. Defendant filed a timely motion for relief from default judgment and for a new trial, but the motion was denied. Defendant appealed. The Supreme Court found the trial court had not abused its discretion in granting default judgment and denying relief from that judgment because Defendant's counsel's neglect to appear at trial was not excusable, and thus an insufficient justification. The dismissal was affirmed.

DIGEST:

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[1]Honorable Alfred T. Goodwin, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2]Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

PACIFIC BASIN, INC., v. MAMA STORE

1. CONSTITUTIONAL LAW – *Due Process – Procedural*: Procedural "due process" only requires adequate notice and an opportunity to be heard.

2. JUDGMENTS – *Grounds to Vacate – 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.

3. APPEAL AND ERROR – *Review – Discretionary Matters – Motion to Vacate Judgment*: The reviewing court reviews the denial of a Rule 60(b) motion for an abuse of discretion.

4. APPEAL AND ERROR – *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.

5. APPEAL AND ERROR – *Review – Discretionary Matters – Motion to Vacate Judgment*: 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.

OPINION OF THE COURT BY CADRA, C.J.

Plaintiff, claiming to be an unpaid seller of goods, sued Mama Store/Litokwa Tomeing to collect $12,012.71, the agreed price of the goods. Defendant filed an answer, claiming "no knowledge" of the debt, and the parties undertook to bring the case to trial. After numerous continuances granted by the High Court upon the applications of each of the parties and on one occasion for the convenience of the court, a trial was set for September 14, 2005. The Defendant failed to appear, in person or by counsel, and a default judgment was entered for the Plaintiff.

The Defendant filed a timely motion for relief from default judgment and for a new trial under Rules 52, 59, 60 and 62. The trial court denied defendant's motion finding the Defendant's counsel admitted to neglecting to appear for trial as scheduled and further finding the Defendant had not stated any meritorious defense. The Defendant has appealed.

On appeal, Defendant/Appellant contends the entry of default judgment upon failure to appear at trial was (1) a denial of the right to "due process" guaranteed by the RMI Constitution, Article II, Section 4(1) and (2) that the trial court abused its discretion in denying Defendant's motion for relief from judgment.

[1] Defendant/Appellant's "due process" argument can be summarily disposed of. Procedural "due process" only requires adequate notice and an opportunity to be heard. *Reid v. Engan*, 765 F.2d 1457, 1463 (9th Cir. 1985); *see, generally, Board of Regents v. Roth*, 408 U.S. 564, 569-70 & n. 7, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972). It is undisputed that Defendant's counsel had written notice of the trial date and thus had an opportunity to be heard on its alleged defense(s) at trial prior to entry of any judgment. Defendant and Defendant's counsel failed to appear for trial despite actual notice. There was no denial of due process under the circumstances presented by this case. Rather, the issue properly presented by this appeal is whether the trial court erred in denying relief from the default judgment.

Rule 60(b) is the procedural mechanism for obtaining relief from a judgment or order on grounds of "mistake, inadvertence, surprise or excusable neglect" (Rule 60(b)(1)) or for "any other reason justifying relief from the operation of the judgment" (Rule 60(b)(6)). Defendant's reasons for seeking relief from default judgment fall within the purview of Rule 60(b) and a discussion of the other Rules relied upon by defendant is unnecessary to the disposition of this appeal.

[2] "[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." *Hammer v. Drago (In re Hammer)*, 940 F.2d 524, 525-26 (9th Cir. 1991) (internal citations omitted). This means that the trial court may deny the motion if any of the three factors are true. *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000).

[3,4,5] We review the denial of a Rule 60(b) motion for an abuse of discretion. *Casey v. Albertson's, Inc*., 362 F.3d 1254, 1257 (9th Cir. 2004) (*citing SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001). Under the abuse of discretion standard, we will reverse only where no reasonable person would have acted as the trial court did. *See, e.g., Castro v. Board of Education of Chicago*, 214 F.3d 932, 934-35 (7th Cir. 2000). Because review of the denial of Rule 60(b) relief is deferential, we must affirm if the trial court adequately considered the reasons for neglect and the reasons did not compel a finding of excusable neglect. *See, e.g., FEC v. Al Salvi*, 205 F.3d 1015, 1020 (7th Cir. 2000).

The trial court found that Defendant's counsel admitted to neglecting to appear at the scheduled hearing. There was no error in this finding. Below and on appeal, the Defendant's attorney admitted that the failure to appear on the date set for trial was caused by counsel's failure to enter the date on her office appointment calendar. The Defendant's attorney also claimed that "for some mistaken reason," she believed that the trial had been or would be moved to October because an important defense witness had to travel from the United States to Majuro. There is, however, no reason apparent in the record which would support a reasonable belief that the September 14, 2005 trial had been taken off-calendar or that trial had been continued to October or some other date. There is no evidence of a request for continuance, either orally or by written motion, having been made by Defendant or Defendant's counsel to continue the scheduled trial date. We find that excusable neglect has not been demonstrated sufficient to justify setting aside the default judgment.

In denying relief from judgment, the trial court found that the Defendant had not stated any meritorious defense and "to set aside the judgment would be simply denying the inevitable and exposing the Plaintiff to further costs and expenses." The only defense urged by Defendant is that the Defendant has no knowledge of incurring the debt. The Defendant, however, has not tendered any evidence that the debt has been paid or that the goods were not sold and delivered. We find no abuse of discretion by the trial court in denying relief from judgment on this ground.

Defendant's counsel cites the Court to *Karlen v. Evans*, 915 P.2d 232 (Mont. 1996),

apparently, for the proposition that only a "slight abuse of discretion" need be shown to warrant reversal of a trial court's refusal to grant Rule 60(b) relief. *Id.* at 185. Even if this lower standard of review were accepted, we do not find an abuse of discretion by the trial court sufficient to justify reversal. In *Karlen*, *supra*, the Karlens' attorney intentionally misled his clients into believing that their case was progressing and concealed the fact their case had actually been dismissed. Given the "egregious conduct" of the attorney the court held the trial court did not err in granting relief. *Id.* at 190-91. This case does not present such "egregious" misconduct on behalf of Defendant's attorney.

Counsel has cited no authority, and we have found none, for the proposition that garden variety malpractice by an attorney is a valid reason to require a court to aside its judgment entered after notice to appear, and a default thereof, in the absence of some showing of manifest injustice, overreaching or negligence by the court or by its officers and assistants. In this case, the Defendant has tendered no evidence that the debt has been paid or that the goods were not sold and delivered. We find no abuse of discretion, slight or otherwise, by the trial court in denying the requested relief.

Accordingly, the judgment of the trial court is AFFIRMED and this appeal is DISMISSED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

HAROLD NUKA / TOSHIKO NUKA

Plaintiff-Appellee,

-v-

REMA MORELIK, RINTA MORELIK,
YODA NYSTA, and
THE SECRETARY OF FINANCE,

Defendant-Appellant.

S. Ct. Case No. 2006-008
High Ct. Civil No. 2005-078

ORDER DENYING INJUNCTION

NOVEMBER 13, 2007

CADRA, C.J.

SUMMARY:

Appellant requests the Supreme Court enjoin the Secretary of Finance from disbursing senior dri jerbal interest payments that the High Court ordered be paid to Appellee in accordance with the Traditional Rights Court's findings. The Supreme Court invoked its jurisdiction to entertain the motion for relief under Supreme Court Rule 8(a)(2)(A), but denied the motion, finding no threat of irreparable injury or harm.

DIGEST:

1. APPEAL AND ERROR - *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.

2. 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.

MARSHALL ISLANDS, SUPREME COURT

3. INJUNCTION - *Preliminary Injunction*: Mere financial injury does not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation.

I. INTRODUCTION/BACKGROUND

Defendant/Appellant Rema Morelik filed an "Application for an Injunction Pending Appeal" (Application) on October 11, 2007. Defendant's "Application" seeks an order pursuant to Supreme Court Rules of Procedure, Rule 8, "prohibiting and enjoining the Secretary of Finance from disbursing payments for the Senior Dri Jerbal share for Tolen Railk weto, Kio Island, and Ennylebagan (Carlos) Island, Kwajalien Atoll." The "Application" has been opposed by plaintiff/appellee Harold Nuka.

The pertinent facts made available by the parties' briefing indicate that the High Court entered a judgment on September 22, 2006 against defendant/appellant. That judgment accepted the unanimous finding and opinion of the Traditional Rights Court plaintiff Toshiko Nuka is (was) the proper person to hold the Senior Dri Jerbal right, title and interest to the above referenced wetos; not defendant/appellant Rema Morelik. The High Court accordingly ordered that the Senior Dri Jerbal payments for these wetos, which had been held in escrow, be paid to Harold Nuka, the successor in interest to plaintiff Toshiko Nuka.

Defendant Rema Morelik filed a "Request for Stay of Judgment" which was denied by the High Court on September 26, 2006.

Defendant then filed an "Application for Stay of the Judgment Pending Appeal" pursuant to Supreme Court Rule of Procedure 8 with the High Court on October 6, 2006. An Opposition was filed by plaintiff on October 8, 2006. There is no indication in the parties' briefing that defendant's "Request for Stay of Judgment" was ruled upon by the High Court.

Defendant brings the instant "Application" claiming that it is "not practicable" to seek relief from the High Court. [(Rule 8(a)(2)(a)]. While the undersigned is not convinced that it is "not practical" to seek an order from the High Court enjoining disbursement of future payments (especially if there is a pending motion or application before the High Court), neither party claims the instant application is improperly before the Supreme Court. In the interests of

expediting a decision, the undersigned addresses this "Application" as a single judge pursuant to Supreme Court Rule of Procedure 27(c) subject to the right of the adversely affected party to seek full panel review.

II. DISCUSSION

A. The legal standard for ruling on the instant motion/application.

[1] The parties agree that the standard for granting a preliminary injunction should govern resolution of the present "Application."

[2] A party seeking a preliminary injunction must fulfill one of two standards, described in the Ninth Circuit as "traditional" and "alternative." *Cassim v. Bowen*, 824 F.2d 791, 795 (9th Cir. 1987). 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. *Id*. 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. This latter formulation represents two point on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Oakland Tribune, Inc. v. Chronicle Pub. Co*., 762 F.2d 1374, 1376 (9th Cir. 1985).

For purposes of ruling on the instant application, the parties agree to application of the "traditional test." In applying the "traditional test," this Court need not make findings on whether the defendant has demonstrated a "strong likelihood of success on the merits" or "whether the public interest favors granting the injunction" because there has been an inadequate showing of "irreparable harm."

B. Defendant has failed to make an adequate showing of "irreparable harm" which would justify granting the "Application."

Defendant is seeking restraint of payment of the Senior Dri-Jerbal's share of payments (money) due on the subject wetos. It is defendant's financial interest in these payments which defendant seeks to protect by the requested relief.

[3] It is clear that mere financial injury does not constitute irreparable harm if adequate compensatory relief will be available in the course of litigation. *Sampson v. Murray*, 415 U.S. 61, 89-90, 39 L.Ed.2d 166, 94 S.Ct. 937 (1974); *Goldie's Bookstore v. Superior Court of the State of California*, 739 F.2d 466, 471 (9th Cir. 1984).

Should defendant prevail on appeal and ultimately be determined entitled to the subject payments, the court can enter a judgment against plaintiff for the amount of those payments wrongfully received plus interest. Defendant has an adequate remedy at law. While a preliminary injunction may be warranted where irreparable harm would result from inability to collect a money judgment (*see, e.g., Tri-State v. Shoshone*, 805 F.2d 351, 355 (10th Cir. 1986)), there has been no showing and there is no evidence that the plaintiff will be unable to satisfy such a potential judgment. There is no factual basis for finding that plaintiff is insolvent, lacks sufficient resources or will be otherwise unable to reimburse defendant for payments received on these wetos.

Under the traditional test the threshold inquiry is whether the movant has shown the threat of irreparable injury or harm. Where the movant had failed to sustain that burden the inquiry is ended and the denial of the injunctive relief is warranted. *See, e.g., Glenwood Bridge, Inc. v. Minneapolis,* 940 F.2d 367, 371 (8th Cir. 1991). Defendant has failed to meet his burden of demonstrating irreparable harm. The "Application" is DENIED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff-Appellee,

-v-

THOMAS KIJINER, JR.,
Defendant-Appellant

S. Ct. Case No. 2007-008
High Ct. Civil No. 2005-046

ORDER ON RULE 9 MOTION FOR RELEASE PENDING APPEAL

DECEMBER 8, 2007

CADRA, C.J.

SUMMARY:

After he was convicted of a misdemeanor and sentenced to serve a jail sentence, Defendant requested the High Court stay execution of his jail sentence pending appeal. When that request was denied, he filed a motion in the Supreme Court for release pending the appeal of his conviction. Although S. Ct. Rule 9 requires a defendant to direct his request for release pending appeal first to the High Court, that did not happen here. The Supreme Court found that the criteria concerning a request for release pending appeal, set forth in S. Ct. 9(c) as it existed at that time, did not require a showing of merit on appeal, as urged by the Republic. (S.Ct. Rule 9 has since been amended.) The Court concluded that Defendant established that he would not flee or pose a danger to any person or the community, and granted the motion for release pending appeal.

DIGEST:

1. CIVIL PROCEDURE - *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.

OPINION OF THE COURT BY CADRA, C.J.

I rule on the motion of Defendant/Appellant for release pending appeal as a single judge pursuant to S. Ct. Rule 27(c).

MARSHALL ISLANDS, SUPREME COURT

I. PROCEDURAL BACKGROUND.

On October 17, 2007, the Defendant/Appellant, Thomas Kijiner, Jr., (hereinafter Kijiner) was convicted of the misdemeanor offense of "negligent driving," having been acquitted of "reckless driving" and "driving while intoxicated." The High court sentenced Kijiner to serve 4 months in the Majuro Jail (2 months of which were suspended), ordered restitution to the victim and ordered payment of a $200.00 fine. Execution of the jail sentence was stayed until 9:00 a.m. on November 20, 2007.

On or about November 16, 2007, Kijiner filed a request to stay execution of the jail sentence with the High Court. The Republic filed a written opposition on or about November 19, 2007. Kijiner's request was denied by the High Court on November 19, 2007. The propriety of the High court's ruling on Defendant's motion is not before this Court as it appears the High court was never asked to address the criteria set forth by S.Ct. Rule 9 for release pending appeal.[1]

Kijiner then filed a "Motion for Release Pending Review" with the Supreme Court on November 20, 2007. I entered a single judge order that day releasing Kijiner from jail pending determination of Kijiner's motion.

The Republic has filed an opposition to Kijiner's motion. The Republic essentially argues that Kijiner has failed to demonstrate that his appeal has merit. The Republic cites a number of U.S. decisions which have held that a defendant should be denied release pending appeal if unable to meet its burden of demonstrating that the appeal has merit. Kijiner has filed a Reply pointing out that Rule 9(c) does not require a showing of merit of the appeal and that the criteria for release pending appeal are met by Kijiner's declaration.

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[1] This Court has not been presented with the record concerning that request. The RMI has represented that the issues presented by the instant motion before the Supreme Court were not presented to the High Court. *See* "Response of the Republic in Opposition to Defendant-Appellant Motion for Release Pending Appeal," p.5. Ordinarily, Rule 9(b) contemplates that the motion for release pending appeal be addressed in the first instance to the court that rendered the judgment of conviction. A procedure apparently not followed in this case.

II. DISCUSSION.

I do not believe a lengthy dissertation is necessary to decide this motion. Rule 9(c) deals with the criteria for release pending appeal and allocates the burden of proof to the defendant. Rule 9(c) provides:

> **(c) Criteria for Release.** The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant.

Under the "plain language" of Rule 9(c) the defendant must establish only that (1) he is not a flight risk and (2) that he will not pose a danger to any person or the community to justify release pending appeal.

I am satisfied that the record establishes that Kijiner is neither a flight risk nor a danger to any person or the community.

The Republic concedes that Kijiner is not a flight risk and that bail conditions can secure his future appearances.[2] There is no evidence that Kijiner has failed to appear at any court appearance in the past. The short duration of the sentence imposed is unlikely to motivate a reasonable person to flee the Republic to avoid execution of the sentence. To assure that Kijiner does not flee, he is ordered to surrender his passport to the Clerk of Court and maintain his bail of $800 as posted pending ultimate determination of his appeal.

I am satisfied from the declaration of Thomas Kijiner, Jr. that he does not present a danger to any person or the community. Kijiner has no prior criminal convictions and has no pending criminal charges. Kijiner presently stands convicted of a single misdemeanor court of "negligent driving." While "negligent driving" is a serious misdemeanor it is not the sort of offense which can be characterized as a violent crime of the sort of offense which by its very nature would justify detention while this appeal is decided. The danger Kijiner may pose to the community by future negligent driving has been adequately addressed by the probation conditions imposed by Judge Hickson in his "Order of Conviction and Sentence" dated October

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[2] *See* "Response of the Republic," *id*, p. 5. (".. the Republic does not wish to contest that the defendant-appellant does not pose flight risk.")

17, 2007. These probation conditions shall also serve as his bail conditions pending resolution of his appeal.

I will comment briefly on the Republic's opposition although much could be written.

[1] The Republic argues that release should be denied because Kijiner has not shown that his appeal has merit. The Republic has cited a number of U.S. cases in support of its argument. Those cases, however, deal with FRAP 9(c) which is substantially different from RMI S.Ct. Rule 9(c). To the extent those cases are relied upon as authority for imposing a requirement not contained in RMI's rule, those cases are inapposite and are not instructive.

FRAP 9(c) provides:

> **Criteria for release.** The court must make its decision regarding release in accordance with the provisions of 18 USC 3142, 3143 and 3145(c).

FRAP 9(c)'s requirement that the defendant prove that his appeal has merit or "raises a substantial question of law or fact likely to result in reversal or in an order for a new trial" was imposed by the U.S. Congress. That requirement was not part of the original Rule adopted by the Federal Appellate Courts.[3] Unlike the federal rule, the Nitijela has not imposed any requirement that a defendant prove that his appeal has merit or "raises a substantial question of fact or law" before release can be granted. Although that requirement may serve a laudable purpose, I do not believe such a requirement can be fairly implied into RMI S.Ct. Rule 9(c).

III. CONCLUSION AND ORDER.

Rule 9(c) is clear on its face. Kijiner has met the criteria for release imposed by the Rule. I conclude that he is entitled to be released pending resolution of his appeal.

IT IS FURTHER ORDERED that (1) the Defendant-Appellant surrender his passport to the Clerk of Court within 10 (ten) days of the date of this Order; (2) the terms of probation as set forth in the High court's Order of conviction and Sentence dated October 17, 2007 shall serve as conditions of release; and (3) bail of $800 shall continue until further order of this Court.

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[3] A history of the Rule can be found at 54 Fordham Law Review 1081 (1986).

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

SUN FU, Supreme Ct. Case No. 2008-004
Appellant, High Ct. Criminal No. 2006-098

-v-

REPUBLIC OF THE MARSHALL ISLANDS,
Appellee.

ORDER DENYING APPLICATION FOR RELEASE PENDING APPEAL WITHOUT PREJUDICE

JUNE 2, 2008

CADRA, C.J.,
KURREN, A.J.,[1] and WALLACE, A.J.[2]

SUMMARY:

After appellant was convicted of violation of RMI's immigration laws, the High Court entered judgment and sentenced him to imprisonment. Appellant filed a timely notice of appeal. He then filed a motion for stay and release pending appeal, without first seeking relief from the High Court. The Supreme Court held that Supreme Court Rule 9(b) requires one who requests release pending appeal of a judgment of conviction to first seek relief from the High Court. The motion was denied, without prejudice to the appellant applying to the High Court for relief.

DIGEST:

1. COURTS - *Supreme Court - Jurisdiction - 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.

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[1] Barry Kurren, United States Judge-Magistrate, District of Hawaii, sitting by appointment of the Cabinet.

[2] J. Clifford Wallace, senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

2. COURTS - *Supreme Court - Jurisdiction - Motions Pending Appeal*: 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.

Appellant, Sun Fu, seeks a stay of sentence and release pending appeal pursuant to Supreme Court Rule 9(b) and (c). We DENY the application without prejudice.

Procedural background:

On April 9, 2008, appellant was found guilty after trial by jury of two counts of violation of RMI's immigration laws: (1) "Contravention of Terms of Visa" [overstaying] in violation of 43 MIRC 116 and 147(1)(i), and (2) "Contravention of Terms of Visa" [working in violation of visa] in violation of 43 MIRC 117 and 147(1)(i).

On April 25, 2008, the High Court held a sentencing hearing, entered a judgment of conviction and sentenced appellant to imprisonment in the Majuro Jail for a period of three (3) years commencing April 25, 2008 and ending April 24, 2011. A fine of $500.00 was imposed on each count. The fine and term of imprisonment were to run concurrently on both counts.

[1] Notice of Appeal of the High Court's "Order of Conviction and Sentencing" was timely filed on May 2, 2008. On May 6, 2008, appellant filed the instant motion for stay and release pending appeal with the Supreme Court under Supreme Court Rule 9(b) and (c). The Republic did not file an opposition or response. Nevertheless, we are constrained to follow the Rules unless a departure therefrom can be justified.

Discussion:

Supreme Court Rule 9(b) provides:

> **(b) Release Pending Appeal from a Judgment of Conviction.** Applications for release after a judgment of conviction shall be made in the first instance in the court that rendered the judgment. If the court refuses release pending appeal, or imposes conditions of release, the court shall state in writing the reasons for the action taken. Thereafter, if an appeal is pending a motion for release, or for modification of the conditions of release, pending a review, may be made to the Supreme Court . . . .

(Emphasis added.) Rule 9(b), on its face, requires that an application for release pending appeal be made "in the first instance" to the court that rendered the judgment before resort is made to the Supreme Court. The reason for this requirement is that the trial court is in a superior position to make bail determinations after conviction than is the appellate court. The requirement that the trial court set forth its reasons in writing if release is denied is to enable the appellate court to provide meaningful review.

RMI Supreme Court Rule 9 is identical to (former) federal Rule of Appellate Procedure (FRAP) Rule 9 as it existed prior to the Bail Reform Act. Federal decisional authority interpreting (former) FRAP Rule 9 is, therefore, instructive. The court in *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972) explained the history and purpose underlying Rule 9(b):

> [I]nitial resolution of an application for release pending appeal is a function historically committed to trial judges. . . . The trial court is not only the traditional but also the superior tribunal for the kind of information gathering which a sound foundation for a bail ruling almost inevitable requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial. It is there, too, that the judge has at his disposal "the judicial machinery necessary to marshal the facts typically relevant to the release inquiry." Indeed, "as a practical matter only the District Court can conduct the 'scrupulous inquiry' and make the findings contemplated. . . ." . . . Moreover, the trial judge's familiarity with the case ordinarily enables ready association of the relevant facts in appropriate relationships with the criteria governing release from custody. The judge's role in evolving trial evidence and his observation of the accused's trial demeanor often imparts to those facts a significance not discernable from the paper record upon which bail decisions in appellate courts must be achieved. . . . So, even prior to the Bail Reform Act, our settled practice called for submission of applications for release pending appeal to the District Court for decision in the first instance. . . . More recently, Rule 9(b) of the Federal Rules of Appellate procedure has explicated that "[a]pplication for release after a judgment of conviction shall be made in the first instance in the district court," and that "only "[t]hereafter" could "a motion for release . . . pending review . . . be made to the court of appeals or to a judge thereof."

Id. at 581-583 (internal citations omitted.) The court went on to explain the Rule's requirement that the trial judge set forth his reasons for denial of release in writing:

> Appellate Rule 9(b) couples a second requirement to the one that release pending appeal be first sought in the trial court. It is that the trial judge state in writing his reasons in the event that release is either denied or conditioned. . . . Without the settling effect of a reasoned treatment of the relevant information by the judge, we are apt to confront "a welter of assertion and counter-assertion [by the parties] . . . from which we have no adequate means of emerging." Without elucidation of the bases for the judge's action, we cannot fairly evaluate the merits of either the application or the judge's decision thereon. As we have had occasion to point out, "[t]he District Judge's reasoning must be delineated both out of fairness to the appellant as an aid to this court in its role in bail administration." *We read the twin specifications of Rule 9(b) – that applications for release pending appeal be first adjudicated in district courts and that district judges supply their reasons for dispositions other than unconditional release – as a mandate that circuit judges give those reasons respectful consideration in arriving at their own decisions on bail.*

Id. at 583-84 (internal citations omitted; emphasis added).

[2] In the case at bar, appellant did not make application for release pending appeal to the trial court as required by Rule 9(b). As a consequence, we are not afforded a description of the insights available only to the trial judge in making an informed bail/release decision. Since application was never made to the trial court, we have no written decision to review. Instead, we have only a statement by counsel, unsupported by affidavit or other evidence, that appellant does not present a flight risk or danger to any other person or the community. We have no means of verifying the factual information set forth by counsel and do not have the benefit of having observed the appellant to assess his demeanor, character and myriad other considerations available to the trial judge in making a release decision. We are unable to make those findings required by Rule 9(c) on which the appellant bears the burden of proof.

We hold that the present record is insufficient to rule on appellant's application. There has been no showing why an application for release pending appeal cannot be made to the High Court or, if made, why such an application would be futile.

We, therefore, DENY appellant's application for release pending appeal without prejudice to appellant making proper application to the trial judge of the High Court who entered the judgment and sentence from which Sun Fu appeals.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS

Plaintiff-Appellee

-v-

MISAKI ELANZO,

Defendants-Appellants

S. Ct. Case No. 2006-009
High Ct. Criminal No. 2006-021

DECISION OF SENTENCE APPEAL
JUNE 5, 2008
CADRA, C.J.
KURREN, A.J.,[1] and WALLACE, A.J.[2]

SUMMARY:

Misaki Elanzo was found not guilty by a jury on the charge of sexual assault in the third degree. He was found guilty by the court on the charges of child abuse and sexual assault in the fourth degree. The court sentenced him to two years imprisonment, with one year suspended, on the child abuse conviction, to be served concurrently with one year imprisonment on the sexual assault in the fourth degree conviction. He appealed this sentence as "very harsh." The Supreme Court found no abuse of discretion on the part of the trial judge in sentencing Elanzo as it did. The sentence was affirmed.

DIGEST:

1. APPEAL AND ERROR –*Criminal Sentence*: The court reviews sentence appeals under the "abuse of discretion" standard.

2. APPEAL AND ERROR –*Criminal Sentence*: 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

[1] Barry Kurren, United States Judge-Magistrate, District of Hawaii, sitting by appointment of the Cabinet.

[2] J. Clifford Wallace, senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

for that of the trial judge merely because it could have balanced the factors differently and could have arrived at a lesser sentence.

3. APPEAL AND ERROR –*Criminal Sentence*: Provided the trial judge fully considered the factors relevant to imposing sentence, the appellate court will generally conclude there was no abuse of discretion.

4. APPEAL AND ERROR –*Criminal Sentence*: 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.

5. CRIMINAL LAW AND PROCEDURE – *Sentencing* – 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.

Misaki Elanzo brings this appeal claiming the sentences imposed upon him by the High Court were "very harsh" or excessive. As there was no abuse of the trial judge's discretion in imposing the challenged sentences, we AFFIRM.

Procedural Background:

On July 18, 2006, Elanzo was charged with three counts by Criminal Information; Count 1, Sexual Assault in the Third Degree in violation of 31 MIRC 152(C)(1)(b); Count 2, Child Abuse, in violation of 26 MIRC 502(2)(b); and Count 3, Sexual Assault in the Fourth Degree, in violation of 31 MIRC 152(D)(1)(a). Elanzo entered pleas of not guilty to each count.

On August 24, 2006, Elanzo proceeded to trial before a jury and was found not guilty of Count 1, Sexual Assault in the third degree. Elanzo waived a jury trial and was then tried by the Court on August 30, 2006 and found guilty of Child Abuse and Sexual Assault in the Fourth Degree.

On September 21, 2006, the trial judge entered an "Order of Conviction and Sentencing." The judge imposed a sentence of two years imprisonment in the Majuro Jail with one year suspended and a fine of $250 on the Child Abuse count. A sentence of one year imprisonment in the Majuro Jail was imposed on the count of Sexual Assault in the Fourth Degree. The

unsuspended terms of imprisonment on both counts were to run concurrently. The composite sentence was, therefore, one year to serve in the Majuro Jail, a fine of $250 and one year imprisonment suspended subject to certain terms and conditions of probation. The sentencing order required Elanzo to report to the Majuro Jail by noon of the second day following expiration of the time of filing an appeal or, if an appeal was filed, by noon of the second day following the Supreme Court's decision on appeal if the sentence was affirmed.

Elanzo timely filed a Notice of Appeal on October 18, 2006. Elanzo contends his sentence is excessive characterizing it as "very harsh." Elanzo requests this Court to suspend the entire sentence of imprisonment imposed by the High Court and place him on "strict probation."

The Standard of Review: Abuse of Discretion.

[1] We review sentence appeals under the "abuse of discretion" standard. *See, e.g.*, *United States v. Haack*, 403 F.3d 998, 1008 (8th Cir. 2005) ("we hold that our standard of review is whether the district court abused its discretion by imposing an unreasonable sentence").

[2,3] Among the reasons proffered for the "abuse of discretion" standard is that the trial judge is in a superior position from which to determine an appropriate sentence. The trial judge has the opportunity to consider many factors from which an appropriate sentence may be deduced such as a defendant's credibility, demeanor, general moral character, mentality, social environment, habits and age. A reviewing court, on the other hand, has only the "cold record." We, accordingly, give 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. We will not substitute our judgment for that of the trial judge merely because we could have balanced the factors differently and could have arrived at a lesser sentence. Provided the trial judge fully considered the factors relevant to imposing sentence, we will generally conclude there was no abuse of discretion. *See, e.g., People v. Williams*, 635 N.E.2d 781, 790 (Ill. App. Ct. 1994).

[4] Application of the standard of review in cases challenging a sentence on grounds of excessiveness is well-established and narrow. 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.'" *United States v. Hoffman*, 806 F.2d 703, 713 (7th Cir. 1986) (quoting *United States v. Fleming*, 671 F.2d 1002, 1003 (7th Cir. 1982)), cert. denied, 95 L.Ed.2d 201 (1987) (footnote omitted).

The High Court Did Not Abuse Its Discretion in Imposing the Sentences Appealed From.

The sentenced imposed on Elanzo were within the statutory range of punishments which could be imposed for the offenses for which he was convicted. 26 MIRC 512(3) provides that "any person who is found guilty of committing child abuse or neglect shall, upon conviction, be liable to a fine not exceeding $2,000, or to a term of imprisonment not exceeding two years, or both." 31 MIRC 152(D)(s) provides that "Sexual assault in the fourth degree is a misdemeanor, and any person found guilty thereof, shall be liable to a term of imprisonment not exceeding one year." Because the sentences imposed on Elanzo were within the statutorily permissible range, the inquiry then becomes whether the trial judge abused his discretion by acting arbitrarily or capriciously.

In challenging his sentence as excessive or "very harsh," Elanzo asserts he is 63 years of age, is a first offender without any prior criminal record, that he receives regular medical examination for his eyes at the Majuro hospital and that the jury found and entered a not guilty verdict on the charge of Sexual Assault in the First Degree.

[5] Elanzo does not identify any reason why the jury verdict of not guilty on the count of Sexual Assault in the Third Debree should reduce or mitigate the sentences imposed on the two counts on which he was convicted. He does not argue that any of the jury's findings are inconsistent with the findings made by the trial judge on those two counts. Elanzo does not challenge his convictions on those counts. We hold that Elanzo is not entitled to a lesser sentence on these counts because he was found not guilty of a more serious offense.

The record discloses that the trial judge considered each of the factors identified by Elanzo as justifying imposition of a lesser sentence. The judge considered other factors relevant to the selection of an appropriate sentence tailored to the specifics of the crimes, taking into

account Elanzo's individual circumstances, the impact on the victim as well as the needs of society.

The trial judge was able to observe Elanzo during trial and found him not to be a credible witness. The judge considered Elanzo's age of 63 at the time of sentencing. There is nothing in the record which would allow a finding that Elanzo's age would mitigate the offenses or present a barrier to serving the unsuspended portion of his sentences. The trial judge took Elanzo's lack of prior criminal history into account. The trial judge also took into account Elanzo's lack of acceptance of responsibility as a potential aggravating circumstance. The trial judge noted the effect of the crime on the minor victim and the breach of familial trust.

Regarding Elanzo's claim that he receives regular medical examinations for his eyes at the Majuro hospital, we observe that this claim was not raised before the trial judge at sentencing. We further note that there has been no medical or other evidence introduced below or on appeal that appellant's eye condition presents an obstacle to serving the unsuspended portion of his sentence. The Republic has represented, and this court has no reason to doubt that Elanzo's medical needs relative to his eye condition can be met while incarcerated.

The trial judge considered the broad sentencing goal of deterrence of the offender and others in society from committing the sort of offenses of which Elanzo was convicted. Elanzo's need and potential for rehabilitation was also taken into account. The trial judge specifically urged the Ministry of Justice to allow Elanzo to participate in any counseling or treatment programs which may be available.

We hold that the trial judge's selection of sentences was within the statutorily permissible range, the trial judge carefully explained his reasons for imposing the sentences appealed from, and conclude the sentences imposed were neither arbitrary nor capricious. We do not believe the sentences are "excessive." We, therefore, AFFIRM Elanzo's sentence and return the jurisdiction to the High Court to insure compliance with its sentencing order.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MERCY KRAMER and

PACIFIC INTERNATIONAL, INC.,
Plaintiffs-Appellees,

-v-

STANLEY ARE and **THERESA ARE**,
Defendants-Appellants.

S. Ct. Case No. 2007-002

High Ct. Civil No. 2006-048

APPEAL FROM THE HIGH COURT
JULY 15, 2008
CADRA, C.J.
KURREN, A.J.,[1] and WALLACE, A.J.[2]

SUMMARY:

In 1998, Mercy Kramer entered into a written agreement with landowners of Lojomwe weto to lease a portion of the weto. She then assigned the lease to PII. Appellants had lived on Lojomwe weto since 1992. They first lived with Theresa Are's stepfather, who left after the structure they were living in burned down. In 2003, Appellants built another structure on the same location. At no time did Appellants, or Theresa Are's stepfather, have a lease to live or build on the property. They claimed to have consent from the landowners.

PII's operations on the land included dredging and blasting on the reef, stockpiling materials, and dumping sand or rocks near the Ares' house. At some point PII requested the Ares vacate Lojomwe weto where their home was located, but the Ares refused. Mercy Kramer filed a complaint in the High Court to evict the Ares from the premises, and PII was added as a plaintiff during trial. The High Court ordered Appellants' eviction, and dismissed their counterclaim for damages. The Supreme Court affirmed.

[1] Barry Kurren, United States Judge-Magistrate, District of Hawaii, sitting by appointment of the Cabinet.

[2] J. Clifford Wallace, senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

KRAMER and PII v. ARE and ARE

DIGEST:

1. APPEAL AND ERROR – *Review - Findings of Fact - Clearly Erroneous:* 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.

2. APPEAL AND ERROR – *Review - Findings of Fact:* 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.

3. APPEAL AND ERROR – *Review - Questions of Law*. The High Court's interpretation of the Marshall Islands Constitution is a question of law which is reviewed *de novo*.

4. LANDLORD AND TENANT - *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.

5. LANDLORD AND TENANT– *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 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.

6. CUSTOM - *Factual Inquiry*: 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?

7. CUSTOM - *Burden of Proof*: 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.

8. APPEAL AND ERROR – *Questions Reviewable – Asserted Below:* The general rule is that issues not raised below are waived on appeal unless necessary to prevent manifest injustice.

9. 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.

10. CONTRACT - *Construction*: If there is a written lease, the provisions of the lease are conclusive and govern the rights of the parties.

11. CONTRACT - *Construction*: 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.

12. LANDLORD TENANT - *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.

13. LANDLORD AND TENANT - *Tenancy at Will*: When title to property is passed by deed or lease, a tenancy at will is terminated, and the tenant becomes a tenant at sufferance.

14. LANDLORD AND TENANT - *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.

15. LANDLORD AND TENANT - *Breach*: The general rule is that a non-party to a lease lacks standing to challenge noncompliance with a lawful lease.

16. TORTS - *Negligence - 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.

17. APPEAL AND ERROR – *Review - Findings of Fact - Clearly Erroneous:* Where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous.

18. APPEAL AND ERROR – *Questions Reviewable – Asserted Below:* Failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal.

19. APPEAL AND ERROR - *Abandonment*: Issues insufficiently briefed are deemed abandoned on appeal.

CADRA, C.J., with whom KURREN, A.J., and WALLACE, A.J., concur:

KRAMER and PII v. ARE and ARE

I. INTRODUCTION

Appellants, Stanley and Theresa Are, Defendants/Appellants, appeal a "Judgment and Order" of the High Court requiring them to vacate premises known as "Lojomwe weto." Appellants also appeal an order of the High Court dismissing their claim for damages arising out of negligence and/or intentional infliction of emotional distress. We conclude there is no reversible error and therefore AFFIRM the High Court's judgment.

II. FACTS AND PROCEEDINGS BELOW

In 1998, Mercy Kramer entered into a written "Lease Agreement" for a portion of "Lojomwe weto" (aka Lajenwa, aka Lojomoe weto, aka Lajenwa) located in the Ajeltake District, Majuro Atoll from Iroij (edrik) Lanbo Kemoot and Alap and Senior Dri Jerbal Ruth Iaman. The portion of "Lojomwe weto" leased to Appellee Kramer is located on the lagoon and ocean side of the main road, between the Airport and Peace Park. The "Lease Agreement" was signed for the landowner-lessors by Timur Jorlang as representative of Leroij Lanbo Kamoot and signed by Esther Iamon as representative of Ruth Iamon who holds the Alap and Senior Dri Jerbal interests. Mercy Kramer signed as lessee.[3]

On October 23, 1998, Mercy Kramer assigned the "Lease Agreement" to Pacific International, Inc. (PII). The assignment of the "Lease Agreement" was in writing with mercy Kramer signing as "Assignor" and PII signing as "Assignee" by its CEO, Jerry Kramer.[4] Subsequent to the assignment, PII commenced its general operations on the leased premises. Those operations later expanded to include dredging and blasting on the reef and stockpiling of materials on the leased premises.

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[3] The "Lease Agreement" was admitted at trial as Plaintiff's Exhibit P-1. Exhibit P-1 bears a date stamp indicating it was filed with the High Court on October 22, 1993 and was recorded as Instrument 134 on January 12, 2005 with the land Registration authority.

[4] The "Assignment of Lease Agreement by Lessee" was admitted at trial as Plaintiff's Exhibit P-Ia.

Appellant Theresa Are's stepfather, Domingo, had been living on the portion of Lojomwe Weto subject to the "Lease Agreement" prior to 1992. Domingo did not have a lease to the property but was present on the property because he was "like a brother to Mwejenleen."

In 1992, Appellants Theresa and Stanley Are, moved in with Domingo. Domingo and his wife, Jabjen, had asked Stanley to come live with them on Lojomwe so that Appellant's children could go to school. At some point in time, Appellants' son burned down Domingo's house. Domingo then left the area, relocating elsewhere.

In 2003, Appellant Stanley Are built a new house or structure for his family to live in at the same location where Domingo's house had been located. It is not disputed that appellants do not have a lease for the portion of Lojomwe weto where their house is located. They claim they were present with the consent of the landowners.

At some point in time, PII dumped some piles of sand or rocks on the leased premises near Appellants house. Appellants presented testimony at trial that piles of rocks prevented ingress and egress from their house. Testimony was also presented that dust from PII's operations landed on appellants' food. Appellant Stanley Are claims these acts were taken by PII in retaliation for his signing a petition against an asphalt plant being operated on the leased premises.

It is not disputed that PII requested Appellants to vacate Lojomwe weto where their home was located. Appellants refused to vacate the premises. On March 28, 2006, Appellee Mercy Kramer filed a complaint against Appellants to evict them from the premises. Appellants filed an answer and counterclaim. Appellees did not answer the counterclaim.

Trial was held before the High Court on March 26 and March 30, 2007. Appellee PII was added or substituted as a party plaintiff at trial on Mach 3, 2007; the trial court finding Kramer lacked standing to pursue the action.

At the conclusion of the testimony and closing arguments, the trial judge ruled from the bench ordering Appellants to vacate the property and dismissing Appellants' counterclaim for damages. The trial court issued a written "Judgment & Order" on April 11, 2007. A timely Notice

of Appeal was filed by Appellants on May 4, 2007. The parties have agreed to disposition of this appeal on the written record and briefs.

III. DISCUSSION

A. Standard of Review

[1, 2] Findings of fact by the High Court will not be set aside unless "clearly erroneous." *Elmo v. Kabua*, 2 MILR 150, 153; *Lokken v. Nakap*, 1 MILR (Rev.) 69, 72. 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; *Zaion, et al. v. Peter and Nenam*, 1 MILR (Rev.) 228, 233. 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. The Supreme Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision. *Elmo, supra; Les Nor. Boat Repair, et al. v. O/S Holly, et al*., 1 MILR (Rev.) 176, 179.

[3] Matters of law are reviewed *de novo*. *Jack v. Hisaia*, 2 MILR 206, 209; *Lobo v. Jejo*, *supra.* 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.

B. The High Court Did Not Err in Evicting Appellants From Lojeme weto.

1. The lease complies with the RMI Constitution, Art. X, Sec. 1(2).

[4] Appellants argue that the High Court erred in concluding that the "Lease Agreement" and subsequent assignment of that lease valid under Article X, Section (1)(2) of the RMI Constitution. Appellants claim the lease did not have the proper approval of the landowners and that the landowners did not consent to an assignment or transfer of the lease from Mercy Kramer to PII.[5]

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[5] The issue of whether the "Lease Agreement" complies with the Constitution, Art. X, Sec. 1(2) was not specifically raised by Appellants in their opening brief. In the opening brief, Appellants apparently conceded that Mercy Kramer had the right to possession of that portion of Lojomwe which she had leased and had the right to dispose of that property but not by way of what Appellants characterize as a sublease. In their "Replying Brief," Appellants argue that the "court erred in concluding that Mercy's lease *and* assignment valid against Article X, Section

The RMI Constitution requires that the "Iroijlaplap, Iroijedrik where necessary, Alap and Senior Dri Jerbal" approve any alienation of land, by lease or otherwise, to be valid. The RMI Constitution, Art. X, Sec. 1(2) provides:

> Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Republic, it shall not be lawful or competent for any person having any right in any land in the Republic, under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the Iroijlaplap, Iroijedrik where necessary, Alap and the Senior Dri Jerbal of such land, who shall be deemed to represent all persons having an interest in that land.

It is not disputed that the persons holding the Iroijedrik, Alap and Senior Dri Jerbal titles did not personally sign the lease; rather, the lease was signed by the landowners' purported representatives. it is also undisputed that the leased premises is located on "Jebdrik's side" for which there is no Iroijlaplap whose approval would be necessary to lease the premises.

The "Lease Agreement" was signed by Timo Jorlang on behalf of his sister, Leroij Lanbo Kemot, and Esther Iaman on behalf of her mother, Alap and Senior Dri Jerbal Ruth Iaman. Appellants did not challenge below and do not challenge on appeal that Leroij Lanbo Kemot and Alab and Senior Dri Jerbal Esther Iaman hold the interests necessary to effectuate a valid lease of the subject weto. Instead, appellants argue that Timor Jorlang did not have a power of attorney to sign for Leroij Lanbo Kemot and they objected to admission of the "Lease Agreement" as an Exhibit at trial.

In response to Appellant's objection, Appellees introduced into evidence a "Special Power of Attorney" dated June 26, 1997, written in both English and Marshallese, signed by Leroij Lanbo

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1(2) of the Constitution." Generally, issues raised for the first time in a reply brief are waived. *See, e.g., Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996). We nevertheless address the issue of Constitutional validity of the lease because it is relevant to the issue of whether the assignment to PII is Constitutionally valid.

Kemot authorizing Timor Jorlang to exercise the rights, title and interests of Iroij Erik on her behalf and on behalf of the bwij for various wetos including Lojomwe."[6]

Appellants introduced no evidence that the "Special Power of Attorney" was not, in fact, signed by Lanbo Kemot or that the "Special Power of Attorney" had been revoked prior to Jorlang singing the "Lease Agreement." Likewise, Appellants introduced no evidence that the "Special Power of Attorney" was invalid under Marshallese custom and/or traditional practice. We hold there was no error by the High Court in admitting the "Special Power of Attorney" and conclude that Timo Jorlang had the authority to sign the "Lease Agreement" on behalf of Leroij Lanbo Kemoot representing the Iroijedrik interest.

Appellants do not challenge the authority of Esther Iamon to have signed the "Lease Agreement" on behalf of Ruth Iamon. Ruth Iamon holds the alap and senior dri jerbal interests to the leased weto. Esther Iamon testified at trial that she entered into the "Lease Agreement" with Mercy Kramer in 1998 and that she had permission and a power of attorney from her mother, Ruth Iaman, to sign for the alab and senior dri jerbal interests on the lease. We, accordingly, conclude that the consent of all landowners required by the Constitution consented to the "Lease Agreement" and that the "Lease Agreement" complies with the requirements of the Constitution, Art. X, Sec. 1(2).

2. *Kramer's assignment of the lease to PII is not invalid under the Constitution, Art. X, Sec. 1(s) because the landowners, through their representatives, consented to an assignment of the lease when they signed the "Lease Agreement."*

[5] Appellants claim that Mercy Kramer's October 23, 1998 assignment of the lease to PII (Exhibit P-1a) is invalid because it did not have the Constitutionally required consent of the landowners. The "Lease Agreement" signed by the landowners through their authorized representatives, however, specifically authorized the lessee Mercy Kramer to "mortgage, pledge, or

[6] Exhibits P-2 and P-3.

otherwise encumber or assign Lessee's interest."[7] There was no requirement imposed by the lease that the lessors review and approve an assignment.

There was no evidence introduced before the High Court that the landowners and/or their representatives ever objected to Mercy Kramer's assignment of the lease to PII and/or ever attempted to cancel the lease to Kramer due to an improper assignment.

Based on the evidence which was before it at trial, the High Court's finding of a valid assignment was not "clearly erroneous." We, therefore, conclude that the assignment comports with the Constitution, Art. X, Sec. 1(2) because the landowners consented to the assignment when they signed the "Lease Agreement."

3. *Appellants failed to introduce any evidence regarding an alleged custom or traditional practice which would allow Appellants to remain on the land leased; the "Lease Agreement" is not invalid under the Constitution, Art. X, Sec. 1(1).*

Appellants argue that the "trial court erred in not applying the customary approval by the landowners for appellants to remain on the premises." Appellants assert that a custom or "traditional practice of approving other people to build their house and remain on the premises has evolved lately due to unavailable space to construct residential homes." The trial court's failure to recognize this alleged custom, according to appellants, violates the constitution, Art. X, Sec. 1(1).

[6] Appellants correctly point out that every inquiry into the custom involves two factual determinations. First, "is there a custom with respect to the subject of the inquiry?" And, if so, "the second is: What is it?" *Lobo v. Jejo*, 1 MILR (Rev.) 222, 226.

[7,8] To the extent, however, that Appellants are relying on a recently evolved traditional custom or practice to establish their legal right to be on the subject weto, Appellants bore the burden of making the two showings required by *Lobo, supra*, before the trial court. There was no evidence of this alleged custom or traditional practice introduced by Appellants. The general rule is that issues not raised below are waived on appeal unless necessary to prevent manifest injustice. See*, e.g. Int'l Union of Bricklayers Allied Craftsmen v. Martin Jaska, Inc*. 752 F.2d 1401, 1404 (9th Cir. 1995).

[7] "Lease Agreement," Exhibit P-1, Section 6.

In the absence of such evidence and in the absence of any showing of manifest injustice, we conclude the trial court did not err in failing to recognize the alleged custom in violation of Art. X, Sec. 1(1) of the Constitution.

> *4. Esther Iamon's understanding that Appellants would be permitted to stay on Lojomwe does not alter the language of the "Lease Agreement" and does not create a right of Appellants to remain on the premises.*

Esther Iamon Lokboj testified that she signed the "Lease Agreement" but there was an understanding that "nobody would be kicked out of nobody would be required to leave the land." The written "Lease Agreement," however, does not reserve or mention the right of persons residing on the premises under a license or permission of one of the landowners to remain after execution of the lease.

[9-11] Esther Iamon's understanding that persons living on the weto would be allowed to remain cannot be used to explain the parties' intentions in entering into the "Lease Agreement." The long recognized general rule is that "[w]here 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." 49 Am.Jur.2d. Landlord and Tenant, Sec. 48; *see also*, *Western Assets Corp. v. Goodyear Tire & Rubber Co*., 759 F.2d 595, 599 (7th Cir. 1985). If there is a written lease, "the provisions of the lease are conclusive and govern the rights of the parties." *Id*. The general rule is also 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. 49 Am.Jur.2d, Landlord and Tenant, Sec. 52; *see also*, *Mercury Inv. Co. v. F.W. Woolworth Co*., 706 P.2d 523, 529 (Okla. 1985).

In this case, the "Lease Agreement," Sec. 11 clearly states that:

> This lease constitutes the entire agreement between the parties and may be altered, amended or replaced only by a duly executed written instrument. No prior oral or

written understanding or agreement with respect to the Lease shall be valid or enforceable.

Esther Iamon's understanding that Appellants would be permitted to stay on the land after it was leased to Kramer is irrelevant to a determination of the parties' rights under the written "Lease Agreement" and does not establish the right of Appellants to be on the land. If the landowners or their representatives desired to lease the land subject to the rights of licensees or persons having permission, but not a lease, to remain on the land they should have made that intention clear in the "Lease Agreement." They did not and we are not at liberty to add or create rights of third persons, such as Appellants, to be on the leased land.

[12-14] Even assuming that Appellants had the permission of the landowners to be present on the leased premises, that permission would be terminated by the landowner's subsequent lease to Kramer. 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. When title to property is passed by deed or lease, the tenancy is terminated, and the tenant becomes a tenant at sufferance. *See, e.g., Irving Oil Co. v. Maine Aviation Corp*., 704 A.2d 872, 873 (Me. 1998); *see, generally*, 49 AmJur.2d, Landlord and Tenant, Sec. 122 (2006 ed.). Tenancies by sufferance are "terminated by a proper demand for possession and can be put to an end whenever the landlord, acting promptly, wishes." 49 Am.Jur.2d, Landlord and Tenant, Sec. 124 (2006 ed.), *see also, Roth v. Dillavou*, 835 N.E.2d 425, 429 (Ill. App. 2003). Appellants became tenants at sufferance of Kramer when the "Lease Agreement" was executed by the landowners and became tenants at sufferance of PII when the "Lease Agreement" was assigned. Appellants were given notice to quit or vacate the land by PII and no longer had a right to remain when that notice was given.

5. Appellants lack standing to allege a breach of the "Lease Agreement" by Appellees.

Appellants argue that Appellees breached their lease with the landowners by quarrying sand and rock, drilling and blasting the ocean side reef, and selling sand and aggregate without the landowner's consent.

[15] The general rule is that a non-party to a lease lacks standing to challenge noncompliance with a lawful lease. *See, e.g., Iowa Coal Mng. Co. v. Monroe Co.,* 555 NW2d 418, 249 (Iowa 1996), *citing* 49 Am. Jur. 2d, Landlord and Tenant, sec. 80 at p. 108 (1995 ed.).

Appellees are not parties to the "Lease Agreement." We therefore do not reach these issues.

6. Conclusion.

Appellants admit that they have no lease to Lojomwe weto. Appellants failed to establish any legal or customary right to remain on the property after the landowners leased it to Kramer and after Kramer's subsequent assignment of the lease to PII. Appellants received notice to vacate the land. We conclude that the trial court did not err in its finding that PII had the legal authority to request Appellants to leave Lojemwe weto, that Appellants were only able to stay on Lojemwe with permission of PII and that permission had been withdrawn. We, therefore, AFFIRM the trial court's order evicting the Appellants.

C. The High Court Did Not Err in Dismissing Appellant's Counterclaim for Negligence/Intentional Infliction of Emotional Distress.

1. The High Court found that PII owed a duty to appellants.

Appellants claim that the trial court erred in not concluding that PII had a legal duty owed them. Appellants argue that the lease imposed a duty on the lessee (and assignee) to care for the occupants or visitors to the leased premises. Appellees respond that the appellants are trespassers to whom no legal duty is owed and that the lease imposes no such duty. The trial court held that a duty was owed by appellees to appellants not to cause them harm.

2. The High court did not clearly err in finding that the duty owed Appellants was not breached and did not clearly err in finding that Appellants suffered no damages.

[16] The breach of a duty is usually a fact issue for the trier of fact. The question of whether a breach of duty caused damages is also a fact issue. *See, e.g., Musgrove v. Ambrose Properties,* 87 Cal.App.3d 44, 53, 150 Cal. Rptr. 722 (Ca. App. 1978).

The trial court heard evidence regarding Appellants' claim for negligence and intentional infliction of emotional distress caused by the creation of dust, dumping loads of sand and debris near

Appellant's house and transporting burning asphalt near Appellant's home. There was conflicting evidence, however, as to whether PII was responsible for the fire which Appellants claim was an attempt to "smoke them out like coconut crabs" and whether Appellants actually suffered any damages as a result of PII's conduct. Appellant Theresa Are testified that on one occasion she saw Lotijar, an employee of PII, burn some debris near her house but Jiata Tiem, Lotijar and Mija testified that it was Mija who had cleaned the area and lit a fire to burn the debris. There was testimony that PII had not instructed Mija to burn the debris and that she put out the first when someone complained about it. Theresa Are also testified that PII dumped piles of rocks, sand or debris so close to their house that there was no way to go in or out. Stanley Are testified as to his believe that PII was retaliating against him since he had signed a petition against the asphalt plant but aside from his belief there was no evidence of an improper motive to harm Appellants by PII. Stanley Are testified he is seeking $200,000 in damages but did not introduce any evidence regarding medical expenses and extent of damages suffered by Appellants.

[17] We are bound to accept the trial court's findings of fact unless clearly erroneous. If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed. 518 (1985); *see also, Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 400, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990) ("In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusion.").

While we may have viewed the evidence differently, we hold that the trial court's finding that there was no breach of the duty and no damages suffered by Appellants is permissible given the evidence before it. We, therefore, cannot find the trial court's findings "clearly erroneous" and affirm the trial court's order dismissing Appellants' negligence and intentional infliction of emotional distress claims.

D. Appellants' Other Claimed Procedural Errors and Evidentiary Rulings by the High Court do not Warrant Reversal or Remand.

Appellants assign a number of errors to the trial court, none of which we hold are sufficient to warrant a remand or reversal.

1. Admission of Exhibits PI(a), P2 and P3.

Appellants claim the trial court abused its discretion "in admitting Exhibits P1(a), P2 and P3 on just the trial date and after closure of the case in chief." Appellants claim they objected at trial to admission of these exhibits on grounds of "surprise, authenticity of the exhibits and that said exhibits were not approved by the lessors or the sub-lessor." Our review of the transcript, however, reveals that the objection to these exhibits was limited to the claim that there was no sublease clause and Mercy Kramer could not unilaterally assign the lease to PII. This issue has been addressed above.

[18] Our review of the transcript also indicates that the trial judge raised the issue of the authenticity of Exhibits P1(a), P2 and P3 on its own, found those exhibits were notarized and admitted those documents as self-authenticating. Appellants did not object to the judge's finding of self authentication and admission of the exhibits on the ground of authenticity. Generally, a failure to object to admission of evidence on a specific ground constitutes a waiver to assert the alleged error on appeal. *See, e.g., United States v. Gomez-Norena*, 908 F.2d 497, 500 (9th Cir. 1990), *cert. denied*, 498 U.S. 947, 111 S.Ct. 363, 112 L.Ed.2d 326 (1990).

Regarding appellants' claim of "surprise," an objection was not specifically made to the trial court on that ground and is consequently waived. We further note that the Civil Rules allow a party to engage in discovery prior to trial. If Appellants had made a timely request for production of the documents Appellees intended to rely upon at trial Appellants would not have been "surprised" when appellees moved for their admission. There is no indication in the record that Appellants were denied discovery or that appellees failed to comply with any pretrial order requiring production of exhibits prior to trial.

Finally, the record reveals that the appellees moved for admission of these exhibits and the trial judge admitted them prior to close of appellees' case in chief. Appellants have failed to show how they were unfairly prejudiced by admission of these exhibits. The trial court's admission of these exhibits was not an abuse of discretion.

2. Calling of Mercy Kramer as a witness.

[19] In their "Notice of Appeal," appellants claim the trial court erred in "not allowing appellants to call plaintiff (appellee Mercy Kramer) as their first witness because no subpoena was served upon her." Appellants, however, have not briefed the issue and we, consequently, hold it to be waived. Issues insufficiently briefed are deemed abandoned on appeal. *See, e.g., Dresden v. Detroit Macomb Hospital Corp*., 553 NW2d 387 (Mich. App. 1996).

IV. CONCLUSION

For the reasons stated above, we AFFIRM the High Court's Judgment & Order directing Appellants to leave Lojomewe weto and dismissing Appellants' counterclaim.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JARLING THOMAS, et al.
Plaintiffs-Appellees

-v-

ABUIT SAMSON,
Defendant-Appellant,
-v-

HELENA ALIK,
Intervenor-Appellant.

S. Ct. Case 2007-001
High Ct. Civil No. 2005-077

APPEAL FROM THE HIGH COURT

JULY 24, 2008

CADRA, C.J.
WALLACE[1] and KURREN,[2] Acting Associate Justices

SUMMARY:

The Traditional Rights Court determined that Plaintiff held alab and senior dri jerbal rights claimed by Defendants. Both the High Court and the Supreme Court upheld the Traditional Rights Court's decision.

DIGEST:

1. APPEAL AND ERROR – *Review* - *Questions of Law*: Errors of law are reviewed *de novo*.

[1] Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

2. APPEAL AND ERROR – *Review - 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.

3. APPEAL AND ERROR – *Review - Traditional Rights Court*: A finding of fact as to custom made by the Traditional Rights Court is to be reversed only if clearly erroneous.

4. APPEAL AND ERROR – *Review - Findings of Fact - Clearly Erroneous*: 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.

5. LAND RIGHTS - *Katleb*: As a matter of customary law, a katleb was given to only one person, not two.

6. LAND RIGHTS - *Statute of Frauds*: The statute of frauds does not apply to a document that is a determination of inheritance.

7. LAND RIGHTS - *Drekein Jenme*: A seventy-year time period is more than sufficient to invoke the Marshallese custom of "never moving or disturbing the *drekein jenme*."

8. LAND RIGHTS - *Drekein Jenme*: 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.

KURREN, Acting Associate Justice:

BACKGROUND AND PROCEDURAL HISTORY

This action arises out of a dispute over who holds the alab and senior dri jerbal rights to Lorilejman Weto, Arrak Village, Majuro Atoll, in the Republic of the Marshall Islands. Plaintiff-Appellee Jarling Thomas, et al. ("Thomas"), Defendant-Appellant Abuit Samson ("Samson"), and Intervenor-Appellant Helena Alik ("Alik") all clam an interest in these rights.

The dispute was referred to the Traditional Rights Court ("TRC'), which heard the matter between January 6 and January 16, 2006. On March 17, 2006, the TRC ruled that Thomas held the alab and senior dri jerbal rights to Lorilejman Weto.

The matter then went before the High Court pursuant to Rule 9 of the TRC's Rules of Procedure. The High Court affirmed the TRC decision, finding that there was "no evidence that the TRC's-decision is clear[ly] erroneous or contrary to law." (High Court Final Judgment 3.) Samson and Alik have now appealed the High Court's decision. The parties waived oral argument, and after careful consideration of the briefs and the record before us, and for the reasons set forth below, the Court AFFIRMS the decision of the High Court affirming the TRC and finding in favor of Thomas.

STANDARD OF REVIEW

[1-4] Errors of law are reviewed *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 584 (1988); *Pwalendin v. Ehmel*, 8 ITR 548, 552 (App. Div. Pohnpei 1986). However, the High Court and this Court must give "proper deference" to the decision of the TRC in cases, such as this one, that involve customary law. *Tibon v. Jihu*, 3 MILR 1 (2005). "Accordingly, a finding of fact as to the custom is to be reversed or modified only if clearly erroneous. 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." *Id*. (internal quotations and citations omitted).

DISCUSSION

Alik, Thomas and Samson all claim an interest in Lorilejman Weto. There is no dispute that Alik's ancestors once owned the rights to this land; Alik now claims that she and her family still own these rights. (TRC Op. 3.) Thomas claims, however, that the alab and dri jerbal rights to Lorilejman Weto were given to her ancestor, Bokrnej, as a *katleb* sometime around 1930. Samson, on the other hand, claims that one of his ancestors, also named Samson, was a joint recipient of that same *katleb* given to Bokmej.

[5] The TRC ruled in favor of Thomas. Specifically, the TRC found that Alik's family had lost its rights to the Lorilejman Weto at some point in the past, and had failed to raise their claims during subsequent meetings for determination of alab and dri jerbal rights. In addition, the TRC found that as a matter of customary law, a katleb was "given to only one person," not two. (TRC Op. 4 (emphasis removed).) That one person, according to the TRC, was Bokmej.

The TRC found that it could not be the case that Samson shared in the katleb to Bokmej. Finally, the TRC found that later land adjudications in favor of Samson had disturbed the custom of *drekein jenme* and were invalid. Accordingly, the TRC ruled that the rightful holder of the alab and dri jerbal rights to Lorilejman Weto was Thomas, descendant of Bokmej. The TRC ruling was adopted by the High Court, and we now AFFIRM that decision.

I. SAMSON'S OBJECTIONS

[6] Samson first argues that the TRC "erred in fact by determining that Exhibit 3, which purports to recognize Bokmej as the holder of the Alab rights on Lorilejman Weto, was in fact 'good and proper' and that it contained the signature of Iroijlablab Amata Kabua." (Appellant's Brief 7.) Samson additionally argues that as a matter of law, Exhibit 3 is invalid under a common law statue of frauds theory. As Thomas points out, however, Exhibit 3 is not a transfer of property, but, a determination of inheritance, and so the statute of frauds would not apply. Moreover, it does not appear that the TRC believed Exhibit 3 to have been actually signed; rather, it appears that the TRC merely believed the document to have been adopted by Amata Kabua. The TRC made neither an error of law nor an error of fact in accepting and relying on Exhibit 3.

[7] Samson next argues that the TRC "erred in law by misapplying the Marshallese custom of 'never mov[ing] or disturb[ing] the *drekein jenme*,' particularly insofar as Exhibit 3 was not good and proper." (Appellant's Brief 7.) Specifically, Samson argues that the decision of Amata Kabua 's land committee should not have been accorded special weight under the *drekein jenme* doctrine because the land committee ruled in favor of Thomas only in 1995, which is not long enough for the decision to be accorded "rock of the ages" status. As Thomas points out, however, the decision that the TRC said should not be disturbed was not the decision of the land committee recognizing certain land rights, but the original decision to award those land rights via the 1930 katleb to Bokmej. (See TRC Op. 3, stating that Amata Kabua "understood what his predecessors had confirmed, and he himself knew not to cause any change".) This seventy-year time period is more than sufficient to invoke the *drekein jenme* doctrine.

Samson also argues that "the High Court erred in fact by determining that the evidence in Kaiboke 's Book supported, rather than undermined, the plaintiff's theory of the case." (Appellant's Brief 17.) However, the High Court never stated that Kaiboke's Book supported plaintiff's theory of the case. The High Court said only that Kaiboke's Book was "consistent with the TRC's finding that the plaintiff Thomas is the Alab and Senior Dri Jerbal of Lorilejman."(High Court Final Judgment 3) Moreover, Samson fails to show why the information contained in Kaiboke's Book - namely, that the alab and drijerbal rights passed to Laudrik after Bokmej's death - supports the position that the *katleb* was originally given to both Samson and Bokmej.

[8] Finally, Samson argues that "the Traditional Rights Court and the High Court erred in law by ignoring the Marshallese custom of presuming the decisions of a Leroijlablab are reasonable unless it is clear they are not." (Appellant's Brief 19.) Samson contends, as he did before the High Court, that "the court erred by not properly considering the testimony and opinion of Leroijlablab Atama Zedkaia," who had determined in 2001 that Samson held the alab rights to Lorilejman Weto. (Appellant's Brief 20.) In finding in favor of Thomas, however, it is evident that the TRC implicitly ruled that the Atama Zedkaia's decision was not reasonable since it contravened the doctrine of *drekein jenme*. Neither the TRC nor the High Court erred in applying the doctrine of *drekein jenme* to contravene the more recent decision of Amata Zedkaia.

II. ALIK'S OBJECTIONS

Alik argues that neither Samson nor Thomas is the proper owner of Lorilejman Weto, and that his family, the original owners of Lorilejman Weto, has a superior interest in the land. Alik fails to allege any specific, non-conclusory legal or factual errors of either the TRC or the High Court, however, so we are unable to address Alik 's concerns further.

CONCLUSION

The High Court properly found that the TRC decision was neither clearly erroneous nor contrary to law, and that Thomas properly holds the alab and senior dri jerbal rights to Lorilejman Weto. Accordingly, the judgment of the High Court is AFFIRMED and this appeal is DISMISSED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

AINE KELET, et al.
Plaintiffs-Appellees

S. Ct. Case No. 2005-003
High Ct. Civil No. 1996-041

-v-

TELNAN LANKI & PETER BIEN,
Defendants/Appellants.

APPEAL FROM THE HIGH COURT

AUGUST 25, 2008

CADRA, C.J.
KURREN, A.J.[1] and WALLACE, A.J.[2]

SUMMARY:

The parties are descendants of the alab and dri jerbal of Lokejbar weto who entered into a lease agreement for use of a section of that land. The parties' predecessors in interest had an arrangement where the alab did not provide the dri jerbal's fixed share of income generated by the lease, but provided money from time to time as he saw fit. Upon the deaths of the original parties to the lease, the dri jerbal's descendant was dissatisfied with this arrangement, and filed suit to recover his share of income from the lease. The Traditional Rights Court determined that plaintiffs were the proper dri jerbal interest holders, and were entitled to recover their one-half share of income from the lease. The High Court entered judgment in accordance with the Traditional Rights Court's findings, and the Supreme Court affirmed.

DIGEST:

1. APPEAL AND ERROR – *Review –Traditional Rights Court*: The High Court must adopt a decision of the Traditional Rights Court unless it is clearly erroneous or contrary to law.

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[1] Barry Kurren, United States Magistrate Judge, District of Hawaii, sitting by appointment of the Cabinet.

[2] J. Clifford Wallace, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

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2. APPEAL AND ERROR – *Review –Traditional Rights Court*: 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*.

3. APPEAL AND ERROR - *Questions Reviewable - Contained in Notice*: 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.

4. APPEAL AND ERROR – *Questions Reviewable – Contained in Notice*: Only in rare instances when the interest of justice requires will the Supreme Court consider an issue outside the notice of appeal.

WALLACE, A.J., with whom CADRA, C.J., and KURREN, A.J., concur:

I. INTRODUCTION

Telnan Lanki and Peter Bien appeal from a judgment of the High Court of the Republic of the Marshall Islands. The High Court held that the decision of the Traditional Rights Court (TRC) was not clearly erroneous or contrary to law, and therefore Takju Jimi and his descendants properly held dri jerbal title in Lokejbar weto. We have jurisdiction pursuant to Article VI, Section2 of the Marshall Islands Constitution, and we affirm.

II. FACTS AND PROCEEDINGS

The parties dispute title to a plot of land known as Lokejbar weto, located on the island of Majuro. At one time, both alap and dri jerbal titles on this land were held by one man, Namidrik. Near the end of his life, Namidrik transferred both titles, with approval from the relevant Iroij, to his wife, Limoj. Limoj then invited her friend, Libadriki, to live on the land with her. With the approval of Iroij Tel and her husband, Limoj transferred dri jerbal rights on the land to Libadriki.

Upon the death of Limoj and Libadriki, both women passed their respective titles to their sons by will. Limoj passed alap title to her adopted son, Ajidrik Bien (Ajidrik), and Libadriki passed dri jerbal title to her son Takju Jimi (Takju). Both men shared the land and co-existed amicably throughout their lives. During this time, the government of the Republic of the Marshall Islands entered into a lease agreement to use a section of Lokejbar weto for the Majuro

airport. Ajidrik, through his daughter, signed the lease as holder of alap title, while Takju signed the lease as holder of dri jerbal title. Although both men signed, Takju did not directly share in the income generated by the lease. Instead, according to appellants, Ajidrik collected all of the lease payments, and "provided money for [Takju] when he saw fit from time to time." [Opening Brief at 5] This arrangement apparently proved workable during the lifetimes of Ajidrik and Takju, but problems arose when title passed to their descendants. Hackney Takju (Hackney), the son of Takju, filed this action against the Peter Bien, a descendant of Ajidrik, in order to recover a one-half share of the income from the airport lease.

In an opinion dated September 10, 2004, the TRC determined that Hackney was the proper holder of dri jerbal rights in Lokejbar weto. The TRC based this decision on the fact that Namidrik had properly transferred both alap and dri jerbal rights to his wife; she had, in turn, transferred dri jerbal rights to her friend Libadriki, and Libadriki had passed that title to her son, Takju. The TRC further supported this determination by referring to the fact that Takju signed the lease for the land as its dri jerbal holder.

On November 30, 2004, the High Court, in a brief opinion, concluded that the TRC's decision was "not clearly erroneous or contrary to law" and held that it could "find no basis on which to question the opinion." The High Court entered judgment in favor of Takju's descendants. The court then issued an order on April 4, 2005 awarding damages in the amount of $38,344.10. The court amended this order by stipulation on April 20, 2005, and increased the award to $74,379.60, to be paid annually at a rate of $7,437.96. The present appeal followed.

III. DISCUSSION

[1,2] Article VI, Section 4(5) of the Constitution of the Marshall Islands provides: "When a question has been certified to the Traditional Rights Court . . . its resolution of the question shall be given substantial weight." Pursuant to this section, the High Court must adopt a decision of the TRC "unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994). We, in turn, review the High Court's factual findings for clear error and its decision of law *de novo*. *Lobo v. Jejo*, 1 MILR 224, 225 (1991).

Appellants challenge the TRC's decision by contending that dri jerbal title never passed to Libadriki, but instead both the alap and dri jerbal titles remained within Namidrik's family. They argue that under "customary rights of [succession]," Ajidrik received both titles, notwithstanding his mother's efforts to transfer dri jerbal title to her friend, Libadriki. Appellants cite a number of cases to support this argument, but they are of little help because they merely provide the general rules for passing land title by inheritance. *See, e.g., Bulale and Jamore v. Reimers and Larence*, 1 MILR 259, 262 (1990); *Limine v. Lainej*, 1 TTR, 231 (1955); *Jatios v. Levi*, 1 TTR 578 (1954). Appellants have cited no cases, however, suggesting that these customary rules of inheritance would somehow serve to invalidate an otherwise valid transfer of title made *before* death and thus prior to application of inheritance law. In this case, the TRC held that dri jerbal title was properly passed from Limoj to Libadriki during Limoj's lifetime, and that Limoj was free to pass her title by will to her descendants. None of these cases cited by appellants demonstrate this decision to be contrary to customary law.

Moreover, appellants have failed to explain why, if Ajidrik held both titles, he allowed Takju to sign the airport lease as holder of dri jerbal title. Appellants speculate that Leroij Reab, who approved the lease, was merely permitting Takju to sign the lease as a courtesy, all the while "knowing such interest would always belong to Ajidrik and his family." [Opening Brief at 7] Appellants offer no objective support for this dubious argument, and have not shown the TRC's contrary finding to be clearly erroneous.

Appellants next argue that the original transfer of dri jerbal rights from Limoj to Libadriki did not have the necessary approval from the appropriate Iroij. They contend that in order to transfer dri jerbal title properly, Limoj "was required to obtain prior consent or approval of Iroij Edrik Jakeo, with further confirmation from the Droulul of Iroijlaplap Jebdrik." [Opening brief at 7] Appellants also argue that the past statements of other Iroij, including those of Iroij Edrik Tolnan Lanki and Leroij Kalora Zaion, should be controlling on the outcome of this case and the TRC erred in crediting the conflicting statements of Jeltan Lanki.

The TRC has jurisdiction, pursuant to Article VI, Section 4 of the Constitution, to decide "questions relating to titles or to land rights . . . depending wholly or partly on customary law." The question of which individual Iroij was required to approve Limoj's transfer, and what weight, if any, should be given to the statements of other Iroij, is an issue of customary law, squarely within the TRC's jurisdiction. In this case, the TRC concluded that the original transfer of title from Limoj to Libadriki was properly made "with the approval of Manidrik and Iroij Tel." [TRC Decision at 2.] The TRC also declined to give controlling weigh to the positions taken by Iroij Eddrik Tolnan Lanki and Leroij Kalora Zaion. Although appellants strongly disagree with this conclusion of customary law, they have offered on appeal no factual errors or binding caselaw that would render the decision of the TRC "clearly erroneous."

[3] Finally, appellants challenge the High Court's April 20, 2005 stipulation and amended order, which required them to pay appellees a total of $74,379.60 in back rent. Appellants argue that this order conflicts with the TRC's decision, which stated that "[a]ny outstanding debts owed to one party by the other is hereby forgiven, and the parties should make a new beginning." There is also the question whether the TRC had jurisdiction to decide the question of damages. These are important issues but we will not reach them because they are not properly before us on this appeal. Rule 3 of the Marshall Islands Supreme Court Rules of Procedure provides that each party must file a notice of appeal containing "a concise statement of the questions presented by the appeal." This rule 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."

The issues raised by appellants to this court in their notice of appeal were as follows:

1. Did the lower courts misapply [M]arshallese customary law of inheritance to title of dri[]jerbal on the land in its opinion favourable to the children of Takuju Jimi . . .
2. Did the lower courts misapply [M]arshallese customary law or requirements limiting any claim of entitlement to the title of dri jerbal by the children of Takju during the life estates of the children of Ajidrik . . .

3. Did the lower Courts err or violated [M]arshallese custom and traditional practices . . . in rejecting customary decisions of former [L]eroij Kalora Zaion, and current [I]roij [E]drik Telnan Lanki . . .
4. Did the Hi[g]h Court err in amending the Opinion of the Traditional Rights Court requiring the children (Peter Bien) of Ajidrik to compensate the children (Hackney Takju) of Takju when customary land status, authority or permission extended to their father – Takuj, is limited or contingent upon rights and obligations of Ajidrik himself, deriving from former owner and holder of the two kajur titles . . .
5. Did the Traditional Right[s] Court make or weigh[ ] its Opinion based on the evidence presented by both parties, and or did it apply that evidence pursuant to customary law . . .

[Notice of Appeal at 1] We have looked in vain for an issue pertaining to damages. Pursuant to Rule 3, we have refrained from considering any issue that a party fails to include in its notice of appeal. *See, e.g. Korok v. Neiwan Lok*, 1 MILR 93 (1988) ("Appellant has no right to brief and argue issues beyond the notice of appeal"); *Rang v. Lajwa*, 1 MILR 214 (1990) (dismissing appeal when appellants gave "no notice at all concerning the alleged errors and questions to be raised on appeal").

[4] It is true that we have, on occasion, considered issues outside the notice of appeal, when the interest of justice so required. *See, e.g. Abner v. Jibke*, 1 MILR 3 (1984) (excusing noncompliance with Rule 3 "so that rights may not be lost through the efforts of inadequate counsel"); *Bulale and Jamore v. Reimers and Clarence*, 1 MILR 259 (1992) (giving consideration to questions of land rights "notwithstanding the deficiencies in the notice"). But appellants cannot claim the benefits of these cases. Even in *Bulale*, we cautioned that although, under the circumstances, we would excuse the deficiencies in appellants' notice of appeal, we might not be "so leniently disposed in future cases." We now reiterate the point that cases like *Abner* and *Bulale* are the rare exception, not the rule. The Supreme Court Rules of Procedure *require* us to disregard those arguments not "set forth in the notice of appeal or fairly comprised

therein." In this case, appellants filed a notice of appeal that made no specific mention of any problems with the High Court's damages order. Because appellants raised the issue of damages for the first time in their opening brief, we will not consider their damages arguments on appeal.

For the reasons stated above, the Judgment and Amended Order of the High Court are hereby AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

TABWI NASHION and **ANN SHELDON**,
Plaintiffs-Appellees,
-v-

ENJA ENOS and **ALDEN JACKLICK**,
Defendants-Appellants

S. Ct. Case No. 2006-011
High Ct. Civil No. 2003-197

APPEAL FROM THE HIGH COURT

AUGUST 25, 2008

CADRA, C.J.
WALLACE, Acting Associate Justice[1] and KURREN, Acting Associate Justice[2]

SUMMARY:

Appellants challenge the decision of the Traditional Rights Court, adopted by the High Court, that appellees have alap and senior dri jerbal rights on Lokitak weto, Jabwor Island, Jaluit, based on a valid kalimur by iroijlaplap Kabua Kabua. Appellants also challenge the procedure employed by the Traditional Rights Court in substituting parties after the original plaintiffs' deaths, and argue that appellees cannot inherit this land title due to their status as adopted children. The Supreme Court affirmed the lower court's judgment.

DIGEST:

1. APPEAL AND ERROR – *Review - Questions of Law*: Errors of law are reviewed *de novo*.

2. APPEAL AND ERROR – *Review - Findings of Fact*: Errors of fact are reviewed for clear error.

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[1] Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the ninth Circuit, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

3. APPEAL AND ERROR – *Review - 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.

4. APPEAL AND ERROR – *Review - Traditional Rights Court*: A finding of fact as to custom made by the Traditional Rights Court is to be reversed only if clearly erroneous.

5. APPEAL AND ERROR – *Review - Findings of Fact - Clearly Erroneous*: 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.

6. COURTS - *Traditional Rights Court - 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.

7. CIVIL PROCEDURE - *Parties - 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.

8. APPEAL AND ERROR - *Questions Reviewable - Asserted Below*: 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.

9. APPEAL AND ERROR - *Questions Reviewable - Asserted Below*: 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.

10. LAND RIGHTS - *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."

11. LAND RIGHTS - *Kalimur*: 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.

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12. LAND RIGHTS - *Kalimur*: 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.

13. LAND RIGHTS - *Kalilmur*: 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.

OPINION OF THE COURT BY WALLACE, A.J.

This is an appeal from a High Court judgment declaring that Anne Sheldon holds the Alap rights and title, and Tabwi Nashion holds the senior dri jerbal rights and title, to Lokitak weto, Jabor, Jaluit Atoll, in the Republic of the Marshall Islands. In reaching its judgment, the High Court adopted the opinion of the Traditional Rights Court (TRC), which found that a written will or kalimur by iroijlaplap Kabua Kabua was valid under Marshallese custom and clearly dictates that Sheldon has Alap rights and Nashion has senior dri jerbal rights. We conclude that the findings of the TRC are not "clearly erroneous" and we therefore affirm the High Court's judgment.

BACKGROUND AND PROCEDURAL HISTORY

The original action commenced in 2003. On April 17, 2006, the plaintiffs-appellees (collectively, Nashion) filed a Motion for Substitution of Parties, substituting Anne Sheldon for Yoshimi Nashion, and Tabwi Nashion for Bwillear Nashion. This motion was made pursuant to Rule 25(a) of the Marshall Islands Rules of Civil Procedure because the original plaintiffs had passed away: Yoshimi Nashion died on April 16, 2005, and Bwillear Nashion on October 15, 2005. Their death certificates were attached to the motion. The TRC granted the motion that day, and the order was served on defendants-appellants (collectively, Enos) on April 18, 2006.

On April 21, 2006, the TRC held a status conference between Nashion and Enos. Enos requested that the trial be moved to another location to accommodate the defense witnesses; that request was granted. On June 6, 2006, Enos made an oral motion requesting time to respond to the April 17, 2006 motion to substitute plaintiffs. Nashion objected, and the TRC denied Enos's

motion. The trial took place between June 7 and July 13, 2006 at the courthouse in Jabor, and Nashion and Enos presented witnesses.

On August 22, 2006, the TRC ruled for Nashion, reasoning that Kabua Kabua's 1988 kalimur clearly determined that Alling T. Elmo (who we presume had been succeeded in interest by Yoshimi Nashion and now Anne Sheldon) was to be Alap and Yoshimi Nashion (who we presume had been succeeded in interest by Bwillear Nashion and now Tabwi Nashion) was to be dri jerbal.

The TRC found that the kalimur was properly signed. It also decided that the fact that the kalimur referred to "Imonkitak weto," which does not exist, instead of "Lokitak weto," the weto in question, was simply a clerical mistake and was immaterial based on the other evidence that Lokitak weto was intended. That evidence includes the language of the kalimur, a 1991 letter dealing with the weto, and testimony that it was Kabua Kabua's intent to leave title to Alling T. Elmo and Yoshimi Nashion. The TRC also found that Enos was aware of Kabua Kabua's disposition and did not object to it.

Finally, the TRC found that, although a contrary disposition of title was indicated by leroij Neimata Kabua in 2000, Neimata Kabua did not have the power to revoke the disposition created by her predecessor Kabua Kabua and, as she refused to take part in this case, it is probable that she no longer believes Enos is entitled to the land rights.

The matter then went before the High Court pursuant to Rule 9 of the TRC's Rules of Procedure. The High Court held a hearing on October 11, 2006. On November 7, 2006, the High Court affirmed and adopted the TRC's decision, stating that there was "nothing . . . to indicate the TRC's opinion was erroneous or contrary to law."

Enos appealed from the High Court's judgment to the Supreme Court. The parties waived oral argument. After careful consideration of the opinions under review, the briefs and the limited record that is before us, we AFFIRM the judgment of the High Court.

STANDARD OF REVIEW

[1-5] We review errors of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 584 (1988); *Pwalendin v. Ehmel*, 8 TTR 548, 552 (High Ct. App. Div. 1986). Errors of fact are reviewed for clear error. 27 MIRC Ch. 2 § 66(2); *see also Elmo v. Kabua*, 2 MILR 150 (1999). However, the High Court and this Court must give "proper deference" to the decision of the TRC in cases, such as this one, that involve customary law. *See Tibon v. Jihu*, 3 MILR 1, 6(2005). "Accordingly, a finding of fact as to the custom is to be reversed or modified only if clearly erroneous. 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." *Id*. (internal quotations and citations omitted); see also *Zaion v. Peter*, 1 MILR (Rev.) 228, 233 (1991).

DISCUSSION

Enos makes three arguments in support of reversal: (1) the substitution of parties was procedurally defective; (2) the TRC failed to answer completely the questions submitted by the parties; and (3) the will or kalimur was invalid.

I

[6] Enos first argues that the TRC's order substituting plaintiffs was erroneous because the TRC failed to follow Rule 25(a) of the Marshall Islands Rules of Civil Procedure. That Rule provides,

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representative of the deceased party and, together with the notice of hearing, shall be served on the parties in the manner provided in Rule 5. . . . Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

MIRCP 25(a).

It does appear to us that the substitution order fails to comply with this rule. First, the TRC should not have decided the Rule 25 motion in the first place, as the motion was not a

question of customary law or traditional practice and therefore was outside its jurisdiction. See Const. Art. VI, Section 4(3); see also *Elmo v. Kabua*, 2 MILR 150 (1999).

Second, there was no evidence attached to the motion showing that Anne Sheldon was the natural daughter of Yoshimi Nashion and that Tabwi Nashion is the oldest son of Bwillear Nashion. There were no birth certificates or affidavits presented with the motion that would connect them as the rightful successors to the late plaintiffs.

[7] Enos also argues that the motion was not served within 90 days of the original plaintiffs' death. While true, this argument does not help Enos. "Although Rule 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." *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994) (internal citations omitted). There is no showing Enos or anyone else made a formal suggestion of death in the record furnished to us.

Nashion concedes that they did not comply with Rule 25(a) when they moved to substitute the original parties, but argues that the TRC cannot be faulted for denying Enos's motion for leave to file a response to the motion for substitution because Enos did not timely object to the substitution. Nashion alleges that the order granting the motion for substitution was served on Enos 37 days before Enos made a response or motion; that three days after the order was filed, a status conference was held and Enos did not move to respond to the motion for substitution or request reconsideration of the order; and that Enos learned on March 16, 2006 that the deceased plaintiffs did not have any natural children, but did not attempt to oppose the motion for substitution until trial.

[8,9] Although Rule 25 may not have been complied with, we are forced to agree with Nashion. "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*, 3 MILR 1, 6 (200) (citing *Jeja v. Lajikam*, 1 MILR (Rev.) 200, 205 (1990)). Enos has the burden of showing a proper objection but has not provided any record of what took place during the hearings in this case. There is no showing whether and when Enos objected to the substitution. Without such a record, we must consider the objection to the substitution motion to be waived. We caution future litigants that, in order for this Court to consider claims properly, the parties must provide a record sufficient for the Court to determine that an objection was properly raised. Accordingly, we decline to review the issue.

II

The second argument advanced by Enos is that the TRC "failed to completely answer any questions submitted by the parties in respect to the weto disputed." However, as with the first issue, Enos has failed to provide us with an adequate record on which to valuate this claim. Enos never specifies in the briefs exactly what questions were posed to the TRC, and provides no record of the alleged questions.

Moreover, it appears to us that the TRC did answer the central questions placed before it: the TRC explained who held the Alap and senior dri jerbal titles, and whether the kalimur was valid. On the record before us, we hold that the TRC's treatment of the issues was satisfactory and reject Enos's argument to the contrary.

III

[10-12]Finally, Enos argues that the kalimur was invalid or should not have worked to pass land title to Nashion. It is critical to a proper analysis of this issue to understand that the 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." *See Lalik v. Elsen*, 1 TTR 134, 138. It can be, and it seems to have been here, a determination by the iroijlaplap of the present rights in land rather than an actual transfer of property to occur at death. *See id.* Because the 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.

Indeed, the Marshall Islands probate Code itself provides that, "[n]othing in this Part shall prevent the making of a will in accordance with the customary or written law of the Republic, nor shall anything in this Part affect the validity of a will made in accordance with such customary or written law." 25 MIRC 1 § 104. Here, the TRC and High Court viewed the kalimur primarily in light of customary law. This kalimur was unlike a will in that it did not transfer land from the testator, iroijlaplap Kabua Kabua, but it expressed his intentions for the disposition of land when Alap Tabwi died. In this case, the kalimur is primarily "evidence," along with other sources, of Kabua Kabua's decision and intent to give Alap and senior dri jerbal title Nashion's predecessors. In that light, we consider Enos's arguments.

Enos first argues that the kalimur is not valid because it states "Imonkitak" instead of "Lokitak." The TRC found this to be a clerical error in typing or a verbal mistake in pronouncing the name, and held that it should not matter that the document misstated the name of the weto. Moreover, while the document specifically mentions Imonkitak, it states, "I am now bequething the right of alap Tabwi, after his death, relating to all of his lands he inherited by ninnin from his father on Jaluit, including Imonkitak and other parts on Jabwor, Jaluit under 'kalotlot' or house of kalotlot." This suggests that it does not matter that the will misnames part of the land, because it clearly identifies "other parts on Jabwor, Jaluit" as the lands to be inherited. Those other parts would include Lokitak.

In our view, the TRC did not clearly err when it determined that the misstatement did not invalidate the kalimur because it was clear on the face of the documents to which lands it referred. Not only that, but there is other evidence that Nashion and Sheldon are the proper title holders. First, in 1991 Kabua Kabua wrote a letter that stated, "There is no one else I recognize today to be the holders of these two titles on Lokitak if it is not Alab Alling T. Elmo and Dri-Jerbal Yoshimi Nashion." That letter clearly identifies Lokitak weto. Additionally, the TRC heard testimony from individuals who were present at a funeral when the iroijlaplap Kabua Kabua stated that Alling T. Elmo and Yoshimi Nashion were to be the Alap and senior dri jerbal of Lokitak weto. Based on this evidence that the TRC considered and the text of the kalimur, we

hold that the TRC did not clearly err when it found that the kalimur determined "the proper and rightful persons . . . to hold the Alab and Dri-Jerbal on Lokitak weto."

Enos's second objection is that there is a discrepancy on the dates of the kalimur. The kalimur lists the date of the declaration as April 7, 1988. However, the kalimur was signed by witnesses and filed by the court on April 6, 1988, so the April 7 date could not possibly be accurate. The inconsistency likely resulted from a clerical error or confusion about the dates.

This discrepancy could arguably pose problems were the kalimur to be considered a will under the Marshall Islands Probate Code, because it suggests the kalimur was not properly witnessed. See Probate Code, 25 MIRC 1 § 106 ("The execution of a will under this Part . . . must be by the signature of the testator and of at least two (2) witnesses"). However, Enos does not make that argument or otherwise explain why the mistaken date somehow invalidates the kalimur. The TRC determined that the kalimur was valid under customary law, and Enos has not provided any specific reason why the date problem makes that holding clearly erroneous. There was no clear error in the TRC's finding that the kalimur was signed and witnessed.

[13] Finally, Enos argues that Anne Sheldon and Tabwi Nashion cannot inherit the land title because they are adopted children. Anne Sheldon admits she is adopted, but Tabwi Nashion contends he is the oldest natural son of Bwillear Nashion. In any event, the fact that either of them might be adopted is not relevant. The case that Enos cites, *Amon v. Langrine*, 7 TTR 65, is readily distinguishable from the case before us. First, for the weto disputed in the cited case, there was no iroijlaplap and so consent was needed from the rest of the clan to give title to an adopted child. That is not true here, because Kabua Kabua was the iroijlaplap and created the kalimur. Second, the TRC found that the kalimur actually was approved by lineage members because family members signed the kalimur and knew about the disposition. The TRC did not therefore err in concluding the disposition was valid.

CONCLUSION

For the above-stated reasons, we AFFIRM the judgment of the High Court.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In re:
SUSANNE KAYSER-SCHILLEGGER and
LUTZ KAYSER,
Plaintiff-Appellants (pro se)

S. Ct. Case No. 2009-001
High Ct. Civil Nos.
2008-016 & 2008-017 (consolidated)

-v-

THE HONORABLE CHIEF JUSTICE OF THE HIGH COURT OF THE REPUBLIC OF THE MARSHALL ISLANDS, CARL B. INGRAM,
Appellee

ROBBIE CHUTARO, JOHN G. SNOOK, GOOGLE, MICROSOFT, YAHOO! INC., LYCOS, INC., AS.COM-IAC WORLD,
Appellees

ORDER DENYING PETITION FOR WRIT OF PROHIBITION DIRECTED TO THE HIGH COURT AND THE HONORABLE CARL B. INGRAM, CHIEF JUSTICE, HIGH COURT

DECEMBER 30, 2008

Cadra, C.J.,
WALLACE, Acting Associate Justice[1] and KURREN, Acting Associate Justice[2]

SUMMARY:

The petitioners seek a writ of prohibition to enjoin the High Court from enforcing interlocutory procedural orders concerning pending motions, an extension of time, and an order that they serve an amended complaint on a corporate defendant. The Supreme Court found no grounds to support issuing a writ.

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[1] Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the ninth Circuit, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

KAYSER-SCHILLEGGER and KAYSER v INGRAM, et al.

DIGEST:

1. WRITS, EXTRAORDINARY - *Power to Issue*: 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.

2. WRITS, EXTRAORDINARY - *Requirements – No Other Adequate Remedy*: 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."

3. WRITS, EXTRAORDINARY - *Requirements - In General*: 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.

4. WRITS, EXTRAORDINARY - *Requirements - In General*: 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.

5. WRITS, EXTRAORDINARY - *Requirements - In General*: Where the jurisdiction of a trial court depends upon a factual determination, a writ of prohibition will not lie.

Upon consideration of Petitioners' petition for a writ of prohibition directed to the High Court, Chief Justice Carl B. Ingram, the papers in support of the petition and the records submitted in support of the petition,

1. Petitioners, Susanne Kayser-Schillegger and Lutz Kayser, seek review of orders entered in the above captioned action and request that this Court issue a writ of prohibition directed to the High Court and the Honorable Carl B. Ingram from enforcing "orders for extension of time" and from enforcing an "order re: pending motions" dated 11/05/09.

Petitioners challenge the High Court's order requiring them to serve an amended complaint upon a corporate defendant over which, they contend, the court lacks jurisdiction.

[1-3] 2. 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 exceptional character where the law affords no adequate remedy on appeal. The party seeking the writ must show that there is no other means of obtaining the relief desired and generally must bear the burden of showing that his right to issuance of the writ is "clear and indisputable." In cases where the petition is directed against an interlocutory order issued by a judge the requirement for obtaining the writ is even stricter because of the general rule that interlocutory orders are not appealable. In such cases, 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. *See, e.g., Kabua v. High Court of the Republic of the Marshall Islands*, 1 MILR 23 (S.Ct. Civil No. 85-05) (1986) and cases cited therein.

[4] 3. 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. *See, e.g., State v. Hamili*, 952 P.2d 390, 392 (Ha. 1998) (citing *Straub Clinic v. Kochi*, 917 P.2d 1284, 1288 (Ha. 1996)).

4. Having reviewed petitioners' submissions and the record before us, we are not convinced that the trial judge exceeded his jurisdiction to issue the challenged orders for extensions of time nor do we, on the record before us, find a flagrant and manifest abuse of discretion in granting those orders such as to make the petitioners' right to issuance of the requested writ clear and indisputable. The High Court's orders granting extensions of time are

interlocutory and can be reviewed through the ordinary course of appeal. We decline review of the High Court's orders granting extensions of time.

[5] 5. Where the jurisdiction of a trial court depends upon a factual determination, a writ of prohibition will not lie. *William Penn Fraternal Ass'n v. Hickman*, 506 S.W. 2d 823, 824 (Ark. 1974). Whether the trial court has jurisdiction over the corporate defendant ordered to be served with an amended complaint is a factual determination to be made by the trial court and a writ of prohibition is not available. Petitioners' have failed to show an alleged error in ordering petitioners to file and serve an amended complaint against this corporate defendant that cannot be reviewed by the ordinary process of appeal. We, accordingly, decline review of the High Court's said order.

6. To the extent petitioners challenge other orders made by the High court in its 11/05/09 "order re: pending motions," we decline review.

IT IS THEREFORE ORDERED that the petition for writ of prohibition is denied without prejudice to petitioners presenting any arguments in the pending High court case(s) and without prejudice to an eventual remedy petitioners may have by way of appeal from a final judgment.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

RISTA BULELE,
Plaintiff-Appellee,

S. Ct. Case No. 2006-008
High Ct. Civil No. 2005-078

-v-
REMA MORELIK, RINTA MORELIK,
YOMA NYSTA, et al.,

Defendants-Appellants

APPEAL FROM THE HIGH COURT
FEBRUARY 13, 2009
CADRA, C.J.

WALLACE, Acting Associate Justice[1] and KURREN, Acting Associate Justice[2]

SUMMARY:

Rema and Rinta Morelik appealed the High Court's acceptance of the Traditional Rights Courts' determination that Rista Bulele, not Rema Morelik, held the senior dri-jerbal title to disputed lands. The Iroij at one point had certified Rema Morelik as senior dri-jerbal but later acknowledged, and testified, that when he signed that certification he was caught in a dilemma, and that the certification was contrary to Marshallese custom. The Supreme Court affirmed the lower court's order.

DIGEST:

1. APPEAL AND ERROR - *Review* - *Questions of Law*: Issues of law are reviewed *de novo*.

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[1] Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the ninth Circuit, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

2. APPEAL AND ERROR - *Review - Traditional Rights Court*: 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*.

3. APPEAL AND ERROR – *Review –Traditional Rights Court:* 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.

4. APPEAL AND ERROR – *Review – Findings of Fact - Clearly Erroneous:* 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.

5. APPEAL AND ERROR – *Review – Findings of Fact - Clearly Erroneous:* 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.

OPINION by Cadra, C.J.

I. INTRODUCTION

Appellants Rema and Rinta Morelik appeal from a "Judgment & Order" of the High Court, determining that Appellee Toshiko Nuka is the proper person to hold the Senior Dri-Jerbal title to lands known as Northern Enalabkan (Carlos Island),[3] Tolen Ralik weto and Gea Island,[4] located on Kwajalein Atoll.

In arriving at its "Judgment & Order," the High Court accepted and gave substantial weight to a "Corrected Opinion" of the Traditional Rights Court, which determined that Toshiko was the proper person to hold the Senior Dri-Jerbal title to these lands. Appellants contend that the High Court erred in accepting the findings of the Traditional Rights Court and awarding the

[3] Northern "Enalabkan" is also referred to and spelled as "Ennylebagan" throughout the parties' briefing.

[4] Also referred to and spelled as "Kio" Island throughout the parties' briefing.

Senior Dri-Jerbal title to Toshiko. Appellants seek reversal of the High Court's judgment and a determination by this Court that Rema holds the Senior Dri-Jerbal title to the above-referenced lands.

For the reasons set forth below, we affirm the High Court's judgment.

II. PROCCEDINGS BELOW

Toshiko commenced suit against Rena, claiming that she, not Rema, properly held the Senior Dri-Jerbal title to the three disputed lands. The High Court subsequently certified the following question to the Traditional Rights Court: "who is the proper and rightful person to hold the dri jerbal title on the three (3) islands in this case?" A joint hearing before the High Court and Traditional Rights court was held on April 3 through April 7, 2006.

On July 18, 2006, the Traditional Rights court issued a unanimous "Corrected Opinion" finding that Toshiko properly held the Senior Dri-Jerbal title to the disputed lands. In reaching this decision, the Traditional Rights Court gave great weight to a menmenbwij (genealogy chart submitted as Plaintiff's Exhibit 1b), which showed that Toshiko is "tor-in-botoktok" (flow of blood) from Nuka (the father) and Bwilele (the grandfather).[5] The Traditional Rights Court found that Kera Nuka, "the older male from Toshiko," (i.e. Toshiko's elder brother) held the Senior Dri-Jerbal title without any dispute from those in the menmenbwij. The court then concluded that Toshiko, as Kera Nuka's younger sibling, properly assumed the title upon Kera Nuka's death.

The Traditional Rights Court in its "Corrected Opinion" also gave great weight to the testimony of Iroijlaplap Anjua Loeak. The court found that Iroij Loeak had "great knowledge of *ean-im-rak* and greatly understood his lands, especially his people," and that he had recognized Toshiko as holding the Senior Dri-Jerbal title to the disputed lands. The court stated that Iroij Loeak's determination in this regard was "very different" from three certifications that he had signed, recognizing Rema as Senior Dri-Jerbal. But the court nevertheless resolved this

[5] Bwilele is referred to and spelled as "Bulele" in some Exhibits.

inconsistency in favor of Toshiko, explaining, "custom change custom (sic). If the bwij becomes extinct, then the children of the botoktok will take their place. But if the botoktok extinct, the bwij will take their place."

In crediting Iroij Loeak's recognition of Toshiko over Rema, the Traditional Rights Court rejected Defendants' (Appellants') argument that the certifications discussed above proved Rema's entitlement to the Senior Dri-Jerbal title. These documents show that Iroij Loeak had recognized Rema as the Senior Dri-Jerbal on the disputed lands at one point in time. However, the court found that Iroij Loeak signed these documents because he was caught in a dilemma (*ear loran ibweb*). He respected the "old ladies" (Jilo Lantir and Rema Morelik) and signed the documents because they told him to. But the court found the certifications "invalid" for three reasons: "(a) They did not seek other members of the family to obtain their opinion. They used force (power); (b). They thought they were the only family of Bwilele; and (c). They tried to manipulate Iroijlaplap Anjua Loeak for their own interest."

The High Court held a Traditional Rights Court Rule 9 hearing on September 14, 2006. Appellees urged the High Court to accept the Traditional Rights Court's opinion as it was based upon an undisputed genealogy chart and the testimony of Iroij Loeak. Counsel for Appellants urged the High Court not to accept the opinion because it misconstrues the testimony of Iroij Loeak and it would be against Marshallese custom for Toshiko, a member of the younger generation, to hold title in preference to Rema, who was the only surviving member of the older generation.

The High Court issued its "Judgement & Order" on September 22, 2006. The High Court stated that it "read the opinion of the Traditional Rights Court, examined all admitted documentary evidence, especially the genealogy charts and read the transcript of testimony of Iroijlaplap Anjua Loeak and Iroij Kotak Loeak." The High Court then accepted the Traditional Rights Court's determination that Toshiko was the proper person to hold the Senior Dri-Jerbal Title. The court concluded, "it is logical and proper for the title of Senior Dri-Jerbal to pass from Kera Nuka to his sister Toshiko Nuka." This appeal followed.

I. STANDARD OF REVIEW

[1, 2] This Court reviews issues of law *de novo*. *Lobo v. Jejo*, 1 MILR 172, 174 (1991). Whether the High Court properly affirmed the Traditional Rights Court's determination of a certified question is a purely legal issue. Therefore, this Court Reviews the High Court's decision to affirm the Traditional Rights Court's determination *de novo*.

[3,4,5] The Traditional Rights Court's determination of a certified question of Marshallese custom shall be given substantial weight. RMI Const., Art. VI, section 4(5). Thus, the court's decision on a certified question shall be upheld unless the decision is clearly erroneous or contrary to law. *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994). "[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." *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed. 2d 518 (1985). 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. *Id.* at 573-574. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Amadeo v. Zani*, 486 U.S. 214, 225, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988) (citing *Anderson*, 470 U.S. at 574).

The fact finder's factual findings need not be perfect or detailed as long as the appellate court can adequately review them. *See, e.g., Davis v. City & County of San Francisco*, 890 F.2d 1438, 1451 (9th Cir. 1989). Factual findings are sufficient if they provide the appellate court with an understanding for the basis of the fact finder's decision and the grounds upon which it reached that decision. *See, e.g., Keane v. Commissioner of Internal Revenue*, 865 F.2d 1088, 1091-92 (9th Cir. 1989).

IV. DISCUSSION

A. The Traditional Rights Court Did Not Clearly Err in Resolving the Inconsistencies in Iroijlaplap Anjua Loeak's Testimony in Favor of Toshiko.

Appellants claim that the Traditional Rights Court erred in failing to give proper deference to the decisions of Iroijlaplap Anjua Loeak, recognizing Rema as the proper holder of the Senior Dri-Jerbal title to these lands. Appellants argue that Iroij Loeak's decisions should be given great weight and assumed to be reasonable unless refuted by clear evidence. *Abner v. Jibke*, 1 MILR 3, 6 (1984) (holding that "determinations by an Iroij are presumed reasonable unless it is clear they are not").

In support of their argument, Appellants refer to certifications signed by Iroij Loeak that appear to recognize Rema as holding the Senior Dri-Jerbal title to the lands in dispute.[6] Appellants also point to testimony by Iroij Loeak of a custom known as Alap Alaj, which dictates that "whenever a dispute or something arises, to the Alap, then it's up to her or him to make a change or a decision."[7] Appellants argue that under this custom, Rema, as Alap, has the authority to determine who the Senior Dri-Jerbal would be on the disputed lands, and she can properly exercise that right to appoint herself as Senior Dri-Jerbal.

In opposition, Toshiko points to evidence that Iroij Loeak in fact recognized her, not Rema, as the Senior Dri-Jerbal titleholder. When asked at trial whether, "under Marshallese custom [ ] Toshiko, being the younger sibling of Kera, is really the proper person to be the Senior Dri Jerbal on these lands today," Iroij Loeak answered, "[t]hat is correct."[8]

There is also evidence that casts doubt on the validity of the certifications signed by Iroij Loeak, recognizing Rema as the Senior Dri-Jerbal titleholder. At trial, he testified that he signed the certifications discussed above because that is what Rema told him to do, yet "under Marshallese custom, it's not correct or proper to do that . . . "[9] He further testified that under Marshallese custom Toshiko, being the younger sibling of Kera, is really the person to be the

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[6] *See* Defendants' Exhibits AL-2 and Al-3.

[7] *See* Tr. Testimony of Iroij Anjua Loeak, pp. 44-45.

[8] *See* Tr. Testimony of Anjua Loeak, p.40.

[9] *See* Tr. Testimony of Anjua Loeak, p.7.

Senior Dri-Jerbal on these lands today, but that "there was a change when their aunties (Jilo and Rema) came to me . . . [T]hese two ladies, the alaps, came and made arrangements to the – regarding their family because they are the ones who are the alaps and the head of the family and I cannot argue with what they have to say."[10]

The testimony of Iroij Loeak was conflicting and confusing. However, sufficient evidence supports the Traditional Rights Court's finding that Toshiko properly holds the Senior Dri-Jerbal title to these lands. As just described, Iroij Loeak testified that it was improper for him to have signed the various certifications under custom. He admitted that, "under Marshallese custom, it's not correct or proper to do that, but I listened to what she said . . ."[11] Iroij Loeak explained that he may have been mistaken or wrong in signing the certifications.[12] This testimony allows competing inferences as to who should be recognized as Senior Dri-Jerbal under Marshallese custom. The Traditional Rights Court did not clearly err in crediting one portion of Iroij Loeak's testimony over another.

Appellants argue that the Traditional Rights Court's stated reasons for rejecting the certifications are not supported by the record. Although we agree that there is no evidentiary basis for the Traditional Right Court to have found that the Appellants used "force (power) or somehow tried to "manipulate" Iroij Loeak for their own interests, this does not preclude us from giving the court's determination the substantial weight required by the Constitution. The Traditional Rights Court was free to give what weight it felt appropriate to these exhibits. It is clear that the Traditional Rights court considered, but gave no weight to these documents. There is no clear error justifying reversal.

B. There is Evidence in the Record That, Historically, the Older Generation Would Hold the Alap Title and the Younger Generation Would Hold the Dri-Jerbal Title

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[10] *Id.* at p. 40.

[11] Tr. Testimony of Anjua Loeak, pp. 6-7.

[12] *Id*. at p. 16.

to These Particular Lands; the Determination that Toshiko Holds The Dri-Jerbal Title is Not Clearly Erroneous.

Appellants argue that the lower courts disregarded the legally established patterns of succession for Marshallese land rights. While the parties are in agreement that "the *general* rule is that the older generation ranks higher than the younger one and it applies to a bwij of the same jowi and not to another bwij of a different jowi,"[13] there is evidence that the general rule of succession was not followed on these lands.

There is no dispute regarding the history as to the parties' predecessors on these lands. In 1959, Bulele was Alap, and Nuka (Bulele's son, a member of the younger generation) was Senior Dri-Jerbal.[14] When Bulele died in 1967, the title of Alap passed to Abija, Bulele's sister's son.[15] When Nuka died in 1974, the title of Senior Dri-Jerbal passed to his sister Jilo Lantir.[16] When Abija died in 1988, the Alap title passed to Jilo, and Kera (Nuka's son and Toshiko's older brother) became Senior Dri-Jerbal.[17] Upon the death of Jilo, Rema became the undisputed Alap.

Willy Mwekto, an expert in Marshall Islands' custom, testified that when Jilo was Alp, Kera from the younger generation was Senior Dri-Jerbal.[18] Kera is in the same generation as Toshiko, which is the younger generation from Rema. Mwekto has never seen a case where the Senior Dri-Jerbal title went from someone in the younger generation back up to someone in the

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[13] *See, e.g.,Customary Titles and Inherent Rights*, Amata Kabua, p. 14.

[14] Tr. Testimony of Toshiko Nuka, p.81; Plaintiff's Exhibits 1a, 1b, and 2.

[15] Tr. Testimony of Rinta Morelik, p. 64, and Toshiko Nuka, p. 83; Plaintiff's Exhibits 3 (1986 Allocation Agreement) and 4 (Exhibit B to Allocation Agreement).

[16] Plaintiff's Exhibit 4.

[17] Tr. Testimony of Anjua Loeak, pp. 19-20.

[18] Tr. Testimony of Willy Mwekto, pp. 110, 121.

older generation.[19] He testified that according to Marshallese custom, when Kera died in 2003, Toshiko should have become Senior Dri-Jerbal on these lands.[20] When asked whether Rema, as the last survivor of her generation, can be both Alap and Senior Dri-Jerbal at the same time, Mwekto testified that she can only be Alap. The Senior Dri-Jerbal title, according to Mwekto, "goes to the botoktok."[21]

Reviewing this evidence, the Traditional Rights Court did not clearly err in finding that Toshiko is the proper holder of the Senior Dri-Jerbal title. The expert testimony confirms that on these lands, the Alap title should be held by the elder member of the older generation, and the Senior Dri-Jerbal title should be held by the elder member of the younger generation. Although the Traditional Rights Court did not explicitly make this finding, it appears that the court implicitly adopted this view of the succession pattern in this case. The court's decision to follow this rule of succession, as opposed to the general rule of succession, was not clearly erroneous. In any event, even if the general rule applied, it would not change the outcome of this case because there is no evidence brought to our attention that Toshiko and Rema are of the same bwij, much less the same jowi.

A. A Review of the Record In Its Entirety Indicates The Traditional Rights Court Was Aware That Rema Was Botoktok, A Child of the Male.

Appellants argue that the Traditional Rights Court clearly erred in ignoring the "plain and obvious' fact that Rema was the senior living botoktok/child of the male. The Traditional Rights Court did state (or appears to have stated) that it would have been correct and proper for the Defendants (Appellants) to hold the Senior Dri-Jerbal title *if there were no children of the male.* This statement is problematic because it is clear that Rema was of the botoktok, she is a child of the male Bulele.

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[19] *Id.* at pp. 121-22.

[20] *Id*. at pp. 121, 124.

[21] *Id.* at p. 134.

While Appellants' argument has facial appeal, the record indicates that the Traditional Rights Court was well aware of Rema's status as botoktok/child of the male. The Traditional Rights Court specifically relied on the *menmenbwij* (genealogy chart) admitted as Plaintiff's Exhibit 1b. That chart clearly shows that Rema is a child of the male Bulele, as does Defendants' Exhibit D-1. There was also testimony to that effect.[22] This plain, obvious and undisputed fact could not have possibly been lost by the Traditional Rights Court. In its "Corrected Opinion," the Traditional Rights Court also states that "*there are children of the botoktok that are still alive today*." This statement evidences a realization that there are members of the botoktok alive today. While we cannot explain what the Traditional Rights Court meant by its statement that it may have been proper for Defendants to be Dri-Jerbal if there were no children of the male, we hold there was no error justifying reversal.

V. CONCLUSION

There is sufficient evidence in the record to support the Traditional Rights Court's ultimate determination that Toshiko Nuka is the proper person to hold the Senior Dri-Jerbal title to these lands under custom. We do not hold that the Traditional rights court committed clear error in its findings of fact.

The High Court "Judgement & Order" is affirmed.

[22] *See, e.g.*, Tr. Testimony of Iroij Anjua Loeak, p.3, and Willy Mwekto, pp. 115-16.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

NINA JALLEY,
Defendant-Appellant

-v-

JORNO MOJILONG, on behalf of
ALMA TAKILANG,
Plaintiff-Appellee

S. Ct. Case No. 2007-005
High Court Civil No. 2003-141

APPEAL FROM THE HIGH COURT
MARCH 10, 2009
DANIEL N. CADRA, Chief Justice
ALLACE, Acting Associate Justice[1] and KURREN, Acting Associate Justice[2]

SUMMARY:

Jalley claims entitlement to Section 177 payments. She appealed the High Court's summary judgment ruling in favor of defendant under the doctrine of claim preclusion. The Supreme Court reversed and remanded the case to the High Court for further factual development and to apply the doctrine of issue preclusion, not claim preclusion.

DIGEST:

1. APPEAL AND ERROR - *Review - Summary Judgment*: The Supreme Court reviews the High Court's summary judgment *de novo*.

2. 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.

3. RES JUDICATA - *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.

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[1] Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the ninth Circuit, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

4. RES JUDICATA - *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.

5. RES JUDICATA - *Claim Preclusion*: A "claim" refers to the violation of a legally cognizable right.

6. RES JUDICATA - *Issue Preclusion*: An "issue" is a question of law or fact presented as part of a party's broader claim.

OPINION OF THE COURT BY WALLACE, A.J.

Nine Jalley appeals from a High Court judgment ruling that Alexander Andrew, the successor-in-interest of Alma Takilang[3] and represented by Jorno Mojilong, is entitled to certain Section 177 payments due to the alap titleholder of Emej, Lonen, and Jitney wetos (the disputed wetos) on Utrik Atoll, Marshall Islands. In its "Order Granting the Plaintiff's September 6, 2006 Motion for Summary Judgment," the High Court concluded that two prior cases, which held that Andrew's predecessors were the proper alaps of the disputed wetos, are res judicata to the current dispute. On appeal, Jalley challenges the res judicata effect of these prior adjudications.

We have jurisdiction to hear this timely filed appeal pursuant to section 207(1) of the Judicary Act, 27 MIRC Ch. 2. We vacate the High Court's judgment and remand.

I.

Mojilong, on behalf of Andrew (collectively, the plaintiffs), filed suit against Jalley for rights to certain Section 177 payments[4] due to the alap of the disputed wetos. On September 6,

[3] Pursuant to the parties' November 8, 2006 stipulation the High Court substituted Andrew for Takilang as plaintiff. Takilang died in Ebeye on October 15, 2006.

[4] Section 177 payments refer to payments made pursuant to the June 1983 Agreement Between the Government of the United States and the Government of the Marshall Islands for

2006, the plaintiffs moved the High Court for summary judgment, arguing that Andrew is entitled to the payments at issues because he is the proper alap of the disputed wetos. In support of their summary judgment motion, the plaintiffs argued that two prior cases previously determined that the alap title belonged to Andrew's predecessors. It was asserted that by Marshallese custom, Andrew therefore has inherited the alap title through his familial lineage. The plaintiffs argued that these cases thus preclude Jalley from claiming that she is the proper alap of the disputed wetos and therefore entitled to the Section 177 payments.

The first case, Trust Territory of the Pacific Islands (TTPI) High Court CA 19-74 (the 1974 case), determined that Lokonan, a predecessor of Andrew, properly held the alap title to the disputed wetos over Jokas, a predecessor of Jalley. The second case, Republic of the Marshall Islands High court CA 1992-112 (the 1992 case), determined that Bonni and Aine, also predecessors of Andrew, properly held the alap title to two of the disputed wetos, Emej and Lonen, over Jokas and Salome, predecessors of Jalley.

Jalley opposed the plaintiffs' summary judgment motion on the following grounds: (1) important evidence was excluded from the 1974 case, (2) her predecessors did not have a full and fair opportunity to litigate the relevant issues in the 1974 case, (3) the current dispute involves different issues than the 1974 case, (4) new facts have emerged since the 1974 case that render the application of res judicata inappropriate, (5) Jalley is not in privity with either Jokas or Salome, the parties to the earlier proceedings, and (6) fundamental fairness precludes the application of res judicata in this case.

After a hearing, the High Court granted the plaintiffs' motion for summary judgment and ordered the Section 177 funds at issue to be paid to Andrew. In so ruling, the court relied

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the Implementation of Section 177 of the Compact of Free Association (Section 177 Agreement). Under the Section 177 Agreement, the United States agreed to compensate citizens of the Marshall Islands for losses or damages suffered as a result of atmospheric nuclear test conducted by the United States in the Marshall Islands during the period from June 30, 1946 to August 18, 1958. *See* Nuclear Claims Tribunal, Republic of the Marshall Islands, http://www.nuclearclaimstribunal.com/.

exclusively on the preclusive effect of the 1974 case and the 1992 case on the current dispute. The court stated that, "the plaintiff seeks to invoke the application of claim preclusion (res judicata) based upon prior court decisions . . . . That is, the plaintiff seeks to bar the defendants from re-litigating who under custom is the proper person to exercise [alap] rights on the disputed wetos." The court then concluded that, "Jalley is barred under the doctrine of claim preclusion (res judicata) from re-litigating the plaintiff's customary alap rights in favor of the plaintiffs. This appeal followed.

II.

[1] We review the High Court's summary judgment de novo. *Metoyer v. Chassman*, 504 F.3d 919, 930 (9th Cir. 2007), *cert. denied*, 129 S.Ct. 394 (2008); *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991) (holding that we review questions of law de novo). We must determine whether the High Court correctly applied the relevant substantive law, and whether there exists a genuine issue of material fact for trial. *Metoyer*, 504 F.3d at 930.

III.

[2,3] This case involves the proper application of the doctrine of res judicata. Res judicata refers to the preclusive effect of a former adjudication on a subsequently-filed action. *Robi v. Five Platters, Inc*., 838 F.2d 318, 321 (9th Cir. 1988); *Jeja v. Lajimkam*, 1 MILR (Rev.) 200, 203 (1990). Res judicata encompasses two separate preclusion doctrines: claim preclusion and issue preclusion. *Robi*, 838 F.2d at 321. Claim preclusion "treats a judgment, once rendered, as the full measure of relief to be accorded between the same parties on the same 'claim' or 'cause of action.'" *Id*., *quoting Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc*., 575 F.2d 530, 535 (5th Cir. 1978). Thus, claim preclusion prevents parties from re-litigating the same claim including 'all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Fischel v. Equitable Life Assur. Soc'y of the United States*, 307 F.3d 997, 105 n.5 (9th Cir. 2002), quoting *Robi*, 838 F.2d at 321-22.

[4] Issue preclusion binds parties in a subsequent action whether on the same or a different claim when "'an issue of fact or law [has been] actually litigated and resolved by a valid final judgment.'" *Fischel*, 307 F.3d at 1005 no.5, *quoting Baker v. Gen. Motors Corp*., 522 U.S. 222, 233 n.5 (1998). "In both the offensive and defensive use situations, the party against whom [issue preclusion] is asserted has litigated and lost in an earlier action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329 (1979). The issue precluded must have been "actually decided" after a "full and fair opportunity" for litigation. *Robi*, 838 F.2d at 322.

[5,6] A principal distinction between claim preclusion and issue preclusion is that the former prevents the re-litigation of "claims" whereas the latter prevents the re-litigation of "issues." *Orff v. United States*, 358 F.3d 1137, 1142-44 (9th Cir. 2004) (detailing the different requirements of claim preclusion and issue preclusion, respectively). A "claim" refers to "the violation of but one right by a single legal wrong." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927); that is, the violation of a legally cognizable right. By contrast, an "issue" is a "single, certain and material point arising out of the allegations and contentions of the parties," or simply a question of law or fact presented as part of a party's broader claim. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, Jurisdiction and Related matters § 4417 n.2 (2d ed. 2008), *quoting Overseas Motors, Inc. v. Import Motors Ltd*., 375 F. Supp. 499, 518, n. 66a (E.D. Mich. 1974).

Thus, in order to determine which of the two preclusion doctrines applies in a given case, a court must first decide whether the party invoking res judicata seeks to preclude a claim or an issue. If the party seeks to preclude a claim, claim preclusion applies. If the party seeks to preclude an issue, issue preclusion applies. To illustrate, where a plaintiff sues for section 177 payments, but has previously sued to obtain the same payments and lost, claim preclusion applies to prevent the re-litigation of the plaintiff's entitlement to those payments, even if the plaintiff's theory of entitlement in the second action differs from that advanced in the first. By contrast, where a plaintiff sues for section 177 payments on the theory that he holds the requisite land title to receive the payments, but a previous land title suit has determined that the plaintiff is not in

fact the proper titleholder, issue preclusion applies to prevent the plaintiff from re-litigating the issue of title, even thought the previous suit involved land rights and the current suit involves rights to Section 177 payments.

With this understanding of the doctrine of res judicata, we turn to the merits of this appeal.

IV.

The plaintiffs' arguments in this case invoke the doctrine of issue preclusion, not claim preclusion. The plaintiffs content that two prior cases prevent the re-litigation of who between Andrew and Jalley is the proper alap titleholder of the disputed wetos. This argument seeks to preclude the re-litigation of a specific question of fact - whether Andrew of Jalley is the proper alap for the disputed wetos - and not the assertion of a specific claim. Thus, issue preclusion applies.

The High Court erred in construing plaintiffs' arguments as invoking the doctrine of claim preclusion. As described above, claim preclusion applies only in cases where a party seeks to prevent the re-litigation of a particular claim. Here, the plaintiffs do not seek to preclude Jalley from asserting a claim, but rather a single issue within the plaintiffs' broader claims for Section 177 payment.

In holding otherwise, the High Court mistakenly characterized Jalley's assertion of alap rights as a separate claim for ownership rights in the disputed land. However, although an ownership interest in a particular weto may give rise to a specific claim for land title, Jalley's argument in this case is not made in service of a land title claim. Rather, Jalley's purported status as alap is relevant only to the extent that it defeats the plaintiffs' claim for Section 177 payments. Thus, although the prior lawsuits involved claims for land title, the plaintiffs invoke them here for their rulings on the issue of who is the proper alap to the disputed wetos.

Thus, properly construed, the plaintiffs' arguments invoke issue preclusion against Jalley. Specifically, plaintiffs seek to apply offensive nonmutual issue preclusion to prevent Jalley from re-litigating the issue of who is the proper alap to the disputed wetos. Offensive nonmutual issue

preclusion allows a plaintiff to prevent a defendant from re-litigating issues that the defendant or those in privity with the defendant previously litigated and lost against a different plaintiff. *Syverson v. Int'l Bus. Machs. Corp*., 472 F.3d 1072, 1078 (9th Cir. 2007). The application of offensive nonmutual issue preclusion is appropriate only if "(1) there was a full and fair opportunity to litigate the identical issues in the prior action, (2) the issue was actually litigated in the prior action, (3) the issue was decided in a final judgment, and (4) the party against whom issue preclusion is asserted was a party or in privity with a party to the prior action." *Id*. (internal citations omitted).

Unfortunately, the parties collectively failed to provide an adequate record, and we cannot determine whether the 1974 case and the 1992 case preclude the relitigation of the proper alap titleholder under the doctrine of offensive nonmutual issue preclusion. Jalley raises a number of arguments bearing on whether those prior cases fully and fairly litigated the issue of alap. However, we were not provided with the necessary records from the prior cases, making it impossible for us to determine the merit of Jalley's argument. Therefore, we vacate the High Court's judgment, and remand for further factual development, and an initial review of the preclusion question. On remand, the High Court should construct the plaintiffs' arguments as invoking offensive nonmutual issue preclusion, and determine whether the application of this doctrine is appropriate based on the standards provided above.

Although we express no opinion on the merits of the preclusion issue, we observe that Jalley's challenge to the preclusive effect of the 1974 case may be foreclosed by the ruling in the 1992 case. According to what we have before us, the 1974 case determined that the predecessor of Andrew properly held the alap title to the disputed wetos. The 1992 case then determined that the 1974 case precluded the relitigation of the issue of the proper alap of two of the lands in question. Based on the parties' briefs, it appears that Jalley challenges only the preclusive effect of the 1974 case. But as just described, the preclusive effect of the 1974 case was affirmed by the 1992 case. Therefore, to the extent that Jalley does not challenge the 1992 case, the ruling in the 1992 case may prevent her from now arguing that the 1974 case should not have preclusive

effect. In any event, on remand, the High Court shall review this and all other relevant issues in the first instance.

On a final note, at oral argument, counsel Jalley, John E. Masek, Esq., indicated that he also represents the local government in this action. He stated that if Jalley were to prevail in this case, the local government would have to pay additional amounts to Jalley. On remand, the High court shall determine whether Mr. Masek's representation of the local government constitutes a conflict of interest with his representation of Jalley in this dispute.

High Court summary judgment VACATED and REMANDED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In the Matter of the Vacancy of the Mayoral Seat, Majuro Atoll Local Government

S. Ct. Case No. 2008-008
High Ct. Civil No. 2008-127

By:

Titus W. Langrine, in his capacity as Acting Mayor of Majuro Atoll Local Government

APPEAL FROM THE HIGH COURT

SEPTEMBER 16, 2009

CADRA, C.J.

KURREN, A.J.[1] and WALLACE, A.J[2]

SUMMARY:

The Majuro Atoll Local Government Executive Committee appointed one of its members to serve the remaining term left vacant by the death of its mayor. Legal counsel for the Majuro Atoll Local Government requested an opinion from the Attorney General as to whether the Majuro Atoll Local Government Constitution required a special election be held to fill the vacancy. The Attorney General agreed that a special election was required, and the acting mayor filed a complaint for declaratory judgment. The High Court entered summary judgment upholding the procedure employed by the Majuro Atoll Local Government Executive Committee, and the Supreme Court affirmed.

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[1] Hon. Barry Kurren, United States District Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Hon. J. Clifford Wallace, Senior Judge, United States Court of Appeals, 9th Circuit, sitting by designation of the Cabinet.

IN THE MATTER OF THE VACANCY IN THE MAYORAL SEAT

DIGEST:

1. APPEAL AND ERROR - *Review – Questions of Law – Summary Judgment*: Appeals from summary judgment, which are solely questions of law, are reviewed *de novo.*

2. CONSTITUTIONAL LAW - *Construction - Rules of Interpretation*: 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.

3. CONSTITUTIONAL LAW - *Construction - Rules of Interpretation*: The court must read all provisions of the constitution together and harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless.

4. CONSTITUTIONAL LAW - *Construction - Rules of Interpretation*: 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.

5. CONSTITUTIONAL LAW - *Construction - Rules of Interpretation*: The duty and function of a court is to construe, not to rewrite, a constitution.

6. ELECTIONS AND VOTING - *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.

7. APPEAL AND ERROR - *Questions Reviewable - Asserted Below:* A constitutional challenge not raised in the trial court is deemed waived on appeal.

OPINION: Cadra, CJ.

This case involves the manner in which a vacancy in the Majuro Atoll Local Government Mayor due to the death of the incumbent is to be filled. Appellant, Office of the Attorney General, contends a special election must be held. Appellee, Titus W. Langrine, in his capacity as Acting Mayor, contends the Majuro Atoll Local Government Executive Committee may appoint one of its members to perform the functions of Mayor for the remainder of the deceased Mayor's term. A Complaint for Declaratory Relief was filed with the High Court. The High

Court held that a special election to fill the vacancy was not required by the Majuro Atoll Local Government Constitution. This appeal followed. Oral argument was waived and the parties requested decision on the written submissions. We affirm.

I. FACTS AND PROCEEDINGS BELOW

The facts are not in dispute. Riley Alberttar was duly decreed Mayor of Majuro Atoll Local Government in November 2007. On May 4, 2008, Mayor Alberttar died. On May 28, 2008, appellee Titus W. Langrine, a member of the Majuro Atoll Local Government Executive Committee, was appointed by his fellow Executive Committee members as Mayor to serve out the remainder of deceased Mayor Alberttar's term.

On May 29, 2008, Majuro Atoll Local Government legal counsel requested an opinion from the Attorney General as to whether a special election was required to fill the seat of the deceased Mayor. The Attorney General issued an opinion on May 28, 2008, stating that the Local Government Constitution requires a special election. On June 24, 2008, appellee Titus W. Langrine filed a Complaint for Declaratory Relief asking the High Court to decide whether the Local Government Constitution requires a special election to fill the vacancy caused by the death of Mayor Albertter. Motions for summary judgment were filed by both parties.

On August 20, 2008, the High Court issued an order granting summary judgment for declaratory relief in favor of appellee. The High Court held that a special election was not required to fill a vacancy in the office of the Mayor caused by the death of the incumbent and, further, that such vacancy is to be filled pursuant to the provisions of Section 19(1) of the Majuro Atoll Local Government Constitution. This appeal followed.

II. THE ISSUE

The issue which divides the parties is solely one of law: Does the Majuro Atoll Local Government Constitution require a special election to fill a vacancy of the Mayor's Office caused by the death of the incumbent mayor or does the Constitution permit the Executive Committee to appoint one of its members to perform the duties of Mayor for the remainder of the incumbent's term?

III. STANDARD OF REVIEW

[1] Appellant contends the High Court erred as a matter of law in reaching: its conclusions. We review the matter de novo. *Lobo v. Jejo*, l MILR l 72, 173 (1991). Appeals from summary judgment are reviewed *de novo*, *Ammu v. Ladrik*, 2 MILR 20, 22 (1994).

IV. DISCUSSION

A. The Majuro Atoll Constitution Does Not Require a Special Election to Fill a Vacancy in the Office of Mayor Occasioned by the Death of the Incumbent.

The Majuro Atoll Constitution, Section 17(1) generally provides that the Mayor shall be elected by the registered voters of Majuro Atoll.[3] The term of the Mayor's office is 4 years pursuant to Section 8. If the Office of Mayor becomes vacant during the 4 year term, the Majuro Atoll Constitution provides a mechanism for filling that vacancy.

Section 24(4) provides that "[i]f the Office of the Mayor becomes vacant otherwise than by his dismissal under Section l8(2), the Executive Members shall continue to perform their functions (including the function of appointing under Section 19, a member of the Executive Committee to perform the functions of Mayor)."

Section 18(1)(c) provides that the Office of Mayor becomes vacant if, among other things, "[h]e dies."

[2] In examining constitutional provisions, the Supreme Court's task is to give effect to the clear, explicit, unambiguous, and ordinary meaning of language; if the language of the provision is unambiguous, it must be given its literal meaning and there is neither the opportunity nor the responsibility to engage in creative construction. *Rice v. Connolly*, 488 N. W.2d 241, 247 (Minn. 1992). There is no ambiguity in the procedure contemplated by Sections 18 and 24.

[3] Section 17(1) provides, "the Mayor shall be elected by the registered voters of Majuro Atoll."

When the Office of Mayor becomes vacant due to death of the incumbent, the Executive Committee is to appoint one of its members to perform the functions of Mayor under Section 19.[4]

The issue then becomes whether the appointment by the Executive Committee is temporary pending a special election.

Appellant argues that "Section 19 of the Constitution of Majuro Atoll discusses temporary appointment, i.e. an appointment in cases where the duly elected Mayor is 'temporarily' absent or incapacitated and not where the office is vacant."[5] Appellant therefore reasons that any appointment under that Section is temporary pending the election of a new Mayor by the registered voters of Majuro Atoll.[6]

[3] If we were to construe Section 19(1) in isolation, without reference to other provisions of the Majuro Atoll Constitution, we might agree that Section 19(1) applies only to temporary appointments during the absence or incapacity of the Mayor and does not apply to vacancies in

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[4] Section19, "Acting Head of the Local Government" provides:

(1) In the event of the absence or incapacity of the Mayor, his functions shall be performed by a member of the Executive Committee appointed by him or in default, the Executive committee.

(2) For the purpose of performing any function of the Mayor that a member of the Executive committee is authorized to perform, by virtue of Subsection (1), the member shall be deemed to be the Mayor, and any reference in any law or in the Rules of Procedures of the council to the Mayor shall be read as including a reference to that member, accordingly.

[5] Appellant's Opening Brief, p. 10.

[6] *Id.*

that office.[7] We must, however, read all provisions of the constitution together and harmonize apparently conflicting or ambiguous provisions so that no provision is rendered meaningless.[8] Section 24(4) expressly provides that Section 19(1) shall apply if the office of the Mayor becomes vacant other than by reason of his dismissal under Section 18(2). Giving effect and meaning to both Sections requires the conclusion that such vacancies are to be filled pursuant to Section 19(1). As discussed above, death of the incumbent Mayor creates a vacancy that is to be filled by appointment of the Executive Committee pursuant to Section 19(1).

[4] We, like the High Court, conclude it significant that the Majuro Atoll Constitution implicitly recognizes that the Office of Mayor can be filled by appointment. Section 18(1)(b) provides that the Mayoral Office becomes vacant if the Mayor "ceases to possess the qualifications for election that he was required under Section 16 to have at the time of his election or appointment." In construing a constitution, we must lean in favor of a construction that will render every word operative, rather than one which will make some words idle or nugatory. *Havens v. Board of County Comm'rs*, 924 P.2d 517, 523 (Co. 1966) ("We have been guided by a long standing rule of constitutional construction that provisions contained in this state's constitution are to be interpreted as a whole with effect given to every term contained therein.") (internal quotation marks omitted). The parties have referred us to no language in the Majuro Atoll Constitution addressing an appointment of the Mayor other than the appointment for a vacancy in that office outlined by Sections 19(1) and 24(4). Giving meaning to each word

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[7] "In legal terminology a dead person is not spoken of as merely absent (or incapacitated). Only figuratively are the dead spoken of as absent. Absence connotes that a person is in being but not present in some particular place, and not that he has departed this life." *See, e.g., Nolan v. Representative Council of City of Newport*, 57 A.2d 730, 731 (R.I. 1948) (addressing issue of whether a city charter imposed a duty to call a special election to fill a vacancy in the office of mayor or whether a city charter imposed a duty to call a special election to fill a vacancy in the office of mayor or whether the council was vested with discretion to do so).

[8] It is the court's duty to make every effort to give effect to every word of a constitution, to resolve ambiguities, and to reconcile inconsistencies. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1085 (2d Cir. 1982) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)).

and provision of the Constitution, we are of the opinion that the intent of the framers is that the Office of Mayor can be filled by appointment and that appointment can be made by the Executive Committee of one its members to perform the functions of Mayor for the remainder of the deceased Mayor's term.

[5] There is no provision in the Majuro Atoll Constitution requiring a special election to fill a vacancy in the Office of Mayor under the circumstances presented by this case. The only reference in the Constitution to a special election is found in Section 10(1).[9] That section refers to the need for a special election to fill the seat of a Council member that becomes vacant other than by termination of his office in accordance with Section 8. We, like the High Court, think it significant that the Constitution explicitly requires the use of a special election to fill a vacancy in a Council member's seat but fails to do so in the case of a vacancy of the Mayor's Office. The drafters could have explicitly manifested the need for a special election to fill a vacancy of the Mayor's office occasioned by the incumbent's death but failed to do so. The duty and function of a court is to construe, not to rewrite a constitution. *State ex rel. Randolph County v. Walton*, 206 S.W.2d 979, 982 (Mo. 1947). We will therefore not write into the Majuro Atoll Constitution a requirement for a special election absent evidence that this is what the drafters intended. We have not been provided such evidence.

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[9] Section 10, Causal Vacancies, provides:

(1) If the seat of a member of Council referred to in Section 6(1)(a) becomes vacant otherwise than by termination of his term of office in accordance with Section 8, the vacancy shall be filled as soon as practicable by a special election in the ward that he represented.

Section 6, Membership and Elections, provides:

(1) The Council shall consist of 16 members, being:
  (a) the 13 members elected by the wards, as specified in Section 4; and
  (b) 2 voting Iroij members; and
  (c) 1 mayor.

(1) The members referred to in subsection (1)9a) shall be elected by ballot by the eligible voters of the ward from which each member is standing for election as provided for by Section 13 and 23 of the Local Government Act 1980.

[6] Sections 24(4) and 19(1) do not limit the duration of the appointment of an Executive Committee member to perform the functions of Mayor. In the absence of any explicit requirement that a special election be held in the event of a vacancy occasioned by the death of the incumbent, and in the absence of any express time limit on how long the appointed Executive Committee member may serve as a replacement Mayor, we conclude that the Constitution permits the appointed Executive Committee member to perform the functions of Mayor for the remainder of the deceased Mayor's term.

Accordingly, we hold the Majuro Atoll Constitution does not require a special election to fill the vacancy of the deceased incumbent under the circumstances presented by this case.

B. We Do Not Reach Appellant's "Equal Protection" Argument Because It was Not Raised Below.

[7] Appellant argues the High Court abused its discretion by denying the registered voters of Majuro Atoll equal protection of the laws under Article II, Section 12(1) and Section 12(2) of the Constitution of the Republic of the Marshall Islands. Inasmuch as this Constitutional challenge on equal protection grounds was not raised below, we deem the issue waived.

V. CONCLUSION

For the reasons set forth above, we hold that a special election is not mandated by the Majuro Atoll Local Government Constitution under the circumstances presented by this case. We hold that the Executive Committee may appoint one of its members to perform the functions of Mayor until the next general election. We, therefore, AFFIRM the judgment of the High Court.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,
Plaintiff-Appellee,

-v-

THOMAS KIJINER, JR.
Defendant-Appellant

S. Ct. Case No. 2007-008
High Ct. Criminal No. 2005-046

APPEAL FROM THE HIGH COURT
AUGUST 2, 2010
CADRA, Chief Justice
SEABRIGHT, Acting Associate Justice,[1] and KURREN, Acting Associate Justice[2]

SUMMARY:

Defendant was convicted of negligent driving after trial. He appealed on the grounds of insufficiency of evidence. The Supreme Court found there was sufficient evidence to support the finding, beyond a reasonable doubt, that Defendant's truck was the vehicle that struck the victim, that the truck was driven negligently, and that Defendant was driving the truck when it struck the victim. The conviction was affirmed.

DIGEST:

1. EVIDENCE – *Weight and Sufficiency*: 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.

2. EVIDENCE – *Weight and Sufficiency*: 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

[1] Hon. J. Michael Seabright, United States District Court Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

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.

SEABRIGHT, Acting Associate Justice:

BACKGROUND AND PROCEDURAL HISTORY

Thomas Kijiner, Jr. appeals his October 17, 2007 High Court conviction for Negligent Driving. On appeal, Kijiner contends that his conviction is not supported by sufficient evidence. For the reasons set forth below, we AFFIRM the High Court's judgment.

Kijiner was charged with reckless driving, negligent driving, and driving under the influence in connection with a hit-and-run accident that occurred in the morning on September 26, 2005. On October 10, 2007 through October 17, 2007, a jury trial was held on the reckless driving charge.

At trial, the evidence showed that Ranny Lomout, after an evening of drinking, left the Long Island Club between 3 a.m. and 4 a.m. and began walking home along the drain outs on the lagoon side of the road. Lamout saw a vehicle's lights approaching, but the vehicle was going so fast that Lamout was "unable to jump or avoid being hit." Lamout later testified that he saw two men inside the vehicle and that he "d[id]n't really know what type or what kind of vehicle it was but it looked like a Ford." After he was struck by the vehicle, Lomout lay beside the road until Joanna Rilang saw him and sought help shortly after 6 a.m. A little more than five minutes after Rilang called for help, both an ambulance and police officers arrived.

Both Rilang and the police officers noticed broken car parts – including pieces of a right side mirror, a signal light, and a headlight cover -- in the area immediately around Lomout. After collecting the broken parts and spending less than twenty minutes at the scene of the accident, the police officers drove toward the airport looking for a vehicle with corresponding damages. After driving for five to ten minutes – making the time approximately 7 a.m. – the police officers spotted Kijiner's Isuzu pickup truck with no right side mirror parked outside of a house in Long Island. Police officers approached the pickup and found Kijiner asleep behind the wheel. Kijiner

smelled of alcohol and it took police officers ten to twenty minutes to wake him. Upon waking, Kijiner could not walk straight and required assistance moving. While examining Kijiner and the vehicle, the police officers determined that the broken headlight cover found at the scene of the accident matched the missing headlight cover on Kijiner's pickup. The Isuzu was registered to Kijiner as of September 26, 2005.

After hearing the evidence, the jury returned a not guilty verdict. Thereafter, the High court ruled on the two remaining charges – finding Kijiner guilty of negligent driving and not guilty of driving under the influence. The High Court sentenced Kijiner to four months imprisonment, and ordered him to pay a $200 fine and restitution in the amount of medical and travel expenses for Lomout.

STANDARD OF REVIEW: SUFFICIENCY OF THE EVIDENCE

[1,2] We review Kijiner's conviction to determine if it is supported by the sufficiency of the evidence. 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). 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." *United States v. Nevils*, 598 F.3d 1158, 1164 (9th Cir. 2010). Instead, the court must construe evidence "in a manner favoring the prosecution." *Id*. at 1167. "Only after we have construed all the evidence at trial in favor of the prosecution do we take the second step, and 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." *Id*. at 1164-65.

DISCUSSION

Kijiner contends that there is insufficient evidence that (1) his pickup was the vehicle that struck Lomout; (2) the vehicle that struck Lomout was driven negligently; and (3) that Kijiner was driving. We disagree.

First, the broken car parts link Kijiner's pickup to the accident. The parts were found in the area immediately around where Lomout was struck. The parts found on the scene also "matched" the damages on Kijiner's pickup – the pickup was missing a right side mirror, which the police officers found at the scene, and had a broken headlight cover, the edges of which lines up with the broken headlight cover found at the scene. Although Lomout's testimony that the vehicle looked like a Ford is some evidence of innocence, any rational trier of fact could find this testimony unpersuasive based on Lomout's drunken state, the darkness of night, the speed of the accident, and Lomout's additional testimony that he "d[id]n't really know what type or what kind of vehicle it was." Thus, any rational trier of fact could conclude beyond a reasonable doubt that Kijiner's pickup was the vehicle that struck Lomout.

Second, on the issue of negligent driving, Lomout was struck while walking along the drain outs by a vehicle traveling sufficiently fast that Lomout was unable to jump out of the way or avoid being hit. A reasonable driver in the darkness of night would drive at a prudent speed and look out for pedestrians in the drain outs, an area where pedestrians commonly travel. Thus, when viewing the evidence in the light most favorable to the government, any rational trier of fact could find beyond a reasonable doubt that the driver of Kijiner's vehicle substantially deviated from the necessary standard of care when he struck Lomout.

Third and finally, the evidence is sufficient to show that Kijiner himself was driving when his pickup struck Lomout. When the evidence is viewed in the light most favorable to the government, police officers found Kijiner asleep and intoxicated behind the wheel of the vehicle that struck Lomout just three hours after the accident took place. Although Lomout's testimony that he saw two men in the pickup that struck him is some evidence of innocence, any rational trier of fact could nevertheless conclude beyond a reasonable doubt that Kijiner was driving based on the fact that he was seated behind the wheel, intoxicated, the registered owner of the pickup, and found approximately three hours after the early morning hit-and-run accident.

In sum, there is sufficient evidence that Kijiner's pickup struck Lomout while being driven negligently by Kijiner. Accordingly, the court AFFIRMS Kijiner's conviction and

sentence for negligent driving. Because Kijiner is on release pending appeal, we REMAND to the High Court to insure compliance with its sentencing order.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

STEPHEN DRIBO,
Appellant,

S. Ct. Case No. 2008-009
High Ct. Civil No. 2002-067

-v-

IRUMNE BONDRIK,
Appellee/Cross-Appellant,

BILLIET EDMOND,
First Intervenor/Appellant,

EZRA RIKLON,
Second Intervenor/Appellant

APPEAL FROM THE HIGH COURT

SEPTEMBER 14, 2010

CADRA, C.J.
SEABRIGHT[1] and KURREN,[2] Associate Justices

SUMMARY:

After trial before the Traditional Rights Court that spanned many years, during which a number of hearings were held jointly with the High Court, the Traditional Rights Court issued its opinion in answer. The High Court subsequently concluded that Traditional Rights Court Rule of Procedure 9 did not require further trial on the merits, and adopted the Traditional Rights Court's opinion. All parties appealed. The Supreme Court affirmed.

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[1] Hon. J. Michael Seabright, United States District Court Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Hon. Barry M. Kurren, United States Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

DIGEST:

1. APPEAL AND ERROR - *Review - Traditional Rights Court:* 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.

2. APPEAL AND ERROR - *Review - Findings of Fact - Clearly Erroneous:* 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.

3. APPEAL AND ERROR - *Review - Findings of Fact - Clearly Erroneous:* 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.

4. APPEAL AND ERROR - *Review - Findings of Fact - Clearly Erroneous:* 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.

5. APPEAL AND ERROR - *Review - Findings of Fact:* 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.

6. APPEAL AND ERROR - *Review - Questions of Law:* Purely or predominately legal issues are reviewed *de novo*.

7. APPEAL AND ERROR - *Review - Discretionary Matters - Rule of Procedure:* The proper standard of review for the High Court's interpretation of Traditional Rights Court Rule 9 is "clearly erroneous."

8. APPEAL AND ERROR - *Review - Discretionary Matters - Rule of Procedure:* 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."

9. APPEAL AND ERROR - *Review - Discretionary Matters - Rule of Procedure:* Under the "abuse of discretion" standard, the court will reverse only where no reasonable person would act as the trial court did.

10. APPEAL AND ERROR - *Review - Traditional Rights Court:* 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."

11. APPEAL AND ERROR - *Review - Discretionary Matters - Rule of Procedure:* 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.

12. STATUTES - *Construction and Operation - Rules of Interpretation:* The courts may look to dictionary definitions when ascertaining the plain and ordinary meaning of undefined terms in a statute.

13. STATUTES - *Construction and Operation - Rules of Interpretation:* 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.

14. STATUTES - *Construction and Operation - Rules of Interpretation:* 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."

15. CONSTITUTIONAL LAW - *Due Process – In General:* 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.

16. APPEAL AND ERROR - *Review - Traditional Rights Court:* 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.

CADRA, C.J., with whom Justices SEABRIGHT and KURREN concur:

MARSHALL ISLANDS, SUPREME COURT

I. INTRODUCTION

On November 3, 2008, the High Court entered a "Final Judgment" determining that appellant Stephen Dribo is the proper person to hold the "alab title, rights and interest" on six wetos[3] and six islands[4] located within Kwajalein and Lae Atolls. The High Court's "Final Judgment" further declared that appellant Irumne Bondrik is the proper person to hold the "alab title, rights and interest" on the remaining weto in dispute.[5]

In reaching its "Final Judgment," the High Court adopted a determination by the Traditional Rights Court that Stephen Dribo was the proper person to hold the alab interest on twelve lands at issue and that Irumne Bondrik was the proper person to hold the title on the remaining weto. The High Court reviewed the record and found that the Traditional Rights Court's determination was "not clearly erroneous or contrary to law." Having accepted the Traditional Rights Court's opinion, the High Court found it unnecessary to proceed to a further "trial" because there were no non-customary issues remaining to be decided.

All parties appeal. We have jurisdiction pursuant to Article VI, Section 2 of the Marshall Islands Constitution and we affirm.

II. PROCEEDINGS BELOW

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[3] The High Court's judgment declared Stephen Dribo alab on Monnen weto on Ebeye, Kwajalein Atoll; Mwinbitrik weto, Mwinluial weto on Eonene in Kwajalein Atoll; Loran weto on Ebadon, Kwajalein Atoll; Moja weto and Kejelab weto on Lae Atoll.

[4] The High Court's judgment declared Stephen Dribo alab on Komle Island, Meik Island, Kidenen Island, Enewetak Island and Nene Island in Kwajalein Atoll; and Enerein Island in Lae Atoll.

[5] The High Court's judgment declared Irumne Bondrik alab on Monbon Rear weto, Kwajalein Atoll.

DRIBO v. BONDRIK

This land title dispute arises out of a determination by Iroijlaplap Imata Kabua that Irumne Bondrik is alab on each of the disputed lands. In response to that determination, Stephen Dribo commenced suit on April 4, 2002, by filing a complaint against Bondrik seeking declaratory and injunctive relief. Dribo's complaint alleged that he was the successor to his father's (Handle Dribo's) title of alab on Meck Island, Omlek Island (Komle), Gillinam Island (Kindene), Enewetak Island, Monbon Rear weto and Lorran weto, all located within Kwajalein Atoll. Dribo further alleged that Mwinbitrin weto, Muininluial weto, Omlek Island, Enewetak Island, Gilliam Island and Meck Island are *Kabijuknen* land from Lijimjim and that Litweta was alab and senior dri jerbal on these lands. Dribo's complaint further alleged that the alab and dri jerbal rights descended to Litweta's children and Handle Dribo exercised the alap right on these lands after Litweta died. Monbon Rear weto was alleged to be *ninnin* land from Lerele to his children and that under custom Stephen Dribo is the person to hold the alab title to both the kabijuken and ninnin lands. Stephen Dribo subsequently amended his complaint claiming Monbon Rear weto, Monnen weto, Moja weto, Kejelab weto and Enerin Island are *Ninnin* (*Botoktok*) lands from Laibat to his children and that he was the proper person to succeed to the alab title to these lands.

On April 8, 2002, the High Court held a hearing on Dribo's application for a preliminary injunction to restrain the Department of Finance from distributing Kwajalein land use payments on the disputed lands. The injunction was granted.

On September 23, 2002, the High Court, Associate Judge Dee Johnson, issued an Order of Certification to the Traditional Rights Court. The certification was subsequently amended on December 5, 2002 and July 21, 2005 to include additional lands. The question certified was "What person or persons is/are the proper person(s) under Marshallese traditional law and customary practices to be the alab for each of the lands named?"

On February 25, 2005, Billiet Edmond filed a motion to intervene, along with an answer and counter-claim. The High Court, Associate Justice Richard Hickson, granted intervention on May 30, 2005. Billiet Edmond claims the alab title on Mwinbitrik weto, Mwinluial weto, Komle

Island, Meik Island, Kiderene Island, Enewetak Island and Nene Island, all located on Kwajalein Atoll. Edmond alleges these lands were bwij lands of Libokeia of the Ri-Meik jowi, the common ancestor of Stephen Dribo and himself.

Proceedings before the Traditional Rights Court commenced on November 9, 2005. On November 18, 2005, Ezra Riklon moved to intervene. That motion was granted on November 22, 2005.

A number of Traditional Rights court hearings were then held jointly with the High Court in both Majuro and Ebeye. Proceedings before the Traditional Rights Court concluded with the filing of written closing arguments in August and September of 2007.

The Traditional Rights Court issued its "Opinion in Answer" on December 13, 2007. That opinion determined that Stephen Dribo was the proper person to hold the alab title on each of the disputed lands but that Irumne Bondrik "can have a share" from Monbon Rear weto. A hearing was held pursuant to Traditional Rights Court Rule of Procedure 9 on May 30, 2008. The High Court, Associate Justice James Plasman, determined there was no need to refer the matter back to the Traditional Rights Court and no need to modify its opinion, except to clarify its determination as to Monbon Rear weto. Motions for reconsideration filed by Dribo and Riklon were denied on August 25, 2008.

A status conference was held on August 27, 2008, at which time the High Court ordered further briefing on the "interpretation of Marshall Islands Traditional Rights Court Rules of Procedure, Rule 9 and the scope of a 'trial' held pursuant to its provisions."

On November 3, 2008, the High Court issued its "Final Judgment." The High Court found that a further "trial" before the High Court was not required by Traditional Rights Court Rule of Procedure 9 under the circumstances presented by this case where the customary issues had been fully litigated before the Traditional Rights Court and where no non-customary issues remained to be decided. The High Court further found the opinion of the Traditional Rights Court was not "clearly erroneous or contrary to law" and adopted its opinion. The High Court declared that "among and between the parties and those claiming through them, Stephen Dribo is

the holder of the alab title, rights and interests on the subject lands in this case except for Monbon Rear weto on Kwajalein Atoll." The High Court declared that "among and between the parties and those claiming through them Irumne Bondrik is the holder of the alab title, rights and interests on Monbon Rear Weto." All parties timely appealed.

Appellant Stephen Dribo contends the High Court erred in adopting the Traditional Rights Court's opinion because the overwhelming evidence is that he, not Irumne Bondrik, is the rightful alab for Monbon Rear weto under custom. Dribo argues the evidence clearly indicates that a bwilok occurred affecting Langrine (Irumne Bondrik's direct line ancestor) and Litia (Riklon's direct line ancestor) and that the lands, including Monbon Rear Weto, were given to Litweta, (Dribo's direct line ancestor). Under custom, Stephen Dribo is therefore the proper person to hold the alab rights on Monbon Rear weto. Even in the absence of a finding of a bwilok, Dribo contends that the circumstantial evidence indicates, as the Traditional Rights Court implicitly found, that something occurred to change the customary pattern of succession. It was therefore inconsistent or contradictory for the Court to find that he was the alab on all the lands but not for Monbon Rear weto.

Appellant Irumne Bondrik contends the High Court erred in not proceeding to trial pursuant to Traditional Rights Court Rule 9. As a result, Bondrik claims his procedural due process rights have been violated and a remand for further proceedings is necessary. Bondrik also contends that it was inconsistent for the Traditional Rights Court to apply the principle of iroij im jela as to Dribo's rights but not to recognize the Iroij's determination as to Bondrik's rights.

Appellant Billiet Edmond claims the Traditional Rights Court's opinion is clearly erroneous because its finding that all the lands in dispute originally belonged to Libol Joase is not supported by the evidence. Edmond contends the evidence indicates that the lands claimed by him were bwij lands for whom the original owner was Libokeia of the Ri-Meik Jowi, not botoktok lands from Liabat. The evidence supports a finding that Edmond is alab on the seven lands he claims.

Appellant Ezra Riklon contends the Traditional Rights Court's decision is clearly erroneous because it did not find a bwilok, lia or other occurrence sufficient to cut off Bondrik's rights to the alab interest in these lands. In the absence of a bwilok, the matrilineal custom of descent requires that he be found alab.

III. STANDARD OF REVIEW

[1] The Marshall Islands Constitution, 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; but shall not be deemed binding unless the certifying court concludes that justice so requires." Pursuant to this section, the High Court must adopt the decision of the Traditional Rights Court unless that decision is "clearly erroneous" or contrary to law. *Bulele v. Morelik*, 3 MILR 97, 101 (2009); *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

[2] Factual determinations of the High Court are reviewed under the "clearly erroneous" standard. *Zaion v. Peter*, 1 MILR (Rev.) 228, 233 (1991); *Lobo v. Jejo*, 1 MILR (Rev.) 224, 255 (1991). Under the "clearly erroneous" standard, the trial court's findings of fact are presumptively correct. *Bulele*, citing *King v. Brown*, 8 F.3d 1403, 1408 (9th Cir. 1993). The appellant, therefore, has the burden of persuading the reviewing court that a factual finding is "clearly erroneous." *Bulele*, citing *Henderson v. Comm'r*, 143 F.3d 497, 500 (9th Cir. 1998).

[3] "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." *Bulele*, citing *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985); *Zion*, 1 MILR (Rev.) at 232.

[4,5] 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*. *Id*. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly

erroneous. *Id*. "On appeal, we view the evidence in the light most favorable to the [trial] court's ruling and must uphold any [trial] court finding that is permissible in light of the evidence." *Exxon Corp. v. Gann*, 21 F.3d 1002, 1005 (10th Cir. 1994).

[6] Purely or predominately legal issues are reviewed *de novo*. *Bulele*, *supra*, citing *Stanley v. Stanley*, 2 MILR 194, 199 (2002); *Jack v. Hisaiah*, 2 MILR 206, 209 (2002).

IV. DISCUSSION

A. The High Court Did Not Err In Deciding Not To Proceed With Further Proceedings On The Customary Issues Fully Litigated Before The Traditional Rights Court And High Court Sitting Jointly.

Appellant Irumne Bondrik contends the High Court erred by adopting the findings of the Traditional Rights Court without proceeding to a "trial" before the High Court on "all of the issues in the case, including those questions submitted to the Traditional Rights Court" as required by Traditional Rights Court Rule of Procedure 9.

Traditional Rights Court Rule of Procedure 9 states in relevant part:

> If there be no necessity for re-submission, then the High Court judge shall proceed to trial and judgment of all of the issues in the case, including those questions submitted to the Traditional Rights Court, but the High Court, in disposing of the case before it, shall give substantial weight to the opinion of the Traditional Rights Court on the questions referred to it as required by the Constitution.

The High Court found that under the circumstances of this case, there is no right to trial before the High Court of issues already fully litigated before the Traditional Rights Court under Traditional Rights Court Rule 9.

1. We review the High Court's interpretation of Rule 9 under the "abuse of discretion" standard.

[7] We must first determine the proper standard of review and the amount of deference owed the High Court in its interpretation of TRC Rule 9. We hold that the proper standard of review is "clearly erroneous."

[8] 27 MIRC, Chpt. 2, sec. 218, allows the High Court to make rules for regulating procedures before the Traditional Rights Court. Traditional Rights Court Rule 9 was

promulgated by the High Court pursuant to that rule making authority. The High Court was thus presented with interpreting its own rule in this case. A high degree of deference is given to a trial court's interpretation of its own rules. In reviewing rulings of a district court regarding local practice and rules, the appropriate standard of review is "abuse of discretion." *See*, *e.g.*, *Guam Sasaki Corp. v. Diana's Inc*., 881 F.2d 713, 715-16 (9th Cir. 1989); see also *Lance, Inc. v. Dewco Servs*., 422 F.2d 778, 783 (9th Cir. 1970) ("When the tribunal which has promulgated a rule has interpreted and applied the rule which it has written, it is hardly for an outside person to say that the author of the rule has misinterpreted it . . . we do think that Local Rules are promulgated by District Courts primarily to promote the efficiency of the court, and that the Court has a large measure of discretion in interpreting and applying them.")

[9] We hold that the appropriate standard of review of the High Court's interpretation of Traditional Rights Court Rule 9 is "abuse of discretion." Under this standard, this Court will reverse only where no reasonable person would act as the trial court did. *Pacific Basin, Inc. v. Mama Store*, 3 MILR 34, 36-37 (2007).

2. The High Court's interpretation of Rule 9 was not an "abuse of discretion."

Bondrik argues that Traditional Rights Court Rule 9 requires the High Court to hold a trial, even though the Traditional Rights Court already held one. The High Court reasoned that adoption of Bondrik's position would undermine the constitutional assignment of roles between the Traditional Rights Court and the High Court. Under the circumstances presented by this case, we agree.

The Republic of the Marshall Islands Constitution, Art. VI, Sec. 4(3), confers jurisdiction upon the Traditional Rights Court to determine "questions relating to titles or to land rights or to other legal interests depending wholly or partly on customary law and traditional practice in the Republic of the Marshall Islands." Art. VI, Sec. 4(5) requires that resolution of a question certified to the TRC "shall be given substantial weight in the certifying court's

disposition of the legal controversy before it; but shall not be binding unless the certifying court concludes that justice so requires."

[10] Under the Constitution, the High Court has a very limited role in the determination of questions within the Traditional Rights Court's jurisdiction. It is well settled that the High Court's duty is to review and adopt the decision of the Traditional Rights Court unless that decision is "clearly erroneous or contrary to law." *See*, *e.g.*, *Tibon v. Jihu*, 3 MILR 1 (2005); *Abija v. Bwijmaron*, 2 MILR 6, 16 (1994).

[**11**] The High Court complied with its Constitutional duty in this case. The High Court reviewed the Traditional Rights Court's decision and found it was "not clearly erroneous or contrary to law." To the extent that Traditional Rights Court Rule 9 requires a "trial" before the High Court on the issues already fully litigated before the Traditional Rights Court and High Court sitting jointly, that Rule would undermine the constitutional assignment of roles between the Traditional Rights Court and the High Court. The High Court's interpretation of Traditional Rights Court Rule 9 was not an abuse of its discretion.

Bondrik argues the word "trial" must be given its plain, common, ordinary meaning in construing Rule 9. Bondrik contends the plain meaning of the word "trial" requires that the High Court should retake evidence already admitted before the Traditional Rights Court, allow the introduction of additional evidence and allow opening and closing arguments. In essence, Bondrik argues for a new trial.

Even if we were to give the word "trial" it's plain, ordinary and commonly understood meaning and review the High Court's interpretation of Traditional Rights Court Rule 9 *de novo* as a question of law, we still do not find that the Rule required further proceedings before the High Court under the circumstances presented by this case.

[12] We may look to dictionary definitions when ascertaining the plain and ordinary meaning of undefined terms in a statute. *Pruitt v. Astrue*, 604 F.3d 1217, 1220 (10th Cir. 2010) ("If the words of the statute have a plain and ordinary meaning, we apply the text as written. We may consult a dictionary to determine the plain meaning of a term.") (quoting *Conrad v. Phone*

Directories Co., 585 F.3d 1376, 1381 (10th Cir. 2009)); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) (stating that dictionaries may be used to determine the "'plain meaning' of a term undefined by a statute"); *Halloran v. Bhan*, 683 N.W.2d 129, 132 (Mich. 2004). The meaning of a court rule, however, "does not depend on the niceties of definition but upon the reasonable intendment of the language in light of the purpose to be effectuated." *Johnson v. State*, 333 A.2d 37, 43 (Md. 1975).

[**13**] "Trial" is defined by Webster's II, New Riverside University Dictionary, as "examination of evidence and applicable law by a competent tribunal to determine the issue of specified charges or claims." "Trial" is similarly defined by Black's Law Dictionary (8th ed. 2004), as "a formal judicial examination of evidence and determination of legal claims in an adversary proceeding." The definition of "trial" is broad enough to include a procedure, as employed in this case, 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. 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. The procedure followed by the High Court was "an adversarial examination of the evidence and determination of the legal claims of the parties." The parties were given a "trial."

[**14**] It has long been recognized that the literal meaning of a statute will not be followed when it produces absurd results. See, *e.g*., *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts - at least where the disposition required by the text is not absurd - is to enforce it according to its terms.'") (Quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A*., 530 U.S. 1, 6 (2000)); *see also Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941); *Sorrells v. United States*, 287 U.S. 435, 446 (1932). We are to avoid constructions that produce "odd" or "absurd results" or that is "inconsistent with common sense." *See Public Citizen v. United States Dep't of Justice*,

491 U.S. 440, 454 (1989); 2A N. Singer, Sutherland Statutes and Statutory Construction, sec. 45:12, at 92 (6th ed. 2000).

Applying the definition of trial and adopting the procedure urged by Bondrik would lead to an absurd result. It is inconsistent with common sense to proceed to a "trial" or further evidentiary proceedings before the High Court after the parties have already been afforded the opportunity to present all their evidence and arguments supporting their respective positions on the customary issues before both the Traditional Rights Court and the High Court and where there are no non-customary issues to be determined. Such a procedure would be unnecessarily time-consuming and expensive to the litigants and the court alike.

Under the circumstances presented by this case, we do not find the High Court abused its discretion in finding that there is no right to "trial" before the High Court of issues fully litigated before the Traditional Rights Court and High Court sitting jointly and where there are no non-customary issues to be decided.

3. The procedure adopted by the High Court did not violate due process.

Bondrik argues the High Court violated his due process rights by not proceeding with a "trial." We disagree.

[**15**] The fundamental aspects of procedural due process are notice and an opportunity to be heard. See, *e.g.*, *Navarro v. Chief of Police*, 1 MILR (Rev.) 161, 165 (1989); *see also Goldberg v. Kelly*, 397 U.S. 254, 268-69 (1970). Beyond the minimum requirements of notice and an opportunity to be heard, due process "is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Keeping the flexibility of the due process requirements in mind, we conclude that the process afforded the parties by the procedure adopted by the High Court was adequate. The parties were afforded a full, trial-type hearing on the customary issues presented by this case before the Traditional Rights Court and the High Court sitting jointly. That hearing process spanned several years. All parties were afforded the opportunity to present evidence in support

of their respective positions on the customary issues. They were allowed the opportunity to cross examine adverse witnesses and meet evidence contrary to their positions. They were allowed opening statements, and to make closing and rebuttal arguments. We find that there was no procedural due process violation by the procedure the High Court employed in this particular case.

B. The Traditional Rights Court's Opinion Is Not "Clearly Erroneous or Contrary to Law."

[16] We again emphasize the narrow and limited extent of our review in this land rights case. As the reviewing court we are to accept the decision of the High Court and Traditional Rights Court unless those decisions are "clearly erroneous." We afford the Traditional Rights Court's and High Court's findings the proper deference owed even if we would have resolved the case differently. We recognize that the Traditional Rights Court is in a unique position to determine matters of custom and tradition. The judges are conditioned in Marshallese culture thereby bringing specialized knowledge of custom and traditional practice to the dispute resolution process. It is for that reason that both the High Court and this Court are to give proper deference to the decisions of the Traditional Rights Court. *See, e.g., Zion v. Peter*, 1 MILR 176, 180 (1991).

After reviewing the record and holding the above-stated principles in mind, we conclude the Traditional Rights Court's findings are supported by evidence in the record and are not "clearly erroneous."

The Traditional Rights Court found that all these lands originally belonged to Leroij Libol Joase. Libol gave Laibat Joase, her oldest son, the weto named Monnen. Libol retained control of the other lands which were her *mona* lands. Laibat Joase had a son named Lobeie. Lobeie had a daughter named Lieojed. Lieojed had a daughter named Litweta. Litweta's bwij has become extinct but the botoktok of her bwij which started with Handle Dribo survives. Stephen Dribo is the son of Handle Dribo. Stephen Dribo being the *tor in botoktok* is the proper person to have the alab title on these lands. While the genealogies and the applicable custom were hotly

contested and while the Traditional Rights Court does not specify what testimony and evidence it relied upon to draw its findings and conclusions, there is evidence in the record to support each of these findings.

The Traditional Rights Court gave great weight to a genealogy chart which it characterized as the "key" to the case. According to that chart, Laibat had two children, a son named Lobeie and a daughter named Liboklan. Lobeie, Boklan (Liboklan) and Liojeed are all botoktok. Willie Mwekto, an expert in the custom, testified that after Liabat died, his rights would go to Lobeie and Liboklan. Lobeie had a daughter named Liojeed. Lobeie also had a daughter named Lydia. Lydia is younger than Liojeed. After Lobeie and Liboklan passed away, the botoktok would run to Liojeed. The botoktok line became extinct with Liojeed. Under custom, the rights would then go to the bwij of the children of Lobeie. Mwekto testified that the rights would go from Liojeed and then to Liojeed's children. When the children of Liojeed deceased, the alab rights would then go to the children of Liojeed's younger sister, Lydia. After the children of Lydia died, the rights would then go to the grandchildren of Liojeed. Liojeed had children, Tuweta and Lajlok. Lydia had many children including Ezra Riklon. Under custom, Ezra and Tuweta would be "like brother and sister" being in the same generation. Handle Dribo was the child of Tuweta. Under the custom as testified to by Willie Mwekto, it would thus appear that the rights would go to Ezra Riklon before going to Tuweta's child, Handle Dribo. The Traditional Rights Court recognized this by stating:

> Intervenor Riklon's claim is that because Litia, his mother, was younger than Lieojed then it is right and proper that the title of alab should have gone to him. He is right in saying this. There is no questioning it. He had presented evidence to prove that he is the proper person to hold the alab right. The question is why wasn't he? Only Lobeie and the iroijs know. This court of custom does not know why this came to be and it believes only the iroijs of these lands can answer this question. The iroijs had recognized Litweta as the alab for all the islands and wetos in dispute.

There was evidence introduced that a bwilok or lia occurred but the Traditional Rights Court made no finding in that regard other than to note that Iroijlaplap Jeimata's book did not document a bwilok.

It is apparent, however, that there was an alteration of the customary pattern of descent of the alab title on these lands. The Traditional Rights Court found that Litweta was recognized by Iroij Lejolang Kabua as alab. Iroij Lejolang Kabua gave Litweta the alab rights on these lands as is evidenced by the Kwajalein Atoll land determination. After Litweta's death, Handle Dribo became the alab on these lands and remained so for many years until his death. There is no evidence that Handle Dribo's alab title was ever challenged prior to his death. It can, thus, be inferred that his alab title was accepted by all persons having an interest in these lands.

In *Binni v. Mwedriktok*, 5 TTR 451(TTHC1971), the Trust Territory Court held that without a clear showing that a special arrangement which breaks or interrupts normal succession only was intended to be an interest for one lifetime, such interest does not revert but continues in the lineage of the appointee under the special arrangement that terminated or upset the normal course of succession. This case, although not binding upon us, supports the Traditional Rights Court's implicit finding that the normal pattern of succession was interrupted by Iroij Lejolang Kabua's placement and recognition of Liweta as alab on these lands. There has been no showing that this alteration of custom was intended for only one lifetime and the recognition of Handle Dribo subsequent to her death indicates that it was not.

The Traditional Rights Court found that Litweta's bwij has now become extinct but the botoktok of that bwij which started with Handle Dribo lives on. The Traditional Rights Court found Stephen Dribo, the son of Handle Dribo, is the *tor in botoktok* and is the proper and closest person to hold the alab title to these lands with the exception of Monbon Rear weto. This finding is supported by the record and is not clearly erroneous.

The Traditional Rights Court found that Monbon Rear Weto belonged to Langrine and

that Irumne Bondrik has rights in that land. The present Iroij recognizes Irumne as alab on that land. We are not persuaded this finding by the Traditional Rights Court and High Court is "clearly erroneous." We, therefore, affirm.

V. CONCLUSION

While the evidence may be construed to support a finding that any one of the parties holds the alab title to these lands, we find that the Traditional Rights Court's findings are supported by the record and are not "clearly erroneous."

We therefore AFFIRM the High Court's "Final Judgment" which accepted the Traditional Rights Court's determination that Stephen Dribo is alab on all the disputed lands with the exception of Monbon Rear weto on which Irumne Bondrik holds the alab title.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JOSEPH ROSENQUIST, derivatively on behalf of Nominal Defendant DRYSHIPS, INC.,
Plaintiffs-Appellant

-v-

GEORGE ECONOMOU, GEORGE DEMATHAS, CHRYSSOULA KANDYLIDIS (aka **CHRYSSOULA KANDYLIDI** or **CHRYSOULA KANDYLIDIS), EVANGELOS MITILANAIOS (**aka **EVANGELOS MYTILINAIOS** or **EVANGELOS MYTILINAEOS), ANGELOS PAPOULIAS,** and **GEORGE XIRADAKIS**
Defendants-Appellees

and

DRYSHIPS, INC.,
Nominal Defendant

S. Ct. Case No. 2010-002
High Ct. Civil No. 2009-056

APPEAL FROM THE HIGH COURT

OCTOBER 5, 2011

CADRA, C.J.
SEABRIGHT[1] and KURREN[2] Acting Associate Justices.

SUMMARY:

Plaintiff filed a shareholder derivative action alleging Defendants breached their fiduciary duty of good faith, committed waste by approving transactions that were not the product of good faith business judgment, and were unjustly enriched. Appellant did not make a demand on the

[1] Honorable J. Michael Seabright, United States District Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, United States Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

board of directors to initiate litigation, asserting that it would be futile. The Supreme Court upheld the High Court's dismissal of Plaintiff's complaint, concluding that Plaintiff did not meet the two-part test to demonstrate futility sufficient to excuse his failure to make presuit demand on the board of directors.

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Law – Dismissal of Complaint:* The Court reviews dismissal of a complaint *de novo*.

2. APPEAL AND ERROR – *Review – Questions of Law – Dismissal of Complaint:* 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.

3. CORPORATIONS – *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.

4. CORPORATIONS – *Law Applicable:* Marshall Islands law requires the courts to look to Delaware corporate law.

5. CORPORATIONS – *Shareholder Derivative Action*: 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.

6. CORPORATIONS – *Shareholder Derivative Action*: 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.

7. CORPORATIONS – *Shareholder Derivative Action*: Futility, as required to excuse presuit demand, is gauged by the circumstances existing at the commencement of a derivative suit.

8. CORPORATIONS – *Shareholder Derivative Action*: "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.

9. CORPORATIONS – *Shareholder Derivative Action:* 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.

10. CORPORATIONS – *Shareholder Derivative Action:* 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.

11. CORPORATIONS – *Shareholder Derivative Action:* 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.

12. CORPORATIONS – *Shareholder Derivative Action:* 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.

13. CORPORATIONS – *Shareholder Derivative Action:* This Court will not second-guess the Board's decision unless that decision "cannot be 'attributed to any rational business purpose."

14. CORPORATIONS – *Shareholder Derivative Action:* The size and structure of executive compensation are inherently matters of business judgment.

ROSENQUIST v. ECONOMOU, et al.

15. CORPORATIONS – *Shareholder Derivative Action:* 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.

KURREN, ACTING ASSOCIATE JUSTICE:

INTRODUCTION

This is a shareholder derivative action brought by Plaintiff-Appellant Joseph Rosenquist, derivatively on behalf of Nominal Defendant DryShips, Inc. Plaintiff is a shareholder of DryShips and filed this lawsuit against the following current and former members of its Board of Directors ("Board"): Defendants-Appellees George Economou, Chryssoula Kandylidis (a/k/a Chryssoula Kandylidi or Chrysoula Kandylidis), George Demathas, Evangelos Mitilinaios (a/k/a Evengelos Mytilinaios or Evangelos Mytilinacos), George Xiradakis, and Angelos Papoulias (collectively, "Defendants"). Plaintiff alleges that Defendants breached their fiduciary duty of good faith, committed waste by approving transactions that were not the product of good faith business judgment, and were unjustly enriched at DryShips's expense.

Plaintiff did not make a demand on the DryShips Board before instituting this action against Defendants. In the Amended Complaint, Plaintiff asserted that any such demand would have been "futile and useless. . .because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute this action." Absent a demand on the Board, Defendants moved the High Court of the Republic of the Marshall Islands to dismiss the Amended Complaint. The High Court agreed with Defendants and dismissed the Amended Complaint, concluding that it did "not contain particularized allegations that raise a reasonable doubt that at the time the lawsuit was filed a majority of the directors were disinterested and independent or that the challenged transactions were the product of a valid exercise of business judgment." Although Plaintiff was permitted to move for leave to amend the Amended Complaint, he chose to appeal the High Court's decision to this Court.

As discussed below, the Court AFFIRMS the dismissal of the Amended Complaint.

MARSHALL ISLANDS, SUPREME COURT

BACKGROUND

A. Factual Background

Plaintiff is a shareholder of DryShips, which is a corporation incorporated under the laws of the Republic of the Marshall Islands and headquartered in Athens, Greece. Defendant Economou founded DryShips in 2004 as a holding company engaged in the ocean transportation of dry bulk cargoes worldwide. DryShips's assets are managed by Cardiff Marine, Inc., an entity owned 70% by Economou and 30% by his sister, Defendant Kandylidis. Fabiana Services S.A. is a corporation owned by Economou, which "provides the services of the individuals who serve in the positions of chief executive and chief financial officer of the Company." Dry Ships's articles of incorporation contain an exculpation clause, which exempts directors from liability for breaches of the duty of care.

Defendant Economou has served as DryShips' s chairman of the Board, president, chief executive officer, interim chief financial officer and, at the times DryShips entered into the transactions at issue, he owned between 9.0% and 31.0% of DryShips common stock.

Defendant Kandylidis, Economou's sister, has served as a non-executive director of DryShips since March 5, 2008. Defendant Demathas served as a non-executive director since July 18, 2006 and was a member of the Audit, Compensation and Nomination Committees at all times relevant. Defendant Xiradakis has served as a non-executive director since 2006 and was a member of the same Committees at all times relevant. Defendant Papoulias served as a non-executive director from April 2005 until December 22, 2008. Defendant Mitilinaios has served as a non-executive director and was a member of the Audit Committee since December 22, 2008. At the time this action was commenced, the Board consisted of Economou, Kandylidis, Dernathas, Mitilinaios, and Xiradakis.[3]

In the Amended Complaint, Plaintiff alleges that Economou dominates and controls DryShips through his ownership of the company, his positions within the company, "anti-

[3]By the time the Amended Complaint was filed, the Board had two additional members: Harry Kerames and Vassilis Karamitsanis.

takeover provisions" of the company's articles and bylaws, and "director appointments and compensation." Plaintiff further alleges that Economou's control of DryShips "resulted in Board approval of transactions that appear to have been designed to benefit Economou, not DryShips." The transactions for which Plaintiff seeks relief in this case are: (1) the Primelead Transaction, (2) the July and October Agreements, and (3) Economou's compensation.

1. The Primelead Transaction

On October 3, 2008, DryShips entered into a share purchase agreement to acquire equity interests of DrillShips Holdings, which was controlled by clients of Cardiff, including Economou, in exchange for 25% of the equity of Primelead Shareholders Inc., which is a DryShips subsidiary ("the Primelead Divestment"). In connection with this transaction, DryShips "assumed installment payment obligations of $1.1 billion and debt obligations of $261.l million."

Nine months later on July 9, 2009, after the shipping industry suffered an economic downturn, DryShips "announced that 'it has entered into an agreement to acquire the remaining 25% of the total issued and outstanding capital stock of Primelead'" ("the Primelead Acquisition").[4] The Primelead Acquisition would cause "Primelead (to] become a wholly-owned subsidiary of [Dry 'Ships]." The Primelead Acquisition "resulted in [DryShips] paying to Economou a one-time $50.0 million cash payment, and issuing to Economou 33,955,224 shares of DryShips convertible preferred stock." "Economou' s 25% equity interest in Primelead that DryShips acquired in the Primelead Acquisition was worth approximately $122 million at the time of the transaction, and the Preferred Stock that Economou received in the Primelead Acquisition was worth approximately $185 million." The Amended Complaint alleges that, in sum, "DryShips paid Economou a total of approximately $235 million ($50 million in cash and

[4] Together, the Primelead Divestment and the Primelead Acquisition are referred to as the "Primelead Transaction."

$185 million in Preferred Stock) for equity worth only $122 million, an overpayment of approximately $113 million, or 93%."

2. The July and October Agreements

On July 3, 2008, DryShips entered into the July Agreement to purchase four Panamax bulk carriers for $400 million from companies beneficially owned by Economou. DryShips paid to the selling entities a cash deposit of $55 million or 13.75% of the purchase price, which is higher than the industry standard of 10%. Defendants Demathas, Kandylidis, Mitilinaios, and Xiradakis approved the July Agreement.

On October 6, 2008, Dryships entered into the October Agreement to purchase nine special-purpose companies that each owned one Capesize bulk carrier. The special purpose companies were each owned by Cardiff or undisclosed clients of Cardiff. DryShips agreed to pay "more than $689 million in newly-authorized DryShips stock, and to assume $216 million in debt and $262 million in remaining shipyard installments to complete construction of some of the dry bulk carriers."

As 2008 progressed, "the health of the shipping industry deteriorated" and "the daily average of charter rates . . . [fell] over 90% from May 2008 through October 2008 and over 70% in October 2008 alone." Consequently, the Board terminated the July and October Agreements.

As to the July Agreement, DryShips paid for an "option to purchase the very same dry bulk carriers on an en bloc basis at a fixed purchase price of $160 million. In exchange for this Option, DryShips paid $26.25 million per vessel, or $105 million." As for the October Agreement, upon termination, "DryShips granted to Economou warrants to purchase Company stock . . ., the intrinsic value of these warrants is approximately $82.5 million." DryShips also "granted to 'clients' of Cardiff . . . $6.5 million shares of Dryships stock worth approximately $68,185,000."

3. Economou's Compensation

On January 21, 2009, Demathas and Xiradakis, as members of the Compensation Committee, approved a $6.98 million bonus payable to Economou for services rendered during

2008. On the same day, the Compensation Committee "also approved an increase in the annual fee to Fabiana" by $597,000, which further increased Economou's annual compensation.

B. Procedural Background

Plaintiff commenced this action on March 2, 2009. On August 12, 2009, Plaintiff filed the Amended Complaint, in which he asserts nine causes of action against Defendants for breach of fiduciary duty (Counts I-III), waste of corporate assets (Counts IV-VI), and unjust enrichment (Counts VII-IX).

Prior to filing this action, Plaintiff did not make a demand upon the Board to initiate litigation. On September 11, 2009, Defendants moved the High Court to dismiss the Amended Complaint for failure to do so. The High Court agreed with Defendants and dismissed the Amended Complaint. Although Plaintiff was allowed to file a motion to amend the Amended Complaint, he chose to appeal the High Court's decision to this Court.

STANDARD OF REVIEW

[1, 2] This Court reviews dismissal of a complaint *de novo*. *Momotaro v. Chief Elec. Off.*, 2 MILR 237, 241 (2004); *Beam ex rel. Martha Stewart Living Omnimedia. Inc. v. Stewart*, 845 A.2d 1040, 1048 (Del. 2004). In reviewing complaints on a motion to dismiss, '"[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, but conclusory allegations are not considered as expressly pleaded facts or factual inferences."' *White v. Panic*, 783 A.2d 543, 549 (Del. 2001). The Court does not "blindly accept as true all allegations, nor [does it] draw all inferences from them in plaintiffs' favor unless they are reasonable inferences." *Id*. "[I]nferences that are not objectively reasonable cannot be drawn in the plaintiffs favor." *Beam*, 845 A.2d at 1048.

DISCUSSION

[3] The parties correctly agree that because DryShips is a Marshall Islands corporation, Marshall Islands law controls. *See Kamen v. Kemper Finan. Servs. Inc.*, 500 U.S. 90, 98-99 (1991). 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. 52

MIRC, Part I, § 79(3). Where a shareholder plaintiff fails to make such a demand, he must allege "with particularity" the reasons why that demand would have been futile. *Id*.; MIRCP 23.1 ("The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors . . . and the reasons for the plaintiffs failure to obtain the action or for not making the effort").

[4, 5] The parties also correctly agree that Marshall Islands law instructs this Court to look to Delaware corporate law. *See* 52 MIRC, Part I, § 13 (noting the Marshall Islands Business Corporations Act "shall be applied and construed to make the laws of the Republic . . . uniform with the laws of the State of Delaware"). Pursuant to Delaware law, where a plaintiff fails to make a demand on the board of directors to initiate litigation, courts apply the two-part test for demand futility set forth in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled in part on other grounds by Brehm v. Eisner*, 746 A.3d 244 (Del. 2000). Under that test, courts "must decide whether, under the particularized facts 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." *Aronson*, 473 A.2d at 814; *In re Citigroup Inc. S'holder Derivative Litig*., 964 A.2d 106, 120 (Del. Ch. 2009) ("the complaint must plead with particularity facts showing that a demand on the board would have been futile")."These prongs are in the disjunctive. Therefore, if either prong is satisfied, demand is excused." *Brehm*, 746 A.2d at 256. Further, as to the first prong of the test, a plaintiff shall "establish[] the lack of independence or disinterestedness of a majority of the directors." *Aronson*, 473 A.2d at 817 (emphasis added).

[6] In determining whether demand is excused, courts "must accept as true the well pleaded factual allegations in the Complaint." *In re Citigroup*, 964 A.2d at 120. "The pleadings, however, are held to a higher standard . . . than under the permissive notice pleading standard under Court of Chancery Rule 8(a)." *Id*. To establish that demand is excused, "the pleadings must comply with stringent requirements of factual particularity' and set forth 'particularized factual statements that are essential to the claim.'" *Id*. at 120-21. "A prolix complaint larded

with conclusory language does not comply with these fundamental pleading mandates." *Id*. at 121 (ellipses points omitted).

[7] "[F]utility is gauged by the circumstances existing at the commencement of a derivative suit." *Aronson*, 473 A.2d at 810. At the time this action was filed on March 2, 2009, the Board consisted of five directors: Economou, Kandylidis, Demathas, Mitilinaios, and Xiradakis.[5] The parties agree that allegations relating to Defendant Papoulias are irrelevant to the demand futility analysis because he resigned on December 22, 2008 and was no longer on the Board when this suit was commenced.

A. Whether Plaintiff Alleges Particularized Facts Creating a Reasonable Doubt That the Directors Are Disinterested and Independent

1. Defendants Economou and Kandylidis

[8] As to Economou and Kandylidis, the High Court concluded that Plaintiff sufficiently alleged particularized facts of self-dealing in the Amended Complaint that create reasonable doubt that they were disinterested in the relevant transactions. In this context, "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 devolves upon the corporation or all stockholders generally." *Aronson*, 473 A.2d at 812.

On appeal, neither party disputes that Economou and Kandylidis are not disinterested. Indeed, the particularized facts alleged in the Amended Complaint assert that Economou stood on both sides of the subject transactions, while Kandylidis stood on both sides of the July and October Agreements and the Primelead Transaction. Further, the Amended Complaint alleges that Kandylidis is the sister of Economou, who is interested in all of the transactions. Accordingly, this Court agrees with the High Court and the parties, and concludes that particularized facts alleged as to Economou and Kandylidis create a reasonable doubt that they are disinterested. See *Aronson*, 473 A.2d at 812. Consequently, demand is excused as to

[5] As noted earlier, by the time the Amended complaint was filed, the Board had two additional directors: Kerames and Karamitsanis.

Economou and Kandylidis under the first prong of *Aronson*. *Brehm*, 746 A.2d at 256 ("if either prong [of the Aronson test] is satisfied, demand is excused"). Because demand must be excused for a "majority" of the Board under the first prong, the Court now turns to the other Board members. *Aronson*, 473 A.2d at 817.

2. Defendants Demathas, Mitilinaios, and Xiradakis

[9] As to Defendants Demathas, Mitilinaios, and Xiradakis, the High Court noted that Plaintiff did not argue that they are "interested" but only that they are not "independent" from Economou. The court concluded that Plaintiff "failed to rebut the presumption of the business judgment rule that [these Defendants], all of whom are sophisticated business people with years of experience, were independent." On appeal, as before the High Court, Plaintiff argues only that Demathas, Mitilinaios, and Xiradakis lack "independence" and does not argue that they were "interested" in the transactions.

"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." *Aronson*, 473 A.2d at 816.

> Such extraneous considerations or influences may exist when the challenged director is controlled by another. To raise a question concerning the independence of a particular board member, a plaintiff asserting the "control of one or more directors must allege particularized facts manifesting 'a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling.' The shorthand shibboleth of' dominated and controlled directors' is insufficient." This lack of independence can be shown when a plaintiff pleads facts that establish "that the directors are 'beholden' to the controlling person or so under their influence that their discretion would be sterilized."

Orman v. Cullman, 794 A.2d 5, 24 (Del. Ch. 2002) (footnote and brackets omitted). As the *Aronson* court noted; "While directors may confer, debate, and resolve their differences through compromise, or by reasonable reliance upon the expertise of their colleagues and other qualified persons, the end result, nonetheless, must be that each director has brought his or her own

informed business judgment to bear with specificity upon the corporate merits of the issues without regard for or succumbing to influences which convert an otherwise valid business decision into a faithless act." 473 A.2d at 816.

Plaintiff argues that particularized facts show that a reasonable doubt exists that Demathas, Mitilinaios, and Xiradakis are independent from Economou based on the following: (1) DryShips's organizational structure; (2) historical transactions allegedly designed to benefit Economou, and (3) the compensation received by these Defendants.

a. DryShips's Organizational Structure

Plaintiff contends that "Economou has dominated DryShips since it set sail in 2004" and points to the following facts in the Amended Complaint as support: Economou implemented the articles of corporation and bylaws that relate to the Board, Economou caused DryShips to adopt a "poison pill" plan, and Economou is the "largest shareholder" and was the "*only* senior officer" until 2009. Plaintiff asserts that these facts show that "Economou has retained for himself total control over the Company's operations and that "Economou unequivocally controls DryShips."

[10] Even if this Court were to agree with Plaintiff that the foregoing facts establish that Economou has total control over DryShips, Economou's control over the company is distinct from his control over its directors."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 stockholder." *Beam*, 845 A.2d at 1054; see *Aronson*, 473 A.2d at 815 ("proof of majority ownership of a company does not strip the directors of the presumption of independence"). Indeed, 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." *Id*. Plaintiff's allegations that Economou controls DryShips does not establish that he controls the other directors and, therefore, the Court concludes that demand is not excused on this ground.

b. Historical Transactions

Plaintiff next argues that Economou's control over Defendants is "demonstrated by years of gratuitous self-interested transactions that the Board has either approved or failed to stop." According to Plaintiff, the following transactions approved by the Board show Economou's control over the other directors: DryShips leases office space from Economou, issued stock to Economou instead of a cash dividend received by all other shareholders, issued stocks to Economou "at the lowest 8-day average closing price" during the third quarter of 2006, purchased shares of Ocean Rig, and paid to Cardiff fees for arranging the Ocean Rig purchase. Plaintiff asserts that these prior transactions "demonstrate a pattern of differential and preferential treatment of Economou by Demathas and Xiradakis" and "demonstrate[] that Demathas and Xiradakis lack independence."

As previously found by Delaware courts, Plaintiff's argument that Defendants' past approval of transactions that benefitted "interested" Economou does not excuse demand futility, for it is circular in reasoning. *In re Tyson Foods Inc. Consolidated Shareholder Litigation*, 919 A.2d 563, 588 (Del. Ch. 2007), the factual allegations stated that "the board members . . . have 'demonstrated a consistent and unvaried pattern of deferring to anything the Tyson family wants, and of failing to exercise independent business judgment.'" The Delaware court stated that this argument is "wholly circular" for the following reasons:

> in order to find that defendants lack independence, [the court] must conclude that they failed to exercise independent business judgment by approving self-interested transactions; and yet in order to find those very transactions beyond the bounds of business judgment, [the court] must conclude that the defendants lacked independence. Such a decision would be contrary to the presumption of business judgment that directors enjoy, however, and cannot be supported.

Id.

Similarly, in *In re Info USA, Inc. Shareholders Litigation*, 953 A.2d 963, 989 (Del. Ch. 2007), the court came to the same conclusion as in *Tyson* that the plaintiffs' argument was circular. In that case, the plaintiffs argued that the director defendants "must be interested" because of their prior actions, which included exempting the CEO and largest shareholder of the company from a poison pill plan, permitting him to use a corporate jet, and approving certain

transactions. *Id*. The Delaware court held that the plaintiffs' "argument fails due to its circular nature." *Id*. The court explained:

> In most derivative suits claiming waste, excessive executive or director compensation, or harm from other self-interested transactions, a plaintiff will argue that the board's decision to allow a transaction was a violation of its fiduciary duties. If the plaintiff can then avoid the demand requirement by reasoning that any board that would approve such a transaction (or as here, a history of past transactions) is by definition unfit to consider demand, then in few (if any) such suits will demand ever be required. This does not comport with the demand requirement's justification as a bulwark to protect the managerial discretion of directors.
>
> To excuse demand in this case it is not enough to show that the defendants approved a discriminatory poison pill, granted [the company's CEO] generous share options or allowed the [CEO's] family to carry out self-interested transactions. Instead, *the plaintiff must provide the Court with reason to suspect that each director did so not because they felt it to be in the best interests of the company, but out of self-interest or a loyalty to, or fear of reprisal from [the CEO]*.

Id. (emphasis added).

As in *Tyson* and *InfoUSA*, Plaintiff's argument here is circular. He points to prior transactions approved by Demathas and Xiradakis that benefitted Economou and argues that they establish a "pattern of differential and preferential treatment of Economou" that "demonstrates that Demathas and Xiradakis lack independence." However, as stated by the *InfoUSA* court, "it is not enough to show that the defendants approved . . . self-interested transactions." 953 A.2d at 989. Rather, Plaintiff "must provide the Court with reason to suspect that each director did so . . . out of self-interest or a loyalty to, or fear of reprisal from [Economou]." *Id*. However, the Amended Complaint lacks particularized facts alleging that Defendants' decisions were made out of loyalty to or fear of reprisal from Economou, that they are so '"beholden' to [Economou] or so under [his] influence that their discretion would be sterilized," or that they "would be more

willing to risk [their] reputation than risk the relationship with [Economou.]" *Beam*, 845 A.2d at 1054; *InfoUSA*, 953 A.2d at 989; *Orman*, 794 A.2d at 24. Without alleging such facts, Plaintiff fails to show that demand is excused based on the Board's prior decisions.

c. Director Compensation

Plaintiff argues that Defendants' director compensation further shows that they "are beholden to Economou and are incapable of acting in the Company's best interests." Plaintiff notes that "Demathas and Xiradakis received the first ever non-executive director equity grant mere days before approving the Primelead Divestment and October Purchase Agreements." Plaintiff argues that this equity grant "demonstrate[s] that Demathas and Xiradakis are incapable of acting independently of Economou."[6]

In the Amended Complaint, Plaintiff alleged that Demathas and Xiradakis "approved grants in the amount of 9,000 vested restricted shares and 9,000 unvested restricted shares to each non-executive director of the Company." Plaintiff explained that the equity grants were "made pursuant to the Company's 2008 Equity Incentive Plan." However, Plaintiff provides no allegations as to the value of the grants and how that value relates to the usual and customary fee typically received by directors. *In re Nat'l Auto Credit. Inc. S'holders Litig*., No. Civ. A. 19028, 2003 WL 139768, at *11 (Del. Ch. Jan. 10, 2003) ("This Court's view of the disqualifying effect of [directors'] fees might be different if the fees were shown to exceed materially what is commonly understood and accepted to be a usual and customary director's fee."). Without more, Plaintiff's allegations regarding the equity grant fail to show that Demathas and Xiradakis lacked independence from Economou. *Jacobs v. Yang*, No. Civ. A. 206-N, 2004

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[6] In his appellate brief, Plaintiff also argued that Demathas's and Xiradakis's increase in compensation for services rendered in 2008 show they are not "independent" of Economou. In his brief, Plaintiff argued that each of Demathas's and Xiradakis's "compensation skyrocketed to US$705,000, a 729% increase over their 2007 compensation." However, at the oral argument before this Court, Plaintiff conceded that he agreed with the High Court and Defendants that the $705,000 compensation was divided between the various Board members.

WL 1728521, at *4 (Del. Ch. Aug 2, 2004) ("[a]llegations [stating that] one's position as director and the receipt of director's fees, without more . . . are not enough for purposes of pleading demand futility").

3. Directors Kerames and Karamitsanis

Kerames and Karamitsanis became Board members after this action was commenced. In the Amended Complaint, Plaintiff states: "Kerames and Karamitsanis, who were appointed to the Board after this action was commenced, are not relevant to the issue of demand futility." On appeal to this Court, Plaintiff provides no argument as to these directors' actions at all - much less that they affect demand futility - and thus the Court concludes that they do not excuse the demand requirement.

4. Summary of the First Prong of the *Aronson* Test

As discussed above, the Court concludes that only Defendants Economou and Kandylidis were "interested" in the subject transactions. The Court concludes that none of the other Board members was "interested" or "dependent" under the *Aronson* test. Consequently, Plaintiff has failed to establish a reasonable doubt as to "the lack of independence or disinterestedness of a majority of the directors." *Aronson*, 473 A.2d at 817. The Court therefore moves to the second prong of the Aronson test for demand futility.

B. Whether Plaintiff Alleges Particularized Facts Creating a Reasonable Doubt That the Challenged Transactions Were Otherwise the Product of a Valid Exercise of Business Judgment

[11] In order to establish a reasonable doubt that the challenged transactions were the product of a valid exercise of business judgment, 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." *Aronson*, 473 A.2d at 812. This is a high burden, where "a plaintiff must plead specific facts to 'overcome the powerful presumptions of the business judgment rule before they will be permitted to pursue the derivative claim.'" *InfoUSA*, 953 A.2d at 972 (quoting

Rales v. Blasband, 634 A.2d 927, 933 (Del. 1993)). "This presumption protects decisions unless they cannot be attributed to any rational business purpose.'" *Id.* (quoting *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)). Because DryShips's articles of incorporation contain an exculpation clause, the Amended Complaint must "plead facts suggesting that the . . . directors breached their duty of loyalty by somehow acting in bad faith for reasons inimical to the best interests of [DryShips' s] stockholders." *In re Lear Corp. S'holder Litig*., 967 A.2d 640, 648 (Del. Ch. 2008).

[12] Mere disagreement with a director's decision "cannot serve as grounds for imposing liability." *Brehm*, 746 A.2d at 266. Indeed, courts do not second-guess business decisions, for doing so "would invite courts to become super-directors, measuring matters of degree in business decision-making and executive compensation" and "would run counter to the foundation of our jurisprudence." *Id*. 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." *Id*. at 259 ("in making business decisions, directors must consider all material information reasonably available"); *InfoUSA*, 953 A.2d at 984 ("[A] skilled litigant, and particularly a derivative plaintiff . . . places before the Court allegations that question not the merits of a director's decision, a matter about which a judge may have little to say, but allegations that call into doubt the motivations or the good faith of those charged with making the decision.").

1. Primelead Transaction

The Amended Complaint alleges that Demathas and Xiradakis approved the Primelead Divestment and that Demathas, Xiradakis, and Mitilinaios approved the Primelead Acquisition. Plaintiff argues on appeal that the "Primelead Acquisition resulted in the Company paying to Economou 93% more than the fair market value of his US$122 million Primelead equity interest" and that approval of the Acquisition "clearly exceeds the bounds of rationality, and is therefore not protected by the business judgment rule." Plaintiff also asserts that Demathas,

Mitilinaios, and Xiradakis "failed to properly apprise themselves of the value of Primelead and the assets being exchanged therefore."

[13] The Court rejects Plaintiff's first argument that the Board's decision as to the Primelead Transaction "exceeds the bounds of rationality." That Plaintiff disagrees with the Board's decision is insufficient to rebut the "powerful presumptions of the business judgment rule." *InfoUSA*, 953 A.2d at 972. Indeed, this Court will not second-guess the Board's decision unless that decision "cannot be 'attributed to any rational business purpose." *Id*. However, the allegations of the Amended Complaint reveal a rational business purpose for approving the Primelead Acquisition. The Amended Complaint expressly states that the Primelead Transaction took place over nine months in which "the Company's financial condition deteriorated dramatically as the shipping and oil industries buckled under the pressure of the world-wide economic downturn." Further, the Amended Complaint alleges that "oil prices plummeted in 2008" and "the Company had no means of financing the $1. 1 billion in installment payments needed to complete the newbuilding drillships. " The Amended Complaint also alleges that the "offshore drilling industry is replete with risk." The downturn of economic conditions for DryShips and the entire industry, as well as the risk involved in the offshore drilling industry, provide a "rational business purpose" for the Board's decision to approve the Primelead Acquisition. The Court therefore concludes that this decision is not one of the "rare cases" that is "so egregious on its face that board approval cannot meet the test of business judgment." *lnfoUSA*, 953 A.2d at 972.

The Court likewise rejects Plaintiff's argument that Demathas, Mitilinaios, and Xiradakis "failed to properly apprise themselves of the value of Primelead and the assets being exchanged therefore." Plaintiff contends that these Defendants "took undisclosed 'appropriate steps' to ensure the fairness of the Primelead Acquisition." Plaintiff argues that "the Company's failure to describe these 'appropriate steps' . . . creates a reasonable inference that [Defendants] . . . failed to properly inform themselves in connection with the Primelead Round-Trip Transaction."

As noted above, "in making business decisions, directors must consider all material information reasonably available." *Brehm*, 746 A.2d at 259. Further, presuit demand will only be excused where "particularized facts in the complaint create a reasonable doubt that the informational component of the directors' decision-making process . . . included consideration of all material information reasonably available." Here, the Amended Complaint lacks particularized facts creating such reasonable doubt. It only contains allegations that DryShips "has not disclosed what 'appropriate steps' were taken in connection with the negotiation of the Primelead Acquisition" but does not include particularized facts that Defendants "act[ed] in bad faith for reasons inimical to the best interests of [DryShips's] stockholders." *Lear*, 967 A.2d at 648.Without alleging facts that Defendants failed to consider all material information reasonably available to them, Plaintiff does not meet the second prong of the *Aronson* test with respect to the Primelead Transaction.

2. July and October Agreements

Plaintiff contends that facts relating to Defendants' decisions with respect to the deposit amount for the July Agreement, as well as the termination fee amounts for the July and October Agreements, rebut the presumption that their decisions were "attributed to any rational business purpose." *InfoUSA*, 953 A.2d at 972.

With respect to the 13.75% deposit that DryShips paid in connection with entering the July Agreement, the Amended Complaint alleges that the industry standard is a 10% deposit and that DryShips had previously paid 10% deposits in other transactions. As for the termination fees of the Agreements, the Amended Complaint alleges that DryShips paid $105 million with respect to the July Agreement and granted Economou warrants worth $82.5 million as to the October Agreement. Importantly, the facts alleged do not indicate that Defendants negotiated the deposit or fees in bad faith. *Lear*, 967 A.2d at 648, 652 n.47 (noting the complaint must contain "allegations that the defendant directors breached their duty of loyalty by engaging in intentional, bad faith, or self-interested conduct that is not immunized by the exculpatory charter provisions").

Furthermore, the Amended Complaint lacks any facts discussing the context of entering the July Agreement, which would have dictated the July deposit amount. With respect to the termination fees, the Amended Complaint states that, "[a]s 2008 progressed, . . . the health of the shipping industry deteriorated" and "the world fell further into economic crisis." Indeed, "daily average of charter rates . . . [fell] 90%." In light of these facts as to the global economic downturn, it was entirely rational for the Board to terminate the agreement to purchase the various carriers for hundreds of millions of dollars. *InfoUSA*, 953 A.2d at 972 (the business judgment presumption "protects decisions unless they cannot be 'attributed to any rational business purpose'" (quoting *Sinclair Oil*, 280 A.2d at 720)).

Additionally, as noted above, courts do not second-guess business decisions but instead question "the informational component of the directors' decision-making process" and "the motivations or the good faith of those charged with making the decision." *Brehm*, 746 A.2d at 266; *InfoUSA*, 953 A.2d at 984. However, the Amended Complaint lacks any particularized facts that Defendants failed to consider all available information or were motivated by bad faith or lacked good faith in deciding the termination fee amounts.

With respect to the termination fee for the July Agreement, Plaintiff alleges in the Amended Complaint that the $105 million fee was paid solely "for the 'opportunity' to purchase the Panamax vessels . . . in the event that the world-wide economy recovers." However, the High Court discredited that "unsubstantial allegation . . . [because] that allegation is contradicted by the Company's securities filings." The High Court and this Court may take judicial notice of Securities and Exchange Commission documents and may disregard facts in the Amended Complaint that are "at odds" with those documents. *See Lagrone v. American Mortell Corp*., Nos. 04C-10-l 16-ASB, 07C-12-019-JRS, 2008 WL 4152677, at *4 (Del. Sept. 4, 2008). In Form 6-K filed on December 10, 2008, DryShips's public disclosures stated that the $105 million was paid "[i]n consideration of the cancellation of the acquisitions and the exclusive purchase option granted to [DryShips]." Therefore, the $105 million was paid not only for the "'opportunity' to purchase the Panamax vessels" but it was also consideration for cancelling a

$400 million contract. The decision to pay $105 million for relief from a $400 million contract for ships worth far less than that, while obtaining an option to purchase the ships at a later date, is a rational decision by the Board. *InfoUSA*, 953 A.2d at 972 (noting the business judgment presumption "protects decisions unless they cannot be 'attributed to any rational business purpose'" (quoting *Sinclair Oil*, 280 A.2d at 720)).

Absent particularized facts creating reasonable doubt that the fees paid in relation to the July and October Agreements were the product of a valid exercise of business judgment, the Court concludes that Plaintiff fails to meet the second prong of the *Aronson* test with respect to these Agreements. *Aronson*, 473 A.2d at 814.

3. Economou' s Compensation

According to the Amended Complaint, Demathas and Xiradakis approved a $6.98 million bonus to Economou for services rendered during 2008 and an increase in the annual fee to Fabiana, which "increased Economou's annual compensation by approximately $576,000." On appeal, Plaintiff contends that "such a significant increase in Economou's compensation at such a perilous time cannot be considered a good faith decision."

[14] According to the Supreme Court of Delaware, "[i]t is the essence of business judgment for a board to determine if a particular individual warrants large amounts of money, whether in the form of current salary or severance provisions." *Brehm*, 746 A.2d at 263 (internal quotation marks and brackets omitted). Stated differently, "the size and structure of executive compensation are inherently matters of judgment." *Id.*; *see also Gagliardi v. TriFoods Int'l, Inc.*, 683 A.2d 1049, 1 051 (Del. Ch. 1996) ("In the absence of facts casting a legitimate shadow over the exercise of business judgment reflected in compensation decisions, a court, acting responsibly, ought not to subject a corporation to the risk, expense and delay of derivative litigation, simply because a shareholder asserts, even sincerely, the belief and judgment that the corporation wasted corporate funds by paying far too much."). Although the compensation paid to Economou was generous, the Board's decision as to the amount of his compensation is inherently a matter of business judgment. The Court therefore concludes that Plaintiff fails to

meet the second prong of the *Aronson* test with respect to Economou's compensation. *Aronson*, 473 A.2d at 814.

C. Allegations of Waste

Plaintiff argues that the Amended Complaint contains "particularized allegations demonstrate[ing] that Demathas, Mitilinaios, and Xiradakis wasted corporate assets in connection with the Primelead Round-Trip Transaction, the [July and October] Agreements, the 2008 Bonus, and the Services Agreement."

[15] 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." *Brehm*, 746 A.2d at 263.

> [A] Waste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade. Most often the claim is associated with a transfer of corporate assets that serves no corporate purpose; or for which no consideration at all is received. Such a transfer is in effect a gift. If, however, there is any substantial consideration received by the corporation, and if there is a good faith judgment that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude ex post that the transaction was unreasonably risky. Any other rule would deter corporate boards from the optimal rational acceptance of risk . . . . Courts are ill-fitted to attempt to weigh the "adequacy" of consideration under the waste standard or, ex post, to judge appropriate degrees of business risk.

Id.

The Court concludes that the Amended Complaint lacks facts establishing that the transactions challenged by Plaintiff served no purpose, involved less than substantial consideration to DryShips, or were so one-sided as to constitute waste. In the Primelead Transaction, DryShips received drillships. With the termination of the July and October Agreements, DryShips reduced its capital expenditures at a time when the company was financially suffering. As to Economou's compensation, the Amended Complaint lacks facts

showing that the "directors irrationally squander[ed] or g[a]ve away corporate assets." *Brehm*, 746 A.2d at 263. Accordingly, the facts alleged in the Amended Complaint do not establish that the challenged transactions constitute "waste" and do not excuse Plaintiff's failure to make a demand on the Board.

CONCLUSION

For the foregoing reasons, the Court concludes that Plaintiff failed to plead particularized facts in the Amended Complaint establishing that demand is excused. The Court therefore AFFIRMS the High Court's February 19, 2010 Order Granting Individual Defendants' Motion to Dismiss the Verified Amended Complaint.

AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

YANDAL INVESTMENTS PTY LTD.,
a Western Australia corporation, and
TAHLIA FAMILIES TRUST, Plaintiffs/Appellants,
v.
WHITE RIVERS GOLD LIMITED,
a Marshall Islands corporation, and
HARRY MASON, Defendants/Appellees.

SCT CN 2011-003 (HCT CN 2010-158)

Submitted November 11, 2011
Filed January 25, 2012

Summary

The Supreme Court concluded that, unless the High Court directs entry of judgment pursuant to Marshall Islands Rule of Procedure 54(b), the orders appealed from (with exception of the High Court's May 19, 2011 "stay order") are not "final decisions," and the Supreme Court lack jurisdiction to entertain an appeal from those orders at this time. The Supreme Court also concluded that the High Court's May 19, 2011 "stay order" is immediately appealable as an exception to the "final judgment" rule under *Moses H. Cone* (i.e., the stay order puts the parties out of the court, either permanently because it terminates the action as a practical matter, or, as some courts have held, for a protracted or indefinite period) or, alternatively, is an appealable "collateral order" over which the court can assert jurisdiction. Finally, the Court concluded it did not have pendent appellate jurisdiction over the interlocutory orders appealed from.

Digest

1. COURTS - *Supreme Court - Jurisdiction*: The Supreme court has jurisdiction to entertain appeals from the High Court is limited to final decisions.

2. APPEAL AND ERROR - *Decisions Reviewable - Finality of Determination*: 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.

3. APPEAL AND ERROR - *Decisions Reviewable - Finality of Determination*: The Supreme Court has consistently held that appeals from interlocutory orders will not be entertained.

4. APPEAL AND ERROR - *Decisions Reviewable - Multiple Parties or Claims*: The general rule governing appeals in multiple party, multiple claim cases is that they may be taken only after the entire case is disposed of on all substantive issues. For a judgment to be final, absent certain exceptions, it must end the litigation on the merits for all claims and all parties. It is sometimes important, however, that review not be delayed until all questions are decided by the trial court. S.Ct. Rule 4(a)(l) provides for review of interlocutory orders where permitted by statute or rule.

5. APPEAL AND ERROR - *Multiple Parties or Claims - MIRCP 54(b) Final Order*: In cases involving multiple claims or multiple parties, Marshall Islands Rules of Civil Procedure (MIRCP) Rule 54(b) grants the power to the High Court, in its discretion, to make final an order determining at least one claim or the entire interest of at least one party. That judgment is then immediately appealable if the trial court expressly determines there is no just reason for delay and expressly directs the entry of judgment. MIRCP 54(b).

6. APPEAL AND ERROR - *Decisions Reviewable - Multiple Parties or Claims*: In the absence of a final judgment entered under Rule 54(b) any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating an the claims and the rights and liabilities of all the parties. In other words, the order or other form of decision which adjudicates some but not all claims or determines liabilities as to some but not all parties remains interlocutory and is not appealable.

7. APPEAL AND ERROR - *Decisions Reviewable - Multiple Parties or Claims*: Unless a court directs the entry of a final judgment pursuant to Rule 54(b), an order in which the district court dismisses a defendant for want of personal jurisdiction but where other defendants remain cannot in itself be a final order for purposes of appeal.

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8. APPEAL AND ERROR - *Decisions Reviewable - forum non conveniens*: It is generally held that a dismissal on *forum non conveniens* grounds is a final, appealable judgment even though it does not end the litigation. *See, e.g., Stroitelstvo Bulgaria. Ltd v. Bulgarian-American Enterprise Fund,* 589 F.3d 417, 421 (7th Cir. 2009), *King v. Cessna Aircraft Co.,* 562 F3d 1374, 1378-89 (11th Cir. 2009).

9. APPEAL AND ERROR - *Decisions Reviewable - Stay Order*: Generally, a stay order does not constitute a final decision and is not considered an appealable order. A stay order is appealable, however, if it puts the plaintiff effectively out of court.

10. APPEAL AND ERROR - *Decisions Reviewable - Collateral Order*: The High Court's stay order is appealable as a collateral order. To be appealable as a collateral order an order must [l] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment.

11. APPEAL AND ERROR - *Decisions Reviewable - Pendent Appellate Jurisdiction*: Pendent appellate jurisdiction allows an appeals court to exercise jurisdiction over a non- final and therefore otherwise unappealable claim where the issue is inextricably intertwined with an issue over which the court properly has appellate jurisdiction.

12. APPEAL AND ERROR - *Stay - Standard of Review*: The standard of review of a stay order is abuse of discretion.

Counsel

James McCaffrey, David W. Lowe, and Tatyana Cerullo, counsel for Plaintiffs/Appellees Yandal Investments, Ltd, and Tahlia Family Trust
Davor Pevec, counsel for Defendants/Appellants White Rivers Gold Limited and Harry Mason

MARSHALL ISLANDS, SUPREME COURT

Before CADRA, Chief Justice, and SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS APPEAL

CADRA, C.J., with whom SEABRIGHT, A.J., and KURREN, A.J., concur:

I. INTRODUCTION

Appellees have moved to dismiss Appellants' appeal from (1) the High Court's December 14, 2010 Order dismissing plaintiffs' original complaint against White Rivers Gold Limited for failure to state a claim with leave to amend, and (2) the High Court's May 19, 2011 Order (a) dismissing all claims against defendant Harry Mason for lack of personal jurisdiction, (b) dismissing securities law claims against defendant White Rivers Gold Limited, and (c) staying the remainder of the claims against White Rivers Gold Limited for negligence and fraud on grounds of *forum non conveniens*, pending completion of a related case in Australia (Western Australia Action CIV 2418 of 2010).

Appellants have filed a timely opposition to the motion to dismiss.

We find the parties' briefing adequate to resolve the motion to dismiss and therefore dispense with oral argument.

We conclude that, unless the High Court directs entry of judgment pursuant to MIRCP, Rule 54(b), the orders appealed from (with exception of the High Court's May 19, 2011 "stay order") are not "final decisions" and we, therefore, lack jurisdiction to entertain an appeal from those orders at this time.

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[1]J. Michael Seabright, District Judge, District of Hawaii, sitting by appointment of Cabinet.

[2]Barry Kurren, Magistrate Judge, District of Hawaii, sitting by appointment of Cabinet.

We also conclude that the High Court's May 19, 2011 "stay order" is immediately appealable as an exception to the "final judgment" rule under *Moses H. Cone* or, alternatively, is an appealable "collateral order" over which we can assert jurisdiction.

We finally conclude we do not have pendent appellate jurisdiction over the interlocutory orders appealed from.

We therefore **GRANT IN PART** and **DENY IN PART** appellees' motion to dismiss. We assert jurisdiction over the appeal from the High Court's May 19, 2011 "stay order" and dismiss the remainder of the appeal without prejudice to appellants seeking an MIRCP, Rule 54(b) determination or, alternatively, awaiting entry of a final decision disposing of all claims against all parties.

II. PROCEDURAL AND FACTUAL BACKGROUND

Our inquiry on appellees' motion to dismiss is limited to whether we have jurisdiction to hear the decisions appealed from *at this time.*. The intricate facts underlying the dispute between the parties arc therefore not relevant except as they provide light on the jurisdictional question.

On September 22, 2010, appellants filed its "Original Complaint for Declaratory and Injunctive Relief" against appellee White Rivers Gold Limited (WRGL). Appellants' complaint sought declaratory and injunctive relief based on their alleged preemptive rights as shareholders of WRGL under the Marshall Islands Business Corporations Act. Appellants alleged that Thames Holdings Limited, a non-domestic corporation organized under the laws of the Marshall Islands, was formed in September, 2008, by filing Articles of Incorporation with the RMI Registrar of Corporations. Thames Holdings Limited was created to implement a joint venture agreement entitled "Heads of Agreement (HoA) Witwatersrand Project" between Mark Creasy and Harry Mason. The complaint alleged appellant-plaintiff Yandal Investments is the "associated entity" of Creasy, referenced in the HoA. Apparently, the Articles of Incorporation of Thames Holdings Limited authorized the issuance of 50,000 shares at a par value of $1.00 per share. On October l, 2008, appellant-plaintiff Yandal, an Australia corporation, was issued Certificate No. 0003 for 40,000,000 shares. On that same date, appellant Tahlia Family Trust, a

discretionary common law trust, was issued Certificate No. 0006 for 850,000 shares. The HoA called for formation of a new company (NEWCO) to be formed in a suitable jurisdiction. Amended Articles of Incorporation were filed on November 2, 2009, changing the name of the corporation to White Rivers Gold Limited. Harry Mason is alleged to be the managing director of WRGL. Amended Articles were filed on March 29, 2010 authorizing the issuance of additional share. The complaint alleges WRGL has issued shares since October 1, 2008, and has solicited new investment without offering appellants-plaintiffs the opportunity to exercise preemptive rights. Appellants' complaint sought a declaratory judgment that they are entitled to exercise their preemptive rights in accordance with the RMI Business Corporations Act, section 78; that their preemptive rights had been violated; and that any previous shares issued in violation of their preemptive rights are null and void. At the time the original complaint was filed, there was a lawsuit pending in Western Australia between Creasy and Mason arising out of the HoA.

Appellee WRGL moved to dismiss Appellants' original complaint for failure to state a claim upon which relief can be granted and on grounds of *forum non conveniens.*

On December 14, 2010, the High Court issued an "Order Granting Plaintiffs Leave to Amend Complaint." The High Court concluded that the shares issued plaintiffs were void because those shares were issued in excess of the number of shares authorized in the Articles of Incorporation and because the shares were issued for less than par value. Because the shares were void, appellants-plaintiffs had no preemptive rights as shareholders and therefore the original complaint failed to state a cause of action. The High Court also found the defendant's motion to dismiss on *forum non conveniens* grounds was premature and denied it without prejudice. Plaintiffs were granted leave to amend.

On January 14, 2011, Appellants filed their "First Amended Complaint" (FAC) alleging claims for "Negligence," "RM1 Securities Law violations," and "Common Law Fraud" against WRGL and Harry Mason.

On February 15, 2011, WRGL filed a motion to dismiss the FAC or, alternatively, stay the proceedings before the High Court. WRGL argued that Appellees' claim for RMI securities law violations failed to state a claim upon which relief can be granted and the claims for negligence and common law fraud should be dismissed on grounds of *forum non conveniens* or stayed pending outcome of the litigation in Australia.

On March 14, 2011, Appellee Mason filed a motion to dismiss the FAC in its entirety for lack of personal jurisdiction over Mason, for failure to state a claim upon which relief can be granted, and for failure to join an indispensable party (i.e., Creasy). Alternatively, Mason moved for an order dismissing the claim for alleged RMI securities law violations and/or dismissing the FAC in its entirety on grounds of *forum non conveniens.*

On May 19, 2011, the High Court issued a written order granting Mason's motion to dismiss for lack of personal jurisdiction. The High Court also dismissed Appellee's claim for "RMI Security Laws violations" for failure to state a claim upon which relief can be granted. The High Court found the securities law claim fails because there was no act, with regard to securities, taken within the Republic; no stock was issued and even if issued was not issued in the Marshall Islands. Finally, the High Court ordered the remaining matters at issue (i.e., the negligence and fraud claims against WRGL) stayed until the pending related civil action in Australia has been resolved.

Appellants filed a timely Notice of Appeal on June 9, 2011. The record was certified on August 25, 2011. On October 3, 2011, Appellees filed a motion to dismiss appeal arguing this Court lacks jurisdiction over the appeal because the orders appealed from are not "final decisions." After a brief extension of time, Appellants filed an opposition to the motion to dismiss on October 19, 2011.

III. Discussion

A. The Supreme Court Only Has Jurisdiction Over "Final Decisions" or "Interlocutory Decisions" Permitted by Statute or Rule.

[1]Generally, our jurisdiction to entertain appeals from the High Court is limited to "final decisions." The RMI Constitution, Article VI, Section 2(2)(a), provides in relevant part: "An appeal shall be to the Supreme Court: as of right from any final decision of the High Court in the exercise of its original jurisdiction." That Constitutional provision gives this Court jurisdiction only over appeals from "final decisions." *See, e.g, Bokmej v. Lang and Jamodrei,* 1 MILR (Rev.) 85, 86 (1987); *RMI v. Balos (2),* 1 MILR (Rev.) 67, 68 (1987).

[2][3]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,* l MILR (Rev.) 299, 300 (1992). This Court "has consistently held that appeals from interlocutory orders will not be entertained." *Id.*

[4]The general rule governing appeals in multiple party, multiple claim cases is that they may be taken only after the entire case is disposed of on all substantive issues. For a judgment to be final, absent certain exceptions, it must end the litigation on the merits for all claims and all parties. *See, e.g., FirsTier Mortg. Co. v. lnvestors Mortg. Ins. Co.,* 498 U.S. 269, 273-74 (1991). It is sometimes important, however, that review not be delayed until all questions are decided by the trial court. S.Ct. Rule 4(a)(l) provides for review of "interlocutory orders where permitted by statute or rule."

[5]In cases involving multiple claims or multiple parties, Marshall Islands Rules of Civil Procedure (MIRCP) Rule 54(b) grants the power to the High Court, in its discretion, to make final an order determining at least one claim or the entire interest of at least one party. That judgment is then immediately appealable if the trial court expressly determines there is no just reason for delay and expressly directs the entry of judgment. MIRCP 54(b).

[6]In the absence of a final judgment entered under Rule 54(b) "any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry

of judgment adjudicating an the claims and the rights and liabilities of all the parties." In other words, the order or other form of decision which adjudicates some but not all claims or determines liabilities as to some but not all parties remains interlocutory and is not appealable.

B. With the exception of the High Court's may 19, 2011 "stay order," the orders appealed from are not "final" for purposes of appeal.

1. The May 19, 2011 order dismissing all claims against Mason is not a final appealable order over which we can independently assert appellate jurisdiction in the absence of a Rule 54(b) determination.

The portion of the High Court's May 19, 2011 order dismissing the entire case against Mason for lack of personal jurisdiction is not a final appealable order because claims remain pending against defendant WRGL and the High Court has not directed entry of final judgment as to defendant Mason pursuant to MIRCP 54(b).

[7]The federal courts have consistently held that unless a district court directs the entry of a final judgment pursuant to Rule 54(b), an order in which the district court dismisses a defendant for want of personal jurisdiction but where other defendants remain cannot in itself be a final order for purposes of appeal. *See, e.g., Special lnvs., inc. v. Aero Air, Inc.,* 360 F.3d 989, 993 (9th Cir. 2004)("An order dismissing one party for lack of personal jurisdiction while allowing suit to continue against the remaining defendants is not a final, appealable order absent an 'express determination that there is no just reason for delay and . . . an express direction for the entry of judgment.'"); *see also, Pennzoil Prods. Co. v. Colelli & Assocs., Inc.,* 149 F.3d 197, 200 (3rd Cir. 1998)(district court order dismissing some, but not all defendants for lack of personal jurisdiction not considered final and appealable although appellate jurisdiction existed because district court granted permission for an interlocutory appeal); *Allen v. Ukam Holdings. Inc.,* 116 F.3d 153, 154 (5th Cir. 1997)(dismissing appeal for lack of appellate jurisdiction when district court dismissed one of two defendants for lack of personal jurisdiction); *Chapple v. Levinsky,* 961 F.2d 372, 374 (2nd Cir. 1992)(dismissal of three defendants for lack of personal jurisdiction could not be appealed absent certification under Rule 54(b), because case remained

pending against other defendant, even though court transferred action as to that defendant to a more convenient venue).

Because Appellants have not obtained a Rule 54(b) determination on the High Court's order dismissing Mason as a defendant we do not have an independent basis to assert appellate jurisdiction over that portion of the High Court's May 19, 2011 order. As discussed below, we decline to assert pendent appellate jurisdiction over this order.

2. The December 14, 2010 and May 19, 2011 Orders are not final appealable orders in the absence of a Rule 54(b) determination.

Similarly, the High Court's December 14, 2010 order regarding Appellants' preemptive rights and shareholder status *vis a vis* WRGL and the May 19, 2011 order dismissing the securities law claims against WRGL are not final appealable orders because claims remain pending against WRGL and the High Court has not directed entry of a final judgment as to those orders pursuant to MIRCP 54(b).

The December 14, 2010 order dismissing Appellants' original complaint against WRGL based on theories of shareholder and preemptive rights with leave to amend is not a final order. Claims dismissed with leave to amend require a final order to be appealable. *See, e.g., WMX Techs., Inc. v. Miller,* 104 F.3d I133, 1136 & n.l (9th Cir. 1997 *en banc*). Appellants could have stood up to their pleading and appealed at that time but would still need to obtain a final order of dismissal to appeal that order. *Id.* Instead, Appellants chose to amend their complaint setting forth different theories of liability. The High Court then dismissed the securities law claims pled against WRGL in the amended complaint but stayed the remainder of the claims for negligence and fraud in its May 19, 2011 order. An appeal of the May 19, 2011 order dismissing the securities law violation claim would also require a final order of dismissal because claims remain pending against WRGL.

If appellants want to appeal the December 14, 2010 order and/or any portion of the May 19, 2011 order, they must first obtain a final order of dismissal Rule 54(b) provides a mechanism

for doing so. Without a Rule 54(b) determination we lack appellate jurisdiction over Appellants' appeal from the December 14, 2010 and May 19, 2011 orders.

C. The May 19, 2011 "'Stay' Order Is Appealable Under The Rule Announced In *Moses H. Cone* And/Or Under The "Collateral Order" Doctrine.

1. The High Court's "Stay Order" puts Appellants "effectively out of court."

[8]It is generally held that a "dismissal" on *forum non conveniens* grounds is a final, appealable judgment even though it does not end the litigation. *See, e.g., Stroitelstvo Bulgaria. Ltd v. Bulgarian-American Enterprise Fund,* 589 F.3d 417, 421 (7th Cir. 2009), *King v. Cessna Aircraft Co.,* 562 F3d 1374, 1378-89 (11th Cir. 2009). In this case, the High Court "stayed," rather than "dismissed," the claims remaining against WRGL on *forum non conveniens* grounds pending resolution of the case in Western Australia.

[9]Generally, a stay order does not constitute a final decision and is not considered an appealable order. A stay order is appealable, however, if it puts the plaintiff "effectively out of court." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.,* 460 U.S. 1, 10 (l983).

In *Moses H. Cone,* the U.S. Supreme Court held that an order staying litigation in federal court pending resolution of a case in state court that would have *res judicata* effect on the federal action essentially amounted to a dismissal. Relying on its earlier decision in *ldlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713 (1962), the Supreme Court concluded that the stay was appealable because there would be "no further litigation in the federal forum" and the state's decision would be *res judicata,* leaving the defendant "effectively out of court." *Moses H. Cone,* 460 U.S. at 10. In *ldlewild,* a federal district court stayed an action seeking to invalidate a New York law to allow the state court the opportunity to address the plaintiff's various claims. *Idlewild, supra,* at 714. Notably, the Supreme Court held that the stay was appealable despite the fact that the state court decision might not moot the federal proceedings. *Id.* at 714, 715 n.2 (holding that Idlewild was "effectively out of court" where the district court's stay allowed the state court to address issues that would not necessarily dispose of the case); *see also, Lockyer v.*

Mirant Carp., 398 F.3d 1098, 1101-04 (9th Cir. 2005)("Even . . . where the case might well come back to federal district court, ldlewild Liquor was 'effectively out of court' for purposes of appealability of the stay order.").

Following *Moses H. Cone,* the federal courts have held that a stay may be an appealable order "when it effectively puts the parties out of the district court, either permanently because it terminates the action as a practical matter, or, as some courts have held, for a protracted or indefinite period." *See, e.g., Spread Spectrum Screening, LLC.. v. Eastman Kodak Co., et al.,* 657 F.3d 1349 (Fed. Cir. 2011); *Blue Cross & Blue Shield of Ala. v. Navigators Ins. Co.,* 490 F.3d 718, 724 (9th Cir. 2007)(concluding certain stay orders are appealable final orders because "lengthy and indefinite stays place a plaintiff effectively out of court"); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.,* 498 F.3d 1059 (9th Cir. 2007)(finding stay order effectively put appellant out of court under *Moses H. Cone* and, alternatively, finding that stay order was an appealable "collateral order.").

The High Court's stay order dearly anticipated and intended that proceedings would resumes once the Australia case is concluded. It is not known, however, how long the court in Australia will take to reach a resolution of the issues before it. The High Court's stay order is indefinite. Given the indefiniteness of the stay we find appellants-plaintiffs are "effectively out of court" and the stay order is appealable.

2. The "stay order" is an appealable "collateral order."

[10]The court in *Dependable Highway* went on to consider whether appellate jurisdiction was established under the so-called "collateral order" doctrine. The court concluded that even if the stay did not constitute a final order under *Moses H. Cone,* appellate jurisdiction was established under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). In *Cohen,* the Supreme Court concluded that under certain circumstances a small class of collateral orders is immediately appealable. To fall with *Cohen's* ambit, an order '"must [l] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the

action, and [3] be effectively unreviewable on appeal from a final judgment." *Dependable Highway,* 498 F.3d at 1065, citing *Coopers & Lybrand v. Livesay,* 437 U.S. 463. 468, (1978).

Citing *Lockyer,* the court in *Dependable Highway* found the first *Cohen* criteria was satisfied "because, even though the stay order could theoretically be modified, the district court did not impose a time limit on the stay or note circumstances that might result in its modification." *Dependable Highway, supra,* at 1065. We, likewise find the first *Cohen* criteria met here because the High Court did not impose a time limit or indicate that it might consider modifying its stay order. We have no indication from review of the record as to when a decision might be reached by the Australian court and proceedings resumes in the High Court. Again, the High Court's stay is indefinite. Generally stays should not be indefinite in nature. *Dependable Highway,* 498 F.3d at 1066-67 citing *Yong v. INS,* 208 F.3d 1116, 1119 (9th Cir. 2000).

The *Dependable Highway* court found that *Cohen's* second criterion was met because "the district court order staying the federal action in light of the English proceedings was a refusal to address the merits of Dependable's breach of contract claims and related challenges to the arbitration clause found in Navigators' Columbus Wording." *Id.* We, likewise, find the second *Cohen* criterion met. The High Court's stay and deferral of issues to the Australia court is a refusal to adjudicate the merits in this forum. The propriety of granting the stay "presents an important issue separate from the merits."

Finally, the third criterion of *Cohen* is met because the "propriety of the stay will be unreviewable on appeal" regardless of whether the Australia proceedings moot the litigation in the RMI. If the Australia proceedings do not put an end to the RMI proceedings, the High Court will lift the stay and eliminate its reviewability. *Id* at 1065.

We therefore conclude that the High Court's May 19, 2011 stay order is appealable under *Cohen* as a collateral order.

D. We Do Not Have "Pendent Appellate Jurisdiction" Over The Interlocutory Orders Appealed From.

Having concluded appellate jurisdiction exists over the High Court's order staying proceedings, the question then becomes whether this Court has pendent appellate jurisdiction over the other interlocutory orders appealed from (i.e., the December 14, 2010 order and May 19, 2011 order dismissing the entire case against Mason and dismissing the securities law violation claim against WRGL).

In *Swint v. Chambers County Commission,* 514 US. 35, 50-51 (1995), the U.S. Supreme Court declined to settle definitely "whether or when it may be proper for a court of appeals, with jurisdiction over one ruling, to review, conjunctively, related ruling that are not themselves independently reviewable." The Court made clear, however, that appellate courts shou1d exercise restraint in reviewing on interlocutory appeal otherwise non-appealable orders because "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen* type collateral orders into multi-issue interlocutory appeal tickets. . . ." *Id.* at 49-50 (citing *Abney v. United States,* 431 U.S. 65l, 663 (l 977)); *see also, Switzerland Cheese Ass'n v. E. Horne's Mkt., Inc.,* 385 U.S. 23, 24 (1966)(cautioning that jurisdiction over interlocutory appeals should be applied "somewhat gingerly lest a floodgate be opened that brings into the exception many pretrial orders."); *see also, Rein v. Socialist People's Libyan Arab Jamahirya,* 162 F.3d 748, 757 (2nd Cir. 1998), *cert denied*, 521 U.S. 1003 (1999)("[a] system in which parties could get immediate appellate review of multiple issues once the door was opened for review of one issue would tempt parties to rummage for rulings that would authorize interlocutory appeals" expressing concern that a "party will appeal a flimsy collateral issue with the intention of obtaining interlocutory review for other issues its presses.").

[11]Pendent appellate jurisdiction allows an appeals court to exercise jurisdiction over a non- final [and therefore otherwise unappealable] claim where the issue is "inextricably intertwined" with an issue over which the court properly has appellate jurisdiction. *See, e.g., Brill v. Garcia,* 457 F.3d 264, 273 (2nd Cir. 2006); *see also, Cunningham v. Gates,* 229 F.3d 1271, 1284 (9th Cir. 2000)("Pendent appellate jurisdiction refers to the exercise of jurisdiction over issues that ordinarily may not be reviewed on interlocutory appeal, but may be reviewed on

interlocutory appeal if raised in conjunction with other issues properly before the court."). The Ninth Circuit has held that "[t]wo issues are not 'inextricably intertwined" if we must apply different legal standards to each issue." *See. e.g., Meredith v. Oregon,* 321 F.3d 807, 814 (9th Cir. 2003); *Cunningham,* at 1285. "Rather, the legal theories on which the issues advance must either (a) be so inextricably intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal, or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue." *Meredith. supra,* at 814.

[12]The standard of review of a stay order is "abuse of discretion." *See, e.g., Dependable Highway Express, Inc.,* at 1066, citing *Intel Corp. v. Advanced Micro Devices, inc.,* 12 F.3d 908, 912 (9th Cir. 1993); *see also, Adams v. Merck & Co.,* 353 Fed.Appx. 960, 962 (5th Cir. 2009)("We review rulings based on the doctrine of *forum non conveniens* for 'abuse of discretion."') citing *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 247-49 (1981). The other High Court orders appealed from are reviewed "*de novo*, as conceded by Appellants in their briefing. The issues presented by the other interlocutory orders appealed from are therefore not "inextricably intertwined" with the issues presented on appeal of the stay order for purposes of asserting pendent appellate jurisdiction.

Pendent appellate review of the interlocutory orders is not "necessary to ensure meaningful review" of the High Court's stay order. The issue on appeal from the stay order is whether the High Court abused its discretion in ordering the stay. In determining that issue, it is not necessary that the October 14, 2010 order regarding Appellants' shareholder and preemptive rights or the May 19, 2011 orders dismissing the entire case against Mason and dismissing the RMI securities law claims against WRGL be addressed.

We conclude we do not have appellate jurisdiction over the December 14, 2010 order and the remaining issues determined by the May 19, 2011 order pendent to our assertion of jurisdiction over the "stay order" appealed from.

IV. CONCLUSION

For the reasons set forth above, we assert jurisdiction over the May 19, 2010 "stay order." We, therefore, **DENY** appellees' motion to dismiss the appeal from the May 19, 2010 "stay order" and **GRANT** the motion to dismiss the appeal from the remaining High Court orders without prejudice to appellants obtaining a Rule 54(b) determination or awaiting a final order disposing of all claims against all parties.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JIEN LEKKA, attorney-in-fact for
KALORA LEKKA,

S.Ct. Case No. 2006-010
High Ct. Civil No. 2003-162

Plaintiff-Appellant

-v-

NEIMATA NAKAMURA KABUA, et al.,

Defendants-Appellees

APPEAL FROM THE HIGH COURT

JULY 24, 2013

CADRA, C.J.
SEABRIGHT[1] and KURREN,[2] Acting Associate Justices

SUMMARY:

Plaintiff requested the High Court find that she, not Defendant, holds Iroijlaplap title rights to certain land. She claimed the Nitijela's declaration of customary law - that only successors to four named Iroijlaplaps may hold Iroijlaplap title - deprived her of property rights without due process. The High Court upheld the Nitijela's declaration of customary law and, based on that law and the parties' genealogies, entered judgment against Plaintiff. Upon appeal, the Supreme Court affirmed.

DIGEST:

1. STATUTES - *Construction and Operation - Rules of Interpretation*: 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.

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[1] Honorable J. Michael Seabright, District Judge, District of Hawaii, sitting by designation of the Cabinet.

[2] Honorable Barry M. Kurren, Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

LEKKA V KABUA, et al.

2. STATUTES - *Construction and Operation - Rules of Interpretation:* 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.

3. STATUTES - *Construction and Operation - Rules of Interpretation:* When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.

4. STATUTES - *Construction and Operation – Rules of Interpretation*: 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.

5. CONSTITUTIONAL LAW - *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.

6. CONSTITUTIONAL LAW - *Nitijela - Enactments*: 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.

Per curiam:

The parties in this action dispute whether Plaintiff may hold and exercise Iroijlaplap title rights to certain lands in the Ralik Chain. The Nitijela issued a declaration of customary law on this issue, stating that only successors of four named Iroijlaplaps may hold and exercise title to the lands. Customary Law (Ralik Chain) Act 1991 (''Ralik Act") § 3, 39 MIRC § 403. Therefore, both parties present their genealogy to the Court in arguing for rights to the lands.

Based on the Nitijela's declaration and the parties' genealogies, the High Court of the Republic of the Marshall Islands found that Plaintiff-Appellant Kalora Lekka is not a successor of any of the named Iroijlaplaps. Further, the High Court declined to find that the Ralik Act impermissibly and retroactively destroys Plaintiffs alleged rights to the lands. Consequently, the High Court granted summary judgment in favor of Defendant-Appellee Neimata Nakamura Kabua

("Defendant Neimata")[3] and dismissed the Amended Complaint. Plaintiff now appeals the High Court's order, which we AFFIRM.

BACKGROUND

I. Factual Background

As noted by the High Court, the relevant facts are the parties' genealogies. Indeed, the Nitijela's declaration of customary law governing who may hold and exercise Iroijlaplap rights to lands in the Ralik Chain is based on genealogy:

> In the Ralik Chain, excluding Ujelang, there are and shall be four (4) separate Iroijlaplap domains and titles held and exercised by the successors of:
> a) Iroijlaplap Jeimata;
> b) Iroijlaplap Laelan;
> c) Iroijlaplap Joel; and
> d) Iroijlaplap Lobokkoj.

Defendant Neimata is a direct descendent of Iroijlaplap Laelan. Iroijlaplap Laelan was the father of Kabua Kabua, who was Defendant Neimata's father. In other words, Iroijlaplap Laelan was Defendant Neimata's paternal grandfather.

Importantly, Plaintiff admits that she is not a direct descendent of any of the four named Iroijlaplaps. Rather, she claims rights to the lands because she is a direct descendent of Iroij Kaiboke. According to Plaintiff, the lands in dispute "originated" with Iroij Kaiboke and are therefore vested in Plaintiff as a descendent of Iroij Kaiboke. Plaintiff disputes the Nitijela's declaration of customary law by countering that, "Under Marshallese Customary Law, the proper persons to hold the Iroij title for this 'mojen' are the descendants of Kaiboke." (Opening Brief at 12.) However, Iroij Kaiboke is not one of the four Iroijlaplaps named in the Ralik Act.

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[3]Plaintiff also named the following Defendants in this case: "the Ministry of Finance; the Republic of the Marshall Islands, and the Tobolar Copra Processing Plant, Republic of the Marshall Islands." However, Plaintiff's core argument in this case is that she - not Defendant Neimata - should hold Iroijlaplap title rights to the lands at issue. The briefs before us, as well as the High Court's opinion, refer only to Defendant Neimata and to no other Defendant. We do the same in this opinion.

II. Procedural Background

The following motions were presented to the High Court:

(1) Defendant Neimata's August 30, 2004 Motion for Summary Judgment; and (2) Plaintiff's August 30, 2004 Motion Setting Forth Applicable Reasons That The Customary Law (Ralik Chain) Act of 1991 Does Not Preclude Plaintiffs Claim. The motions presented the following issue to the High Court: "Does the Ralik Act, which only recognizes successors of Iroijlaplaps Jeimata, Laelan, Joel, and Lobokkoj as the four Iroijlaplaps of the Ralik Chain (excluding Ujelang), preclude Plaintiff's claim to Ralik Chain Iroijlaplap rights . . .?" (High Court Order at 2.)

The High Court noted that Plaintiff does not claim to be a "hereditary successor of one of the four-named Iroijlaplaps, but instead claims [the] Ralik Iroijlaplap rights through . . . Kaiboke." (High Court Order at 4.) The High Court found that Plaintiff "is not for purposes of the Ralik Act a 'successor' of one of the four-named Iroijlaplaps." (*Id*. at 8.) The High Court also rejected Plaintiff's argument that the Ralik Act impermissibly and retroactively destroys her rights to the land. Therefore, the High Court granted summary judgment in Defendant Neimata's favor.

DISCUSSION

I. Iroijlaplap Title to the Lands

According to the Constitution of the Republic of the Marshall Islands, the Nitijela, as a legislative body, is responsible for declaring the customary law in the Marshall Islands. Section 2 of Article X of the Constitution provides:

> (1) ln the exercise of its legislative functions, it shall be the responsibility of the Nitijela, whenever and to the extent considered appropriate, to declare, by Act, the customary law in the Marshall Islands or in any part thereof. The customary law so declared may include any provisions which, in the opinion of the Nitijela, are necessary or desirable to supplement the established rules of customary law or to take account of any traditional practice.

> (2) This section shall not be construed to authorize the making of any law that would defeat an otherwise valid claim under Article II.

Constitution of the Republic of the Marshall Islands, art. X, § 2.

Pursuant to this constitutional authority, the Nitijela passed the Ralik Act, which "declare[s] the customary law with respect to the four Iroijlaplap domains in the Ralik Chain, excluding Ujelang." 39 MIRC ch. 4. In Section 3 of the Ralik Act, the Nitijela made the following declaration:

> In the Ralik Chain, excluding Ujelang, there are and shall be four (4) separate Iroijlaplap domains and titles held and exercised by the successors of:
> (a) lroijlaplap Jeimata;
> (b) Iroijlaplap Laelan;
> (c) Iroijlaplap Joel; and
> (d) Iroijlaplap Lobokkoj.

Ralik Act § 3.

[**1-3**] Traditional rules of statutory interpretation apply to this Court's construction of Section 3 of the Ralik Act. "The preeminent canon of statutory interpretation requires us to presume that the legislature says in a statute what it means and means in a statute what it says there." *Miranda v Anchondo*, 684 F.3d 844, 849 (9th Cir. 2012) (quotations, brackets and citation omitted). "Thus, statutory interpretation 'begins with the statutory text.'" *Id*. (citation omitted). "If the statutory language is unambiguous and the statutory scheme is coherent and consistent, judicial inquiry must cease." *Id*. (Quotations and citation omitted). "Resorting to legislative history as an interpretive device is inappropriate if the statute is clear." *Id*. (citations omitted). Additionally, "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions." *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991) (citation omitted).

[4] The statutory language of Section 3 of the Ralik Act 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 by the successors of the four named Iroijlaplaps. *In re Jackson*, 184 F.3d 1046,

1051 (9th Cir.1999) ("'Statutory interpretation begins with the plain meaning of the statute's language."). Given that the statute designates only four Iroijlaplaps, successors of any other Iroijlaplap are excluded from holding title to the Ralik Chain lands. *Boudette*, 923 F.2d at 757 ("[W]hen a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions."). Accordingly, the statutory language is clear that the Nitijela intended that only successors of the four named Iroijlaplaps may hold and exercise title lo the lands at issue.

Plaintiff admits she is not a direct descendent of any of the four named lroijlaplaps. Therefore, under the plain language of the statute, the Court finds that Plaintiff is not a successor of any of them. *Miranda*, 684 F.3d at 849 ("Unless otherwise defined, words of a statute will be interpreted as taking their ordinary, contemporary, common meaning." (Brackets and citation omitted.) Accordingly, the Ralik Act precludes Plaintiff from holding and exercising Iroijlaplap rights to the Ralik Chain lands.

II. The Takings Claim

Next, Plaintiff argues that the Ralik Act deprived her of her property without due process of law in violation of Article II, Section 4(1) of the Marshall Islands Constitution. We disagree.

[5] As noted above, the Constitution specifically gives the Nitijela the right to declare customary law. This power, including the power to "supplement the established rules of customary law or to take account of any traditional practice," is only limited by the prohibition of making a law "that would defeat an otherwise valid claim under Article II." *Id*. art. X, § 2(2). Thus, the plain language of the Constitution unambiguously provides the Nitijela with broad powers to declare the customary law. And, in our view, the Constitution affords the Nitijela correspondingly broad discretion in its exercise of that power.

[6] Given this broad mandate and discretion, we cannot constitutionally review the Nitijela's decision-making *de novo* or "second-guess such determination." *See Kabua Kabua v. Kabua Family Defendants*, C.A. Nos. 1984-98 & 1984-102 (consol.), 24 (High Ct. Marshall Islands

Dec. 1, 1993). Instead, where the Nitijela has exercised its Constitutional duties we must defer to its specific findings unless a claimant clearly establishes a violation of Article II.

And this is where Plaintiffs argument falls short. Although the Constitution provides a specific limitation on the Nitijela 's ability to declare customary law (if the law would defeat a valid due process claim), Plaintiff has simply failed to provide evidence that the Nitijela exceeded its authority in invoking Article X, Section 2 when it enacted the Ralik Act. In short, there is simply no evidence to support Plaintiffs claim that she had "vested property rights" that were taken without due process of law.

CONCLUSION

For the foregoing reasons, the Court finds that Plaintiff is not a successor of any of the named Iroijlaplaps in Section 3 of the Ralik Act and concludes that the Act precludes Plaintiff from holding and exercising Iroijlaplap rights to the lands at issue. Further, the Court rejects Plaintiff's claim that she possessed vested property rights taken without due process. As a result, the Court AFFIRMS the High Court's September 11, 2006 Order Granting Defendant Neimata Nakamura Kabua's Summary Judgment Motion.

AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

AMENTA MATTHEW, GERALD M. ZACKIOS, and **ELDON NOTE**,

Petitioners/Appellants

-v-

JOSEPH JORLANG, in his capacity as Chief Electoral Officer,

Respondent/Appellee

S. Ct. Case No. 2012-004
High Ct. Civil No. 2011-224

APPEAL FROM THE HIGH COURT

OCTOBER 7, 2014

CADRA, Chief Justice
SEABRIGHT[1] and KURREN,[2] Associate Justices

SUMMARY:

Petitioners appealed the decision of the Chief Electoral Officer denying a recount of the general election. The High Court dismissed the appeal. The Supreme Court declined to exercise its discretion to hear the appeal, and dismissed the appeal for lack of jurisdiction.

DIGEST:

1. COURTS - *Supreme Court - Jurisdiction* - 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.

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[1] Hon. J. Michael Seabright, United States District Court Judge, District of Hawaii, sitting by designation of the Cabinet.

[2]Hon. Barry M. Kurren, United States Magistrate Judge, District of Hawaii, sitting by designation of the Cabinet.

2. COURTS - *Supreme Court - Jurisdiction* - 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.

3. COURTS - *Supreme Court - Jurisdiction - 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.

4. COURTS - *Supreme Court - Jurisdiction - Election Challenge:* 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.

5. COURTS - *Supreme Court - Jurisdiction:* 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).

6. COURTS - *Supreme Court - Jurisdiction - Election Challenge:* 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.

SEABRIGHT, Acting Associate Justice:

INTRODUCTION

Amenta Matthew ("Matthew"), Gerald M. Zackios ("Zackios"), and Eldon Note ("Note") (collectively "Petitioners" or "Appellants") appeal a November 14, 2012 memorandum of Decision and Order of the High Court that, in turn, dismissed an appeal of a decision of Chief Electoral Officer ("CEO") Joseph Jorlang ("Respondent" or "Appellee") denying petitions seeking a recount of the November 21, 2011 general election of the Republic of the Marshall Islands ("RMI"). Based on the following, we DISMISS this appeal for lack of jurisdiction.

BACKGROUND

Petitioners were candidates in the November 21, 2011 general election, with Matthew and Zackios seeking seats in the Nitijela, and Note running for Mayor of the Kili/Bikini/Ejit local government. As found by the High Court, the unofficial results of the election were publicly

announced on December 12, 2011 pursuant to the Elections and Referenda Act, 2 Marshall Islands Revised Code ("MIRC") Ch. 1, § 178(4)(b) (the "Elections Act"), which provides: "On the completion of the count, the counting and Tabulation Committee shall: (a) certify the result of the count to the Chief Electoral Officer; and (b) publicly announce the unofficial result of the election." All three Petitioners lost their respective races in those unofficial results.

Prior to the announcement of the unofficial results, on December 8, 2011, Zackios filed a petition for re-count with the CEO, challenging the tabulation process for counting of postal ballots (ballots cast by mail by Marshallese citizens residing in the United States). Matthew and Note filed similar petitions for re-count on December 14, 2011.

The re-count petitions were filed under § 180 of the Elections Act, which provides in pertinent part:

> A candidate in an election may file with the Chief Electoral Officer a petition for a re-count in the electorate on the grounds that:
> . . .
> (b) there was an error in relation to the count, the records of the election, or the admission or rejection of ballot papers, and that he believes that a re-count will affect the result of the election.

Id. § 180(1)(b). As for timing of re-count petitions, the Elections Act requires that: "[t]he petition shall be filed within two weeks after the date of the announcement of the unofficial result of the election in accordance with [§ 178(4)(b)]." *Id*. § 180(3). The Elections Act further provides that:

> In the case of a re-count applied for on the grounds set out in [§ 180(1)(b)], the petition shall be supported by an affidavit of the petitioner, specifying his belief and the grounds for his belief that the manner in which the count or other alleged discrepancy was believed to have been erroneous.

Id. § 180(2). The Elections Act requires the CEO to grant the petition if he "is of the opinion that there is a substantial possibility that the result of the election would be affected by a re-count," *id.* § 180(4), "otherwise he shall reject it." *Id.*

The CEO rejected the petitions, and the Petitioners filed a "Complaint for Declaratory Relief" with the High Court on December 30, 2011. *See id.* § 181(1) ("If the Chief Electoral Officer rejects a petition under Section 180 of this Chapter he shall advise the petitioner in writing accordingly, giving his reasons, and the petitioner may, within five (5) days after receipt of the advice appeal to the High Court against the decision."). In a November 14, 2012 Memorandum of Decision and Order, the High Court dismissed the action as to all three Petitioners. The High Court found, among other matters, that Petitioners had not met certain requirements of the Election Act, and had thus failed to exhaust administrative remedies, because (1) Zackios had filed his petition before the unofficial announcement of results (where § 180(3) states that the petition "shall be filed within two weeks *after* the date of the announcement of the unofficial result"), and (2) Matthew and Note had not filed proper affidavits as required by § 180(2) ("[T]he petition shall be supported by affidavit of the petitioner, specifying his belief and the grounds for his belief that the manner in which the count . . . was believed to have been erroneous."). On December 13, 2012, Petitioners filed this appeal from the High Court's decision.

ANALYSIS

Essential to this decision is the fundamental principle that this court's jurisdiction is delineated in the RMI constitution. Specifically, Article VI, §2(2) of the RMI Constitution provides:

> An appeal shall lie to the Supreme Court:
> (a) as of right from any final decision of the High Court in the exercise of its original jurisdiction;
> (b) as of right from any final decision of the High Court in the exercise of any appellate jurisdiction, but 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; [or]
> (c) at the discretion of the Supreme Court, subject to such conditions as to security for costs or otherwise as the Supreme Court thinks fit, from any final decision of any court.

MATTHEW, ZACKIOS, AND NOTE v. CEO

It is undisputed that the current appeal to the Supreme Court is not based on "an exercise of its original jurisdiction" (under § 2(2)(a)), and that the High Court has not "certifie[d] that the case involves a substantial question of law" (under § 2(2)(b)). Rather, the parties agree that the appeal is brought pursuant to § 2(2)(c) ("[A]t the discretion of the Supreme court").

[1] *Clanton v. Marshall Islands Chief Electoral Officer*, 1 MILR (Rev) 146 (1989), teaches that "reviews by the High Court of the decisions of the Chief Electoral Officer [when a petition for re-count has been rejected] are performed by the High Court in the exercise of its appellate jurisdiction." *Id*. at 150. And where there is no appeal "as of right" under § 2(2)(b) of the Electoral Act - such as in this case - "an appeal may still lie 'at the discretion of the Supreme Court, subject to such conditions as to security for costs or otherwise as the Supreme Court thinks fit, from any final decision of any court.'" *Id*. (quoting § 2(2)(c)). "The Supreme Court's discretion to grant, or indeed to order up, an appeal pursuant to [§ 2(2)(c)] appears to be unfettered. No qualifying words restrict the plain language. However, the word 'discretion' itself imports a reasoned, mature, and responsible exercise of judicial authority." *Id*. *Clanton*, for example, "[took] jurisdiction of . . . appeals in the exercise of our discretion pursuant to [§ 2(2)(c)]," *id*. at 151, in a re-count case because the particular issues were "of great public interest, involving the construction and operation of elections statutes which are basic to the legitimacy of the government of this Republic." *Id*.

But *Clanton* does not hold or even suggest that the Supreme Court *always* has jurisdiction in an election re-count case - that the court accepted jurisdiction under those particular circumstances has little bearing on whether the Court has jurisdiction under all other circumstances. Instead, *Clanton* is important for its recognition that discretion under § 2(2)(c) "appears to be unfettered" with "[n]o qualifying words restrict[ing] the plain language" of § 2(2)(c). *Id*. at 150. Under Clanton, the court's discretion must be a "reasoned, mature, and responsible exercise of judicial authority." *Id*.

[2] The present appeal does not merit acceptance of jurisdiction. Although a re-count is sought, the legal issues presented involve little more than a basic application of well-accepted

principles of statutory construction. *See*, *e.g.*, *United States v. Turkette*, 452 U.S. 576, 580 (1981) ("In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive." (citation and internal quotation marks omitted). The High Court applied the plain and unambiguous langue of §§ 180(2) and 180(3) of the Elections Act to undisputed facts. Even Petitioners admit that there were "minor technical defects with the actual petitions." That is, the High Court was not required to interpret the meaning of unclear or obscure words or clauses in light of legislative intent. And "reasoned, mature, and responsible" discretion certainly allows the Supreme Court to decline jurisdiction where a case concerns a straightforward application of clear statutory language.

[3] Petitioners argue that this case presents strong and compelling reasons for this Court to accept jurisdiction because an election is at stake. But the 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.[3] *See*, *e.g.*, *Willis v. Crumbly*, 268 S.W.3d 288, 291 (Ark. 2007) ("Election contests are purely statutory, and 'a strict observance of statutory requirements is essential to the exercise of jurisdiction by the court, as it is desirable that election results have a degree of stability and finality.'") (quoting *Tate-Smith v. Cupples*, 134 S.W.2d 535, 538 (Ark. 2003)).

[4] Indeed, there is good reason 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. *See Rock v. Lankford*, 301 P.3d 1075, 1084 (Wyo. 2013) ("Statutes creating the right to contest elections generally impose strict, short, and mandatory deadlines for the commencement of election contests. This is for the obvious reason

[3]Petitioners argue that the Court should exercise discretion to accept the appeal (and excuse compliance with "technical" aspects of the Election Act) because it will result in a different outcome of the election. This argument, however, is circular - it assumes they will necessarily prevail on the merits and that a re-count will result in their election to office.

that government business cannot be brought to a standstill pending the outcome of a drawn-out election contest.") (citations omitted); see also *Willis*, 268 S.W.3d at 291 ("[T]he purpose of election contests is to aid the democratic processes upon which our system of government is based by providing a ready remedy whereby compliance with election laws may be assured to facilitate, not hinder by technical requirements, the quick initiation and disposition of such contests.") (quoting *Tate-Smith*, 134 S.W.2d at 538-39). As *Plyman v. Glynn County*, 578 S.E.2d 124 (Ga. 2003), reasons:

> [The] legislature put a very short fuse on election contest cases. [The statute] requires cases contesting election results to be brought within five days of certification of the returns. This short time period reflects the legislature's strong desire to avoid election uncertainty and the confusion and prejudice which can come in its wake. Certainly, the swift resolution of election contests is vital for the smooth operation of government.

Id. at 126.

Other courts have also recognized legislative intent to decide election disputes expeditiously, with careful adherence to statutory requirements. *See Petition of Jones*, 346 A.2d 260, 262-63 (Pa. 1975) ("The Pennsylvania Election Code . . . reflects a clear intention of the Legislature to expeditiously dispose of objections and to provide for [prompt] certification of the vote. The integrity of the election process requires immediate resolution of disputes that prevent certification. . . . Recognizing these considerations, this Court has held that compliance with the statutorily imposed time limits is especially important in this area.") (citation omitted); *Smith v. King*, 716 N.E.2d 963, 969 (Ind. App. 1999) ("The right to vote and to have one's vote counted properly is at the core of our democracy, and the public has a corresponding interest in both the integrity and the finality of elections. Thus, the election contest procedures enacted by our legislature are designed to protect both the candidate and the voter but also manifest a clear legislative intent that election contests be resolved expeditiously.").

[5,6] Under the statutory provisions of the RMI code, the High Court has the structure and administrative resources to facilitate, if necessary, a relatively prompt decision in an appeal from a decision of the CEO in an election challenge. This Supreme Court, in contrast, is by nature

much more deliberative, with unique administrative prerequisites before it convenes (e.g., selection and designation of Acting Associate Justices). Treating a second level of appeal to the Supreme Court from an appellate decision of the High court as truly discretionary serves these goals of avoiding "election uncertainty" and providing a "swift resolution of election contests." *Plyman*, 578 S.E.2d at 126. And while there certainly may be election challenges that require the Supreme Court to exercise appellate jurisdiction, this is not one of them.

CONCLUSION

For the foregoing reasons, we exercise our discretion and decline to accept jurisdiction under Section 2(2)(c) of the RMI Constitution in this straightforward case.

The appeal is DISMISSED for lack of appellate jurisdiction.