REPUBLIC OF THE MARSHALL ISLANDS LAW REPORTS VOLUME 2

Opinions and Selected Orders July 1993 through July 2004

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Publisher's 2004 Note to the Marshall Islands Law Reports Vol. 2

As the late Supreme Court Justice Clinton R. Ashford noted in the preface to the1993 Marshall Islands Law Reports ("MILR") "[t]he development and proper operation of a judicial system in which decisions are based upon precedent, as well as upon the constitution, statutes, customary law and traditional practice, demand that court decisions interpreting and applying the sources of law be readily available for the information and guidance of concerned persons." However, since the 1993 publication of the MILR, the decisions of the Supreme Court have not been published or made readily available. Volume 2 incorporates decisions issued after mid-1993 publication through mid-2004.

Volume 2 follows the format, and is built upon the foundation, established by Justice Ashford and his colleagues who produced the 1993 MILR. To them all legal practitioners in the Marshall Islands owe a debt of gratitude, and I would like to take this opportunity to recognize their contributions and to thank them.

Also, my thanks goes to High Court staff who assisted me in locating decisions, especially Assistant Clerk of the Courts Ms. Lena Tiobech, and special thanks go to Supreme Court Chief Justice Daniel N. Cadra, High Court Associate Justice Richard Hickson, and President of the Marshall Islands Bar Association, Scott H. Stege, who assisted in proof-reading revised Volume 1 and Volume 2, although all errors are my own.

Carl B. Ingram
Chief Justice, High Court

TABLE OF CASES

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MEJJIT LABWIDRIK, *et al.*,

S.CT. CIVIL NO. 93-02
(High Ct. Civil No. 1993-028)

Plaintiffs-Appellants,

-v-

LISEN CANDLE, *et al.*,

Defendants-Appellees.

ORDER CONCERNING APPEAL

SEPTEMBER 7, 1993

ASHFORD, C.J.

SUMMARY:

Plaintiff appealed from a High Court order granting in part and denying in part Defendants' motion for summary judgment. The Supreme Court held that inasmuch as the High Court's order denied the motion, the order is interlocutory and the Supreme Court is without power to entertain interlocutory appeals. To the extent that the High Court's order granted the motion, it is a final decision, but absent a certification from the High Court that hearing the appeal will neither confuse nor delay the determination of the remaining claims by the High Court, any appeal must wait entry of final judgment on all claims of all parties.

DIGEST:

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: Insofar as an order of the High Court denies a motion for summary judgment, it is interlocutory only.

2. APPEAL AND ERROR – *Same – Same*: Insofar as an order of the High Court grants a motion for summary judgment, the order is a final decision of the High Court.

3. APPEAL AND ERROR – *Same – Same*: Except with respect to (1) matters removed by

the High Court to the Supreme Court pursuant to Article VI, § 2(3) of the Constitution, and (2) review of orders granting, dissolving or denying an injunction issued by the Nuclear Claims Tribunal or the Special Tribunal, pursuant to 42 MIRC Ch. 1, § 6(3), the Supreme Court is without power to entertain interlocutory appeals.

4. APPEAL AND ERROR – *Same* – *Same*: To the extent that an appeal is from that part of the order granting the motion for summary judgment, it will be allowed only if the High Court certifies to this Court within 30 days of filing of this Order or such longer time as the High Court may request, that the claims of Plaintiff with respect to which the High Court granted summary judgment against Plaintiff-Appellant are: (a) severable from and may be considered without reference to (i) the other claims of Plaintiff and (ii) the claims of other parties, and (b) there is no just reason to delay consideration of the order on appeal. Absent such certification by the High Court, which the Supreme Court requires as assurance that hearing the appeal will neither confuse nor delay the determination of the remaining claims by the High Court, any appeals must await entry of final judgment by the High Court on all claims of all parties.

[1,2] It appears from the Notice of Appeal, filed August 30, 1993, in the High Court that Plaintiff-Appellant Hiroshi V. Yamamura has appealed from an order of the High Court granting in part and denying in part Defendants' Motion for Summary Judgment. Insofar as that order denied the Motion, it is interlocutory only. Insofar as it granted the Motion, the order is a final decision of the High Court.

[3] Except with respect to (1) matters removed by the High Court to the Supreme Court pursuant to Article VI, § 2(3) of the Constitution, and (2) review of orders granting, dissolving or denying an injunction issued by the Nuclear Claims Tribunal or the Special Tribunal, pursuant to 42 MIRC Ch. 1, § 6(3), this Court is without power to entertain interlocutory appeals. Further, insofar as the order appealed from denied the Motion for Summary Judgment, Plaintiff-Appellant is not aggrieved by the order.

[4] To the extent that the appeal is from that part of the order granting the motion for summary judgment, it will be allowed only if the High Court certifies to this Court within 30 days of filing of this Order or such longer time as the High Court may request, that the claims of Plaintiff with respect to which the High Court granted summary judgment against Plaintiff-Appellant are:

(a) Severable from and may be considered without reference to (i) the other claims of Plaintiff and (ii) the claims of other parties, and

(b) There is no just reason to delay consideration of the order on appeal.

Absent such certification by the High Court, which this Court requires as assurance that hearing the appeal will neither confuse nor delay the determination of the remaining claims by the High Court, any appeals must await entry of final judgment by the High Court on all claims of all parties.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In the Matter al the Estate of
NOJI KIWA, Deceased,

S.CT. CIVIL NO. 94-07
(High Ct. Probate No.1993-030)

by

LIJOAN ISHODA,

Petitioner-Appellant.

MOTION FOR AND ORDER OF DISMISSAL OF APPEAL

Comes now Appellant by counsel David M. Strauss pursuant to Supreme Court Rule of Procedure 42(b) and moves this court to dismiss this appeal.

Dated: July 18, 1994.

/S/
David M. Strauss

SO ORDERED.

/S/
Clinton R. Ashford, Chief Justice
Marshall Islands Supreme Court

Dated: July 19, 1994.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In the Matter of the Receivership of GUSHI BROTHERS COMPANY, a Sole Proprietorship	S.CT. CIVIL NO. 94-06 (High Ct. Civil No. 1989-414)

ORDER DISMISSING APPEAL

AUGUST 8, 1994

ASHFORD, C.J.

Pursuant to stipulation by the attorneys for the parties, it is

Ordered, that this appeal is dismissed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MERIA ABIJA,

Plaintiff-Appellee,

-v-

EMLE BWIJMARON,

Defendant-Appellant.

S.CT. CIVIL NO. 93-01
(High Ct. Civil No. 1989-022)

APPEAL FROM THE HIGH COURT

AUGUST 11, 1994

ASHFORD, C.J.
KING, A.J. *pro tem*,[1] and WALSH, A.J. *pro tem*[2]

SUMMARY:

This was a dispute over the alap and senior dri jerbal rights in Elelwe weto. Appellant claimed she had such rights because of an alleged division of lands during Japanese times. Appellee denied that there was any such division. Following a joint trial with the High Court and Traditional Rights Court during which the Traditional Rights Court determined that there was no division of lands, Appellant asked the High Court to rule that the division issue had already been decided in a Trust Territory Case, and therefore the doctrines of *res judicata* and collateral estoppel precluded relitigation of that issue in the present case. The High Court held that *res judicata* and collateral estoppel did not apply and entered judgment in favor of Appellee. The Supreme Court affirmed the High Court's judgment on the grounds that Appellant had waived the right to assert the defenses of *res judicata* and collateral estoppel.

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[1]Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, by appointment of the Cabinet.

[2]Honorable Allison A. M. Walsh, Deputy Judge of the Federal Court of Canada, by appointment of the Cabinet.

ABIJA v. BWIJMARON

DIGEST:

1. APPEAL AND ERROR– *Questions Reviewable – Cross Appeal*: An appellee need not cross-appeal from a judgment in order to assert an argument which supports the judgment as entered, even where the argument being raised has been explicitly rejected by the lower court.

2. APPEAL AND ERROR – *Review – Questions of Law*: A question concerning waiver of affirmative defenses, and specifically *res judicata* and collateral estoppel, involves the interpretation of Rule 8(c) of the Marshall Islands Rules of Civil Procedure and thus it is a question of law reviewed *de novo.*

3. CIVIL PROCEDURE – *Pleadings – Affirmative Defense or Avoidance*: The general rule regarding *res judicata* and collateral estoppel is that they must be pleaded in the answer or other responsive pleading or they are waived. Marshall Islands Rules of Civil Procedure, Rules 8(c), 12(b).

4. 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*.

5. CONSTITUTIONAL LAW – *Construction – Article VI*: Article VI, section 4(5) mandates that when a question has been certified to the Traditional Rights Court for its determination, its resolution of the question shall be given substantial weight in the certifying court's disposition of the legal controversy before it, which means that the certifying court is to review and adopt the decision of the Traditional Rights Court unless that decision is clearly erroneous or contrary to law.

6. COURTS – *High Court*: A High Court judge who was not present at a hearing before the Traditional Rights Court may nevertheless render a final judgment based on the findings of the Traditional Rights Court.

OPINION OF THE COURT BY KING, A.J.

This action was instituted by Plaintiff-Appellee Meria Abija[3] ("'Appellee") against Defendant-Appellant Emle Bwijmaron ("Appellant") following a dispute between the parties over the alap and senior dri jerbal rights to Elelwe weto. The High Court entered judgment in

[3]Meria Abija passed away during the pendency of this suit. Her daughter, Elizabeth Eliu, has been substituted as Plaintiff.

favor of Appellee following a joint trial with the Traditional Rights Court. Appellant argues on appeal that the High Court erred when it rejected Appellant's *res judicata* and collateral estoppel defenses. In addition, Appellant claims that Justice Fields, who took over the case after Chief Justice Bird resigned with the joint trial already completed, should not have rendered a decision in this case. We affirm the Judgment, but on different grounds.

I.

Both Appellee and Appellant are descendants of a woman named Lanwor ("first Lanwor") who was the founder of a bwij. The parties agree that at one point the first Lanwor bwij held the alap and dri jerbal rights to four wetos, Drennar and Lokonmok wetos on Rita, and Elelwe and Okok wetos on Laura. First Lanwor had two daughters, one of which was also named Lanwor ("second Lanwor") and the other named Melerik. Appellee descends from the second Lanwor side while Appellant descends from the Melerik side.

Appellee claims to hold the alap and senior dri jerbal rights to Elelwe weto through normal devolution of title according to Marshallese custom. Appellant claims to hold the same rights to the exclusion of Appellee because of an alleged division of the bwij lands made during Japanese rule, whereby Elelwe and Okok wetos became the wetos of the Melerik side of the bwij and Drennar and Lokonmok wetos became the wetos of the second Lanwor's side. In effect, the division created two new bwijs, each with two wetos. Appellee disputes that any such division occurred.

The parties agreed to submit the issue of division, as well as other issues, to the Traditional Rights Court ("TRC") following a joint trial with the High Court.[4] The parties also

[4]The agreed-upon instructions given to the Traditional Rights Court included the following:

1. You must decide whether there was a division of the four wetos, Elelwe, Okok, Drennar, and Lokonmok, during Japanese times in which the alap and dri jerbal rights to the two wetos in Rita, Lokonmok and Drennar, were given to the descendants of the second Lanwor to the exclusion of the descendants of Melerik, and in which the alap and dri jerbal rights to the two wetos in Laura, Okok and Elelwe, were given to the descendants of Melerik to the exclusion of

agreed to abide by certain statements of Marshallese custom.[5] The parties stipulated that if the

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the descendants of the second Lanwor. Defendant carries the burden of proof on this issue.

2. You must also decide whether such a division was made with the approval of the Iroijlaplap or Iroij Erik and with the approval of the members of the first Lanwors bwij and that such a division was consistent with custom. Defendant carries the burden of proof on this issue.

3. If you find that there was no division made, in accordance with the stipulation of the parties you must find that Meria Abija is the alap of Elelwe weto.

4. If you find that there was a division, you must first determine if Jorbit is a child of Lowaer. Plaintiff has the burden of proof on this issue.

5. If you find that there was a division and you find that Jorbit is a child of Lowaer, in accordance with the stipulation of the parties you must find that Jorbit is the alap of Elelwe.

6. You must determine if Ernie is the blood child of David. Defendant has the burden of proof on this issue.

7. If you find that there was a division, and you find that Jorbit is not the child of Lowaer, and you find that Emle is the blood child of David, in accordance with the stipulation of the parties you must find that Ernie is the alap of Elelwe weto.

8. You must determine who is the Senior Dri Jerbal of Elelwe weto and why.

[5]The parties agreed that:

> The alap right to land descends matrilineally, from generation to generation. The right descending, in turn, from the eldest to the youngest child of the eldest to youngest female of the preceding generation.
>
> If the female line becomes extinct, that is, if there are no surviving children of a female alap, the eldest surviving child of the eldest male member of the bwij inherits the alap right to land.
>
> An alap may designate a change in succession rights to land, with the concurrence of the iroij and the bwij.
>
> The senior dri jerbal is the eldest surviving child of the eldest male alap.

TRC determined there was no division, it must also find Appellee to be the alap of Elelwe.

The joint trial before the TRC and High Court took place from August 20 to 24, 1990, with Chief Justice Bird presiding and ruling on evidentiary issues. Following the trial, the agreed-upon questions were certified to the TRC for its determination. On September 10, 1990, the TRC rendered its unanimous decision, concluding that no division of the bwij lands had occurred during Japanese times, and that Appellee held both the alap and senior dri jerbal titles on Elelwe weto.

On October 10, 1990, Appellant filed an Opposition to Adoption of Decision from the TRC. In that pleading, Appellant raised for the first time the issues of *res judicata* and collateral estoppel. Appellant argued that the issue of division, which was submitted to the TRC by stipulation of the parties, was already decided in Case No. 226, Trust Territory High Court, Marshall Islands Division, August 31, 1968. In Case No. 226, apparent predecessors-in-interest to Appellee and Appellant, Liwaika and Terkaki, were both parties-plaintiff. Liwaika and Terkaki sued Bilimon, another relative of Appellant and Appellee, over the senior dri jerbal rights to Drennar weto. The Trust Territory Court found that:

> The bwij descended from [second] Lanwor held its alap and dri jerbal rights in lands on Djarrit Island [Rita], including that in question in this action [Drennar], separate from the bwij descended from Melerik, which held such rights in lands on Majuro Island [Laura] separate from [second] Lanwor's bwij, at least from about the middle of Japanese time; this separate ownership was publicly acknowledged and was recognized by all concerned, including the Japanese authorities, during the latter half of the Japanese period of administration.

Appellant urged that because Case No. 226 had supposedly already decided the division issue, Appellant and Appellee should be bound by that decision. Appellee argued that Appellant waived her right to assert *res judicata* and collateral estoppel because they are affirmative defenses which were not timely pleaded in her answer prior to trial.

The High Court, Justice Fields presiding, ruled on the waiver issue in its Judgment. The court noted first that Appellant did not raise *res judicata* or collateral estoppel as affirmative

defenses in her answer to the amended complaint. Nor did she expressly assert the defenses at any time prior to trial, and in fact acknowledged at a pre-trial conference that the division issue was to be decided at trial.

The court then noted that Appellant apparently was arguing that she had raised the *res judicata* and collateral estoppel issues by implication when she offered the "Judgment Order" in Case No. 226 into evidence at the commencement of the trial. At that time, Appellant's counsel stated to the court, "given the evidence that will be presented to you in the next couple of days, Ernie Bwijmaron is confident that you will make the same decision as the court did in 1966 [Case No. 226]."[6]

On the other hand, Appellee introduced a significant amount of evidence on the issue of division without objection by Appellant as to its relevance. Likewise, Appellee failed to object to the introduction of the "Judgment Order" in Case No. 226.

Based on these facts, and despite the language of Rules 8(c) and 12(b) of the Marshall Islands Rules of Civil Procedure, ("MIRCivP")[7] the High Court ruled that the affirmative

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[6]Case No. 226 was actually decided in 1968. The transcript of proceedings makes it clear, however, that Appellant's counsel was referring to Case No. 226 in her opening statement, though she apparently inadvertently stated that it was decided in 1966.

This Court also notes that in her opening statement at trial, Appellant's counsel stated that "The major issue this court will have to resolve is simply whether or not there has been a division of land that had originally belonged to the first Lanwor."

[7]Rule 8(c) provides:

> A party shall set forth affirmatively. . . estoppel, *res judicata*, . . . and any other matter constituting an avoidance or affirmative defense. . . .

Rule 12(b) provides:

> Every defense, on law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted on the responsive pleading thereto if one is required. . . .

defenses of *res judicata* and collateral estoppel were not waived. According to the High Court: [B]ecause the Plaintiff contributed to the confused situation in this matter through the use of transcripts from the case file in Case No. 226, and through the failure to object to the introduction of the "Judgment Order" into evidence, it would not appear to serve the interests of justice to conclude that Defendant waived the defenses.

Nevertheless, the High Court went on to hold that the defenses of *res judicata* and collateral estoppel were not available to Appellant. First of all, there was no identity of subject matter between Case No. 226 and this case. Case No. 226 dealt specifically with senior dri jerbal rights on Drennar weto while the instant case involves alap and senior dri jerbal rights on Elelwe weto.[8] The High Court further concluded that "the better rule" is that a judgment operates as *res*

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[8]According to the High Court, the issue in Case No. 226 was as follows. Plaintiffs Liwaika and Terkaki sought injunctive relief to prevent the Defendant, Bilimon, from interfering with their building of a house on Drennar weto. Bilimon answered by alleging that:

> Prior to his death. . . [Lajitok, son of Limkej,] made an oral will before Liwaika, one of the plaintiffs [sic], the group of 20-20 and myself, the will was that I was to succeed and exercise . . . [Lajitok's rights on . . . [Drennar] Weto, whereas Liwaika *was* to do the same on the other weto Lokonmak" (or Lokonmok).

However, when framed by the judge presiding in Case No. 226 and memorialized in his pretrial order of December 6, 1965, the issue was stated as follows:

> a. Was there an arrangement in Japanese times between Lajitok and Tarkaki by which Lajitok was put off of or gave up his rights in Okok Weto and Tarkaki became alap of that weto and gave up his rights in Drenar [Drennar] and thereafter failed to bring food to Lajitok?

In his Findings of Fact the judge in that case answered the question as follows:

> 1. The bwij descended from [the second] Lanwor held its alap and dri jerbal rights in lands on Djarrit Island [Rita], including that in question in this action [Drennar], separate from the bwij descended from Melerik, which held such rights in lands on Majuro Island [Laura] separate from [the second] Lanwor's bwij, at least from about the middle of Japanese time; this separate ownership was publicly acknowledged and was recognized

judicata only with respect to parties (or those in privity with them) that were adversaries in the proceeding in which the prior judgment was entered. The court analyzed the genealogy and determined that the predecessors-in-interest of the parties in the instant matter were co-plaintiffs in Case No. 226, and not adversaries. Thus, *res judicata* was not available to Appellant. The court held that collateral estoppel was not available to Appellant for similar reasons.

The court then ruled on the merits of the case, holding that there was no division of the wetos as alleged by Appellant, and thus Meria Abija, and now her successor in interest Elizabeth Eliu, is the right and proper alap on Elelwe weto. In arriving at its decision, the court gave substantial weight to the findings of the TRC. However, the court also engaged in its own independent evaluation of the evidence presented at trial.

Appellant timely appealed.

II.

[1] Appellee asks this Court to affirm the High Court's Judgment on grounds rejected by the High Court – waiver of the *res judicata* and collateral estoppel issues – even though Appellee did not cross-appeal from the High Court's Judgment. Appellant does not challenge Appellee's right to raise this argument, and in fact argues that the High Court correctly decided the waiver issue. We note, nevertheless, that an argument on appeal which supports the judgment as entered can be made without a cross-appeal. Wright, Miller & Cooper, 15A *Federal Practice & Procedure*: Jurisdiction 2d § 3904, at 195-96 (1992). "A cross-appeal is unnecessary even where the argument being raised has been explicitly rejected by the [lower] court." *Engleson v. Burlington Northern Railroad Co.*, 972 F.2d 1038, 1041 (9th Cir. 1992). We also note that the record before

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by all concerned, including the Japanese authorities, during the latter half of the Japanese period of administration.

The High Court found that the lands at issue in Case No. 226 were, at best, those in Drennar and Okok. Elelwe was not expressly mentioned. Thus, there was nothing to demonstrate that the traditional land rights in Elelwe weto were ever considered by the Court in Case No. 226 when it decided the issue of division.

us is sufficient to permit a ruling on the issue of waiver. Thus, we will address that issue first.

[2] A question concerning waiver of affirmative defenses, and specifically *res judicata* and collateral estoppel, involves the interpretation of Rule 8(c) of the MIRCivP and thus it is a question of law reviewed *de novo. Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 735 (9th Cir. 1988); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984).

[3] The general rule regarding *res judicata* and collateral estoppel is that they must be pleaded in the answer (or other responsive pleading), or they are waived. *Kern* Oil, 840 F.2d at 735. Courts have allowed parties to amend pleadings to set forth forgotten affirmative defenses when done before trial. *Id.* Even after trial an affirmative defense may be asserted by a Rule 15(b) motion to conform to the evidence at trial when the defense was tried with the express or implied consent of the parties. This case presents none of those scenarios.

Appellant failed to plead *res judicata* and collateral estoppel in her answer. She also failed to amend her answer before trial. This is hardly surprising since the primary issue to be decided by the TRC, as stipulated to by the parties, was the issue of division of the wetos. Appellant gave no indication at trial that she was invoking *res judicata* and collateral estoppel. In fact, in her opening statement, counsel for Appellant indicated just the opposite. "Ernie Bwijmaron is confident that you will make the same decision as the court did in 1966,"[9] is a statement which implies that counsel intended the TRC to engage in an independent evaluation of the evidence presented on the division issue. Thus, Appellee was not given notice, express or implied, that Appellant was relying on those affirmative defenses.

There was no confusion surrounding the introduction of the "Judgment Order" in Case No. 226 into evidence. The Opening Statement of Appellant's counsel indicates it was intended merely to be one piece of evidence of division, not a conclusive piece. If it were to be conclusive, there would be no point in submitting the issue to the TRC along with evidence for and against division. Moreover, use of evidence from Case No. 226 did not cause confusion

[9] *See supra* note 4.

regarding whether Appellant raised the issue of *res judicata* and collateral estoppel as defenses.

Appellant offers no reason why she failed to raise the defenses before trial. She agreed to submit the division issue to the TRC. Based on the foregoing reasons, we conclude that Appellant waived the affirmative defenses of *res judicata* and collateral estoppel.[10]

III.

Appellant next argues that it was error for Justice Fields, as a successor to Chief Justice Bird, to decide this case when he did not preside over the joint trial, and therefore did not witness the presentation of the evidence. Though Appellant admits that a High Court judge need not be present at the trial to give a decision of the TRC binding effect, she contends that when a High Court judge is present, only that judge can decide whether or not to accept the TRC's findings. Otherwise, the parties are deprived of the observing judge's discretion to disregard the TRC's decision." Judge Bird could have disreguarded [sic] the opinion of the Traditional Rights Court based on some demeanor he observed on the stand." We reject Appellant's contention.

[4] The question presented involves the High Court's interpretation of the Marshall Islands Constitution. This is a question of law which we review *de novo*.

[5] Under the Constitution of the Republic of the Marshall Islands,

> 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.

Article VI, Section 4(5). We interpret this provision to impose limits upon the ability of the certifying court to reject the TRC's disposition. The High Court's duty is to review the decision of the TRC, and to adopt that decision unless it is clearly erroneous or contrary to law. The

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[10]The Court notes that even if Appellant had not waived the defenses, the High Court correctly determined that *res judicata* and collateral estoppel do not apply in this case because Case No. 226 did not involve a division concerning Elelwe weto. Thus, there is no identity of subject matter and issue in the present case and Case No. 226. *Zaion, et al. v. Peter and Nenam*, 1 MILR (Rev.) 228, 234-5 (Jan 24, 1991).

limited role of the High Court places credibility determinations within the TRC's jurisdiction.[11] Thus, we reject Appellant's contention that Chief Justice Bird, had he decided this case, could have rejected the TRC's decision based on some demeanor he observed on the stand. For this reason, it is not critical that the judge who was present at the joint trial actually render the decision. It was sufficient that Justice Fields, who thoroughly reviewed the case file, transcripts of the trial, and tape recordings of the trial proceedings, found no clear error on the part of the TRC, but rather agreed with the TRC's determinations.

Our interpretation of Article VI, Section 4(5) is bolstered by the Rules for Traditional Rights Court ("RTRC"). Those rules specifically provide different procedures for trials before the TRC alone, RTRC Rule 12, and for joint trials before the TRC and the certifying court, RTRC Rule 13. Either way, the TRC renders an independent opinion on matters certified to it. The RTRC, in accordance with the Marshall Islands Constitution, also requires the certifying court to give the opinion of the TRC substantial weight when ultimately disposing of the case. RTRC Rule 14.

[6] Finally, we note that it was the parties themselves who stipulated to the TRC determining the division issue. Though we agree with Appellant that this did not make the TRC's decision binding on the parties, it did put the primary responsibility for determining credibility issues with the TRC, leaving the High Court with a limited role. Thus, we hold that it was not error for a High Court judge who was not present at the TRC hearing to reach a final judgment in this case based on the findings of the TRC.

IV.

Lastly, Appellant argues that she did not receive notice of the assignment of this case to Justice Fields, and that this flaw constitutes reversible error. Appellant cites no authority for the proposition that she was entitled to some type of notice other than becoming aware that Chief Justice Bird had resigned, and that the case was eventually reassigned to Justice Fields.

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[11]Indeed, the parties themselves agreed upon instructions which directed the TRC to determine credibility issues.

Appellant had opportunity below to raise this issue but failed to do so. Appellant has also failed to show how she has been prejudiced by this alleged lack of notice. Thus, we reject this argument.

In sum, we affirm the Judgment below on the grounds that Appellant waived her right to assert the defenses of *res judicata* and collateral estoppel, and there was no error in Justice Fields being assigned to and deciding this case.

AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

KABUA KABUA,

Plaintiff-Appellant,

-v-

IMADA KABUA, AMATA KABUA, KITLAN KABUA, ANJOJO KABUA, MICHAEL KABUA, JIKUL (SEAGULL) KABUA, THE PEOPLE OF BIKINI, KWAJALEIN ATOLL CORPORATION, THE REPUBLIC OF THE MARSHALL ISLANDS, JOHN DOES 1-50, and DOE CORPORATIONS, ASSOCIATIONS, AND PRIVATE AND GOVERNMENTAL ENTITLES 1-50,

Defendants-Appellees.

S.CT. CIVIL NO. 93-03
(High Ct. Civil Nos. 1984-098 and 1984-102 consolidated)

ORDER DISMISSING APPEAL

AUGUST 12, 1994

ASHFORD, C.J.

It appearing from correspondence addressed to this Court by Plaintiff-Appellant's counsel, including a copy of the Motion of Plaintiff's Counsel For Hearing to Ascertain his Position . . . With Respect to Prosecution of Litigation, that there is doubt as to both Plaintiff-Appellant's intention to continue this appeal and the authority of his counsel to continue to represent him, it is

Ordered:

1. This appeal is dismissed and the case is remanded to the High Court for determination of the authority of Plaintiff's counsel to continue to represent him and such other

determinations as the High Court shall deem appropriate.

2. This order is without prejudice to Plaintiff's right to renew his appeal from the Judgment of the High Court dated December 28, 1993 and filed January 3, 1994, following the entry of a further order or Judgment of the High Court, at an appropriate time by appropriate procedure.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

LIKIRI AMMU,

Plaintiff-Appellant,

-v-

ALION and BOKOJ LADRIK,
et al.

Defendants-Appellees.

S.CT. CIVIL NO. 94-01
(High Ct. Civil No. 1992-007)

APPEAL FROM THE HIGH COURT

AUGUST 17, 1994

ASHFORD, C.J.
KING, A.J.[1] (sitting by Cabinet appointment) and
PHILIPPO, A.J. (sitting by designation)

SUMMARY:

This was a contest concerning the iroij edrik rights in Ledrikran and Utinoen wetos, Majuro. The High Court granted summary judgment for the Defendants, holding Plaintiff recognized the Defendants as holder of those rights by a stipulation in an earlier action between them involving the same rights in the same wetos. The High Court denied Plaintiff's Motions for Summary Judgment in which Plaintiff (a) urged the High Court to follow an earlier ruling of the High Court in another case, and (b) sought to nullify the stipulation by claiming Defendants had no royal blood and therefore could not exercise iroij edrik rights. The Supreme Court affirmed.

DIGEST:

1. CIVIL PROCEDURE – *Motions* – *Summary Judgment*s – *Record*: The pleadings,

[1]Honorable Samuel P. King, Senior United States Judge for the District of Hawaii, by appointment of the Cabinet.

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, collectively, are the record of the case.

2. CIVIL PROCEDURE – *Same – Same – Same*: Summary judgment is determined on the basis of the record.

3. APPEAL AND ERROR – *Review – Questions of Law – Summary Judgment*s: The standard of review of the trial court's grant or denial of summary judgment is *de novo*.

4. STARE DECISIS: The doctrine of *stare decisis*, now commonly called following precedent, is concerned with determination of points of law, not with conclusions of fact.

5. CIVIL PROCEDURE – *Motions – Summary Judgment*s – *Unsworn Statements*: Unsworn statements and arguments in a memorandum of counsel, filed with a Motion For Summary Judgment, cannot be considered as establishing fact.

6. EQUITY – *Principles – Estoppel*: Equitable estoppel precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by acts, deeds or representations, either express or implied.

OPINION OF THE COURT BY ASHFORD, C.J.

BACKGROUND:

Defendants' Motion for Summary Judgment invoked the doctrines of (a) estoppel arising from a stipulation in High Court Civil Action No. 1982-13 between Plaintiff and Defendants herein and therein, and (b) *res judicata* arising from the adjudications in that civil action and in Trust Territory Land Determination Hearings. The High Court granted the motion insofar as it was based on the estoppel defense and denied the motion insofar as it was based on the doctrine of *res judicata*. On this appeal, we need not reach the *res judicata* defense.

High Court Civil No. 1982-13 was an action between Likiri Lamdrik (Likiri Ammu in the current litigation), Plaintiff, and Bokoj Ladrik and others, Defendants. Subsequent to the stipulation above mentioned, a third party was allowed to intervene in the action, but it was ultimately dismissed for lack of prosecution. The stipulation was signed by Plaintiff Likiri Lamdrik and by Defendant Alion Ladrik. It recited that "Plaintiff Likri Lamdrik announced her

wishes to dismiss her action against Alion Ladrik and his brothers and sisters upon ground they now have recognized Likri and her children as alap and dri jerbal to the wato formerly held by Ammu as follows: 1. Otenoen wato, Laura; 2. Bikenout wato, Arrak; 3. Ledrikran wato, Woja." The stipulation further recited that the parties entered into a settlement "that this action be dismissed." It also stated that Plaintiff Likri signed it "to indicate my full agreement with the decision of my Iroij edrik" and that Plaintiff wished to inform the Court "of my willingness to work and cooperate with Iroij edrik Alion Ladrik so long as we live, including my successors . . . ."

The case now before the Court, on appeal from the High Court, is a dispute over entitlement to the iroij edrik rights in Ledrikran and Utinoen wetos. Plaintiff has not challenged Defendants' assertion that these are the same wetos as those identified in the stipulation as Ledrikran wato and Otenoen wato.

Plaintiff filed two motions for summary judgment. The first urged the Court to follow the same course taken by the High Court in an earlier action, Civil No. 1988-21, in which the High Court held that the doctrine of *stare decisis* required the Court to follow rulings of the High Court of the Trust Territory, trial division, in Civil Actions Nos. 2-74 and 12-74.

Plaintiff's second motion for summary judgment asserted (1) Civil Actions 2-74, 12-74 and 1988-21 established that Defendants do not hold any iroij edrik rights in lands formerly owned by Iroijlaplap Jebdrik, and (2) Defendants, lacking royal blood, were without authority to stipulate with Plaintiff as alap and dri jerbal of Ledrikran and Utinoen wetos.

[1,2] Rule 45(c) MIRCivP provides that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The documents referred to, collectively, are the record of the case. Summary judgment is determined on the basis of the record. *USA Small Bus. Adm v. Trans Atoll Ser Corp. et al.*, 1 MILR (Rev.) 57 (Nov 12, 1986).

[3] The standard of review of the trial court's grant or denial of summary judgment is *de*

novo. *Kruso v. International Telephone & Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989); *State Farm Fire and Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT:

[4] Plaintiff's first motion for summary judgment was supported by an affidavit of Plaintiff which gave some of the genealogies of the parties and purported to quote from a "ruling" entered in Civil No. 1988-21, to the effect that Defendants herein did not have royal blood. A copy of the ruling was not furnished to the court[2] and Plaintiff made no statement of her own knowledge concerning the royal or commoner status of the Defendants. In short, the record failed to establish that there was no dispute as to any material fact. Aside from that deficiency, it is worth noting that the doctrine of *stare decisis*, now commonly called following precedent, is concerned with determination of points of law, not with conclusions of fact.

[5] Plaintiff's Second Motion was supported only by her counsel's affidavit and copies of four Trust Territory Determinations of Ownership. None of these Determinations concerned either of the two wetos which are the subject of this case. Further, Plaintiff's counsel, in his affidavit, argued that they no longer have any legal effect. Counsel's affidavit stated, as fact, merely that he was counsel for Plaintiff and that he was "aware of 1982-13 action." The balance of the affidavit was statements of legal conclusions, which do not establish fact. The unsworn statements and arguments in his memorandum filed with the Motion cannot be considered as establishing fact. *United States of America Small Business Administration v. Trans Atoll Service Corporation, supra.*

Plaintiff's Second Motion, like the first, totally failed to establish that there was no genuine issue as to any material fact.

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[2]The ruling purported to be quoted, apparently, was an "Order As To Application of the Doctrine of *Stare Decisis*," filed March 20, 1989 in *Balos Lajio, et al. vs. Alion Ladrik, et al.*, Civil No. 1988-21, a copy of which was attached to the Notice of Appeal. This Order was not before the trial court and will not be considered by this Court, which determines appeals on the basis of the record below.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT:

Turning to Defendants' Motion for Summary Judgment, we find that it is supported by an affidavit of counsel concerning his examination of the record in High Court Civil Action No. 1982-13. For purposes of the Motion, the uncontroverted affidavit established that Civil Action No. 1982- 13 "was between the same parties and over the same issues and 2 of the same wetos as the present action." The affidavit recited that Civil Action No. 1982-13 was settled by a stipulation and attached copies of the stipulation in both Marshallese and English. The substance of the stipulation has been quoted herein above.

[6] We believe the trial court was correct in granting Defendants' motion on the basis of equitable estoppel. This doctrine:

> "precludes a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth by acts, deeds or representations, either express or implied." *Sonoda v. Burnett,* 7 TTR 156, 162 (Tr. Div., Marianas Dist., 1974)

The judgment of the trial court is affirmed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MEJIT LABWIDRIK, *et al.*,

Plaintiffs-Appellants,

-v-

LISEN CANDLE, *et al.*,

Defendants-Appellees.

S.CT. CIVIL NO. 94-04
(High Ct. Civil No. 1993-028)

ORDER DISMISSING APPEAL

SEPTEMBER 15, 1994

ASHFORD, C.J.

The parties, by Agreement to Dismiss Appeal filed September 15, 1994, having moved this Court to dismiss the appeal in this case, it is

ORDERED that the appeal is hereby dismissed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

HEMTY EDWIN S.CT. CIVIL NO. 94-05
(High Ct. Civil No. 1989-437

Plaintiff-Appellant,

-v-

AJNEJ ELBI,

Defendant-Appellee.

ORDER DISMISSING APPEAL

OCTOBER 21, 1994

ASHFORD, C.J.

SUMMARY:

The Supreme Court dismissed the appeal for the failure to file a timely notice of appeal.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Give Timely Notice*: Failure to timely file a notice of appeal is grounds for dismissal.

[1] The jurisdiction of this Court to entertain an appeal is dependent on timely filing of the notice of appeal. *RMI v. Balos, et al. (3),* 1 MILR (Rev.) 120 (May 4, 1988); *Jejo v. Lobo (2),* 1 MILR (Rev.) 127 (Apr 6, 1989). The appeal in this case was filed 31 days after the Judgment was filed and, therefore, was filed one day too late. Accordingly, it is

ORDERED that the appeal is dismissed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In the Matter of Public Laws Nos. 1993-56 and 1994-87

S.CT. CIVIL NO. 94-09
(High Ct. Civil No. 1994-048)

IROIJ ANJUA LOEAK, YOSHIMI NASHON AND NEAMON BEN,

Petitioners.

OPINION ON QUESTION REMOVED FROM THE HIGH COURT PURSUANT TO CONSTITUTION, ARTICLE VI, SECTION 2(3)

FEBRUARY 3, 1995

ASHFORD, C.J.

SUMMARY:

In 1993 the Nitijela enacted amendments to the Marshall Islands Nuclear Claims Tribunal Act. One amendment prohibited private legal counsel from appearing before the Tribunal on behalf of persons whose claims were filed subsequent to the amendment. Those claimants were required to use the free services of the Public Advocate. In 1994 the Nitijela enacted amendments to the Probate Code. Those amendments prohibited administrators of estates, in which more than 50% of the value consisted of a Nuclear Claims Tribunal award, from retaining private legal counsel. They were obliged to use the free legal services of the Marshall Islands Public Defender or Legal Aid Office, if desired. Three citizens challenged the constitutionality of these amendments on grounds the amendments deprived them of due process, equal protection of the law and privacy. The High Court referred the question to the Supreme Court for determination. The Supreme Court ruled that the amendments to the Probate Code were valid. The Supreme Court also ruled that the amendment to the NCT Act prohibiting some claimants from retaining private legal counsel deprived those claimants of due process, was unconstitutional and was void.

DIGEST:

1. CONSTITUTIONAL LAW – *Construction of Statutes*: The Constitution is the supreme law of the Republic and any statute that is inconsistent with it is void to the extent of the inconsistency.

2. CONSTITUTIONAL LAW – *Same*: The presumption of constitutionality is a strong one,

and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution.

3. CONSTITUTIONAL LAW – *Same*: The Court is entitled to look to, without being bound by, the decisions of United States courts for guidance in determining the effect of the Constitution on challenged statutes when the challenges are based on provisions in the Constitution that are similar to provisions in the United States Constitution.

4. CONSTITUTIONAL LAW – *Privacy*: Both ordinary and truncated estate administration procedures are in a public forum and open to inquiry by anyone interested. The inclusion of NCT awards in an estate so administered does not violate any right of privacy assured by Article II, Section 13 of the Constitution.

5. CONSTITUTIONAL LAW – *Due Process – In General*: The concept of due process protects rights that cannot be denied without violating fundamental principles of liberty and justice.

6. CONSTITUTIONAL LAW – *Same – Right to Counsel*: It has long been recognized that in criminal proceedings, due process includes the right to the assistance of counsel of one's choice.

7. CONSTITUTIONAL LAW – *Same – Same*: Recent cases have recognized that the right to counsel is also preserved by the due process clause in civil cases.

8. CONSTITUTIONAL LAW – *Same – Same*: It is also established that the right to counsel preserved by the due process clause extends to administrative proceedings as well as to courtroom proceedings.

9. CONSTITUTIONAL LAW – *Same – Same*: Even in a criminal case the right to have a particular attorney is not absolute, and in civil cases a party's right to choose its own counsel can be overridden.

10. CONSTITUTIONAL LAW – *Same – Same*: The right to counsel in civil matters ordinarily includes the right to retain counsel of one's choice.

11. CONSTITUTIONAL LAW – *Constitutionality of Statutes – P.L. 1994-87*: P.L. 1994-87 does not prevent any person, other than the administrator of an estate, from employing counsel and asserting whatever rights he claims with respect to the assets and obligations of the estate. The statute prohibits only the administrator, in his fiduciary capacity, from employing private counsel. If and to the extent that the administrator, in his personal capacity, is interested in the

estate, the statute is inapplicable to that interest, which also may be protected through the use of private counsel.

12. CONSTITUTIONAL LAW – *Same – Same*: The limited interference in the administration of certain estates, with the right of a party to a civil action to be represented by counsel of his choice, effected by P.L. 1994-87, does not offend the guarantee of due process in Article II, Section 4(1) of the Constitution.

13. CONSTITUTIONAL LAW – *Equal Protection*: Equal protection of the laws is expressly guaranteed by the Constitution, Article II, Section 2(1), and is also inherent in the due process guarantee of Article II, Section 4(1).

14. CONSTITUTIONAL LAW – *Same – Tests for Measuring*: The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate government interest. When social or economic legislation is at issue, wide latitude is allowed.

15. CONSTITUTIONAL LAW – *Same – Same*: When a statute classifies by race, alienage or national origin, or impinges on personal rights protected by the Constitution, it will be subjected to strict scrutiny and will be sustained only if suitably tailored to serve a compelling government interest.

16. CONSTITUTIONAL LAW – *Same – Constitutionality of P.L. 1994-87*: P.L. 1994-87 is social legislation with a classification based on value. That classification is rationally related to a legitimate state interest, preserving cash from awards made by the NCT. The Equal Protection challenge to the statute, therefore, must fail.

17. CONFLICTS OF INTEREST – *Attorneys – Multiple Clients*: No lawyer can represent parties whose interests are in direct conflict.

18. CONFLICTS OF INTEREST – *Same – Same*: A lawyer cannot, without violating the standards of conduct pertaining to conflicts of interest, represent multiple clients who assert claims in an aggregate amount exceeding the amount of the fund from which those claims are to be satisfied. Reason dictates the same result if the possibility exists that the fund might prove to be inadequate or it is probable that lengthy delay in obtaining payment from the fund will be encountered.

19. CONSTITUTIONAL LAW – *Constitutionality of Statutes – P.L. 1993-56*: P.L. 1993-56, insofar as it prohibits claimants from retaining private legal counsel in connection with claims brought under the NCT Act and limits them to utilization of the services of the Public Advocate,

deprives claimants of timely, effective and conflict-free representation. It is, therefore, in violation of the due process guarantee of Article II, Section 4(1) of the Constitution and is void.

BACKGROUND

Nuclear Claims Awards

The Agreement Between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact of Free Association[1], for convenience usually called the "Section 177 Agreement" provided, among other things, (1) for the United States to provide $150 million ("the Fund") to the Marshall Islands, (2) for the earnings ("Annual Proceeds") of the Fund to be disbursed as specified in the Agreement and (3) for the Marshall Islands to establish a Claims Tribunal. The Claims Tribunal was given jurisdiction to determine all claims related in any way to the United States' nuclear testing program conducted in the 1946-1958 period in the Marshall Islands. It was allotted $45.75 million of the anticipated $270 million aggregate Annual Proceeds, during the 15 years of the Compact, to pay those claims. The Section 177 Agreement provided[2] that payments should be made from the Fund on an annual basis, if necessary, to supplement insufficient Annual Proceeds for that year. Distributions of both the Fund and Annual Proceeds were exempted from taxation by the signatory governments.[3]

As required by the Section 177 Agreement, the Republic of the Marshall Islands established the Nuclear Claims Tribunal (the "NCT"). Marshall Islands Nuclear Claims Tribunal Act 1987, 42 MIRC Ch. 1 (the "NCT Act"). By the end of 1993, the NCT had awarded $22.8 million to or on behalf of 572 individuals for medical conditions resulting from the testing

[1]Free Association Agreement. Signed June 25, 1983, Entered Into Force October 15, 1986. Treaties in Force 1987.

[2]Section 177 Agreement, Article II, Section 7(a).

[3]Section 177 Agreement, Article V, Sections 1 and 2.

program, and had paid out about 40% of each award.[4]

Statutes

In 1993, the Nitijela enacted Bill No. 27, entitled: "A Bill for An Act to protect the financial interests of persons affected by the Nuclear Testing Program who receive compensation under the 177 Provision of the Compact of Free Association," as P.L. 1993-50. This statute declared it to be the policy of the Republic that no compensation money should be paid or received for legal or other services or obligations (exempting, however, spending decisions of individual recipients of compensation); that assignments of funds to be received by distribution authorities (local government councils) would be considered consistent with the Section 177 Agreement only if they furthered the purposes of that Agreement; and that assignments for payment of legal fees would not be considered to be consistent with the Agreement.[5] The statute made it a felony for a distribution authority to deduct from compensation paid to an individual (except for taxes), to assign the right to receive funds for payment of legal fees and to pay, receive or assign compensation money in contravention of the statute.[6]

Also in 1993, the Nitijela enacted the Marshall Islands Nuclear Claims Tribunal (Amendment No. 1) Act of 1993, P.L. 1993-56. This statute recited that many claimants before the NCT failed to avail themselves of free legal services available to them, often in the mistaken belief that employing private legal counsel was necessary to prevail on their claims. It asserted that due to the high cost of private counsel, many claimants were not enjoying the full benefit they would have had by using the free services of the Public Advocate (an officer of the NCT). It contained recitals, also, that (1) probate matters related to the claims were routinely brought using the services of private legal counsel, resulting in diminution of the benefits received by claimants' beneficiaries; and (2) the Nitijela intended by the Act to protect the rights of claimants

[4]NCT Annual Report to the Nitijela, 1993, page 3.

[5]P.L. 1993-50, § 2.

[6]P.L. 1993-50, §§ 3-6.

and their beneficiaries (a) by prohibiting the involvement of private legal counsel with claims before the NCT and (b) by requiring that all probate matters of claimants be brought before and administered by the NCT.[7]

The operative provisions of P.L. 1993-56 amended the NCT Act, with respect to claims filed subsequent to the effective date of the Act, by (1) giving the NCT the duty and responsibility to decide, administer and disburse with respect to all probate matters in any way related to the nuclear testing program, excluding, however, (a) assets of the decedent unrelated to compensation awarded the decedent by the NCT and (b) disputes over ownership of real property, both of which should continue to be administered and determined by the High Court; (2) requiring the Public Advocate to advise and assist all claimants in pursuing their claims before the NCT; (3) prohibiting claimants from retaining private legal counsel in connection with claims brought under the NCT Act and (4) repealing the authority of the NCT to award reasonable attorneys fees to parties.[8] P.L. 1993-56 also expressly repealed[9] provisions of the NCT Act that permitted claimants to retain private legal counsel to pursue claims brought thereunder and limited fees for such services to those permitted by the Lawyers Fees (Regulation

[7]P.L. 1993-56, § 2.

[8]P.L. 1993-56, § 3.

[9]P.L. 1993-56, § 4.

and Control) Act 1986.[10] The Nitijela Committee Report[11] on the Bill, and the amendments to the Bill suggested therein, do not elaborate on the reasons for and purposes of the legislation.

In 1994, the Nitijela enacted the Marshall Islands Nuclear Claims Tribunal (Amendment) Act of 1994, P.L. 1994-87. This statute (1) repealed the duty and authority granted the NCT the previous year to handle probate matters related to nuclear claims compensation[12] and (2) amended the Probate Code[13] to provide (a) that an estate in which more than 50% of the value consisted of an award by the NCT should be administered as a limited value estate, and (b) that the administrator is prohibited from retaining private legal counsel and, instead, is required to use the free legal services of the Marshall Islands Public Defender or Legal Aid Office, if desired.[14] Neither the statute nor the Committee Report on the Bill[15] contains a statement of reasons for or

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[10]20 MIRC Ch. 7. This Act authorized the Minister of Justice to promulgate regulations prescribing maximum fees chargeable by lawyers for legal services. The regulations promulgated by the Minister of Justice govern contingent fees only. For tortious and other claims (excluding contract and debt recovery matters) the rates chargeable diminish in six steps from 40% of the first $1,000 recovered to 2½% on amounts recovered in excess of $1 million. For contractual and debt recovery matters the rates chargeable diminish in six steps from 30% of the first $5,000 recovered to 2½ % on amounts recovered in excess of $1 million. In other matters, the regulations provide that the attorneys' fees shall be fixed by agreement on either a fixed fee or hourly basis. 20 MIRC Ch. 7, Regulations.

[11]Standing Committee Report No. 129, 14th Constitutional Regular Session, 1993.

[12]P.L. 1994-87, § 2. These had been "proven administratively inefficient and otherwise difficult to implement." Standing Committee Report No. 149, 15th Constitutional Regular Session, 1994.

[13]25 MIRC Ch. 1. The Probate Code is not comprehensive. Part I of the Code deals only with wills. Part II provides for the administration, in a rather summary manner, of estates consisting of personal property of a value not exceeding $20,000, with debts not in excess of that amount, and estates consisting solely of war claims proceeds of less than $1000 arising from death, personal injury or loss of personal property.

[14]P.L. 1994-87, § 4.

[15]Standing Committee Report No. 149, 15th Constitutional Regular Session, 1994.

purposes underlying this amendment of the Probate Code.

The current controversy

In June, 1994, three citizens of the Republic filed a declaratory judgment action in the High Court, seeking to have P.L. 1993-56 and P.L. 1994-87 declared to be unconstitutional on various grounds. These petitioners alleged that they wished to retain private legal counsel to probate the estates of a parent of each of two of them, in each of which more than 50% of the value consisted of an award or possible award by the NCT, and to present claims on behalf of two of them to the NCT. In July, 1994, on petitioners' motion and prior to any evidentiary hearing, the High Court, pursuant to the provisions of Article VI, Section 2(3) of the Constitution, removed to this Court for determination the question of the effect of the Constitution on the two challenged statutes. This Court established a briefing schedule in which all of the Attorney General, the Legislative Counsel, the Chief Legal Aid Officer, the Public Advocate, the Defender of the Fund (also an officer of the NCT), and the Public Defender were invited to file briefs as *amicus curiae*. The Attorney General, the Legislative Counsel and the Defender of the Fund declined to do so. The Court thanks the Chief Legal Aid Officer, the Public Advocate and the Public Defender for their contributions to determination of the question referred.

Standard of review

The High Court having referred the constitutional questions raised by the petition to this Court for initial determination, this Court is not reviewing any determination by the High Court and approaches the matter *de novo*.

DISCUSSION

[1,2] Every analysis of constitutionality must start with consideration of some general principles universally accepted as binding upon courts. The first is that the Constitution is the supreme law of the Republic and any statute that is inconsistent with it is void to the extent of the

inconsistency.[16] The second is that the presumption of constitutionality is a strong one, *Joash v. Cabinet of Marshall Islands,* 8 TTR 498 (1985), and a court must make every effort to find an interpretation of a statute that is consistent with the Constitution. *Van Slooten v. Larsen,* 410 Mich. 21, 299 N.W.2d 704 (1980), app. dis. 455 U.S. 901, 102 S.Ct. 1242, 71 L.Ed.2d 440 (1982); *Minnesota Higher Ed. Facilities Authority v. Hawk,* 305 Minn. 97, 232 N.W.2d 106 *(1975); Tanttila v. Tanttila,* 152 Cob. 445, 382 P.2d 798 (1963).

[3] Petitioners have argued that both statutes are unconstitutional because they (1) deprive them of their right, implicit in the due process clause of Article II, Section 4(1), to be represented by counsel of their choosing; (2) infringe upon their rights to personal autonomy and privacy guaranteed by Article II, Section 13; and (3) violate their right to equal protection under the law assured by Article II, Section 12(1). The due process provision in Article II, Section 4(1) is identical to the due process clauses in the Fifth and Fourteenth Amendments to the Constitution of the United States. The equal protection guarantee in Article II, Section 12(1) is an expanded, positive statement of the equal protection provision in the same Fourteenth Amendment. While the personal autonomy and privacy provisions of Article II, Section 13 have no counterpart in the United States Constitution, both the due process clauses and other provisions of that constitution, which also appear in Article II of the Marshall Islands Constitution, have been construed to implicitly guarantee the right of privacy. Pursuant to Article I, Section 3(1),[17] therefore, this Court is entitled to look to, without being bound by, the decisions of United States courts for guidance in determining the effect of the Constitution on the challenged statutes.

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[16]Constitution, Article I, Sections 1(1) and 2(1).

[17]"In interpreting and applying this Constitution, a court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Republic of the Marshall Islands, but shall not be bound thereby; and, in following any such decision, a court shall adapt it to the needs of the Republic, taking into account this Constitution as a whole and the circumstances in the Republic from time to time."

MARSHALL ISLANDS, SUPREME COURT

A. PROHIBITED USE OF PRIVATE COUNSEL IN PROBATING ESTATES CONSISTING IN MAJORITY PART OF A RIGHT TO PROCEEDS OF AN NCT AWARD.

For convenience, the amendment to the Probate Code effected by P.L. 1994-87 will hereinafter be referred to as the "probate amendment." In effect, that amendment qualified an estate having as its principal asset an NCT award, irrespective of its total value, to be administered as an estate of limited value[18] or a small estate[19] under the Marshall Islands Probate Code. Both are summary procedures, designed to take less time and be less expensive than required by the procedures used in ordinary probate and administration of estates. With estates of limited value, a member of the decedent's immediate family, eldest maternal uncle, head of his lineage or creditor is able to petition the court to transfer the personal property of decedent to petitioner. The petitioner must identify the relatives of the decedent, the total value of the property, the persons entitled to the property (by will or otherwise) and must undertake to pay the debts of decedent with available assets and distribute the balance to the persons entitled. Persons delivering assets to the petitioner are not held to account to any other person. If petitioner's right to any asset is denied, the court determines entitlement. If it appears that debts will exceed assets, petitioner thereafter acts only as directed by the court. Petitioner is accountable for property transferred to him, but no provision for an accounting is made and actions against him must be commenced within two years of the order to transfer assets. The procedure with respect to small estates[20] is similar, but the size of the estate must be less than $1,000, the process is commenced by affidavit and the time limitation on suit against the transferee is one year. In neither of these expedited procedures is there any filing of an inventory, published notice to creditors, formal accounting or order of distribution.

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[18]25 MIRC Ch. 1, §§ 11-15.

[19]25 MIRC Ch. 1, §§ 16-19.

[20]Originally limited to estates consisting of awards from the United States under the Micronesian Claims Act of 1971, 50 App USCA 2018-2020b, terminated August 3, 1976.

1. Privacy

[4] Both ordinary and truncated estate administration procedures are in a public forum and open to inquiry by anyone interested. In these procedures, the provisions of decedent's will, if any, are disclosed, his heirs and legatees are identified, the scope of his estate is disclosed and his creditors are identified. It does not appear, therefore, that the inclusion of NCT awards in an estate so administered violates any right of privacy assured by Article II, Section 13.

[5-8] 2. Due process: right to private counsel

The concept of due process protects rights that cannot be denied without violating fundamental principles of liberty and justice. It has long been recognized that in criminal proceedings, the right to the assistance of counsel of one's choice is such a right. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Many recent cases have recognized that the right to counsel is also preserved by the due process clause in civil cases. *See, e.g., Potashnick v. Port City Const. Co.,* 609 F.2d 1101 *(5th* Cir. 1980), *reh. den*. 613 F.2d 314, *cert. den.* 449 U.S. 820, 101 S.Ct. 78,66 L.Ed.2d 22 (1980); *Gray v. New England Tel.& Tel. Co.,* 792 F.2d 251 (1st Cir. 1986). It is also established that this right extends to administrative proceedings as well as to courtroom proceedings. *Goldberg v. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). While it is conceded that government is not required to furnish counsel to civil litigants, whose personal liberty is not at stake, recently one court has expressed the view that the right to counsel in civil proceedings means, in most instances, the right to counsel of one's choice. *McCuin v. Texas Power & Light Co.,* 714 F.2d 1255 (5th Cir. 1983); *Texas Catastrophe Property Ins. Ass'n v. Morales, 975* F.2d 1178 (5th Cir. 1992), *reh. den.* 980 F.2d 1442, *cert. den.* 123 L.Ed.2d 446 (1993).

[9-10] That court has recognized, however, that even in a criminal case the right to have a particular attorney is not absolute, *United States v. Dinitz,* 538 F.2d 1214 *(5th* Cir. 1976), *cert. den.* 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977), and that in civil cases a party's right to choose its own counsel can be overridden by "compelling reasons." Examples of "compelling reasons" are given in *McCuin, supra.* They include consideration of effective judicial

administration and economy of litigation costs. This Court is inclined to agree that the right to counsel in civil matters ordinarily includes the right to retain counsel of one's choice. This Court is not yet prepared, however, to adopt the "compelling reasons" standard announced by the United States Fifth Circuit Court of Appeals for declining to preserve that right. There is a different cultural background in the Marshall Islands than in the U.S., there are relatively few lawyers and there is a lesser degree of sophistication in legal matters.

[11] The probate amendment requires the administrator of an estate of limited value or small estate (referred to in the Probate Code as the "complainant" and "transferee" and in the probate amendment as the "claimant" or "affiant") to use the services of the Offices of the Marshall Islands Legal Aid or Public Defender,[21] if desired, and prohibits the administrator from using the services of private legal counsel.[22] The administrator's duties are largely ministerial and he acts as a fiduciary. His interests, to be protected by the assigned counsel, are certainly not of the magnitude as is the personal liberty of a defendant in a criminal case, or even as are the rights to property or compensation of a litigant in the ordinary civil case. There are no inheritance or estate taxes to be paid, so the administrator is likely to encounter controversy only with respect to collecting assets of the estate, paying debts and making distribution of the balance of the estate to those entitled. The Court finds nothing in the probate amendment that prevents any person, other than the administrator, from employing counsel and asserting whatever rights he claims with respect to the assets and obligations of the estate. The Court construes the probate amendment to prohibit only the administrator, in his fiduciary capacity, from employing private counsel. If and to the extent that the administrator, in his personal capacity, is interested in the estate, the Court construes the statute as inapplicable to that interest, which also may be protected through the use of private counsel.

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[21]If they previously had no authority to appear in such matters, by implied amendment through P.L. 1994-87 their authorizing statutes now permit them to do so.

[22]The term "private legal counsel" is not defined in the probate amendment.

[12] The Court concludes that this limited interference, in the administration of certain estates, with the right of a party to a civil action to be represented by counsel of his choice does not offend the guarantee of due process in Article II, Section 4(1).

3. Equal Protection

Article II, Section 12(1) of the Constitution states: "All persons are equal under the law and are entitled to the equal protection of the laws."

Article II, Section 12(3), however, states: "Nothing in this Section shall be deemed to preclude non-arbitrary preferences for citizens pursuant to law."

[13] Equal protection is also inherent in the notion of "due process," to which every person is entitled under Article II, Section 4(1) of the Constitution.

What is meant by "equal protection of the laws"? The majority in a relatively recent United States Supreme Court case said it meant that "all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Center,* 473 U.S. 472, 105 S.Ct. 3249, 87 L.Ed.2d 313, 320 (1985). Professor Tribe, in *American Constitutional Law*, 2d ed., 1988, stated that equal protection includes rights to equal treatment and to be treated as an equal (expressly guaranteed in Article II, Section 12(1)) and that these are not the same thing. Equal treatment, he wrote, does not operate with respect to all interests because that would preclude government from discriminating in the public interest (which power was reserved to the government in Article II, Section 12(3)), while treatment as an equal protects all interests of all persons. *Id.* at page 1437.

[14,15] In *Cleburne, supra,* the United States Supreme Court recited the tests for determining whether challenged legislation denies equal protection:

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest (Citations omitted). When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude (citations omitted), and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

> The general rule gives way, however, when a statute classifies by race, alienage, or national origin. These factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy – a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest (citations omitted). Similar oversight by the courts is due when state laws impinge on personal rights protected by the Constitution (citations omitted). 87 L.Ed.2d 313, 320.

The court went on to observe that a heightened standard of review would be used to test legislative classifications based on gender or legitimacy, but not to classifications based on age. *Id.* 320, 321.

[16] The probate amendment does not employ a basis for classification that requires strict or heightened scrutiny. It is social legislation with a classification based on value. The question, then, is whether that classification is rationally related to a legitimate state interest. Here, the policy expressed in P.L. 1993-50, the forerunner of the probate amendment, and in the probate amendment is to preserve awards made by the NCT through preventing them from being used for payment of legal fees. In an economy which, outside of the urban centers, is largely a subsistence economy, the government can certainly have a valid interest in preserving cash for the persons entitled to a decedent's estate. In that economy, the principal sources of substantial cash have been awards made for war claims and nuclear claims. The classification, based on value, is rationally related to that interest. The equal protection challenge to the probate amendment, therefore, must fail.

B. PROHIBITED USE OF PRIVATE COUNSEL IN CONNECTION WITH CLAIMS BROUGHT UNDER THE NCT ACT.

For convenience, the amendment to the NCT Act effected by P.L. 1993-56 will hereafter be referred to as the "NCT amendment." As amended by the NCT amendment, the relevant portions of the NCT Act now read:

> "§ 17. Office of Public Advocate.
>
> (1) There shall be appointed one Public Advocate and such Associate Public Advocates as required, who shall:
>
> (a) advise and assist all claimants in the filing, preparation and presentation of claims under this Act;
>
> . . . . .
>
> (5) A claimant or class of claimants shall be prohibited from retaining private legal counsel in connection with claims brought under this Act."

The NCT amendment defined private legal counsel as a "private attorney, trial assistant or other individual who offers legal services for a fee."[23]

The NCT Act does not require, and has never required, the Public Advocate and the Associate Public Advocates to be lawyers or trial assistants. The Court will take judicial notice[24] of the facts that neither the Public Advocate nor those who have been, from time to time, Associate Public Advocates are or have been lawyers or trial assistants, that the Public Advocate is well experienced in his job and that he and his staff have had some advocacy training.[25]

1. Due Process

As noted above, due process in civil cases, including administrative proceedings, requires that a litigant have the right to be assisted by counsel, ordinarily of his own choice. In the case at bar, the government has chosen to assign counsel to the litigant, free of charge, and to prohibit

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[23]P.L. 1993-56, Section 3(2).

[24]Rule 201 of the Evidence Act of 1989, 28 MIRC Ch. 1A, permits judicial notice to be taken at any time, including on appeal, of facts not subject to reasonable dispute, in that they are generally known within the jurisdiction of the court or capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

[25]NCT Report to the Nitijela, 1992, pages 8, 9.

him from employing counsel of his choice, even though he is willing to pay the fees of employed counsel. Counsel assigned by the statute is not a lawyer. Even if he was, however, he would not, in the circumstances pertaining to presentation of claims to the NCT, be able to represent the clients assigned to him in the manner required by standards of conduct governing the performance of lawyers. Those standards are set out in part in the American Bar Association's Model Code of Professional Responsibility[26] and its successor, the Model Rules of Professional Conduct. No reason appears to excuse the assigned counsel from the same standards of performance that would be required of private counsel employed by the litigant.

Canon 7 of the Model Code of Professional Responsibility ("Model Code") admonishes a lawyer to represent a client zealously within the bounds of the law. Disciplinary Rule 7-101 under that Canon requires a lawyer to seek the lawful objectives of his client though reasonably available means permitted by law and precludes him from prejudicing or damaging his client during the course of the professional relationship. The newer Model Rules of Professional Conduct ("Model Rules") are somewhat more specific in these areas. Model Rule 1.3 requires a lawyer to act with reasonable diligence and promptness in representing a client. Model Rule 1.7 directs that a lawyer shall not represent a client if that representation would be directly adverse to another client or if his responsibilities to that other client would materially limit his representation of the would-be client, unless the lawyer reasonably believes the multiple representation would not adversely affect either client and both clients consent after consultation.

Prohibitions against representing clients with conflicts of interest, similar to those in Rule 1.7, are found in the current draft of Chapter 8 of the American Law Institute's Restatement of the Law Governing Lawyers.[27] Section 201 of that draft states:

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[26]Adopted by joint order of the High Court and the Supreme Court dated January 17, 1990, as a part of the Rules for Admission to and Practice of Law Before the Courts of the Republic of the Marshall Islands. *See* Rule V.A.(4).

[27]Tentative Draft No. 4, April 10, 1991.

> Unless all affected clients consent to the representation under the limitations and conditions provided in § 202, a lawyer may not represent a client if the representation would constitute a conflict of interest. A conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, to a former client, or to a third person.

Section 202(1) allows a lawyer to represent clients, notwithstanding a conflict of interest, if all affected clients, each having adequate information about the risks and advantages to themselves of that representation, expressly consent. Even with such consent, however, § 202(2)c) precludes the lawyer from undertaking the multiple representation if, because of special circumstances, he will likely not be able to provide adequate representation to one or more of the clients.

Need the Public Advocate be concerned with violating these standards and limitations in representing claimants before the NCT? Statements in the annual reports of the Tribunal and in the *amicus curiae* brief filed by the Public Advocate, referred to below, make it apparent that he is seriously concerned with them.

a. Diligence.

Broadly stated, claims filed with the NCT fall into two categories: (1) those for personal injury or death arising from cancer-causing radiation that emanated from the nuclear testing program of the United States, and (2) those for property damage from the same program. The Public Advocate stated in his brief that, as of the end of October, 1994:

> Over 4,600 individual claims have been filed to date with the Tribunal and new claims continue to be filed on a regular basis. Many of these are multiple in nature, involving, for example, claims for one or more personal injury, for one or more personal injury suffered by a deceased relative, and for property damage in one or more atoll. Effectively, then, the Public Advocate is required to represent well over 10,000 separate claims before the Tribunal.[28]

[28] *Amicus Curiae* Response of the Public Advocate, pages 3, 4.

Not all of these claimants need be represented by the Public Advocate because the NCT amendment precludes only claimants filing after October 8, 1993[29] from employing private legal counsel. However, the claimants covered by the NCT amendment will add substantially to the case load the Public Advocate was in the process of trimming when the amendment was passed. Believing that limitations of resources and evidence required him to focus on claims with the greatest likelihood of success, he had initiated a system for evaluation of the claims. He reported that claims for which sufficient evidence and reasonable linkage to the testing program could be found would be pursued, and other claimants would be advised that his office would be unable to pursue their claims.[30] The Public Advocate now asserts, considering the task assigned to him by the NCT amendment:

> Given the large volume of claims and the limited number of staff, it is impossible for the Office of the Public Advocate to represent all claimants in an adequate and timely manner.[31]

Theoretically, the Nitijela could meet this objection of the Public Advocate by appropriating enough money to provide staffing that would provide legal services meeting the required standards. It has not done so, however, and what we are concerned with here is whether, by prohibiting claimants before the NCT from employing private attorneys to pursue their claims, those claimants have been deprived of fundamental rights protected by the due process clause.

b. Conflicts of interest: property damage.

The Public Advocate has invited the attention of this Court to the fact that the NCT amendment requires him to represent parties with directly conflicting interests, contrary to the prohibitions of the Model Code, Model Rules and current draft of Chapter 8 of the American

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[29]The effective date of the NCT amendment.

[30]NCT Report to the Nitijela, 1992, page 18.

[31]*Amicus Curiae* Response of the Public Advocate, page 4.

Law Institute's Restatement of the Law Governing Lawyers. He has stated that there are thousands of claims for damage to property pending before the Tribunal, including many where conflicting claims to ownership of the property have been made.[32] Since no lawyer can represent parties whose interests are in direct conflict,[33] at least some of those claimants will, because of the NCT amendment, be without any representation before the NCT, if, indeed, the Public Advocate can continue to represent others of them against former clients.

c. Conflicts of interest: claims to be satisfied from a limited source of funds.

[17] In the early years of its existence, the NCT expressed substantial doubt that the Nuclear Claims Fund would be sufficient to pay the awards it would make.[34] Indeed, the Defender of the Fund unequivocally represented to this Court that: "it appears likely that successful claimants will never receive 100% of their total award because of the insufficiency of the Compact funds."[35] This gloom was reiterated in the 1992 NCT Report: "Based on current information, Tribunal concludes that Article IV funds are inadequate to satisfy all current and projected compensation awards."[36]

More recently, the NCT and the Public Advocate have taken a somewhat less pessimistic view. Their cautious re-assessment is based upon the assumption that some part of the Fund will still be intact at the conclusion of the 15-year period of the Compact of Free Association, at

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[32]*Amicus Curiae* Response of the Public Advocate, page 3.

[33]Model Code, Canons 5 and 9; Model Rule 1.7; *Woodruff v. Tomlin,* 616 F.2d 924 (6th Cir. 1980), *cert. den.* 449 U.S. 888, 101 S.Ct. 246, 66 L.Ed.2d 114 (1980).

[34]NCT Report to the Nitijela, 1991, pages 17, 18.

[35]Appellee's Memorandum on Why Appeal Should Be Denied, page 4, filed February 18, 1992 in *Rongelap Atoll Local Government Council, et al. v. Marshall Islands Nuclear claims Tribunal,* 1 MILR (Rev.) 255 (May 7, 1992). Emphasis in the original.

[36]NCT Report to the Nitijela, 1992, page ES-3. The reference is to Article IV of the Section 177 Agreement, providing the claims adjudication process for the $45.75 million made available to the NCT.

which time at least 75% of the Annual Proceeds will be available to pay monetary awards made by the NCT.[37]

> Since it appears clear at this time that the $45.75 million available to the Tribunal for payment of awards during the 15-year period will not be enough to make full payment, consideration should begin soon on how best to prepare for the future distribution of those funds, as well as for continued adjudication of claims that may arise after the end of the Compact period.[38]

> Presuming that at least a portion of the Nuclear Claims Fund survives the fifteen-year period of the Compact of Free Association, there will continue to be annual proceeds generated from which to pay awards. In theory, then, there will be an infinite amount of funding available. Admittedly, however, it may take decades before annual proceeds can be realized in an amount sufficient to pay all awards in full.[39]

[18] A lawyer cannot, without violating the standards of conduct pertaining to conflicts of interest, represent multiple clients who assert claims in an aggregate amount exceeding the amount of the fund from which those claims are to be satisfied.[40] Reason dictates the same result if the possibility exists that the fund might prove to be inadequate or it is probable that lengthy delay in obtaining payment from the fund will be encountered. In the latter situation, which is the most favorable to claimants that the NCT currently can project, resourceful counsel for the claimants might conceive of arguments for preferring payment of their clients' claims in advance of others. Although all monetary awards made by the Tribunal are to be paid on an *annual pro-*

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[37]Section 177 Agreement, Article II, Section 7(c).

[38]NCT Report to the Nitijela, 1993, page 15.

[39]*Amicus Curiae* Response of the Public Advocate, page 2.

[40]See, for example, Rhode Island Bar Association Ethics Advisory Panel Opinion #93-15, issued March 31, 1993, concerning multiple claims against an auto insurance policy, and Connecticut Bar Association Informal Opinion 89-18, concerning claims against a decedent's estate, obtainable from the American Bar Association's Center For Professional Responsibility.

rata basis,[41] there has already been controversy[42] over the meaning of that direction. No attorney representing a large variety of claimants could make an argument for preference for any of them over the others of them, and conceding that all should share pro rata, at the same times and rates, would not optimize recovery for any of them.

From the foregoing, it can be seen that what is at stake for NCT claimants is more than merely the cost of attorneys' fees. Whether those claimants can obtain an award, the size of the award, the time within which it can be obtained, the amount of it that will be paid and the timing of payment are all in issue. Many of the injured parties have already died and many of the current claimants are of advanced years who, if they are to be paid at all, must be paid promptly.

[19] The NCT amendment deprives claimants of timely, effective and conflict-free representation. It is, therefore, in violation of the due process guarantee of Article II, Section 4(1) of the Constitution.

2. Privacy and equal protection.

In view of the conclusion reached with respect to petitioners' due process claim, it is unnecessary for the Court to reach their claims based on Article II, Section 13 and Article II, Section 12(1).

CONCLUSION

This case is remanded to the High Court with directions to enter a judgment declaring:

1. That P.L. 1993-56, insofar as it prohibits claimants from retaining private legal counsel in connection with claims brought under the NCT Act and limits them to utilization of the services of the Public Advocate, violates the guarantee of due process of law in Article II, Section 4(1) of the Constitution and is, therefore, unconstitutional and void.

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[41]Section 177 Agreement, Article II, Section 7(b).

[42]*Rongelap Atoll Local Government Council, et al. v. Marshall Islands Nuclear Claims Tribunal*, 1 MILR (Rev.) 255 (May 7, 1992).

2. That P.L. 1994-87 does not violate any of the guarantees contained in Article II, Sections 4(1), 12(1) and 13 of the Constitution and is, therefore, valid.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

CORRADO GUASCHINO,

Plaintiff-Appellant,

-v-

ROBERT REIMERS and RAMSEY REIMERS,

Defendants-Appellees.

S.CT. CIVIL NO. 94-02
(High Ct. Civil No. 1993-076
and High Ct. Civil No. 1993-077)

APPEAL FROM THE HIGH COURT

MARCH 8, 1995

ASHFORD, C.J.
WALSH, A.J. *pro tem*,[1] and HOUSEL, A.J. *pro tem*[2]

SUMMARY:

Plaintiff appealed the judgments in two cases which were consolidated for trial in the High Court. In both cases, the High Court denied judgment for Plaintiff and awarded compensatory damages against him on Defendants' counterclaims. In one case, the High Court also awarded punitive damages against Plaintiff. The Supreme Court affirmed the denials of Plaintiff's claims and the awards of compensatory damages because Plaintiff had failed to meet his burden of proof at trial and had not demonstrated any errors of law by the trial judge. The Supreme Court vacated the award of punitive damages, however, because Defendant had not asked for punitive damages until closing argument and the evidence did not establish outrageous conduct by Plaintiff.

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[1]Honorable Allison A. J. Walsh, Deputy Judge of the Federal Court of Canada, by appointment of the Cabinet.

[2]Honorable Jerry W. Housel, member of the bar and Court Commissioner in the State of Wyoming, by appointment of the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

DIGEST:

1. JUDGMENTS – *On Trial of Issues*: A trial court can only decide issues of fact on the basis of evidence whether written or oral introduced before it.

2. EVIDENCE – *Unsworn Statements*: Statements in pleadings or argument, whether oral or written, do not themselves constitute evidence.

3. PARTIES – *Appearing Pro Se – Compliance with Rules*: An unrepresented litigant appearing *pro se* is not entitled to any different treatment in the application of Rules of Evidence and Procedure than is a litigant represented by counsel.

4. CIVIL PROCEDURE – *Discovery – Production of Documents*: Orders for production of documents are discretionary and will not normally be interfered with on appeal, unless the action was improvident and affected substantial rights.

5. DAMAGES – *Punitive Damages – in General*: Punitive damages cannot be awarded when not asked for in the pleadings, but only in argument after the close of evidence.

6. DAMAGES – *Punitive Damages – Contract Actions*: In an action for breach of contract, punitive damages may be awarded only if the conduct constituting the breach is also a tort for which punitive damages are recoverable.

7. DAMAGES – *Punitive Damages – Tort Actions*: In tort actions, punitive damages are awarded to punish a person for his outrageous conduct and to deter him and others like him from similar conduct in the future.

8. DAMAGES – *Punitive Damages – Tort Actions – Outrage*: Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, those damages can be awarded only for conduct involving some element of outrage similar to that usually found in crime.

OPINION OF THE COURT BY WALSH, A.J.

These two actions and the counter-claims brought by Defendants in connection therewith are consolidated for hearing of the appeals before us, as they had been before the trial judge. As a result, some of the evidence adduced at trial and some of the issues raised in appeal related to the construction of a residence for Robert Reimers and some to the construction of a residence

for Ramsey Reimers with respect to which the most important issues arose.

The trial judge properly wrote a separate judgment for each, but it would be repetitive for us to deal at length in two judgments with the issues and facts applicable to both.

General Comments

These cases contain many unusual features and for instruction of litigants raising similar issues in future it appears desirable to deal in a general way with them, setting out some basic legal principles before applying them to the issues in the present cases.

[1,2] (1) A trial court can only decide issues of fact on the basis of evidence whether written or oral introduced before it. Statements in pleadings or argument, whether oral or written, do not themselves constitute evidence. *Sandbargen v. Gushi*, 7TTR 471, 474 (1976).

(2) The burden of proof of facts on which a plaintiff bases his claim or a defendant bases his defense rests on the party making it. *Tasio v. Yesi*, 3 TTR 598, 600 (1966); *Sandbargen, supra*, 475.

(3) An appellate tribunal may not substitute its own view of the facts for that of the trial judge unless his decision on the facts is manifestly absurd or capricious or without due regard to the evidence before him, since an appeal hearing is not a trial "*de novo*." *Ebot v. Jablotok*, 1 MILR (Rev.) 8, 9 (Aug 6, 1984); *Mwedritok v. Langijota and Abija*, 1 MILR (Rev.) 172, 174 (Aug 15, 1989); *Clanton, et al. v. MI Chief Elec. Off. (1)*, 1 MILR (Rev.) 146, 151 (Aug 2, 1989).

Conduct of Trial

[3] While it would not be appropriate for us to expound the evidence presented at trial in detail, one of the more serious grounds of appeal by Plaintiff-Appellant Guaschino is that the learned trial judge was biased against him. Unfortunately, Guaschino, though evidently very intelligent and eloquent and having some legal knowledge, found it necessary to act as his own counsel. As a result he suffered considerably from lack of legal knowledge, frequently failing to object to improperly asked leading questions or to irrelevant questions. On the other hand, many of his submissions were clearly improper or irrelevant. In such circumstances, a trial judge

normally deals with an unrepresented litigant as sympathetically as possible in endeavoring to obtain the relevant facts, but an unrepresented litigant is not entitled to any different treatment in the application of Rules of Evidence and Procedure than is a litigant represented by counsel.

Reading the transcript as a whole, we cannot conclude that the conduct of the hearing was biased. Early in the hearing, the trial judge dealt sympathetically with Guaschino, frequently rejecting objections made by counsel for Defendants. Later on he clearly became impatient with Guaschino's attempts to introduce irrelevant material and statements he made unsupported by evidence. By the time Guaschino himself took the stand, called as a witness by the Defendants, he actively took part in the questioning of Guaschino.

One must sympathize with his position as the evidence on the whole was highly unsatisfactory and contradictory on essential facts. However, we cannot sustain Appellant's appeal on the issue of bias because the record does not support it.

Other Issues Raised by Appellant

Without going in detail on each and every argument raised by Appellant, there are several on which he argues that the judgment should be reversed whether because of a manifestly incorrect appreciation and application of the facts or for legal reasons.

These arguments can be conveniently dealt with under various headings.

On Findings of Fact

1. Nature of agreement or contract. Guaschino attempted to obtain a written contract with Ramsey Reimers, but his draft was never signed by Reimers. Although it allegedly remained in Reimers' desk for six years, it cannot be assumed that there was tacit approval of it. Although in Defendant's pleadings there are several references to a contract, there does not appear to be anything more than an oral construction undertaking with no meeting of the minds as to the details of Guaschino's responsibilities by virtue of it.

The draft agreement prepared by Guaschino but never signed by Reimers certainly sets out in some detail the work Guaschino undertook to do and refers to himself as "designer and project manager for the project," and to that extent corroborates Reimers' understanding of what

was orally agreed to. Oral contracts can be valid but there must be a meeting of the minds. For the Ramsey Reimers' house there appears to have been no such complete understanding as to Appellant's responsibilities. Ramsey Reimers, believing Appellant to be an architect and designer originally sought a simple house, costing some $80,000.00, but accepted a design which would cost much more than that to build. In consultation with Appellant, Ramsey Reimers accepted the tender of Andrew Bing to build it for $271,000.00. Bing states that he purchased the major plumbing and electrical wiring conduits and boxes for the house and the rooting materials but not the windows. While not familiar with the agreement between Ramsey and Guaschino, he considered that Guaschino was the architect and designer, but not that this required him to be present all the time. He had some plans and got some answers from Guaschino when questions were asked during the construction. It appears that his own job foreman may not have been competent nor did he supervise to insure good quality work.

Eventually Bing was terminated and Noel Bigler was engaged by Ramsey to point out the many defects and make some repairs of faulty work.

2. Responsibility of an architect or designer. Appellant is not a qualified architect or industrial designer and does not claim to be, although he states he had had wide experience in design and supervising construction of buildings when he undertook this assignment. The Marshall Islands has no specific requirements for qualifications of industrial designers. Appellant insists that he was not required to be on the job constantly as it is the responsibility of a contractor and his foremen to see that the work is properly done. He engaged what he calls competent and qualified electrical and mechanical engineers to prepare whatever plans were necessary for this work. He himself did not provide very detailed drawings, stating that even an architect employs draftsmen to do this. Nevertheless, it is evident that much of the highly incompetent and unacceptable electrical and mechanical work was done without detailed plans or competent supervision.

The best witness as to what is expected by way of supervision by a designer is the expert witness Carleton Hawpe, a very fair witness. Although frequently employed by Defendants,

which is not unusual, especially with respect to expert witnesses, he testified that in a project of this magnitude structural and soil engineers should have been hired as well as electrical and mechanical engineers. He stated that normally supervision is not part of the architectural package during construction but that drawings should be sufficiently detailed so that the contractor who is responsible can see that they are carried out.

It is evident that Guaschino was negligent in his design, provided insufficiently detailed drawings and left too much of the supervision to contractors, subcontractors and their employees. He has not discharged the burden of proof as to his performance, so the final judgment dismissing his claim and sustaining the counterclaims was well justified on the facts.

On Issues of Law

1. Contract for Robert Reimers' house. Appellant contends that there was no valid contract for it since it was signed by Ramsey Reimers and not by Robert Reimers himself without any proof of agency. There is no merit in this argument. Appellant acted on it and the house was substantially finished prior to his termination. Moreover, he even argues that the fact that it encountered only minor problems indicates that he is a competent designer. There is no merit in this since one design, even if adequate, does not indicate that a different one for an entirely different and more unusual house will be.

2. Appellant argues that he was not properly notified when certain witnesses were examined in Honolulu so did not have the opportunity to cross-examine them. The record reveals that proper notice was given, and the depositions were properly produced in evidence. MIRCivP Rule 26(b).

[4] 3. Appellant argues that it was erroneous in law to refuse to order production of and to admit customer invoices and receipts for materials purchased in Hawaii on the basis of their being irrelevant. Orders for production of documents are discretionary and will not normally be interfered with on appeal, unless the action was improvident and affected substantial rights. *Carter v. Baltimore & O.R. Company et al.*, 152 F.2d 129 (1945). The receipts and invoices were certainly irrelevant with respect to Appellant's innuendo that the Reimers were attempting

to avoid payment of import duties which was not an issue. They might have been relevant however in determining the amount of commissions he was claiming on an alleged 10% agreement basis. Since the decision is against him in any event and they would only be of interest with respect to the quantum of his claim, the non-admission does not affect the validity of the judgment.

4. Appellant attacks the admissibility of the testimony of many of the witnesses called, including those called by him. Admittedly, many of them are either related to, have been employed by, are currently in the employ of, or wish to be employed in future by Reimers or by Reimers Enterprises. This does not disqualify them from testifying, but their testimony must be examined with caution. Some of them have been or are employed in correction of defects in the houses and have, of course, been paid for their services. This is particularly true of the evidence of the expert witness Hawpe. It is entirely proper that he should be paid for his services and not be deemed to be an unacceptable witness as a result thereof. At trial Plaintiff did not object to Hawpe being qualified as an expert. It is important to note that Appellant called no expert himself to refute Hawpe's evidence. Appellant himself is not a disinterested witness nor are the Reimers.

5. One legal issue, or perhaps one of mixed fact and law is that of the kick-back which Appellant undoubtedly received from many of the materials suppliers. He is candid about receiving them for his own benefit. As he states, it is by no means unusual for a supplier to offer a discount to large purchasers or regular customers.

Appellant states that the contract made by Ramsey Reimers with the general contractor provided that materials should be provided by the owner. The general contractor, Bing, stated however that much of the material was purchased by him. The unsuitable windows were purchased by Guaschino from a reputable manufacturer but the witnesses indicate they were totally unsuitable with respect to the material and design for the climate. Testimony indicates that aluminum windows were called for in the original design plans and although they would have been more expensive and would also eventually suffer some damage from the climate they

would be in all respects more satisfactory than those installed.

In any event Guaschino admittedly purchased much of the materials in Hawaii negotiating the prices himself, and sometimes buying the cheapest quality, including the unsuitable windows, allegedly in the interest of keeping the price down for the owners. He was being paid for his work in connection with the building of the houses and any discounts he received from suppliers clearly belong to the owner, unless the owner has been advised of the discounts and approved Appellant's right to keep them. It appears that this was not the case. Much of the evidence respecting the kick-backs and quantum of damages caused to Defendants by the totally unacceptable construction defects and costs already incurred for repairs and anticipated costs for future repairs of such defects as can be repaired, is highly confused and unsatisfactory and may contain some duplications, but the trial judge appears to have done the best he could with it and we see no reason to interfere with the damages awarded on the counter-claims, save for the punitive damages.

Quantum of Award in Counter-Claim

[5-8] Although we are in agreement that the appeals must be denied and the counter-claims maintained on the merits, we do not agree with all the amounts awarded against Appellant Guaschino. In particular the award of $500,000.00 punitive damages cannot be sustained. First, punitive damages were not asked for in the pleadings, but only in argument after the close of evidence by Defendant and Counter-claimants' counsel. Second, they were not justified. In an action for breach of contract, punitive damages may be awarded only if the conduct constituting the breach is also a tort for which punitive damages are recoverable. Restatement (Second) of Contracts § 355 (1979). The torts in this case were negligence and misrepresentation by Appellant. In tort actions, punitive damages are awarded to punish a person "for his outrageous conduct and to deter him and others like him from similar conduct in the future." Restatement (Second) of Torts § 908(1) (1964).

> Since the purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence, these damages can be awarded

> only for conduct for which this remedy is appropriate – which is to say, conduct involving some element of outrage similar to that usually found in crime. Restatement (Second) of Torts § 908 cmt b (1964).

Appellant's conduct, while egregious, fell short of being outrageous.

Conclusion

It is evident that Appellant is the author of his own misfortunes for assuming design responsibilities for a very complicated and unusual design in the case of Ramsey Reimers' house, which was beyond his experience and qualifications, for providing insufficiently detailed plans and insufficient supervision in the circumstances of the work done without detailed plans by the contractor and subcontractors, and above all for soliciting and accepting and retaining kick-backs from suppliers chosen by him.

In many if not most cases what occurred was primarily the doing of others, but he is certainly legally responsible, and must be held accountable. The contractor Bing did a very unsatisfactory construction job as did his subcontractor Rosenberry with respect to the asphalting on the roof in connection with the dome to waterproof the roof. His subcontractor for electrical work also did unacceptable work. Paradise Construction Products International did not deliver much of the material and furnishings ordered and then went out of business, but Appellant was at fault in prepaying for merchandise before delivery (even if it was necessary to prepay at least 50% with the order as he claims). Ramsey Reimers was also negligent in blindly affirming these contracts and he and some of his company's employees in providing funds for prepayment of them.

Appellant undoubtedly spent considerable time on the two projects for which he will now be called upon to refund amounts he received, but if he has no claim on a *quantum meruit* basis he has only himself to blame.

The judgments appealed from are affirmed, with the exception of the award of punitive damages in High Ct. Civ. No. 1993-077. That award of punitive damages is vacated.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

SOUTH SEAS MARINE CORPORATION,

Plaintiff-Appellant,

-v-

FRANCIS REIMERS,

Defendant-Appellee.

S.CT. CIVIL NO. 94-08
(High Ct. CIVIL No. 1993-075)

APPEAL FROM THE HIGH COURT

MARCH 8, 1995

ASHFORD, C.J.
WALSH, A.J. *pro tem*,[1] and HOUSEL, A.J. *pro tem*[2]

SUMMARY:

The Supreme Court affirmed the Order of the High Court (1) dismissing Plaintiff's Motion to Disqualify Defendant's counsel based on his previous representation of Plaintiff and access to corporate records, and (2) sustaining Defendant's Motion to Dismiss Plaintiff's Complaint for breach of warranty, wrongful termination of lease and tortious interference with prospective contractual advantage. The ruling was based upon determination of the same issues between the same parties in a prior case,

DIGEST:

1. APPEAL AND ERROR – *Review – Discretionary Matters – Disqualification of Attorneys*: The standard of review of a court's ruling on a motion for an attorney disqualification is abuse of discretion.

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[1]Honorable Allison A. J. Walsh, Deputy Judge of the Federal Court of Canada, by appointment of the Cabinet.

[2]Honorable Jerry W. Housel, Court Commissioner and member of the Wyoming State Bar, by appointment of the Cabinet.

SOUTH SEAS MARINE CORP. v. REIMERS

2. ATTORNEYS – *Disqualification – Prejudice*: An attorney is not disqualified if his previous representation of the opposing party did not involve disclosure to him of confidential information prejudicial to that party in the pending case.

3. RES JUDICATA – *Requirement*: The final judgment on the merits in a previous action involving the same parties and substantially the same issues precludes litigating issues that were or should have been presented in the previous action.

4. SERVICE OF PROCESS – *Constructive Service*: Service on opposing party is valid where statutory and rule procedures are fully complied with.

5. ATTORNEYS – *Representation*: A corporation represented by a non-attorney throughout the trial and appellate proceeding cannot claim error for such representation where the question was not presented to or decided by the lower court.

6. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*: An appeal is limited to the record of evidence introduced and proceedings taken in the lower court.

OPINION OF THE COURT BY HOUSEL, A.J.

Plaintiff appeals from orders of the High Court dismissing his motion to disqualify Defendant's counsel and dismissing Plaintiffs claims. Plaintiff appeared by its President in the trial court, Corrade Guaschino, but was required to be represented by counsel on this appeal.

Plaintiff claims damages against the Defendant for:

(1) Breach of warranty of ownership of Anorak Island with iroij, alap and dri jerbal rights.

(2) Wrongful termination of the lease of said property to Plaintiff.

(3) Tortious interference with Plaintiff's prospective contract to market lease rights.

Defendant denied Plaintiff's claims and alleged 16 affirmative defenses including *res judicata*. Defendant counterclaimed against Plaintiff for damages for unpaid rental, unauthorized use of the leased premises, interference with Defendant's rights to use them, and attempted sale or assignment of the leasehold interest in violation of the lease. Defendant sought termination of

the lease and judgment for his attorney's fees.

Before trial, Defendant moved to dismiss Plaintiff's action with prejudice on the ground of *res judicata* and Plaintiffs failure to assert his claims in the prior action. Plaintiff moved to disqualify Defendant's counsel for previous representation of Plaintiff and access to Plaintiffs records.

At the hearing on the motions, no evidence was offered or introduced by Plaintiff. In statements to the Court, he argued for disqualification of Defendant's counsel alleging previous representation of Plaintiff in a civil action involving title to a boat, access to corporate bylaws and unspecified private papers relating to buying and selling Plaintiff's corporate shares, and advice on proposed sale of Plaintiff's shares to investors. Defendant's counsel stated that all documents referred to are public records; that while employed by the law firm retained by Plaintiff, he represented Plaintiff only on the boat case, which was totally unrelated to the present action; and that he did not represent Plaintiff for over five years before Plaintiff's complaint here was filed.

The Court found no grounds for disqualification of Defendant's counsel and denied Plaintiff's Motion to Disqualify. Plaintiff stated he was filing an immediate appeal to the Supreme Court for dismissal of Plaintiff's counsel. Following further argument by Plaintiff, he left the courtroom, notwithstanding that he was warned by the trial judge (a) that an interlocutory appeal of the order denying the Motion to Disqualify likely would not be entertained by the appellate court and (b) that Defendant's Motion to Dismiss would be heard immediately and he should remain in the courtroom to protect Plaintiffs interests. The Court then proceeded to consider Defendant's Motion to dismiss Plaintiffs complaint.

Defendant introduced evidence establishing constructive service on Plaintiff in High Court Civil Action No. 1991-116 and copies of the file in that case. The parties there were identical to those in this case, the same lease is involved and the evidence there was substantially the same as that argued for though not introduced by Plaintiff in this case. A default judgment was entered in Civil No. 1991-116. Among other things, it terminated the lease on which

Plaintiff relies.

[1] Disqualification of Counsel. The standard of review of a court's ruling on a motion for an attorney disqualification is abuse of discretion. *Kabua v. Kabua*, 1 MILR (Rev.) 96 (Apr 18, 1988).

Both this action and the previous action in High Court Civil No. 1991-116 stem from the same nucleus of facts. The rights established by the Order of Dismissal in that case would be impaired by ruling for Plaintiff on his claims in this action.

[2] An attorney may not represent a party against a former client if the matters involved are substantially related and confidential information was obtained on those matters which would be prejudicial to the former client. However, an attorney will not be disqualified where the evidence fails to establish receipt of confidential information.

> "There must be a substantial relationship between the subject matter of the present and the former representations in order for an attorney to be disqualified from representing a client." 7A C.J.S. Attorney & Client § 160

> "An attorney is not prevented from representing a subsequent client against a former client, where the duties required of him do not conflict with those required in the first employment." *Shaw v. Bill*, 95 U.S. 10 (1877)

Defendant's counsel was not precluded from representing Defendant in this case. The matters on which his counsel previously represented Plaintiff were substantially different from those in this case and Plaintiff failed to establish that Defendant's attorney had acquired any confidential information in the prior matter detrimental to the Plaintiff in the current matter.

[3] (2) *Res Judicata*. The defense of *res judicata* is available when there is a final judgment on the merits in a previous action involving the same parties and substantially the same claims, facts or issues:

> A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, on the same cause of action, in the same or another court, as long as it remains unreversed and

> not in any way vacated or annulled, whether it depends on federal, general or local law. 50 C.J.S. Judgements § 598.
>
> As stated in many cases, the doctrine of *res judicata* is that an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of causes of action and of facts or issues thereby litigated, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction. 46 Am Jur 2d, Judgements § 514.

In *Fellowship of Christ Church v. Thorburn*, 758 F.2d 1140 (1985), the lower court found appellants did not have an opportunity to defend prior to entry of the judgment. Also, that appellants had adequate opportunity to raise the issue following entry of the judgment and could have and did not move for a new trial. The federal court stated:

> Appellants challenge the district courts holding that *res judicata* bars relitigation under § 1983 of their claim, which has been finally determined in state court. The appellants contend that *res judicata* does not bar their claim primarily because they never received an evidentiary hearing in state court, and secondarily because not all of the federal plaintiffs participated in and are bound by the state litigation. We find these contentions to be without merit, and affirm the district court. . . .
>
> As a general matter, the doctrine of *res judicata* forecloses relitigation of matters that were determined, or should have been raised, in a prior suit in which a court entered a final judgment on the merits. *See Migra v. Warren City School Dist.*, 465 U.S. 75, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984).

In *N.L.R.B. v. Allen*, 758 F.2d, 1140 (1985), *cert. denied* by *Allen v. N.L.R.B.*, 474 U.S. 1101 (1986). The Sixth Circuit, Federal Court of Appeals, stated:

> The doctrine of *res judicata* is intended to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance of adjudication.' *Allen*, 449 U.S. at 94, 101 S.Ct. at 415.

Under Rule 13(a) of the Marshall Islands Rules of Civil Procedure ("MIRCivP") claims of a

defendant against a plaintiff arising out of the same transaction or occurrence sued on must be alleged in a counterclaim in the same action. The purpose of the Rule is to bring related claims into a single litigation and avoid multiplicity of actions. *Stancill v. McKensie Tank Lines, Inc.*, 497 P.2d 529 (1974). In High Court Civil Action 1991-116 (July 22, 1992), Defendant there (Plaintiff here) did not answer the complaint or assert any counterclaim against Defendant here (Plaintiff there). Thus, the Plaintiff, if properly served in the prior action, is precluded from asserting those claims against Defendant now.

(3) Process. The defense of *res judicata* does not apply if the party against whom it is asserted did not have full and fair opportunity to litigate the issues in the previous case. *N.L.R.B. v. Allen, supra*. The judgment in High Court No. 1991-116 was by default and Plaintiff claims the substitute or constructive service by Plaintiff in that case was insufficient and that he had no notice of the action and no opportunity to defend it.

The issue of proper service on Plaintiff here (Defendant there) in High Court Civil 1991-116 was examined by the Court in that action and the Court ruled that Plaintiff here (Defendant there) had been "regularly served with Summons and Complaint pursuant to the order of the Court dated May 13, 1992 but had failed to appear." In this case, the High Court stated in its order dismissing Plaintiffs complaint that "Pursuant to order of court, service of the complaint and summons was made on plaintiff (Defendant there) by mail, postage prepaid, to the last known address of plaintiff (Defendant there)."

[4] Substituted or constructive service is available where it is impracticable to obtain actual service upon a party.

> Generally, there are two methods of service of original process: actual or personal service, and substituted or constructive service. Where a party cannot be actually served with process, in proper cases service may be effective by a substituted mode under statutes or rules providing therefor. . . .
>
> Due process of law does not necessarily require personal service of notice on parties either resident or nonresident. Use of constructive service for in personam actions is not a *per se* violation of due process under Fourteenth

Amendment. 62B Am Jur 2d, Process § 146.

> It is within the power of the legislature to provide for substituted service in case of necessity or if personal service is for any reason impracticable. . . .
>
> Service is complete when all the required acts are done . . . it is immaterial that defendant in fact receives no actual notice thereof; and the fact that he does not thereafter personally receive the papers which were so served or that he receives them at a late date ordinarily does not affect the validity of the service. 72 C.J.S. Process § 50.

[5] Plaintiff also contends, only on appeal, that the High Court committed a "fundamental and substantial error" in allowing him to represent South Seas Marine Corporation because he is not an attorney. An appellate court cannot rule on the merits of a question not presented and decided upon by the court appealed from. *Clanton, et al. v. MI Chief Elec. Off. (1),* 1 MILR (Rev.) 146, 153 (Aug 2, 1989). This question was not raised or presented in the High Court in this case. Further, Plaintiff is estopped from claiming error he himself committed.

[6] An appellate court is limited to the evidence produced and proceedings taken in the lower court. Plaintiff attached exhibits and affidavits to his brief on appeal relating to the issues and substituted service, but introduced no evidence at the trial. There is no basis for this court to reverse the High Court.

We affirm.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BERTHA LIKINBOD and
HELENA ALIK

S.CT. CIVIL NO. 94-03
(High Ct. Civil No. 1993-126)

Plaintiffs-Appellants,

-v-

MIRIAM KEJLAT,

Defendant-Appellee.

ORDER DENYING MOTION FOR REHEARING

APRIL 21, 1995

ASHFORD, C.J.

SUMMARY:

A motion for rehearing did not identify any points of law or fact overlooked or misapprehended by the Court. Therefore, it was denied.

DIGEST:

1. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*: An appeal is on the record; it is not a new trial. Additional evidence, including statements of purported fact in counsel's argument, will neither be accepted nor considered.

2. COMMON LAW – *Constitutional Law – Continuance of Common Law*: The framework of governance provided by the Constitution continued the common law in effect as the governing law, in the absence of customary law, traditional practice or constitutional or statutory provisions to the contrary.

3. LACHES – *Constitutional and Statutory Law*: The doctrine of laches is a well-established part of the common law. There are no statutory or constitutional provisions that preclude application of the doctrine of laches, even to cases involving land titles.

Plaintiffs-Appellants timely filed a motion for rehearing. The lengthy motion contains extensive argument based on speculation and unsupported statements of fact. It also expounds upon Marshallese custom with respect to devolution of titles. The primary legal argument set forth in the motion is that the doctrine of laches should not be applied to cases involving title to Marshall Islands lands. Numerous documents were attached in support of the motion.

[1] All of the documents filed with the motion, excepting only one, were before the trial court when it granted summary judgment for the Defendant. They were part of the record considered by this Court in deciding the appeal. The exception is an affidavit by Iroijlaplap Amata Kabua executed on March 24, 1995, some two weeks after the Opinion on this appeal was filed. Because that affidavit was not before the trial court, nor a part of the record, it will not be considered by this Court. An appeal is on the record; it is not a new trial. Additional evidence, including statements of purported fact in counsel's argument, will neither be accepted nor considered.

[2,3] The 1979 Marshall Islands Constitution set forth "the legitimate legal framework for the governance of the Republic."[3] That framework included a parliamentary-style Nitijela and Cabinet, a Bill of Rights modeled on the United States Bill of Rights and a Judiciary Article continuing the U.S.-style court system that operated during the period when the Marshall Islands were a part of the Trust Territory of the Pacific. That framework continued the common law in effect as the governing law, in the absence of customary law, traditional practice or constitutional or statutory provisions to the contrary. The doctrine of laches is a well-established part of the common law. There are no statutory or constitutional provisions that preclude application of the doctrine of laches. Customary law and traditional practices concerning land tenure, which Article X of the Constitution expressly preserves, are not offended by its application. In this case, the High Court merely held, in accordance with established standards, that Plaintiffs' conduct deprived them of any right to relief from the court. See, for example, *Langijota v. Alex*,

[3]Preamble, first paragraph.

1 MILR (Rev.) 216 (Dec 3, 1990). That ruling, and this Court's affirmance of it, did nothing in derogation of Marshallese custom and traditional practices with regard to land tenure.

The motion for rehearing has failed to identify any points of law or fact which this Court overlooked or misapprehended. Accordingly, the motion is denied.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF THE ESTATE OF MARIA PETER, Deceased,

S.CT. CIVIL NO. 95-02
(High Ct. Probate No. 1994-002)

By: HENSE HENSENE

Petitioner-Administrator,

-v-

WITTEN T. PHILIPPO,

Respondent,

and

OKJEN KOBAIA,

Respondent-Real Party in Interest.

PETITION FOR WRIT

DECEMBER 13, 1995

ASHFORD, C.J.

SUMMARY:

The Court denied a Petition for a writ of *mandamus* or prohibition, finding that there was no legally sufficient justification for issuance of either of those extraordinary writs.

DIGEST:

1. WRITS, EXTRAORDINARY – *Power to Issue*: Mandamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised.

2. WRITS, EXTRAORDINARY – *Requirements – In General*: For a writ of *mandamus* to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the

performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy.

3. JUDGES – *Powers and Functions – Ruling on Motions*: A judge has a duty to decide motions that are properly submitted to him, but he is not required to decide them within a time which suits the convenience of counsel nor is he required to rule on motions or issues which have been rendered moot by time or events.

4. WRITS, EXTRAORDINARY – *Requirements – In General*: For a writ of prohibition to issue to a judge, it must be shown that the respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law and that it would result in injury for which there is no other adequate remedy.

5. WRITS, EXTRAORDINARY – *Power to Issue*: A writ of prohibition is to be used with great caution and forbearance and should be issued only in cases of extreme necessity.

ORDER AND OPINION BY ASHFORD, C.J.

CONCISE STATEMENT AND DISPOSITION:

In this Petition for Writ of Mandate (sic), Prohibition or Other Appropriate Relief, the Petitioner-Administrator sought to interdict a hearing scheduled for November 24, to vacate an order entered on November l5, to disqualify the judge from further activity in the case and to prohibit the judge from interfering with attorney McCaffrey's representation of the petitioner. For the reasons which appear below the petition is denied in its entirety.

FACTS:

P.L. 1994-87, containing the Probate Code (Amendment) Act of 1994, was certified and became law on March 3, 1994. Petitioner herein was appointed Administrator of the Estate of Maria Peter on November 11, 1994. The estate he was to administer was described by the High Court judge as a "Nuclear Cairns Tribunal estate." It appears, therefore, that the administrator had the benefit and burden of the amendments to the Probate Code made by P.L. 1994-87. Thus, he was entitled to the free legal services of the Legal Aid Office or of the Public Defender, if desired, and was prohibited from retaining private legal counsel to assist him in the discharge of his fiduciary duties. In October 1995 the administrator was in fact represented by Rosalie Konou

of the Legal Aid Office.

The following sequence of events then occurred (all Majuro dates):

October 2: Kobaia, represented by attorney David Strauss, filed motions to set aside judgment, appoint co-administrator and approve distribution scheme and for a temporary restraining order, preliminary injunction and accounting.

October 10: Judge Philippo, in the presence of the administrator and his attorney, Ms. Konou, granted a temporary restraining order and set some or all of the remaining motions for hearing on October 31. This was confirmed by order filed October 18.

October 25: Attorney Strauss caused subpoenas to be issued to attorney Konou and her secretary to testify on behalf of Kobaia at the October 31 hearing.

October 26: The subpoenas were served.

October 27: A Substitution of Attorneys was filed, in which the administrator substituted "JAMES McCAFFREY, Attorney at law" for "ROSALIE A. KONOU, RMI Legal Aid Office" as his "attorney of record." This document was signed by the administrator and both attorneys. Mr. McCaffrey's signature was dated at Tijuana, Mexico, and the others at Majuro. On its face, this substitution offended the prohibition contained in the Probate Code (Amendment) Act of 1994.

Attorney David Lowe faxed a Memorandum to Judge Philippo from Fairfield, California, advising that he will be representing Ms. Konou, she has been subpoenaed to appear on October 31, he is unable to be present with her on that date, he understands that Mr. McCaffrey will be substituting in place of her as attorney for the administrator, Mr. McCaffrey is also unable to appear on October 31 and Ms. Konou has moved for a continuance and to disqualify Judge Philippo. He requested a conference call or other communication regarding a new date for the hearing. The memo concluded with the statement that copies of the memorandum are being sent to "each of the other counsel."

Mr. McCaffrey sent a letter by fax from Tijuana to Judge Philippo, with a copy by fax to Mr. Strauss, stating "I was retained late yesterday by Hense Hensene, the

Administrator." He stated he understood "there is currently a motion for a continuance before the court" and requested a continuance, stating reasons. He also stated that he had received a copy of Mr. Lowe's memorandum and stated he, too, would be available for a conference call or to submit available dates and gave telephone numbers at which he could be reached.

No copies of the motion for continuance mentioned by Messrs. Lowe and McCaffrey and the motion to disqualify mentioned by Mr. Lowe have been submitted to this court, if they exist.

October 30: Mr. Strauss faxed a letter to Ms. Konou, showing copies by fax to the clerk of courts and by mail to Messrs. McCaffrey and Lowe, stating he had received correspondence from Messrs. Lowe and McCaffrey, and "in order to dispose of this matter tomorrow afternoon" he would not call her as a witness and is asking the court to quash the subpoena issued to her. Mr. Strauss faxed a letter to the clerk of courts, showing a copy to Ms. Konou, stating he had decided not to call Ms. Konou to testify "at tomorrow's scheduled hearing" and asking that the subpoena he requested be regarded as quashed.

October 30: Mr. McCaffrey filed a combined motion to quash the subpoena issued to Ms. Konou, motion to continue the October 31 hearing, assertion of the administrator's right to an attorney of his choosing and assertion of privilege by the administrator concerning communications with his former attorney, Ms. Konou. This was supported by a memorandum and affidavits by him and by Ms. Konou asserting that his costs and fees were to be paid by the RMI Legal Aid Office and not by the administrator and that his work was to be without supervision by the Legal Aid Office. Mr. McCaffrey states that these documents were filed on October 30. The copies furnished this court have no filing stamp and do not have attached any certificate of service on opposing counsel. At this time, this court is not called upon to determine whether the conditions of employment of Mr. McCaffrey cured the problem with the Probate Code (Amendment) Act of 1994.

October 31: Mr. McCaffrey faxed two draft orders to Judge Philippo, to quash the Konou subpoena and to continue the hearing on Kobaia's motions. It is not clear whether the covering letter and draft orders were received by the court prior or subsequent to the early afternoon

hearing on October 31.

The court convened, for the scheduled hearing on Kobaia's motions. The administrator appeared, but his attorney, Ms. Konou, did not. The transcript of the hearing reveals that the judge had not been notified that she would not appear and the administrator did not know why she failed to appear. Over the strenuous objection of attorney Strauss, Judge Philippo declined to hear the scheduled motions. Further, he directed that an order be issued for Ms. Konou to show cause why she should not be held in contempt for failure to appear, and set ten o'clock a.m. on November 13, 1995 as the time and date for the order to show cause hearing. He also stated that he would not hear the motions until after that hearing and determination of what to do with a motion to disqualify him and with an attempted substitution of counsel filed by the administrator. At the hearing, the judge also expressed doubt whether conflicts facing Ms. Konou would prevent her from fully and adequately representing the interests of the administrator.

Judge Philippo signed an order setting Monday, November 13, 1995 at 10:00 a.m. as the date and time for Ms. Konou to appear and show cause why she should not be held in contempt for failure to appear at the October 31 hearing. The order also stated "(a)t that time she should also be prepared to address the issue of whether she can continue to represent the interests of the administrator and whether or not this court should recuse itself from further hearing this matter." The order was filed in November but the date stamp on the copy furnished to this court is too dim to be deciphered. Mr. McCaffrey asserts that it was filed on November 8 or 9.

November 6: Mr. Lowe faxed a letter to Judge Philippo in which he stated "(a)s far as I have been able to determine, there is no pending matter regarding Ms. Konou for which she would require my services." He also asked that, in any scheduling decision the judge might be required to make, the judge bear in mind that Lowe would be on vacation in England from November 10 until November 22.

November 10: According to Mr. McCaffrey, the October 31 show cause order was served on Ms. Konou on this date, but was never served on him or the administrator.

November 12: Mr. McCaffrey filed an objection to lack of service of the show cause

order on him and the administrator and a memo in opposition to the scheduled November 13 hearing, devoted primarily to a defense of Ms. Konou.

November 13: The court convened a hearing on the order to show cause. Ms. Konou did not appear, having notified the court by fax that morning that she had decided she would not. It is not clear whether the administrator appeared. Mr. Strauss did appear.

November 15: Judge Philippo filed an order in which he referred to the legislative requirement that administrators of estates with nuclear claims as the primary asset be represented only by the Legal Aid Office or the Public Defender and made a number of factual findings and legal conclusions. These included findings that Mr. McCaffrey appeared to be representing the interests of Ms. Konou rather than those of the administrator, that a conflict of representation existed between the Legal Aid Office and the administrator which precluded the Legal Aid office from contracting with another attorney for representation of the administrator and that the asserted grounds for disqualification of the judge were insufficient in law to cause a disqualification. The order appointed the Public Defender to represent the administrator, denied the motion to disqualify and set Kobaia's motions for hearing on November 24, 1995, at 10 o'clock a.m.

November 16: Mr. McCaffrey filed a motion for reconsideration of the court's November 15 order, an alternative motion for stay of that order pending a proposed petition to this court for a writ of *mandamus* and a request that these motions be promptly considered and decided on the written submission only. No certificate of service on opposing counsel was attached to the copy furnished to this court nor is there any filing stamp on that copy.

November 22: The petition for mandate (sic) was filed in this court. It did not have attached any proof of service upon the respondent judge, all parties to the action and the attorney general as required by S.Ct. Rule 21(a).

November 24: Presumably the scheduled hearing was held. However, no information on that point has been submitted to this court.

November 28: A file-stamped copy of the petition for mandate (sic) was received by this

court from the clerk of courts and an unstamped copy was received from Mr. McCaffrey by priority mail bearing a date stamp of November 22 at San Diego. Again, no proof of service was attached.

DISCUSSION:

[1,2] Mandamus and prohibition are extraordinary writs. The power to issue them is discretionary and sparingly exercised. *Kabua, et al. v. H.Ct. Chief Justice, et al.*, 1 MILR (Rev.) 33, 34-5 (Mar 20, 1986). For a writ of *mandamus* to issue there must be a clear showing of a non-discretionary duty mandated by law, a default in the performance of that duty, a clear right to have the duty performed and a lack of any other sufficient remedy. *Kabua v. Kabua, et al.*, 1 MILR (Rev.) 247, 253 (Dec 20, 1991).

[3] A judge has a duty to decide motions that are properly submitted to him, but he is not required to decide them within a time which suits the convenience of counsel nor is he required to rule on motions or issues which have been rendered moot by time or events. A trial judge has considerable discretion in the timing and manner in which he conducts the business of his court. The events detailed above indicate that the substitution of counsel initially failed to consider the provisions of the Probate Code (Amendment) Act of 1994 and that counsel subsequently concentrated on the defense of Ms. Konou and failed to consider the need for scheduling and appearances that would accommodate the needs of both the judge and other counsel.

[4,5] For a writ of prohibition to issue to a judge, it must be shown that the respondent is about to exercise judicial power, that the exercise of such power is unauthorized by law and that it would result in injury for which there is no other adequate remedy. *Kabua v. Kabua et al., supra.* In this instance, there is no showing that Judge Philippo was about to exceed his jurisdiction or abuse his discretion. Neither has it been shown that any injury would result from his orders that could not be remedied by appeal. A writ of prohibition is to be used with great caution and forbearance and should be issued only in cases of extreme necessity. *Arriola v. Hefner*, 7 TTR 437 (1976). The sequence of events above detailed falls substantially short of being sufficiently compelling.

IN THE MATTER OF THE ESTATE OF PETER

CONCLUSION:

The Petition is denied.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

LOTAN JACK,

Petitioner-Appellant

-v-

CENT LANGIDRIK,

Objector-Appellee.

S.CT. CIVIL NO. 96-05
(High Ct. Probate No. 1996-007)

ORDER DISMISSING APPEAL

OCTOBER 22, 1996

FIELDS, C.J.

SUMMARY:

The Supreme Court dismissed the appeal for the failure to file a timely notice of appeal.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Give Timely Notice*: The Supreme Court on its on motion dismissed the appeal for the failure to timely file a notice of appeal.

[1] Pursuant to Rule 42(b) of the Supreme Court Rules of Procedure, adopted and filed June 4, 1993, and effective July 1, 1993, the Court on its own motion, hereby dismisses the appeal filed by Hemos Jack, on behalf of Appellant, Lotan Jack, on October 8, 1996. The Judgment in this matter was filed on September 5, 1996. Pursuant to Rule 5 (a) the Notice of Appeal must be filed within 30 days from the filing of the Judgment.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MARSHALL ISLANDS NATIONAL TELECOMMUNICATIONS AUTHORITY,

Plaintiff,

-v-

REPORT EMMIUS,

Defendant,

and

MARSHALL ISLANDS NATIONAL TELECOMMUNICATIONS AUTHORITY,

Plaintiff,

-v-

LITOKWA TOMEING,

Defendant.

S.CT. CIVIL NO. 95-01
(High Ct. Civil No. 1993-120)

S.CT. CIVIL NO. 95-03
(High Ct. Civil No. 1993-245)

ORDER OF REMAND TO SUPPLEMENT RECORDS

DECEMBER 21, 1995

ASHFORD, C.J.

These cases were removed to the Supreme Court pursuant to Article VI, Section 2(3) of the Constitution. They appear to raise similar constitutional issues and will be consolidated for further proceedings in this Court. Meantime, however, the record in No. 95-01 is not sufficient to permit determination of the issues presented and this Court anticipates that the record in No. 95-03, when transmitted, will have similar deficiencies. It is, therefore,

ORDERED that these cases are remanded to the High Court for supplementation of the record in No. 95-01 and for making a complete record in No. 95-03, by stipulation, affidavits, or hearing. If there is any dispute as to fact, the High Court shall find the facts after notice and hearing. Supplementation shall cover at least the following:

1. The factual record in No. 95-03 shall be at least as complete as the factual record established by affidavits and a certificate of translation in No. 95-01.

2. In addition, in both cases, the following questions shall be answered:

(a) Were those portions of the accounts receivables involved in these cases that are claimed to be for service provided and billed prior to October 1, 1988 (hereinafter for convenience called the "affected receivables") ever abandoned, written off, or otherwise declared valueless by any of the Republic, the National Telecommunications Authority established by P.L. 1987-15 or the National Telecommunications Authority established by P.L. 1990-105?

(b) In the appraisal required to be made under Section 12(1) of P.L. 1990-105, was any value assigned to the affected receivables whether individually identified or treated as part of a class?

(c) What representations, if any, were made concerning the affected receivables, whether individually or treated as part of a class, in the prospectus and any other documentation given to the public in connection with the offering of stock in the National Telecommunications Authority established by P.L. 1990-105?

(d) Was the National Telecommunications Authority stock sold to the public for valuable consideration and, if so, was that consideration not less than $10.00 per share as required by Section 12(4) of P.L. 1990-105?

(e) Did either or both of Senators Emmius and Tomeing disclose to the Nitijela at the time of any votes upon the Bills which became P.L. 1994-83 and P.L. 1995-139 that he had an unpaid bill from the National Telecommunications Authority for service provided and billed prior to October 1, 1988? If so, in each such instance, did the

Nitijela determine that he could vote?

(f) On what readings of the Bills which became P.L. 1994-83 and P.L. 1995-139 did each of Senators Emmius and Tomeing vote?

3. In addition to the translation of the Journal proceedings on the bill which became P.L. 1994-83, furnished as part of the record in No. 95-01, the records in Nos. 95-01 and 95-03 shall include any other legislative history that may exist concerning P.L. 1994-83 and P.L. 1995-139, with translations into English if those records are in Marshallese. Those records shall also include a copy of P.L. 1995-139.

4. Upon completion of the records, the High Court may again remove these cases to this Court. If it does so,

(a) The Opening Brief of Defendant Emmius shall be considered to have been filed in No. 95-03 as well as in No. 95-01. All other briefs shall be filed in both cases.

(b) The Opening Briefs of Defendants may be supplemented within 15 days following the transmission of the supplemental record, as herein ordered, to this Court. The Answering Brief of Plaintiff shall be filed within 30 days following the filing of Defendants' supplemental brief or expiration of the 15-day period, whichever is earlier, and the Reply Briefs of Defendants shall be filed within 10 days following the filing of Plaintiff's Answering Brief.

(c) *Amicus Curiae* Briefs by the Attorney General and the legislative counsel are invited. They shall be filed pursuant to the schedule governing the party whose position they support.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF THE AUDIT OF THE RMI LEGAL AID OFFICE BY THE OFFICE OF THE AUDITOR GENERAL.

S.CT. CIVIL NO. 96-04
(High Ct. Civil No. 1996-140)

APPEAL FROM THE HIGH COURT

JANUARY 28, 1997

FIELDS, C.J.
DANZ, A.J. *pro tem*,[1] and PLASMAN, A.J. *pro tem*[2]

SUMMARY:

This is an appeal from an order of the High Court directing the Legal Aid Office, a statutory authority, to comply with a subpoena from the Auditor General for the productions of documents related to client trust funds held by the Legal Aid Office. The Supreme Court affirmed rejecting claims by the Legal Aid Office to attorney-client privilege and limitations on the constitutional authority of the Auditor General to audit public funds and private funds relevant or related to the use of public funds.

DIGEST:

1. CONSTITUTIONAL LAW – *Construction – Article VIII*: The word "public" in Article VIII, Section 13 of the Constitution does not necessarily limit the word "accounts."

2 CONSTITUTIONAL LAW – *Same – Same*: There is no constitutional restriction prohibiting the audit by the Auditor General of the accounts of statutory authority such as the Office of Legal Aid. There is a constitutional requirement that the Auditor General shall perform such an audit and report any irregularities in the account to the Nitijela, Article VIII, Section 15(4).

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[1]Honorable Gregory J. Danz, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

[2]Honorable James Plasman, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

3. EVIDENCE – *Privileges – Attorney-Client*: The attorney-client privilege rules only protects (1) "confidential communications," (2) "made by a client to an attorney," (3) "to obtain legal advice or assistance."

4. EVIDENCE – *Same – Same*: The attorney-client privilege does not protect all communications between a lawyer end client but, rather, hinges upon the client's belief that he/she is consulting a lawyer in order to seek confidential legal advice.

5. EVIDENCE – *Same – Same*: Since the attorney-client privilege works to suppress otherwise relevant evidence and forestall a search for the truth, the limitations which restrict its operation must be assiduously heeded. In other words, the privilege must be strictly limited to the purpose for which it exists.

6. EVIDENCE – *Same – Same*: The purpose for which the attorney-client privilege exists is to protect disclosures between client and attorney to obtain legal advice, which might not be given in the absence of the privilege.

7. EVIDENCE – *Same – Same*: Deposits and disbursements (and records of deposits and disbursements) from a client's trust account cannot be characterized as "confidential communications" within the meaning of the rule.

8. EVIDENCE – *Same – Same*: Monies or fees collected from clients to cover publication expenses and the like are also not confidential.

9. ATTORNEY – *Duty to Client – Confidences and Secrets*: ABA Model Code of Professional Responsibility, Canon 4 (1980 version) provides that "[a] lawyer should preserve the confidences and secrets of a client." DR 4—101 (A) defines "confidence" and "secret": "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

10. ATTORNEY – *Same – Same*: It is not an ethical violation to disclose a client confidence or secret if required by law. *See* DR 4-101 (C)(2).

11. CONSTITUTIONAL LAW – *Construction – Article VIII*: Client trust accounts of the RMI Legal Aid Office, even if containing private funds, are "relevant" and "related to" the Auditor General's investigation of RMI Legal Aid's use of public funds.

12. CONSTITUTIONAL LAW – *Construction – Article VIII*: The Auditor General has the

authority to audit a government program, such as RMI Legal Aid, to determine whether the desired results or benefits of the program are being achieved.

13. ATTORNEY – *Duty to Client – Client's Funds*: The RMI Legal Aid Office also has the duty not to commingle public funds with its client's funds. ABA Model Code of Professional Responsibility Canon 9, EC 9-5.

OPINION OF THE COURT BY FIELDS, C.J.

On April 12, 1996, the Auditor General acting pursuant to the Constitution of the Republic of the Marshall Islands Article VIII Section 15 requested, by subpoena, all financial records of the Legal Aid Office. The Legal Aid Office refused to comply, claiming many records are private matters between attorney and client and as such are not subject to an audit by the Auditor General.

On April 30, 1996, the Attorney General filed a motion in the High Court to compel Legal Aid to produce all requested documents.

On May 20, 1996, the High Court issued its order requiring the production of all documents subpoenaed by the Auditor General.

Legal Aid filed this appeal claiming (1) the Nitijela created Legal Aid and provided that office with constitutional, statutory and customary rights to privacy and confidentiality with its clients; (2) that Legal Aid has the authority to establish and maintain trust accounts for its clients; (3) that existing laws protect the privacy of the clients trust accounts; (4) that the trust accounts contain clients' secrets; and (5) that the Constitution, Article VIII, Section 15(1) limits the Auditor General to auditing only public funds and account.

The office of the Auditor General is a creation and exists by virtue of the Constitution of the Republic of the Marshall Island, Article VIII Section 13. The Constitution, Section 15, sets forth the duties of the Auditor General. It provides that:

> (1) The Auditor-General shall audit the public funds and accounts of the Republic of the Marshalls including those of all Departments or offices of the

> legislative, executive and judicial branches of government and of any public corporation or other statutory authority constituted under the law of the Republic. . . .

[1,2] The word "public" does not necessarily limit the word "accounts" and this court is not so declaring such a limitation. It is clear that the Legal Aid is a "statutory authority" created by the Nitijela. There is no constitutional restriction prohibiting the audit by the Auditor General of the accounts of the Office of Legal Aid. There is a constitutional requirement that the Auditor General shall perform such an audit and report any irregularities in the account to the Nitijela, Article VIII, Section 15(4). Since this report to the Nitijela deletes the names of individuals there would be no breech of any attorney-client confidentiality if such existed. This court holds there is no such confidentiality in this case.

A. The attorney-client privilege set forth by 23 MIRC, Ch. 1A, Section 502(b) is not applicable and cannot prevent disclosure of the requested documents.

RMI Legal Aid argues financial information in its "client trust account" is confidential information privileged under 38 MIRC, Ch. IA, Section 502(b) (hereinafter Evidence Rule 502(b).

Evidence Rule 502(b) provides, in relevant part:

> Confidential communications made by a client to an attorney in order to obtain legal advice or assistance are privileged . . . only the client or the client's estate has the authority to claim or waive it; provided, however, the attorney may claim the privilege on behalf the client.

Counsel have cited no authority indicating that a client's trust account is within the scope of the "attorney-client" privilege and the court is unaware of any. The court, therefore, briefly examines the nature of the privilege in determining whether this privilege is applicable to RMI Legal Aid's claim of privilege a to its "clients' trust account."

[3] The rule, on its face, only protects (1) "confidential communications," (2) "made by a client to an attorney," (3) "to obtain legal advice or assistance."

[4] The "attorney-client" privilege does not protect all communications between a lawyer end client but, rather, hinges upon the client's belief that he/she is consulting a lawyer in order to seek confidential legal advice. *Colonial Gas v. Aetna Cat. & Sur. Co.*, 144 F.R.D. 600 (D. Mass. 1992); *United States v. Leplinger*, 776 F.2d 678 (7th Cit. 1985).

[5] Since the privilege works to suppress otherwise relevant evidence and forestall a search for the truth, the limitations which restrict its operation must be assiduously heeded. In other words, the privilege must be strictly limited to the purpose for which it exists. *DiCenzo v. Izawa*, 723 P.2d 171 (Hawaii 1986); *Misek-Falkoff v. International Business Machines Inc.*, 144 F.R.D. 40 (S.D. NY 1992).

[6] The purpose for which the evidentiary privilege exists is to protect disclosures between client and attorney to obtain legal advice, which might not be given in the absence of the privilege. *United States v. Upjohn Co.*, 600 F.2d 1223 (6th Cir 1979).

[7] Deposits and disbursements (and records of deposits and disbursements) from a client's trust account cannot be characterized as "confidential communications" within the meaning of the rule. Probate awards, War Claim awards, money awards arising out of civil judgments, and any other sort of money obtained by court judgment which might be placed in a client's trust account are matters of public record and are, by no means, confidential. Disbursements from certain trust accounts arising out of probate awards can be made only upon order of the court. Whether such disbursements are authorized is a matter of public record and a client has no reasonable expectation that such disbursements will remain confidential.

[8] Monies or fees collected from clients to cover publication expenses and the like are also not confidential. The payment of any such fees or costs by a client are likely to be paid by the client even in the "absence of the privilege." The nature of the "attorney-client" privilege is not meant to protect such information. Disclosure of any such fees violates no confidence of the client and does not disclose the substance of any legal advice given. As the Attorney General points out in its reply "no harm could conceivably be done to a client if the Auditor General were to see and examine such client's account."

The privilege is intended to prevent disclosures of client's confidences. Bank records and other documents evidencing activity on the "clients' trust account" would disclose no client confidence. The court concludes the "attorney-client" privilege of Evidence Rule 502(b) is not applicable to RMI Legal Aid's claim of confidentiality.

B. Information contained in RMI Legal Aid's "Client Trust Account" records are not "secrets."

[9] ABA Model Code of Professional Responsibility, Canon 4 (1980 version) provides that "[a] lawyer should preserve the confidences and secrets of a client."

DR 4—101 (A) defines "confidence" and "secret":

> "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely to be detrimental to the client.

RMI Legal Aid has not shown how the disclosure of records pertaining to its "client's trust account" is likely to be embarrassing or detrimental to any of its clients. Monies contained in the account come from court judgments which are of public record. It is hard to imagine that disclosure of a client's payment of any fees or costs into the account would be embarrassing to the client or that a reasonable expectation of nondisclosure exists.

[10] It is not an ethical violation to disclose a client confidence or secret if required by law. *See* DR 4-101 (C)(2). As discussed below, the court is of the opinion that the information requested by the Auditor General regarding the "client's trust account" is required by law.

C. The documents and records pertaining to private funds in the "client's trust account" are relevant to the audit of RMI Legal Aid's use of public funds and should be disclosed.

RMI Legal Aid argues the Auditor General may only audit "public funds," not the alleged "private funds" in the "client's trust account" and therefore, even if not privileged, an audit of the

"client's trust account" is beyond the statutory authority of the Auditor-General.

As authority RMI Legal Aid cites 3 MIRC, Ch. 9, Section 2(b) which provides:

> "[A]udit" means an independent examination of books, performance, documents, records, and other evidence relating to the receipt, possession, charge, disbursement, expenditure, application or use of public funds by any agency or any activity or any agency. . . . (emphasis added).

Section 2)b) should be construed in "pari materia" with all other provisions of the Auditor General Act. The Auditor General is to "specially act to prevent and detect fraud, waste and abuse in the collection and expenditure of public funds." 3 MIRC Ch. 9, Section 4(1) (emphasis added).

3 MIRC, Ch. 9, Section 15 further provides:

> (1) The Auditor General in carrying out the provisions of this Act shall, pursuant to Article VIII, Section 15(3) of the Constitution of the Marshall islands have access to all records, reports, audits, reviews, papers, books, documents, recommendations, correspondence, and any other data or material that is maintained by on available to any agency which in any way is related to the activities with respect to which the Auditor General has duties and responsibilities. . . ."
>
> (3) The Auditor General may require by subpoena the production of all records, reports, audits, . . . books, documents, recommendations, correspondence, and any other data and material relevant to any matter under investigation or audit. (emphasis added).

[11] The court finds the information requested by the Auditor General's subpoena regarding the "client's trust account," even if containing private funds, is "relevant" and "related to" the Auditor General's investigation of RMI Legal Aid's use of public funds.

RMI Legal Aid is an agency of the government and is funded by public money. The Auditor General has been provided information that RMI Legal Aid has been charging clients fees in violation of the Government Fees Act 1984, 3 MIRC, Ch. 12, as amended and Article VIII, Section 1(2) of the Constitution. (Reply Memorandum, pg. 4, pan. 2.4). The government

certainly has a legitimate interest in assuring such a situation has not occurred and is not occurring.

[12] The Auditor General has the authority to audit a government program, such as RMI Legal Aid, to determine whether the desired results or benefits of the program are being achieved. 3 MIRC, Ch. 9, Secs 2, 3 and 4. It not being the intent of the government that the RMI Legal Aid Office collect fees in violation of the law, the Auditor General has the authority to investigate whether, in fact, such unlawful fees are being collected. An audit of the "clients' trust account" is likely to reveal any impropriety in the collection of fees or disbursements of funds. Documents concerning the clients' trust account are therefore relevant to any audit or investigation into whether the desired results of the RMI Legal Aid program are being achieved.

[13] The RMI Legal Aid Office also has the duty not to commingle public funds with its client's funds. ABA Model Code of Professional Responsibility Canon 9, EC 9-5.[3]

An audit would reveal whether public funds are being commingled with private monies in the "clients' trust account." The court finds that the records and documents pertaining to the "clients' trust account" are relevant or related to the investigation or audit of public moneys provided Legal Aid.

II. CONCLUSION

The court concludes the documents requested by the Auditor General's subpoena pertaining to RMI Legal Aid's "client's trust account" are not privileged and are relevant to the audit of the use of public funds by that office.

IT IS THEREFORE, ORDERED that all documents requested by the Auditor General's April 11, 1996, subpoena be produced forthwith.

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[3]EC 9-5: Separation of the funds of a client from those of his lawyer not only serves to protect the client but also avoids even the appearance of impropriety, and therefore commingling of funds should be avoided.

In the context of the matter before the court the client's funds should not be commingled with the public funds in RMI Legal Aid's general account.

MARSHALL ISLANDS, SUPREME COURT

The Judgment rendered by the High Court and filed on May 30, 1996, is hereby AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

BARRIS LOKOT and PAUL KABUA, previously substituted in place of SELVENIOUS KONOU (Deceased), and MANINI CLANRY,

Plaintiff-Appellants,

-v-

JERRY KRAMER, MERCY KRAMER, PACIFIC INTERNATIONAL, INC., *et al.*,

Defendants-Appellees.

S.CT. CIVIL NO. 96-03
(High Ct. Civil No. 1992-056)

APPEAL FROM THE HIGH COURT

JANUARY 29, 1997

FIELDS, C.J.
DANZ, A.J. *pro tem*,[1] and PLASMAN, A.J. *pro tem*[2]

SUMMARY:

This is an appeal from a decision of the High Court to dismiss appellants' complaint for various errors and the failure to prosecute, which prevented defendants from having their expert available for trial due to the expert's death during the lapse of time. The Supreme Court affirmed the High Court finding it had not abused its discretion in dismissing the complaint.

DIGEST:

1. LAND RIGHTS – *Disposition on Merits*: This court agrees with the High Court that the

[1]Honorable Gregory J. Danz, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

[2]Honorable James Plasman, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

land rights of the Marshallese people are of extreme importance and that the drastic procedure of preventing a full hearing in court should be avoided if at all possible.

2. ATTORNEYS – *Agent for Client*: Parties are liable for the violations of their attorneys.

3. APPEAL AND ERROR – *Review – Discretionary Matters – Dismissals*: An appellate court can only reverse a trial court's decisions to dismiss a case for failure to prosecute if the appellate court finds the trial court abused its discretion and its decisions is "clearly erroneous."

4. APPEAL AND ERROR – *Same – Same*: It is presumed the trial judge acted reasonably and reversal may occur only if it is plain either that the dismissal was a mistake or that the Judge did not consider factors essential to the exercise of a sound discretion.

OPINION OF THE COURT BY FIELDS, C.J.

On June 26, 1992, Plaintiffs Selvenious Konou and Manini Clanry filed a complaint in the High Court through their attorney, Selvenious' daughter. The High Court on December 17, 1992, ordered plaintiff to file a supplemental complaint or an amended complaint to cure jurisdictional defects. On December 31, 1992, plaintiffs filed their first amended complaint. This complaint sought to eject defendants from the premises they had been occupying for the past 15 years and for damages.

On January 6, 1993 defendants filed their answer and counterclaim. The dispute arises over the alap and dri-jerbal rights to an area plaintiffs claim to be Mejben Island. Defendants deny occupying an area formerly designated as Mejben Island, but rather (Mercy Kramer only) claims such rights only to the land they are occupying.

On January 11, 1993, defendants filed the first motion to dismiss for plaintiffs' failure to comply with MIRCP 17(a) for failure to bring the action in the name of the real party in interest, the alap Neikoj and for failure to comply with MIRCP 19, failure to join the alap Neikoj and the Iroijlablab, Amata Kabua. On June 23, 1993, the court found alap Neikoj's joinder was required.

Also on June 23, 1993, the High Court held a pre-trial conference ordering plaintiffs to comply with certain orders prior to November 30, 1993, and defendants to do the same 30 days

later. Neither party complied. Various violations of orders and procedures are set forth and that plaintiffs failed to comply with them.

On August 11, 1994, plaintiffs filed a motion to substitute a party and thereafter failed to appear at the hearing on the motion. Thereafter, plaintiff filed motions without serving defendants (motion to set a hearing on issue of substitution of parties).

Between August 1994 and February 1996, plaintiffs filed no documents. Defendants filed a motion to dismiss the complaint for plaintiffs' failure to prosecute their case to trial and for their various violations of rules of procedures and orders of the court. Defendants only expert witness as to the location of Mejben Island died on January 28, 1995.

On May 24, 1996, the High Court dismissed the complaint with prejudice finding that plaintiffs' various violations and failure to bring the matter to trial has prevented defendants from having their expert available for trial due to the lapse of time and his death. The High Court found no alternative lesser sanction available.

[1] This court agrees with the High Court that the land rights of the Marshallese people are of extreme importance and that the drastic procedure of preventing a full hearing in court should be avoided if at all possible. The court feels that the lapse of 15 years from the time defendants occupied the land until suit was filed by plaintiffs was unreasonable but this has not been raised by the parties.

[2] This court rejects plaintiffs' argument that the parties should not be held liable for the violations of their attorney. The U.S. Supreme Court clearly rejected any such argument in *Link v. Wabash Railroad Co*. and citing *Smith v. Aver,* 101 U.S. 320, 326:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexpected conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer – agent and is considered to have notice of all facts, notice of which can be charged upon the attorney."

This court agrees and adopts this concept here in the Marshall Islands.

The question then remains: Is there a less drastic sanction than dismissal with prejudice in a case involving land rights, as set forth in this case? This Court finds no sanction other than dismissal was available to the trial court.

A case is subject to dismissal for failure to prosecute. MIRCP 33 (B) provides in part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of the Court, a defendant may move for dismissal of any action or any claim against him.

The decision to dismiss for want of prosecution requires that the court weigh conflicting policies: on the one hand, the courts need to manage its docket, the Republic interest in expeditious resolution of litigation, and the risk of prejudice to defendants from delay; and on the other hand the policy favoring disposition of cases on their merits. These factors were weighed by the trial court.

Clearly, defendants have been prejudiced by the delay due to the death of their expert witness, Dr. Sherman Wengerd, who could have testified to the location of Mejben Island. Plaintiff's claims rights to this former island and claim that defendants are now occupying it. Defendants deny a claim to that area, but claim rights only to the land conveyed to them in 1980. This conveyance was witnessed by the esteemed President, Amata Kabua, who has died since the oral arguments were heard on this case. While the President, Amata Kabua, may have been a witness, he also is now not available.

[3] The standard for review for this Court is: Did the trial court abuse its discretion in ordering a dismissal for failure to prosecute? The trial court's findings are reversible only if clearly erroneous.

[4] It is presumed the trial judge acted reasonably and reversal may occur "only if it is plain either that the dismissal was a mistake or that the judge did not consider factors essential to the exercise of a sound discretion." *Johnson vs. Kaminaga*, 34 F.3d 466 (7th Cir. 1994).

This Court cannot say that the trial Judge committed any error in Judgment in the

conclusion it reached upon weighing all relevant factors. (*See Nealey vs. Transportation Martima Mexicana S.A.*, 662 F.2d 1275 (9th Cit. 1930).

Therefore, the trial Court's dismissal with prejudice is AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

KEJJO BIEN,

Petitioner,

-v-

JOSEPH JORLANG, in his official capacity as Acting Chief Electoral Officer, Electoral Division, Ministry of Interior and Outer Island Affairs, Republic of the Marshall Islands,

Respondent.

S.CT. CIVIL NO. 96-01
(High Ct. Civil No. 1996-390)

APPEAL FROM THE HIGH COURT

JANUARY 30, 1997

FIELDS, C.J.
DANZ, A.J. *pro tem*,[1] and PLASMAN, A.J. *pro tem*[2]

SUMMARY:

This appeal is from a judgment by the High Court dismissing an appeal of the Chief Electoral Officer's denial of a petition for a recount. Postal ballots that Appellant sought to be counted were not post marked on or before the date of election as required by statute. The judgment of the High Court is affirmed.

DIGEST:

1. APPEAL AND ERROR – *Chief Electoral Officer*: The Supreme Court will not to

[1]Honorable Gregory J. Danz, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

[2]Honorable James Plasman, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

substitute its judgment for that of the Chief Electoral Officer based on the information submitted to him unless his decision is a clear departure from statutory requirements, is fraudulent or in bad faith, arbitrary, capricious, without basis in the evidence, or his decision is one which no reasonable mind could have reached.

2. ELECTIONS AND VOTING – *Presumptions:* Every reasonable presumption will be indulged in favor of the validity of an election.

3. EVIDENCE – *Presumptions*: The law presumes that election officers perform their duty honestly and faithfully.

4. APPEAL AND ERROR – *Chief Electoral Officer*: If the record supports the Chief Electoral Officer's decision, it is conclusive upon the court and the respondent's action must be sustained and will not be disturbed by the court.

5. APPEAL AND ERROR – *Questions Reviewable – Record and Proceedings Not in Record*. It is well settled that an appeal is on the record which existed at the time the appeal was taken.

6. STATUTES – *Construction and Operation*: Courts should give great deference to the interpretation given statutes and regulations by the officials charged with their administration.

7. ELECTIONS AND VOTING – *Presumptions:* The voters are presumed to know the law.

OPINION OF THE COURT BY FIELDS, C.J.

On November 20, 1996 [sic 1995?], the election for the Senator for the Mili Atoll was held in the Marshall Islands. The unofficial results showed Petitioner received 10 votes less than Tadashi Lometo.

The Petitioner filed a petition for recount with the Chief Electoral Officer. The petition was denied. An appeal to the High Court was denied on March 7, 1996. Thereafter an appeal was filed in the Supreme Court.

Petitioner alleges in his opening brief filed with this court, that the record in front of the Chief Electoral Officer when the petition was denied "consisted solely of the petition for recount and the letter from the Chief Electoral Officer denying the recount." (Pages 2 and 3). Petitioner

then submits and argues other documents to support his position that the Chief Electoral Officer erred in not counting ballots from Honolulu and Guam, all admittedly postmarked after the election on November 20, 1995. A document titled "Affidavit of Kejjo Bien" filed with appellant's brief purportedly was signed before a notary. The copy filed with this court does not contain the signature of the notary or clerk of the Court. Thus, without such signature, it could not be an "Affidavit." This court in an attempt to determine what record was actually before the Chief Electoral Officer at the time of his rejection reviewed the file of the High Court as well as the original file of the Chief Electoral Officer. No original document was located nor was any copy showing a signature of a notary on the alleged affidavit. While these facts are not dispositive of this case they reaffirm the necessity of upholding the mandatory directions of Title 2 MIRC, Ch. 1, Section 162(3):

> The covering reply envelope must be placed in the mail and be postmarked on or before the date of the election. . . . (Emphasis added)

The Nitijela, in their infinite wisdom, has clearly used the word "must" which connotes the mandatory, unless some compelling reason indicates a contrary intent. The Nitijela clearly wanted an election that was free from any impropriety or appearance of such. A democracy can only flourish with free elections untainted by any questionable conduct.

The appeal filed by appellant on December 29, 1995, again makes reference only to the petition for recount and the rejection by respondent. No mention is made of any other documents subsequently filed by appellants with his opening brief as Exhibits "A" 2 through 9.

This court is to determine whether the Chief Electoral Officer abused or erroneously exercised his discretion vested by 2 MIRC 180(4). *Clanton v. MI Chief Elec. Off. (No. 1),* 1 MILR (Rev.) 146, 152 (Aug 2, 1989).

[1] This court is not to substitute its judgment for that of the Chief Electoral Officer based on the information submitted to him unless his decision is a clear departure from statutory requirements, is fraudulent or in bad faith, arbitrary, capricious, without basis in the evidence, or

his decision is one which no reasonable mind could have reached. *See* 2 Am Jur 2d, Administrative Law § 676.

[2,3] Every reasonable presumption will be indulged in favor of the validity of an election. The law presumes that election officers perform their duty honestly and faithfully. 29 C.J.S. Elections § 274.

The court has the duty to uphold the election if possible.

> It is a primary principle of law as applied to election cases that it is the duty of the court to validate the election if possible. That is the election must be held valid unless plainly illegal. *Rideout v. City of Los Angeles*. 197 P. 74; and cited in *Wilkes v. Mouton*, 722 P. 2d 187 (1986).

[4] If the record supports the respondent's decision, it is conclusive upon the court and the respondent's action must be sustained and will not be disturbed by the court, 2 Am Jur 2d, Administrative Law § 679.

[5] This appeal is to be considered on the record which existed at the time the Chief Electoral Officer rejected the petition for recount. It is well settled that an appeal is on the record which existed at the time the appeal was taken. The Supreme Court in *Clanton v. MI Chief Elec. Off. (No. 1), supra*, at 151, specifically set forth the procedure on an appeal from the decision of the Chief Electoral Officer:

> As a matter of general law, it is axiomatic that an appeal is on the record (citations omitted). Neither enlargement of the grounds for complaint nor the presentation of additional evidence nor a hearing is encompassed within the ordinary meaning of appeal. Nothing in 2 MIRC Chapter 1, Section 81 suggests that any meaning other than the ordinary meaning of the word is intended.

The record as of the time this appeal was filed consisted of (1) The petition for recount and (2) The letter rejecting the petition by the Chief Electoral Officer. In accordance with the clear directives of Clanton (No. 1) the court must limit its consideration to the record as it existed

at the time this appeal was filed. The court does not consider various other documents attempted to be introduced *post hoc* by petitioner.

The Administrative Procedure Act is not applicable to the Chief Electoral Officer in deciding a petition for re-count. The Nitijela has set forth a specific procedure to be followed in election cases. The Elections and Referenda Act sets forth a specialized procedure to be followed by the Chief Electoral Officer in deciding a petition for recount. This specialized procedure is clearly distinct from the procedure for deciding "contested cases under the Administrative Procedure Act. For example, in deciding a petition for recount, the Elections and Referenda Act (2 MIRC, Ch. 1, Sec. 180(4)) requires the Chief Electoral Officer to consider only the petition and any written evidence submitted with it." No hearing is contemplated by statute. On the other hand, 6 MIRC, Ch. 1, Sec. 11 requires that "in a contested case, all parties shall be afforded an opportunity for hearing." The Elections and Referenda Act merely requires the Chief Electoral Officer to set forth his "reasons" for rejection the petition. There is no requirement of factual findings or reference to underlying evidence on which he based his "reasons," as required under the Administrative Procedure Act. (*See* 6 MIRC, Ch. 1, Sec. 14) .

Title 2, MIRC, Sec. 181(1) provides:

> If the Chief Electoral officer rejects a petition under Section 180 of this Chapter he shall advise the petition in writing accordingly, giving his reasons. . . .

The Chief Electoral Officer sufficiently complied with his duty to set forth his "reasons" for rejecting the petition. Assuming the Chief Electoral Officer had before him the reasons, now advanced by petitioner, it is obvious that the Chief Electoral Officer strictly construed Section 162(3) giving a mandatory meaning to the word "must." That statute states:

> The covering reply envelope must be placed in the mail and be postmarked on or before the date of the election. . . . (Emphasis added)

The Nitijela, by use of the words "must," created a mandatory requirement that postal ballots be postmarked, at the latest, on the date of the election. There is nothing in the statute indicating the Nitijela intended to give any discretion to accept late postmarked ballots.

[6] Courts should give great deference to the interpretation given statutes and regulations by the officials charged with their administration. *Blanding v. Dubose*, 454 U.S. 393 (1982).

The court concludes that the interpretation given the statute, by the Chief Electoral Officer, was reasonable and not an abuse of discretion. Absent an abuse of discretion, the court is not to substitute its judgment for that of the Chief Electoral Officer. The court finds the interpretation of the statute is mandatory.

[7] The voters are presumed to know the law, that is that "The ballots must be placed in the mail and be postmarked on or before the date of election." Their reliance on actions or words of a third party does not excuse their actions.

The decision of the High Court rejecting petitioner's appeal is HEREBY AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

James Plasman, Justice *Pro Tem*, participated in the oral arguments and discussions thereafter, but withdrew from the case in order to avoid the appearance of any impropriety. (The motion to confirm Plasman's appointment to the Nuclear Claims Tribunal was made by Respondent herein).

Therefore this Decision is filed by the remaining two Justices.

By Order of Chief Justice Allen P. Fields.

Dated: January 30, 1997.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

LIMOJ KONOU,

Plaintiff-Appellee,

-v-

JILON KONOU,

Defendant-Appellant .

S.CT. CIVIL NO. 97-01
(High Ct. Civil No. 1994-038)

JUDGMENT OF DISMISSAL

APRIL 4, 1997

FIELDS, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because appellant failed in a timely manner either (i) to order from the reporter a transcript of such parts as the proceedings that appellant deemed necessary or (ii) to certify that no parts of the proceedings will be ordered and file a statement of points of error.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Designate Record*: Appellant's failure to in a timely manner either order from the reporter a transcript of such parts as the trial court proceedings that appellant deemed necessary or to certify that no parts of the proceedings will be ordered and file a statement of points of error is grounds for dismissal.

Defendant-Appellee's motion to dismiss the appeal, filed by John Silk, Counsel for Appellee, for the failure of Appellant to abide by, or to timely comply with the Supreme Court Rules of Procedure is hereby GRANTED.

[1] The Court finds that the time period within which the Appellant is required to order from

the reporter a transcript of such parts of the proceedings as he deems necessary which are not already on file has expired and no order was made to the reporter. The notice of appeal was filed on January 24, 1997. The 10 days expired on February 3, 1997. Further, Appellant failed to file a certificate indicating that no parts of the proceeding are to be ordered. (Supreme Court Rules 10(b)(1).

Appellant has further failed to file a statement of the points of error he intends to present on the appeal within the 10-day time period provided in Supreme Court Rule l0(b)(3).

Therefore pursuant to Rules 27 and 42(b) of Supreme Court Rules of Procedure this appeal is hereby DISMISSED and the Judgment of the High Court in Action No. 1994-038 is hereby AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF ESTATE OF HARRY ANJEN, (DECEASED)

S.CT. CIVIL NO. 97-02
(High Ct. Civil No. 1996-047)

BY: KATINA PETER,

Petitioner-Appellant.

JUDGMENT OF DISMISSAL

APRIL 4, 1997

FIELDS, C.J.

SUMMARY:

The Supreme Court dismissed the appeal because appellant failed in a timely manner either (i) to order from the reporter a transcript of such parts as the proceedings that appellant deemed necessary or (ii) to certify that no parts of the proceedings will be ordered and file a statement of points of error.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to Designate Record*: Appellant's failure to in a timely manner either order from the reporter a transcript of such parts as the trial court proceedings that appellant deemed necessary or to certify that no parts of the proceedings will be ordered and file a statement of points of error is grounds for dismissal.

The Court on its own motion pursuant to Rule 42(b) of the Supreme Court Rules of Procedure hereby dismisses the appeal filed herein by Henry Moses Beia on behalf of Petitioner/Appellant.

[1] The Court finds that the appeal was filed on January 29, 1997. Appellant has failed to order from the reporter a transcript of such parts of the proceedings as he deems necessary which are not already on file and no order was made to the reporter. More than 10 days have elapsed

since the notice of appeal was filed. *See* Supreme Court Rules, Rule 10(b). The Court further finds appellant failed to file a certificate stating no parts of the proceedings are to be ordered. *See* Supreme Court Rules, Rule 10(b)(1).

Appellant has further failed to file a statement of points of error he intends to present on the appeal within the 10-day time period provided in Supreme Court Rule 10(b)(3).

Therefore pursuant to Rule 42(b) of Supreme Court Rules of Procedure, this appeal is hereby dismissed and the Judgment of the High Court in Action No. 1996-047 is hereby AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF PUBLIC LAW NO. 1995-118

S . CT. CIVIL NO. 97-03
(High Ct. Civil No. 1996-167)

Respondent-Appellee,

-v-

THE MARSHALL ISLANDS NATIONAL TELECOMMUNICATIONS AUTHORITY,

Petitioner-Appellant.

APPEAL FROM THE HIGH COURT

DECEMBER 31, 1997

FIELDS, C.J.
TAYLOR, A.J. *pro tem*,[1] and DANZ, A.J. *pro tem*[2]

SUMMARY:

The High Court ruled that the Marshall Islands National Telecommunication Authority (NTA) was not a private corporation with a due process right to counsel of its choice. The Supreme Court reversed.

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Law*. Both issues [the right to counsel and the constitutionality of an Act] are questions of law which are reviewed *de novo*.

2. CONSTITUTION LAW – *Construction – Rules of Interpretation*: Under Article I, § 3(1) of the RMI Constitution, the Court may look to court decisions of the United States as well as

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[1]Honorable Marty W.K. Taylor, Chief Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, sitting by designation by the Cabinet.

[2]Honorable Gregory J. Danz, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

generally accepted common law principles for guidance.

3. CORPORATIONS – *In General*: The Marshall Islands National Telecommunication Authority is a private corporation, and is not an instrumentality or agent of the RMI government because: (1) it is not wholly owned by the RMI, that is, the government does not own all assets of NTA or all the stocks of NTA [28% of the issued stock has been purchased by private individuals, (Ex. B)]; (2) it is operated for profit; (3) it is not primarily engaged or even engaged at all, in the administration of government; (4) the board of NTA is not exclusively controlled by the government; (5) and, the government is not entitled to all profits and does not risk all losses of NTA, rather private shareholders' money is also at risk. Even though NTA provides telecommunication to the public at large, it remains a private corporation.

4. CONSTITUTIONAL LAW – *Due Process – Right to Counsel*: A private company has a due process right to counsel of its choice.

OPINION OF THE COURT BY TAYLOR, A.J.

Appellant, Marshall Islands National Telecommunications Authority ("NTA"), appeals the judgment of the Marshall Islands High Court dated January 20, 1997, which held that (1) NTA is part of the government; (2) NTA and its numerous individual private shareholders are not entitled to the benefits and protections of the Marshall Islands Constitution; and (3) §§ 13(1)(i) and 13(l)(m) of the Office of the Attorney General Act 1995 ("OAGA") as applied to NTA are constitutional. We have jurisdiction pursuant to Article VI, § 2(2)(a) of the Marshall Islands Constitution. We reverse.

ISSUES PRESENTED AND STANDARD OF REVIEW

We are asked to determine whether the NTA is a private corporation entitled to the benefits and protections of the Constitution, including the right to counsel of its choice; and whether the OAGA, as applied to NTA, is unconstitutional.

[1] Both issues are questions of law which are reviewed *de novo*. *Abija v. Bwijmaron*, 2 MILR 6 (Aug 11, 1994).

IN THE MATTER OF P.L. 1995-118

FACTS AND PROCEDURAL BACKGROUND

I. Uncontroverted Facts:

Prior to 1987, the department of the Ministry of Transportation and Communication provided domestic and international telecommunications services in the Marshall Islands. In 1987, the Nitijela enacted Public Law ("P.L.") 1987-15, the National Telecommunication Authority Act ("the old NTA Act"), which created NTA for the purpose of taking over the management of telecommunication services in the Republic of the Marshall Islands ("RMI").

On September 4, 1990, Nitijela's Resources and Development Committee held a public hearing on Nitijela Bill No. 161, which was introduced to provide for the establishment and privatization of the NTA. On September 17, 1990, the Committee met in executive session to study the revisions proposed at the public hearing. As a result, Standing Committee Report No. 205 on Nitijela Bill No. 161 was issued. The intent of Bill No. 161 was "to provide for the establishment and privatization" of the NTA. (Tr. 6) (emphasis added).

Following the hearing and in accord with the Standing Committee Report, the Nitijela enacted P.L. 1990-105, the Marshall Islands National Telecommunications Authority Act of 1990 ("the NTA Act"). The NTA Act required NTA to comply with certain directives during the process of privatization, all of which were complied with, including: a determination of the initial capital of NTA ($3,600,000); the adoption of articles of incorporation and bylaws to govern NTA's operations and functions; and the authorization to allow management to seek proposals for privatization.

Pursuant to § 12(3) of the NTA Act, 25% or 90,000 shares of the initial authorized capital stock of 360,000 shares were issued to the RMI government. NTA commenced selling shares to the public on December 2, 1991. Section 12(6) of the NTA Act required the board to hold an initial shareholders meeting to elect new directors within 60 days from the date of the initial stock offering. On January 22, 1992, at a special meeting, the board confirmed that 4,048 shares had already been sold to 138 private individuals. The first shareholders' meeting was held on January 30, 1992, and has been held annually thereafter.

From 1988 until May 22, 1996, the NTA and its predecessor (the old NTA) retained the services of a private attorney to provide it with legal advice and representation on a wide variety of legal matters, including: collection of outstanding debts due to NTA; legal advice regarding telecommunications law; and contract review, drafting and litigation. On February 28, 1995, the speaker signed P.L. 1995-118 which in effect required NTA to retain the services of the Attorney General's office. NTA's President and General Manager subsequently opposed the law, desiring instead to retain its own private counsel, Mr. Carl Ingram, Esq., who had served as both legal counsel and Secretary of the Board of Directors since 1988.

II. Procedural History:

On May 27, 1996, NTA filed a complaint for declaratory judgment and injunctive relief challenging the constitutionality of P.L. 1995-118. There were no material facts in dispute, and both parties agreed that the only genuine issues were questions of law involving the construction and application of the Republic's Constitution and statutes, and that the matter should be disposed by summary judgment. The High Court declined to rule on the summary judgment motion and instead scheduled the matter for trial on January 16, 1997. Following trial, the High Court held: (1) NTA is part of the government; (2) NTA and its numerous individual private shareholders are not entitled to the benefits and protection of the Constitution; and, therefore (3) the provisions of the OAGA which require NTA to use only the Attorney General's Office for legal services, do not violate the Constitution.[3] NTA timely appealed.

ANALYSIS

I. NTA is a private corporation.

Both parties and the High Court agreed that if NTA is not a governmental instrumentality or agency, §§ l3(1)(i) and 13(l)(m) of P.L. No. 1995-118 of the OAGA, as applied to NTA,

[3]In re Public Law No. 1995-118, High Court Civil Action No. 1996-167 slip op. (RMI Jan. 20, 1997).

violates the Constitution.[4] The question remains, therefore, whether NTA is a private or public corporation.

[2] Article I, § 3(1) of the RMI Constitution governs how the Courts are to interpret and apply the Constitution:

> [i]n interpreting and applying this Constitution, a Court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Republic of the Marshall Islands, but shall not be bound thereby; and, in following any such decision, a court shall adapt it to the needs of the Republic, taking into account this Constitution

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[4]Section 13 of the OAGA provides in pertinent part

> (1) The Civil Division [of the Attorney General's Office] and no other attorney, public or private, shall be the attorney for:
> . . . .
> (i) National Telecommunications Authority;
> . . . .
> (m) Any corporation in which the Government of the Marshall Islands owns more than 50% of the issued voting stock;
>
> (2) This section 13 shall apply to any corporation listed or described in subsection (1) for so long as the Government of the Marshall Islands owns more than fifty percent (50%) of the issued, voting stock.
>
> (3) The Attorney-General may hire outside counsel, at the expense of the represented entity, to assist the Civil Division in its representation of public corporations and agencies. Such outside counsel shall report to and be responsible to the Chief-Civil Division and the Attorney-General,
>
> (4) Outside counsel hired by the Attorney-General shall not be deemed to be members of the Public Service. No outside counsel shall assist the Civil Division with more than one public corporation or agency described or listed in this Section 13.
>
> (5) The Office of the Attorney-General shall be entitled to reasonable compensation from the public corporation or agency for its representation.

> as a whole and the circumstances of the Republic from time to time.[5]

Accordingly, the Court may look to court decisions of the United States as well as generally accepted common law principles for guidance.

Corporations are either public or private, depending upon its powers and the purpose of its creation.[6] Public corporations are created for public purposes only, connected with the administration of the government, and the interests and franchises of which are the exclusive property and domain of the government itself.[7] Alternatively, private corporations are created for private purposes, and they are not considered by law public merely because it may have been supposed by the legislature that their establishment would promote either directly or consequently the public interest.[8]

In a landmark decision, the United States Supreme Court found that even though a corporation was an educational institution in which the public was keenly interested, it was nonetheless a private corporation because the state did not own it entirely and because its board was not exclusively controlled by the state. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819). Subsequently, the Court held that the state could not constitutionally alter the corporation's charter once it had been granted. Following *Dartmouth College*, the test for a public corporation is whether the government owns 100% of the stock of the corporations; or whether the government has the sole right to regulate, control and direct the corporation, and its funds and its franchises, at its own will and pleasure; or some combination of both. *Trustees of Columbia Acad. v. Board of Trustees of Richland County School*, 202 S.E.2d 860 (S.C. 1974); *Providence Eng'g Corp. v. Downey Shipbuilding Corp.*, 294 F. 641 (2d Cir. 1923), *cert. denied*,

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[5]*See also In re Public Laws No. 1993-56 and 1994-87*, 2 MILR 27, 35 (Feb 3, 1995).

[6]*See generally* 18 Am Jur 2d, Corporations § 30 (1985).

[7]*Id.*

[8]*Id.*

264 U.S. 586 (1924).

[3] We find that NTA is a private corporation, and is not an instrumentality or agent of the RMI government because: (1) it is not wholly owned by the RMI, that is, the government does not own all assets of NTA or all the stocks of NTA [28% of the issued stock has been purchased by private individuals, (Ex. B)]; (2) it is operated for profit; (3) it is not primarily engaged or even engaged at all, in the administration of government; (4) the board of NTA is not exclusively controlled by the government; (5) and, the government is not entitled to all profits and does not risk all losses of NTA, rather private shareholders' money is also at risk. Even though NTA provides telecommunication to the public at large, it remains a private corporation.

We disagree with appellee's contention that the legislative history leading up to the enactment of P.L. 1990-105 which established the NTA, and subsequent conduct clearly indicate that the ultimate goal of having the NTA privatized has not yet been achieved. The High Court focused its decision upon the need for complete independence from the RMI and that a "sliding scope towards privatization has been established, but that NTA is not there yet"[9]; however, none of the tests articulated by the United States Supreme Court require complete independence, nor speak of "sliding scopes." A corporation is either public or private,[10] depending upon its character and organization. Here, because NTA is not wholly owned by the RMI government, and we find that it is a private corporation, we need not determine at which point (when NTA sold its first shares of stock to private individuals or when the shareholder's first elected the board of directors) NTA ceased being an agency or instrumentality of the government and became a private corporation.

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[9]In re Public Law No. 1995-118, *supra* at 7.

[10]There is a large class of private corporations which owe a special duty to the public which they may be compelled to perform. These corporations are known commonly as public service corporations and in legal phraseology as quasi-public corporations or corporations affected with a public interest. Quasi-public corporations are private corporations which have been given certain powers of a public nature, such as telecommunications. *See generally* 18 Am Jur 2d, Corporations § 64 (1985) (Quasi-public Corporations).

II. As a private corporation, NTA is entitled to the protection, rights and guarantees of the Constitution.

Both parties have already acknowledged that private corporations are entitled to the protection of constitutional rights.[11] It is undisputed that § 13 of the OAGA denies NTA its choice of counsel. The due process provision of Art. II, § 4(1) of the RMI Constitution is identical to the due process clause of the Fifth Amendment of the U.S. Constitution, incorporated by the Fourteenth Amendment to the individual States.

[4] This Court has previously recognized a due process right to counsel of one's choice. In *In re Public Laws No. 1993-56 & 1994-87, supra* at 339, the RMI Supreme Court cited the following:

> The concept of due process protects rights that cannot be denied without violating fundamental principles of liberty and justice. It has long been recognized that in criminal proceedings, the right to the assistance of counsel of one's choice is such a right. *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). Many recent cases have recognized that the right to counsel is also preserved by the due process clause in civil cases. *See, e.g.*, *Potashnick v. Port City Const. Co.*, 609 F.2d 1101 (5thCir. 1980), *reh. den.* 613 F.2d 314 (1980), *cert. den.* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed. 2d 22 (1980); *Gray v. New England Tel. & Tel. Co.*, 792 F.2d 251 (1st Cir. 1986). It is also established that this right extends to administrative proceedings as well as to courtroom proceedings. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct, 1011, 25 L.Ed. 2d 287 (1970). While it is conceded that government is not required to furnish counsel to civil litigants, whose personal liberty is not at stake, recently one court has expressed the view that the right to counsel in civil proceedings mean, in most instances, the right to counsel of one's choice. *McCuin v. Texas Power & Light Co.*, 714 F.2d 1255 (5th Cir. 1983); *Texas Catastrophe Property Ins. Ass'n v. Morales*, 975 F.2d 1178 (5th Cir. 1992), *reh. den.* 980 F.2d 1442 (1992), *cert. den.*, 507 U.S. 1018, 113 S.Ct. 1815, 123

[11] *See generally* 18 Am Jur 2d, Corporations § 64 (1985) (enumerating a corporation's constitutional rights).

L.Ed. 2d446 (1993).

Section 13 of the OAGA would require NTA to retain the legal services of the Attorney General's office, thus denying NTA the right to counsel of its choice. Such a deprivation would violate NTA's fundamental due process rights. Therefore, the OAGA as applied to NTA is unconstitutional.[12]

CONCLUSION

For the foregoing reasons, we hereby REVERSE the decision of the High Court.

David M. Strauss, counsel for Appellant
Atbi A. Riklon, counsel for Appellee

[12]Because we find that NTA is entitled to counsel of its choice, we need not address the issue of whether representation of NTA by the Attorney General's Office would create a conflict of interest.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

JORBI ANITOK,

Plaintiff -Appellee

-v-

TILLY BINEJAL,

Defendant-Appellant.

S.CT. CIVIL NO. 96-06
(High Ct. Civil No. 96-54)

APPEAL FROM THE HIGH COURT

JANUARY 6, 1998

FIELDS, C.J.
TAYLOR, A.J. *pro tem*,[1] and DANZ, A.J. *pro tem*[2]

SUMMARY:

Plaintiff failed to establish any negligent act of defendant and attorney's fees are not to be awarded in the absence of a contractual obligation or unless allowed by statute.

DIGEST:

1. TORTS – *Negligence – General*: Negligence is the omission to do something an ordinarily prudent person would have done or the doing of something which an ordinarily prudent person would not have done under such circumstances.

2. CIVIL PROCEDURE – *Claims – When Made*: As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because he did not set forth in the complaint a theory on which he could recover, "provided always that a late shift in the thrust of the case will not

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[1]Honorable Marty W.K. Taylor, Chief Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, sitting by designation by the Cabinet.

[2]Honorable Gregory J. Danz, Member of the Nuclear Claims Tribunal, sitting by designation by the Cabinet.

prejudice the other party in maintaining his defense upon the merits."

3. ATTORNEYS – *Fees*: Under "common law" attorney's fees are not awarded to the prevailing party in the absence of an agreement between the parties or a statute authorizing the award of attorney's fees.

OPINION OF THE COURT BY FIELDS, C.J.

Plaintiff-Appellee claimed Defendant-Appellant was negligent in the operation of Appellant's [Appellee's ?] boat (Bum-Bum) and that as a result of the damage done to the boat and the loss of the contents, the Defendant should pay for the losses and should also reimburse Plaintiff for the attorney's fees incurred in bringing this law suit.

Plaintiff-Appellee was to deliver to Defendant-Appellant certain goods on Arno Atoll. Defendant was to pay for the goods upon delivery on Arno. This was in accord with their previous transaction. Plaintiff directed his son to load the bum-bum and to deliver the goods to Arno. The son navigated the bum-bum into the channel underneath the bridge going from the Majuro Lagoon out into the ocean for the short trip to Arno. According to the testimony of Plaintiff his son had little experience in navigating that channel, and he requested Defendant to assist his son if necessary. Plaintiff did not go on the bum-bum on this trip, but rather directed the son to take the bum-bum to Arno. The son was never told by the father not to make the trip to Arno. Once in the channel the son of Plaintiff became concerned about the wave action coming in from the ocean side. He voluntarily handed over the wheel of the boat to Defendant. Defendant testified that it was then too late to turn the bum-bum around and at that point a large wave overturned the Bum-bum. The cargo was lost in the water and the bum-bum suffered damage on being washed onto the rocks.

Plaintiff then filed suit claiming a breach of contract made the Defendant liable for the damage to the bum-bum, the lost cargo as well as attorney's fees incurred by Plaintiff in bringing this action. During argument by Plaintiff's attorney the trial Judge advised counsel that he would not award judgment based on his claim on a contract theory but would only give a judgment on a

theory of negligence. Thereupon the wise counsel then argued that Defendant was negligent and that Plaintiff should prevail as a result of his negligence. No negligence was pled, only a cause of action on contract can be found in the pleadings.

I

[1] Negligence is the omission to do something an ordinarily prudent person would have done or the doing of something which an ordinarily prudent person would not have done under such circumstances. The Restatement of Law (Rest. 2nd Torts § 282) defines the term as follows "Negligence is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm." The conduct of Defendant did not fall below a standard of conduct that a reasonable ordinary person would have done under the same circumstances. Defendant took control of the bum-bum after the Plaintiff's employee, his own son, navigated it into the channel from which it could not turn around but only go foreword. There is no evidence that Defendant could have taken any action to avoid the consequences of the oncoming wave. An act of God, or any accident that occurs does not necessarily mean that someone was negligent. There must be some evidence introduced before the trier of fact to show that the conduct of the party failed to meet the standard required of an ordinarily prudent person. The transcript of the proceedings in this action fails to show any negligence of the part of Defendant-Appellant.

II

While the court does not have to decide the issue of pleading of one cause of action only to be changed at the direction of the trial judge during argument, such practice should be discouraged. The change in theories should be done by counsel prior to the commencement of the trial and not after the introduction of all the evidence and then at the insistence of the trial Judge.

[2] As a general rule, a plaintiff should not be prevented from pursuing a valid claim just because he did not set forth in the complaint a theory on which he could recover, "provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining

his defense upon the merits." 5 C. Wright & A. Miller, *Federal Practice & Procedure*, Sec. 1219 at 94 (1990). *Evans v. McDonalds* 936 F.2d 1087, 1090 (1991). The purpose of "fact pleading," as provided by Fed.R.Civ.P. 8(a)(2), is to give the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery. The liberalized pleading rules do not permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case. This practice, if permitted, would waste the parties' resources, as well as judicial resources, and would unfairly surprise defendants, requiring the court to grant further time for discovery or continuances.

III

[3] Under "common law" attorney's fees are not awarded to the prevailing party in the absence of an agreement between the parties or a statute authorizing the award of attorney's fees. *Huecker v. Milburn*, 538 F.2d 1241, 1245 (CA6 1976). 6 Moore's Fed. Prac. § 54.77. This Court hereby adopts and declares the "common law" America Rule to be the law of the Marshall Islands. The trial court's ruling to the contrary is hereby rejected.

The judgment is hereby reversed. The trial court is hereby ordered to set aside its judgment heretofore entered in this case and to enter judgment in favor of Defendant-Appellant, Tilly Binejal.

Harold Van Voorhis, Trial Court Judge
Filimon M. Manoni, for Appellant
Hemos A. Jack, for Appellee

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF THE ESTATE OF NANIN ZAION (deceased)

S.CT. CIVIL NO. 97-06
(High Ct. Probate No. 1994-060)

BY:

CLARY MOKORORO

ORDER DISMISSING APPEAL AND
VACATING STAY RE SANCTIONS AGAINST ROSALIE A. KONOU

JULY 10, 1998

FIELDS, C.J.

SUMMARY:

An attorney in the case appealed a High Court order imposing sanctions. The Supreme Court dismissed the appeal because the attorney failed to timely file an opening brief.

DIGEST:

1. APPEAL AND ERROR – *Dismissal, Grounds for – Failure to File Opening Brief*: Appellant's failure to timely file an opening brief is grounds for dismissal.

This Appeal was taken by Rosalie A. Konou, Esq., from a High Court order imposing sanctions in the captioned proceeding issued October 13, 1998. Ms. Konou's request to the High Court for reconsideration of that order was denied by the High Court's Order of October 21, 1997.

On October 24, 1997, Ms. Konou filed notice of appeal to the Supreme Court. On October 27, 1997, this Court stayed the trial court's order "pending further order" to allow the appeal process to proceed. On November 3, 1997, Ms. Konou filed a document designating "the

whole case file" in the above captioned matter. On the 24th of December Ms. Konou requested a sixty day extension of time to file her opening brief. This court granted that request the same day. No further documents or pleadings were subsequently filed in this appeal.

On July 1, 1998, Appellee Scott H. Stege filed and duly served on the appellant and the Public Defender's office a motion to dismiss this appeal and vacate the stay of the High Court's order sanctioning Rosalie A. Konou because no Opening Brief or other appellant filing had occurred since December 24, 1997.

The motion is GRANTED:

[1] The Court concludes Appellant failed to pursue her appeal by filing the requisite opening brief or otherwise engaging in any activity to move the appeal forward. It is fair to say that Appellant, after receiving an extension, abandoned her appeal.

This Court concludes this appeal to be inactive; that Appellant has failed to follow Supreme Court rules limiting the time allowed to file briefs and extensions thereof under Rules 4, 29 and 30, Supreme Court Rules of Civil Procedure.

This appeal is DISMISSED. The October 27, 1997 order of this court staying the order of the High Court is VACATED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

GUSHI BROTHERS CO.,

Plaintiff-Appellee,

-v-

JIMMY KIOS, LETAN JELLO and ARTICLE KIOS,

Defendants-Appellants.

S.CT. CIVIL NO. 96-07
(High Ct. Civil No. 1992-032)

APPEAL FROM THE HIGH COURT

AUGUST 26, 1998

FIELDS, C.J.
TAYLOR, A.J. *pro tem*,[1] and NGIRAKLSONG, A.J. *pro tem*[2]

SUMMARY:

This appeal is from a High Court decision that in accordance with the doctrine of *res judicata* appellants are bound by their prior stipulated dismissal with prejudice. Hence, appellee's land lease and bill of sale are valid, and appellants' attempts to build on the subject land are in violation of those agreements. The Supreme Court affirmed.

DIGEST:

1. RES JUDICATA – *Requirements*: A party seeking to rely on the doctrine of *res judicata*, or claim preclusion, must prove that: 1) there has been a final judgment on the merits in a prior suit; 2) the prior suit involves the same parties or their privies; and 3) the causes of action are the same as in the prior suit.

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[1]Honorable Marty W.K. Taylor, Chief Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, sitting by designation by the Cabinet.

[2]Honorable Arthur Ngiraklsong, Chief Justice of the Supreme Court of the Republic of Palau, sitting by designation by the Cabinet.

GUSHI BROS. CO. v. KIOS, *et al.*

2. JUDGMENTS – *Conclusiveness and Finality – dismissal with prejudice*: As the trial court noted, it is well established that a stipulation of dismissal with prejudice is a final judgment on the merits and operates the same as any other final judgment for purposes of *res judicata*.

3. APPEAL AND ERROR – *Questions Reviewable – Questions of Law*: When a decision is presented to the appellate court, that court is required to reach the appropriate legal conclusion. Whether the trial court has made a proper or an improper decision on an issue of law is irrelevant.

4. APPEAL AND ERROR – *Review – Questions of Law*: The appellate court reviews questions of law, such as *res judicata*, *de novo*.

5. LAND RIGHTS – *Alap – Powers and Obligations*: Notice to members of the alap's bwij is not necessary for the alap to convey his or her alap rights. It is sufficient that the iroij, iroijedrik where necessary, alap and senior dri jerbal approve of any such alienation or disposition of land rights.

OPINION OF THE COURT BY FIELDS, C.J.

In 1992, appellant Jimmy Kios began construction on a parcel of land on Binbinkan Weto. Appellee Gushi Brothers Co. asked him to stop, explaining that it had leased that land and that Kios had no right to build there, Kios continued construction and appellee filed a lawsuit seeking injunctive relief. After four years of proceedings, the case went to trial. The trial court held that Kios's construction activities violated appellee's lease. Kios appealed, arguing that the court made several errors in its application of *res judicata* and other issues of law and custom. We disagree and affirm.

I. BACKGROUND

In 1985, Chuji Chutaro, owner of appellee Gushi Brothers Co., entered into negotiations with Letan Jello concerning the lease of two lots of land on Binbinkan Weto (Lots "A" and "B"). A lease was prepared and signed by the three individuals with property interests in the land: Henry Muller, Letan Jello and Article Kios. On April 30, 1985, the lease was filed with the court and Chutaro began making the payments as specified in the lease. A month later, Chutaro

entered into a further agreement with the three land owners concerning a third lot of land in the same vicinity (Lot "C"). The land owners and Chutaro signed an "addendum" to the original lease that contained payment terms identical to those in the original lease. The "addendum" was filed with the court on June 3, 1985. In 1987, Jello offered to sell his rights on Binbinkan Weto to Chutaro. Chutaro accepted and a bill of sale was prepared and signed by Jello. Chutaro continued to pay Muller and Kios in accordance with the lease and the addendum.

In 1988, Jello sued Chutaro, claiming that the original lease, the addendum and the bill of sale should be void because he did not understand them when he signed them (Civil Action No, 1988-223). On February 8, 1989, Jello and Chutaro reached a settlement agreement pursuant to which Jello acknowledged the validity of the lease, the addendum and the bill of sale but retained ownership rights to the "ocean side" of the property where he and his family lived. Jello and Chutaro, both represented by counsel, stipulated to a dismissal of the case with prejudice and filed the dismissal with the court on February 10, 1989.

In 1992, appellant Jimmy Kios began construction of a dwelling on Lot C. On April 8, 1992, appellee Gushi Brothers Co. filed this case against Jimmy Kios seeking injunctive relief requiring Kios to stop building. Kios denied having leased any portion of Lot C to Chutaro or Gushi Brothers Co. and filed counterclaims asserting that the lease and the addendum by which Gushi Brothers Co. asserted rights to the land were invalid. Gushi Brothers Co. filed a motion asserting that Jimmy Kios had no standing to assert any claim to Lot C because he held no alap or dri jerbal title. The court, former Chief Justice Rutledge presiding, denied the motion in an order dated February 18, 1993, but ordered that Jello (the alap) and Article Kios (the senior dri jerbal) had to be joined as necessary parties. After they became defendants in the case, Jello and Article Kios filed counterclaims against plaintiff asserting that the lease and its addendum were invalid. Plaintiff answered and in September 1994 moved for summary judgment. Former Chief Justice Philippo denied the motion on November 23, 1995.

In 1996, this case went to trial in front of Chief Justice Cadra. On December 5, 1996. The court entered an order finding that the original lease, the addendum and the bill of sale were

all valid and that Jimmy Kios's activities on Lot C were in violation of those agreements. Defendants appealed bringing this case before the Supreme Court.

II. DISCUSSION

In their opening brief, appellants raised a multitude of alleged errors in the trial court's opinion. Later, appellants narrowed their attack to two issues: 1) the trial court's application of principles of *res judicata*; and 2) the trial court's application of custom and law to the facts presented.

A. *Res Judicata*

The trial court found that the February 1989 stipulated dismissal of Letan Jello's lawsuit against Chuji Chutaro was *res judicata* with respect to Jello's and Jimmy Kios's claims concerning the validity of the lease and addendum to Lot C. According to appellants, however, the stipulated dismissal was not a final judgment subject to the rules of *res judicata* because the parties reached the settlement agreement without any court involvement. Appellants contend that it is improper to give any *res judicata* effect to a dismissal that was never reviewed by a judge. In addition, appellants argue that the trial court should not have raised the *res judicata* issue at trial because that issue had been resolved already by the previous judges in the case.

[1,2] A party seeking to rely on the doctrine of *res judicata*, or claim preclusion, must prove that: 1) there has been a final judgment on the merits in a prior suit; 2) the prior suit involves the same parties or their privies; and 3) the causes of action are the same as in the prior suit. *See Zaion, et al., v. Peter and Nenam*, 1 MILR (Rev.) 228, 234-5 (Jan 24, 1991). As the trial court noted, it is well established that a stipulation of dismissal with prejudice is a final judgment on the merits and operates the same as any other final judgment for purposes of *res judicata*. *See* 9 C. Wright & A. Miller, *Federal Practice & Procedure* § 2367 (1995); *Citibank N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501-02 (11th Cir. 1990); *Nemaizer v. Baker*, 793 F.2d 58, 60-61 (2d Cir. 1986); *Astron Indus. Assn. v. Chrysler Motors Corp.*, 405 F.2d 958, 960 (5th Cir. 1968). The fact that the court did not become involved in the prior suit makes no difference.

Pursuant to MIRCP 33, the parties were permitted to stipulate to a dismissal without the court's involvement or its approval. *See* MIRCP 33(a)(1)(ii) ("[A]n action may be dismissed by the plaintiff without order of court . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.").

The 1989 stipulated dismissal stated explicitly that it was "with prejudice." That dismissal constitutes a final judgment on the merits in the suit between Chuji Chutaro and Letan Jello. Other than Jello, however, the present case involves different parties. Thus, it is necessary to analyze whether the parties in this case are privies of Chutaro and Jello. There is little dispute that Gushi Brothers Co. is a privy of Chutaro; Chutaro is the owner of that company.

The trial court found that Jimmy Kios was a privy of Letan Jello, but that Article Kios was not. Appellants have not contested the court's decision on the privity issue, except to the extent that they argue that Article Kios was in privity with Letan Jello. It is unclear why appellants would chose to maintain that Article Kios is a privy of Letan Jello; the effect of such an admission is to make Article Kios bound by the 1989 stipulated dismissal. Nonetheless, appellants have taken such a position and appellee agrees with it. Because there is no longer a dispute between the parties on this issue, we will treat Article Kios as a privy of Jello.

Finally, we must determine whether the causes of action in this suit are the same as those in the prior suit. In Jello's 1988 lawsuit against Chutaro, Jello claimed that the original lease. The addendum and the bill of sale were void. In this suit, Gushi Brothers Co. requested injunctive relief against Jimmy Kios on the grounds that it had a valid lease to Lot C and that Jimmy Kios had no legal right to build there. Jimmy Kios and later, Letan Jello and Article Kios, counterclaimed on the basis that the lease and the addendum were invalid. These counterclaims were the same claims raised by Jello in his 1988 suit. Thus, in each lawsuit the claims focused on the validity of the lease and the addendum. We hold that the causes of action are the same and find no error in the trial court's application of *res judicata*.

Appellants maintain that even if the trial court did not err in its *res judicata* analysis, that it should not have raised the issue of *res judicata* at trial after the two previous trial judges on the

case had ruled that appellee's *res judicata* argument was unavailing. Appellants vastly overstate the significance of the earlier orders issued by Justices Rutledge and Philippo. In his decision, Justice Rutledge ordered merely that Letan Jello and Article Kios be added as necessary parties to the lawsuit. Justice Philippo's summary judgment order focused on whether material facts were still in dispute, not on the question of *res judicata*.

[3,4] In any case, we would have reached the same conclusion on the *res judicata* issue regardless of the various trial court decisions. It is apparent to us that principles of *res judicata* should apply in this case. When a decision is presented to the appellate court, that court is required to reach the appropriate legal conclusion. Whether the trial court has made a proper or an improper decision on an issue of law is irrelevant. We review questions of law, such as *res judicata, de novo.*

Going even one step further, even if this court and the trial court were incorrect about the application of *res judicata*, the trial court found the lease, the addendum and the bill of sale to be valid contracts. *See* Trial Court Opinion at 26-56. Appellants have failed to articulate how the trial court erred in any respect on those findings.

B. Custom and Law

[5] Appellants maintain that the trial court should not have relied on the 1989 dismissal because Letan Jello did not give notice of that dismissal to all relevant bwij members as he was required to do under Art. X, § 1(2) of the Constitution. Such is not required under the Constitution. The Constitution clearly states that only the Iroijlaplap, Iroijedrik where necessary Alap and the Senior Dri Jerbal of such land must give approval of any alienation or disposition of said land. Those persons mentioned "shall be deemed to represent all persons having an interest in that land." To require notice to all members of the bwij may be impossible and is not required under the Constitution. Further the appellants have not provided this Court with any rationale for overturning the trial court's rulings on the validity of the leases, the addendum and the bill of sale. The trial court found that those documents were valid and binding. We see no reason to find otherwise.

Accordingly, the decision of the trial court is AFFIRMED.

Rosalie Konou for Appellants
Scott H. Stege for Appellee

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IROIJ MURJEL HERMIOS, *et al.*,

Plaintiffs,

-v-

BRENSON S. WASE, MINISTER OF INTERNAL AFFAIRS, AND THE GOVERNMENT OF THE MARSHALL ISLANDS,

Defendants,

and

LITOKWA TOMEING,

Intervenor-Appellee,

-v-

HEMMY LANGMOS,

Real Party in Interest-
Appellant.

S.CT. CIVIL NO. 97-04
(High Ct. Civil No.1994-0l1)

APPEAL FROM THE HIGH COURT

SEPTEMBER 7, 1998

FIELDS, C.J.
TAYLOR, A.J. *pro tem*,[1] and NGIRAKLSONG, A.J. *pro tem*[2]

[1]Honorable Marty W.K. Taylor, Chief Justice of the Supreme Court of the Commonwealth of the Northern Mariana Islands, sitting by designation by the Cabinet.

[2]Honorable Arthur Ngiraklsong, Chief Justice of the Supreme Court of the Republic of Palau, sitting by designation by the Cabinet.

MARSHALL ISLANDS, SUPREME COURT

SUMMARY:

Appellant appealed the decision by the High Court and the Traditional Rights Court sitting together that Appellee was the alap and senior dri jerbal of the subject weto. Appellant claimed that the trial court did not consider certain evidence. The Supreme Court affirmed.

OPINION BY CHIEF JUSTICE ALLEN P. FIELDS

In 1994, Iroijlaplap Murjel Hermios, Plaintiff, brought an action seeking to declare the lease of Telnan and Monaktal Wetos, Wotje Atoll, to be valid and that he was entitled to receive the iroij share of payment. Litokwa Tomeing, intervened claiming the iroijedrik, alap and dri jerbal rights. Hemmy Langmos filed an answer to the Intervenor claiming an equal share with the Intervenor and specifically claiming that he held the right to the alap and dri jerbal shares. In a hearing before the High Court in 1994, the lease was declared valid and the parties stipulated that Litokwa Tomeing, the Intervenor, held the iroijedrik title to the weto in question. No evidence was introduced as to the alap and dri jerbal shares and the matter was certified to the Traditional Rights Court for further Hearing. In 1997, the Traditional Rights Court and the High Court determined that, in the best interests of justice and economy, the hearing would be held jointly before the two courts. This was pursuant to Rule 13 of the Rules for Traditional Rights Court.

In 1997, evidence was introduced before the joint Courts, and the Traditional Rights Court ruled that the alap and dri jerbal rights on both Telnan and Monaktal were held presently by Litokwa Tomeing and his brothers and sisters, being the children of Iroijlaplap Tomeing. The High Court adopted the Findings of the Traditional Rights Court and entered a Judgment in favor of Litokwa Tomeing, Intervenor and Appellee. Hemmy Langmos appealed, arguing that the High Court erred in failing to require the Traditional Rights Court to comply with its procedure in considering material evidence and that the High Court erred in failing to apply the law to the findings of the Traditional Rights Court. We disagree and affirm.

HERMIOS v. MIN. OF INTERNAL AFF. &TOMEING v. LANGMOS

1. BACKGROUND

The claims underlying this dispute and appeal were originally filed against the Government of the Republic of the Marshall Islands seeking payments pursuant to a lease agreement with the Republic for use of the Wetos to build a School on Wotje Atoll. The present parties to this appeal intervened claiming certain rights to the payments. The matter went to trial on the sole issue as to who holds title to the alap and dri jerbal rights to the wetos in question.

2. DISCUSSION

Article VI, section 4 of the Marshall Islands Constitution creates the Traditional Rights Court. Subdivision (2) of that section provides that the High Court shall provide for the procedures of the Traditional Rights Court unless the Nitijela provides for these matters. In the absence of action by the Nitijela, the High Court established the Rules for Traditional Rights Court.

Article VI, section 4, subdivision (3) of the Constitution provides:

> The Jurisdiction of the Traditional Rights Court shall be limited to the determination of 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.

Article VI, section 4, subdivision (5) provides:

> When a question has been certified to the Traditional Rights Court for its determination under paragraph (4), 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.

The Rules for Traditional Rights Court Rule 13 provides that when the High Court and the Traditional Rights Court sit in a joint hearing:

> At such a joint hearing the Trial Judge and the panel of Traditional Rights Court members shall sit as judges for the hearing of all statements, evidence and summation in the case. . . .

Rule 14 provides that if the Trial Court concludes justice does not require that the Traditional Rights Court's resolution be resubmitted to the Traditional Rights Court, then the Trial Court shall proceed and determine all of the issues of the case. The Trial Court shall give substantial weight to the opinion of the Traditional Rights Court of the questions referred to it as required by the Constitution.

Appellant's complain that the Traditional Rights Court failed to comply with its own procedure in considering material evidence is misguided. While the appellant may not agree with the result and the determination of the Traditional Rights Court, the Statement of that Court clearly indicates the names of all the witnesses who testified as well as all documents presented and received in evidence were considered.

The question presented to the Traditional Rights Court was "Who holds both the alap and dri jerbal rights in and to Weto Telnan and Weto Monaktal?" The answer was Iroijlaplap Tomeing. The court provided their reasons for so finding as follows:

1 Iroijlaplap Tomeing personally approached and asked Alap Lajinwa and Didmij, the dri jerbal, to give him Weto Ekmouj as his Imon Jerbal. After his request was granted, the iroijlaplap renamed the weto from Ekmouj to Telnan.

2. Monktal Weto was bought by Iroijlaplap Tomeing with the money he received from the Japanese as payment for their use of Telnan.

3 Evidence presented proved that Iroijlaplap Tomeing had lived on and cleaned and maintained both wetos.

The Court gave additional reasons for their findings as follows:

1. The panel realizes and believes that under Marshallese custom and practice if an iroijlaplap is physically clearing and working a parcel of land or weto, then the three (3) or four (4) land rights are owned exclusively by

the iroijlaplap and his children.

2. Now, without reservations and in accordance to Custom, the panel has determined that Weto Telnan and Weto Monaktal, should be restored to the ownership of Litokwa Tomeing and his brothers and sisters being the children of Iroijlaplap Tomeing and rightful heirs of the rights of alap and dri jerbal.

Appellant has failed to demonstrate that the Traditional Rights Court has failed to consider evidence under the will of Iroijlaplap Langmos, the Iroij Book, and receipts for the shares issued by the Republic of the Marshall Islands Government to Langmos. All of these items were introduced in evidence and are listed in the decision of the Traditional Rights Court. It is clear that the Court had all those items in mind when reaching its decision. The Iroijlaplap Murjel Hermios also testified that the shares belong to Litokwa Tomeing and his brothers and sisters. Any action or statements made after the hearing are not before this court. The record clearly discloses that the Traditional Rights Court acted in accordance with the Constitution, Article VI, section 4, (3) and the Rules of the Court, and answered the question as to who is entitled to the title and land rights depending wholly or partly on customary law and traditional practice in the Republic of the Marshall Islands.

The trial court did not commit reversible error in accepting the findings of the Traditional Rights Court. Rule 13, *supra*, declares that "all statements, evidence and summations in the case" are to be submitted to the joint panel of the High Court and the Traditional Rights Court. The High Court heard all evidence as did the Traditional Rights Court and found that any alleged waiver did not exist to defeat Litokwa Tomeing's right to the title or land rights to Telnan and Monaktal wetos. The courts found that the wetos in question belonged to the father of Litokwa Tomeing and not the father of Hemmy Langmos, appellant herein. Thus the father of Langmos could not include a division of them in his will (Kalimur), since he had no interest in them to convey. That very Kalimur provides for the procedures for resolving future disputes. The parties are before the courts now to resolve their disputes. These wetos were not the subject matter of prior court actions and there can be no claim of waiver resulting from the prior proceedings. All

claims of waiver should have been presented to the joint hearing of the two courts.

Accordingly, the decision of the trial court is AFFIRMED.

Dennis Reeder, counsel for Appellant
Rosalie Aten Konou, counsel for Appellee

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff,

-v-

THE AMERICAN TOBACCO COMPANY*, et al.*,

Defendants.

S.CT. CIVIL NOS. 99-01 and 99-02
(High Ct. Civil No. 1997-261)

APPEAL FROM THE HIGH COURT

APRIL 5, 1999

FIELDS, C.J.

SUMMARY:

The Supreme Court dismissed appeals by both plaintiff and defendants from a High Court dismissing some, but not all, defendants for lack of personal jurisdiction.

DIGEST:

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: An appeal shall lie only from a final decision.

All purported appeals filed in this consolidated action are hereby dismissed, as premature appeals.

[1] The Constitution of the Republic of the Marshall Islands provided that "an appeal shall lie to the Supreme Court" only from the final decision of any court. Until there is a final judgment in this case there can be no appeal to the Supreme Court.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

In The Matter of the 19th Nitijela Constitutional Regular Session,

By

LITOKWA TOMEING in his official capacity as Senator of the Nitijela,

Petitioner,

and

In The Matter of the 19th Nitijela Constitutional Regular Session,

By

Attorney General, *ex parte,*

Petitioner.

S.CT. CIVIL NO. 98-04
(High Ct. Civil No.1998-215)
(High Ct. Civil No. No. 1998-214)

APPEAL FROM THE HIGH COURT

SEPTEMBER 8, 1999

FIELDS, C. J.
GOODWIN, A.J. *pro tem*,[1] and KING, A.J. *pro tem*[2]

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

[2]Honorable Samuel P King, Senior Judge, United States District Court for the District of Hawaii, sitting by designation by the Cabinet

IN THE MAT. OF THE 19TH NITIJELA CONST. REG. SES.

SUMMARY:

The Supreme Court affirmed the High Court's ruling that Members of the Nitijela are constitutionally required to vote on motion of no confidence and the attempts to boycott such votes are illegal.

DIGEST:

1. COURTS – *Jurisdiction – Nitijela Proceeding Non-justiciable*: Procedural matters, as distinguished from legislative acts, are committed to the discretion of the Nitijela are not subject to judicial review.

2. CONSTITUTIONAL LAW – *Construction – Rules of Interpretation*: In the absence of some textual or logical support, the Supreme Court will not read into the Constitution a provision not contained therein.

3. CONSTITUTIONAL LAW – *Nitijela – Vote of No Confidence*: Members of the Nitijela are under an obligation to vote on a motion of no confidence once noticed. The language of Article 1, § 2(2) that requires the vote to be held not earlier than 5 days nor later than 10 days is not permissive and suggests that prompt action by the Nitijela is not only recommended but required.

4. COURTS – *Jurisdiction – Nitijela Proceeding Non-justiciable*: Internal matters of voting and procedure (i.e., voting by secret ballot or roll call) appear to be easily resolvable by the Nitijela according to its own procedural rules, without the assistance of the Court, and indeed, considerations of separation of powers leaves the matter exclusively in the hands of the Nitijela.

OPINION OF THE COURT BY GOODWIN, A.J.

Petitioners appeal the judgment of the High Court (Chief Justice Cadra, presiding) which essentially denied declaratory relief to the petitioners in a controversy among Senators after six members of the Nitijela brought a motion of no confidence against the President. Before a vote was taken, a number of Senators walked out of the session, at the direction of the President, and refused to return. This resulted in less than a quorum remaining. In the absence of a quorum, the ten-day voting period, specified by the Constitution for a vote on such a motion, expired.

The parties sought relief by way of declaratory judgment before the High Court, which

accepted jurisdiction and entered judgment against petitioners on September 29, 1998. We have jurisdiction, and for the reasons which appear below, dismiss the appeal.

The Controversy

As noted, six members of the Nitijela, including Senator Tomeing, brought a motion of no confidence in the Cabinet, pursuant to Article V, § 7(1) of the Constitution. A contemporaneous motion demanding a secret ballot was filed. Members opposed to the no confidence motion demanded a roll call vote. The Speaker ruled that the vote would be by secret ballot and called a recess so that ballots could be distributed. No appeal was taken from this ruling. Instead of appealing the ruling of the Speaker, Senators loyal to the President walked out of the session and refused to return.

The Constitution provides that the Nitijela cannot transact business without a majority of the senators being present Article IV, § 15(8). The walkout of the Senators loyal to the President left less then a quorum and thus prevented the Nitijela from considering any business, including the motion of no confidence. The Constitution explicitly states that a motion of no confidence "shall be voted on at a meeting of the Nitijela held not earlier than 5 days nor later than 10 days after the date of the giving of the notice." Art V, § 7(2).

After the 10-day voting period had passed, the Senators loyal to the President claimed that the motion had "lapsed" and was therefore moot. The Senators who brought the motion disagreed, claiming that the motion was still pending and had to be voted upon by the Nitijela before any further business could be transacted.

The Complaint for declaratory judgment asked the High Court to decide whether the vote on the motion should be by roll call or by secret ballot, and whether the motion had "lapsed." The High Court declined to answer the question of the method of voting on the ground that it was an internal-procedure question which the Nitijela should answer by following its own rules of procedure. The court answered the collateral question by holding that the motion had not "lapsed," but the Court did not dispose of the controversy.

While the parties do not agree on the characterization of the issues we are asked to decide, the following questions are presented by the record:

(1) Is there a judicial remedy for Nitijela's failure to act on the motion of no confidence within the 10-day time frame specified by the Constitution?

(2) Did the motion lapse, or is it still pending?

(3) Did the High Court correctly refuse to issue an advisory opinion on voting procedure?

Discussion

The Constitution of the Marshall Islands does not speak directly to the issues presented in this case, and the briefs of the parties and the opinion on of the High Court reveal little relevant case law from the Marshall Islands. We begin with the proposition that we have a duty under the Constitution, Article VI, Section 1, to review a judgment of the High Court that declares unconstitutional an act of the Nitijela, or that enforces an act of the Nitijela over the protest of an appellant who asserts that the act is unconstitutional. Obviously, neither constitutional issue is presented in this appeal. The legal, as distinguished from constitutional, questions remaining for judicial review after the High Court declined to rule on the internal housekeeping questions that were presented in the Complaint for Declaratory Judgment, are essentially legislative procedural questions rather than substantive questions arising under the constitution and laws of the Republic.

A. Constitutional Provisions

Article IV, Section 13 provides, in part:

(1) The President may, by writing signed by him, dissolve the Nitijela if:
(a) a motion of no confidence in the Cabinet has twice been carried and has twice lapsed, and no other President has held office in the interval between the two votes of no confidence . . . .

Article V, Section 7 provides:

(1) At any meeting of the Nitijela, any 4 or more members . . . may give notice of their intention to make a motion of no confidence in the Cabinet
(2) Any such motion shall be voted on at a meeting of the Nitijela held not earlier than 5 days nor later than 10 days after the date of the giving of the notice.
(3) If the motion of no confidence is carried by a majority of the total membership of the Nitijela, the President shall be deemed to have tendered his resignation from office.
(4) If the Nitijela has not elected a President at the expiration of 14 days after the date on which the President is so deemed to have tendered his resignation from office, the vote of no confidence and the tender of the President's resignation shall lapse.
(5) In any case where a vote of no confidence has lapsed, notice of intention to make a motion of no confidence in the Cabinet may not again be given until the expiration of 90 days after the date on which that vote of no confidence lapsed, unless there has sooner been an appointment of the members of the Cabinet, following the election of a President.

B. Opinion of the High Court

The High Court began by asserting that "Constitutional interpretation requires the making of 'value judgments' and is not strictly governed by technical rules of statutory construction." [Opn. p.1] The court also noted the "crucial nature of a motion of no confidence" in the parliamentary system of government. With this background, the court went on to consider whether the failure of the Nitijela to vote on the motion within the 10-day period provided in Article V, § 7(2) caused the motion to lapse or to be rendered moot and ineffective, as the government argued. Considering the "plain and obvious meaning" of the Constitutional provisions, the court found that the government's position was unsupported because it "appears well settled that a failure to comply with a time limit does not relieve the duty to act and/or render subsequent action void where the statute or rule does not provide for consequences upon a failure to comply." [Opn. p.5].

The court went on to examine the constitutional provisions "so as to give effect to the intent of the framers and the people who adopted it" by using a "broad, liberal or equitable" analysis. [Opn. p.7]. The court determined that the legislature's duty to vote on the motion of no

confidence within 10 days was mandatory by virtue of the use of the word "shall," ("Any such motion shall be voted on . . .", Art V, § 7(2)), and therefore determined that the legislature's evasion of its responsibility was contrary to the constitutional mandate. The court also observed that "[t]o hold that the motion has 'lapsed' or is 'rendered moot and ineffective'" because the vote did not occur within the required 10 days would permit the evasion of a mandatory Constitutional duty by unconstitutional means. . . . The framers of the Constitution surely did not intend such a result." [Opn. p.10].

The court then concluded that: ". . . the motion for vote of no confidence did not lapse under the circumstances presented in this case and, in order to effectuate the performance of a mandatory duty, the court further holds that the Nitijela session does not terminate until the vote is had. The proper remedy in this particular 'crisis' is to hold that the vote should occur on the first day a quorum is [obtained]." Id. The court went on to find that the other issues presented by the parties (i.e., whether the vote should have been conducted by secret ballot or by roll call, and whether the Speaker's determination was appealable to the full Nitijela) were political decisions committed to the discretion of the Nitijela by the Constitution, and were therefore inappropriate for judicial review under the doctrine of separation of powers. [Opn. p.11]. We agree.

C. Analysis

Appellants do not present any argument addressing directly the judgment of the High Court, but rather contend that the court should have addressed the two issues presented in the complaint (i.e., the constitutionality of the Speaker's ruling and whether the ruling was appealable under Nitijela procedural provisions).

[1] The Appellees ("the Senators") contend that the questions not addressed by the High Court are indeed political in nature and should be resolved internally by the Nitijela. Specifically, Article IV § 15(1) of the Constitution states that "the Nitijela may from time to time make rules for the regulation and orderly conduct of its proceedings and the despatch of its official business." Furthermore, § 16(3) provides that the "validity of any proceeding in the

Nitijela . . . shall not be questioned in any court; but this shall not be taken to preclude judicial review of the validity of any Act or resolution of the Nitijela." The Senators and the High Court take this as a firm commitment of procedural matters, as distinguished from legislative acts, to the discretion of the Nitijela. We agree.

Although the Government contends that the motion of no confidence "lapses" after ten days, the word "lapse" appears to have a specific and narrow meaning when considered in context. In Article V, § 7(4), "lapse" refers to a situation in which a vote of no confidence is carried, but the Nitijela fails to elect a new President within 14 days. On its face, this provision seems designed to preserve the Presidency – one could easily imagine a situation in which the Nitijela ousts an incumbent President but its members cannot agree on the selection of a new President. In that event, the former President would resume his or her responsibilities, and the country would not be without a President for more than 14 days.

[2] The provisions concerning the timing of the vote seem to serve an entirely different purpose. The High Court surmised that the five to ten day window set forth in Article V was designed to ensure that the vote on a motion of no confidence would be timely (not delayed more than ten days) but not so soon that the President would be surprised (less then five days). In contrast to 7(4), there is no mention of a "lapse" – it is simply assumed that the Nitijela will perform its duty to vote on the motion in a timely fashion. Also, there does not seem to be any reasonable purpose served by reading in a lapse provision. Indeed, providing for a lapse on the motion of no confidence would facilitate the obstruction to orderly process by allowing a minority of the Nitijela to cause a loss of a quorum and prevent the body from fulfilling its constitutional duty to vote. We believe it would be counter-productive to read in a "lapse" provision in the absence of some textual or logical support for such an interpretation. The High Court decided this question correctly.

[3] While we do not adopt the full text of the High Court's opinion, we agree that the members of the Nitijela are under an obligation to vote on the motion. The language of the provision is not permissive, and the limited time frame suggests that prompt action by the

Nitijela is not only recommended but required. Therefore, those senators who obstructed the vote were behaving unlawfully. *See* Article 1, § 2(2). However, the Constitution does not explicitly provide a remedy or penalty for legislative conduct. The result of this silence is to leave the matter with the Nitijela for the enforcement of its existing rules of procedure, or the amendment of them if they are deemed by the Nitijela to be incomplete or inadequate.

[4] As to the questions the High Court declined to address, these internal matters of voting and procedure appear to be easily resolvable by the Nitijela according to its own procedural rules, without the assistance of the Court, and indeed, considerations of separation of powers leaves the matter exclusively in the hands of the Nitijela.

We therefore do not reach the question whether the ruling of the speaker pursuant to Section 26 of the Nitijela Rules of Procedure contravenes Article IV, § 15(5) of the Constitution.

The constitutional provisions do not require that the no confidence vote be conducted by secret ballot. The general provision states that "[w]hen any question is put to the Nitijela, any member may call for a roll-call vote thereon, unless this Constitution requires that vote to be by secret ballot." Article IV, § 15(5). Accordingly, while the Speaker's actions may have been subject to an appeal by aggrieved senators, we need not express a judicial view of the matter. The procedural rules of the Nitijela provide that a vote may be had by secret ballot upon request by three or more Senators, *unless a roll-call vote has been requested* pursuant to Rule 27(1). Rule 27(1) does not require any particular form for the roll-call vote request. Moreover, the Constitution does not suggest that any particular remedy is required. Pursuant to Rule 113 (2), the ruling by the Speaker (that the vote would be by secret ballot) was subject to appeal to the membership as it did not involve an interpretation of the Constitution.

Conclusion

The Nitijela's procedural rules govern the conduct of votes and allow for removal of a Speaker if a majority so votes. We find nothing in this record to suggest that the internal rules of the Nitijela are not adequate to provide for the orderly conduct of legislative business.

Accordingly, the judgment of the High Court remains in effect. The appeal is dismissed for want of a Constitutional question.

Gerald M. Zackios, Attorney General
Filimon Manoni for Appellants
David M. Strauss for Appellee

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IMATA KABUA, PHILLIP MULLER and TONY DE BRUM,

Plaintiffs-Appellants,

-v-

KESSAI NOTE in his official capacity as Speaker of the Nitijela and JOE RIKLON in his official capacity as Clerk of the Nitijela,

Defendants-Appellees.

S.CT. CIVIL NO. 98-03
(High Ct. Civil No. 1998-091)

APPEAL FROM THE HIGH COURT

SEPTEMBER 17, 1999

FIELDS, C. J.
GOODWIN, A.J. *pro tem*,[1] and KING, A.J. *pro tem*[2]

SUMMARY:

The Supreme Court affirmed the High Court's ruling dismissing plaintiff-appellants' complaint, which sought to have the courts review internal proceedings of the Nitijela with respect to the passage of an Act.

DIGEST:

1. NITIJELA – *Rules – Conflicts of Interest*: Pursuant to Rules 8 and 29 of Nitijela

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

[2]Honorable Samuel P King, Senior Judge, United States District Court for the District of Hawaii, sitting by designation by the Cabinet

Procedure, the Speaker is authorized to raise and rule upon a question of conflict of interest

2. NITIJELA – *Rules – Certification of Acts*: Pursuant to Rule 8 of the Nitijela Rules of Procedure, the Speaker is authorized to certify passage of a legislative enactment.

3. COURTS – *Jurisdiction – Nitijela Proceeding Non-justiciable*: The process by which an Act of the Nitijela becomes a law is within the sole province of the Nitijela not subject to judicial review.

OPINION OF THE COURT BY KING, A.J.

Defendant Speaker Kessai Note and Defendant Clerk Joe Riklon of the Nitijela certified that Nitijela Bill No. 14 ND-2 had been passed by the Nitijela in accordance with the Constitution of the Republic of the Marshall Islands and the Rules of the Nitijela. This legislative bill thus became Public Law 1998-64.

Plaintiffs were and are three voting members of the Nitijela. They are President Imata Kabua, Minister of Foreign Affairs Phillip Muller, and Senator from Majuro Tony de Brum. Their votes were not counted in connection with the passage of Nitijela Bill No. 114 ND-2. They seek in this action to go behind the certification of passage in order to prove that, if any of their votes had been counted, the bill would not have passed.

The dispute arose during the consideration on March 25, 1998, by the Nitijela, of two companion bills, Bill 113 and Bill 114. Bill 113 provided for the repeal of the so-called Gambling Act. Bill 114 provided for the prohibition of gambling activities, including gambling machines, within the Republic.

When these bills came up for consideration, Defendant Note raised the issue of the impropriety of members voting on matters in which the members had a pecuniary interest. He referenced the Ethics in Government Act and Section 29 of the Rules of Procedure of the Nitijela.

Defendant Note stated that he was aware of conflicts of interest of certain members because of their pecuniary interest in gambling machines in the Republic, that he expected

members to declare their conflict of interest and not vote on these bills, and if they did not declare their conflict of interest he would declare it, subject to appeal to the Nitijela. (Affidavit of Defendant Note).

According to Defendant Note's affidavit, all three plaintiffs refrained from voting on Bill 113.

When Bill 114 came up for a vote, a motion to file the bill was made by Plaintiff Kabua (Ex. B1 to the Complaint). Plaintiffs argued that they did not have a conflict of interest when voting on the motion to file because this was a procedural matter not directly related to gambling. Defendant Note rejected that argument and declared that the plaintiffs did have a conflict of interest in relation to the motion to file. (Affidavit of Defendant Note).

In the event, the Speaker did not count the "aye" votes of the three plaintiffs. (Affidavit of Defendant Note). (Defendant Note states that Tony de Brum did not vote on the motion to file. Tony de Brum in his affidavit, Exhibit B3 to the complaint, states that he did. In either case, his vote was not counted.)

Plaintiffs allege that: "This issue, as prejudged by the Speaker was not put to the Nitijela as the rules required." The record before the court does not indicate whether any attempt was made to appeal this ruling to the full body.

The Rules of Procedure of the Nitijela provide in Section 27 that three members may request a vote by call of the roll. According to Defendant Note, the voting on the motion to file was by roll call. The first count was 13 to 13 (not counting plaintiffs' votes). Another Senator's vote which had not been included in the first count was declared to be a "nay" vote making the final result 14 against and 13 for. (There are 33 members of the Nitijela. Three members were absent.)

There was another vote on passage at which Plaintiff Kabua was not present. He left before the vote to attend to other business. (Affidavit of Plaintiff Kabua, Exhibit B 1 to the complaint). The record before the court is silent as to whether the other two plaintiffs attempted to vote on passage of Bill 114.

It is not argued that each of the plaintiffs does not have an interest in gambling machines in the Republic.

Plaintiffs seem to be arguing that (1) the Speaker's application of the conflict of interest rule to the motion to file was in error, either because (a) he had no authority to make such a decision, or (b) he was wrong, or (c) he was not sustained by the vote of the whole body, or (2) his action was "wrongful, unlawful and unconstitutional."

Plaintiffs seek declaratory and injunctive relief as follows:

(1) An order requiring the defendants to count the vote cast by each plaintiff in favor of the motion to file Bill 114 and declaring that the motion to file had carried.

(2) An order declaring that Public Law 1998-64 is null and void.

(3) A preliminary injunction enjoining "the defendants, together with their employees, agents and servants," from enforcing Public Law 1998-64.

(4) A permanent injunction against the same persons prohibiting the enforcement of Public Law 1998-64.

The motion for preliminary injunction was denied earlier.[3]

We adopt the excellent analysis by Acting Chief Justice Harold van Voorhis set forth in the Order dated July 22, 1998, and repeat here only the main principles that guide our decision.

Section 29 of Rules of Procedure of the Nitijela provides: "A member shall not vote on any matter in which he has a distinct, individual, pecuniary interest, or in which his individual conduct is involved."

This rule was adopted pursuant to Article IV, Section 15(1) of the Constitution which provides: "Subject to this Section and to any Act, the Nitijela may from time to time make Rules for the regulation and orderly conduct of the proceedings and the despatch of its official business."

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[3]Among other difficulties with the motion is the fact that it is directed to the wrong persons. Enforcement of the gambling laws is the province of the executive. The same difficulty applies to the prayer for a permanent injunction.

Thus Section 29 of the Rules of Procedure of the Nitijela is clearly authorized by this provision of the Constitution and the further provisions of Article II, Section 16 of the Constitution relating to Ethical Government,[4] and of Section 1704 of the Ethics in Government Act of l993.[5]

Section 8 of the Rules of Procedure of the Nitijela specifies the functions of the Speaker, among which are the duty to be "responsible for ensuring that the official business of the Nitijela is conducted in compliance with the Constitution and these Rules,"[6] and to "authenticate by his signature and cause to be sealed with the official seal of the Nitijela official acts and papers of the Nitijela."[7]

[1,2] Thus, Speaker Note was clearly authorized to raise and rule upon a question of conflict of interest and to certify passage of a legislative enactment, and Clerk Riklon was clearly authorized to countersign documents signed by the Speaker.

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[4]"The Government of the Republic of the Marshall Islands recognizes the right of the people to responsible and ethical government and the obligation to take every step reasonable and necessary to conduct government in accord with a comprehensive code of ethics."

[5]"To ensure that every citizen can have complete confidence in the integrity of the Government, each public official and Government employee shall respect and adhere to the fundamental principles of ethical conduct set forth below . . . .

> . . . .
>
> "(6) Public officials and Government employees shall give due disclosure of any conflict of interest such official or employee has or may have in the performance of his or her duties and recuse himself or herself of any involvement on the matter in his or her capacity as such an official or employee. . . . (underline added)
>
> . . . .
>
> "(12) Public officials and Government employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards set forth in this Chapter . . . ."

[6]Subsection (l)(b). Also Article IV, Section 8(2) of the Constitution.

[7]Subsection (2)(g). *See also* Article II, Section 8(6) of the Constitution, requiring the countersignature of the Clerk of the Nitijela.

The case then reduces to a question of whether the Speaker and Clerk appropriately and lawfully carried out their duties with respect to the proceedings of the Nitijela on March 25, 1998.

Article IV, Section 16 states in relevant part:

> (1) The validity of any proceeding in the Nitijela. . . and the validity of any certificate duly given by the Speaker under Section . . . 21 of this Article . . . shall not be questioned in any court; but this shall not be taken to preclude judicial review of the validity of any Act . . . of the Nitijela under this constitution.
>
> . . . .
>
> (3) Neither the Speaker nor any officer of the Nitijela in whom powers are vested for the regulation of procedure or the conduct of business or the maintenance of order shall, in relation to the exercise of any of those powers, be subject to the jurisdiction of any court, but this shall not be taken to preclude the exercise of judicial power under Section 7 of Article II or judicial review, in an action against the Clerk of the Nitijela as a nominal defendant, pursuant to Section 9 of this Article.

[3] We note that the provisions of Public Law 1998-64 are not at issue, but only the process by which it became a law. Since the process detailed above was within the sole province of the Nitijela, this court is without jurisdiction to review the official actions of the Speaker and Clerk regarding the proceedings of the Nitijela with respect to Public Law 1998-64.

Brown v. Hansen, 973 F.2d 1118, 1122 (3d Cir. 1992), states the general rule that: "If defendants' conduct here did not violate any constitutional or statutory provision, the question whether the legislature violated its own internal rules is nonjusticiable."

Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892), in holding that federal courts will not inquire into whether an enrolled bill was the bill actually passed by Congress, stated:

> The signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress. It is a declaration by the two houses, through their presiding officers, to the President, that a bill, thus attested, has received, in due form, the sanction of the legislative branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass Congress shall be presented to him. And

> when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed Congress should be deemed complete and unimpeachable . . . . The respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated: leaving the courts to determine, when the question properly arises, whether the act, so authenticated, is in conformity with the Constitution."

This statement was quoted and cited with approval by Justice Scalia in *United States v. Munoz-Flores*, 495 U.S. 385, 408 (1990).

The Constitution and judicial holdings lead to the conclusion that the courts have no jurisdiction to decide the issues raised in the complaint.

The decision and order of the High Court dismissing the complaint is affirmed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MAY JANNO ELMO,

Plaintiff-Appellant,

-v-

NEIMATA NAKAMURA KABUA,

Defendant-Appellee.

S.CT. CIVIL NO. 97-05
(High Ct. Civil No. 1996-175)

APPEAL FROM THE HIGH COURT

OCTOBER 4, 1999

FIELDS, C. J.
GOODWIN, A.J. *pro tem*,[1] and KING, A.J. *pro tem*[2]

SUMMARY:

This is an appeal from a High Court judgment that Plaintiff-Appellant was not entitled to a share of land use payments going to the iroij as Plaintiff-Appellant's successor was not the child of a previous iroij. The Supreme Court affirmed.

DIGEST:

1. APPEAL AND ERROR – *Review – Discretionary Matters – Findings of Fact*: The Findings of Fact by the High Court are not to be set aside by the Supreme Court unless found to be clearly erroneous.

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

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

[2]Honorable Samuel P King, Senior Judge, United States District Court for the District of Hawaii, sitting by designation by the Cabinet

ELMO v. KABUA

Erroneous: A Findings of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the Court below made a mistake

3. APPEAL AND ERROR – *Same – Same – Same – Same*: "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 – *Same – Questions of Fact*: Appellate Courts will not interfere with the findings of the trial court which are supported by credible evidence.

5. APPEAL AND ERROR – *Same – Same*: An Appellate Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision.

6. APPEAL AND ERROR – *Same – Same*: There is credible evidence to support the findings of the trial court and this court will not re-weigh the evidence, but must make every reasonable presumption in favor of the trial court's decision.

7. LAND RIGHTS – *Iroij – Powers and Obligations*: An iroij must notify and consult with his successor and/or Bwij, before executing a testamentary statement allocating a certain amount to be paid to another from the iroij's share of land use payment.

8. EVIDENCE – *Discretion of Court*: Generally evidentiary matters are said to he committed to the discretion of the trial court.

9. APPEAL AND ERROR – *Review – Discretionary Matters – Evidentiary Matters*: The trial court's decision regarding evidentiary matters will be reviewed only for an abuse of discretion.

10. APPEAL AND ERROR – *Review – Harmless Error*: Assuming the evidence was improperly admitted, such admission "is not grounds for reversal if it appears there is sufficient evidence to justify the decision, independently of the evidence to which the objection was made." Further any such error must affect "a substantial right of the party" otherwise it will be deemed harmless error.

OPINION OF THE COURT BY FIELDS, C.J.

Plaintiff-Appellant appeals from the High Court decision denying her claim for a portion of the proceeds of land use payments.

Appellant claims three points of error:

(1) Both the Traditional Rights Court and the High Court erred in their Findings and Conclusions that Appellant's father Korab (aka Lokorab) was not the son of Nellu.

(2) The Traditional Rights Court abused its discretion in allowing testimony of witnesses not included in Defendant's witness List pursuant to the pre-trial order and in denying Plaintiff the same opportunity.

(3) The High Court denied Plaintiff the opportunity to submit "newly discovered evidence" to support Plaintiffs motion for relief from the Judgment.

In its findings of fact, the High Court accepted the Traditional Rights Court's findings that Plaintiff was not entitled to share the land use payments received by Defendant because Korab was not the child of Nellu. Further, the iroij (Kabua Kabua), under custom, cannot bind his or her successor (Defendant, Neimata Nakamura Kabua) to pay a certain sum of money to another (Plaintiff, May Janno Elmo).

The case was tried before the Traditional Rights Court on questions certified by the High Court. The matter then came before the High Court for argument on whether to accept or reject the findings and conclusions of the Traditional Rights Court. The Constitution of the Republic of the Marshall Islands provides that "The jurisdiction of the Traditional Rights Court shall be limited to the determination of 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 Marshall Islands." Article VI, section 4(3). "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." Article VI, section 4(5).

The question certified to the Traditional Rights Court was: Was Plaintiffs father, Korab, the son of Nellu and thus entitled to share one-half of the proceeds of the land use payment received by Defendant?

The genealogy involved herein is as follows: Neimakwa, a Leroij Lap Lap, had two sons.

The oldest was Nellu and the younger was Laelan. Laelan's successor was Kabua Kabua. Neimata Nakamura (Kabua)-Defendant is the acknowledged successor to Kabua Kabua. May Janno Elmo-Plaintiff is the daughter of Korab, and claims that Korab is the son of Nellu, and as a result she is entitled to one-half the land use payments.

Evidence was presented to the Traditional Rights Court on the issue of Korab's parentage. The traditional Rights Court found that Korab was not the son of Nellu. This finding was based upon the fact that Nellu never acknowledged to his people and his Bwij that Korab was his son. Korab was not born or raised in Nellu's household. Further Korab never held the title of iroij lab lab. Under custom if Korab was the child of Nellu, he would have succeeded Laelan as iroij lab lab upon Laelan's death. Also Korab never owned a separate book of credit at any business establishments, but rather had to rely on Laelan's credit. If Korab was the son of Nellu he would have owned his separate account as do other iroij. Plaintiff has not pointed to any evidence to the contrary that should have been offered on this subject.

[1-3] The Findings of Fact by the High Court are not to be set aside by the Supreme Court unless found to be clearly erroneous. *Mwejdriktok v. Langijota and Abija*, 1 MILR (Rev.) 172, 174 (Aug 15, 1989), *Lokkon v. Nakap,* 1 MILR (Rev.) 69, 72 (Feb 5, 1987). A Findings of fact is clearly erroneous when review of the entire record produces a definite and firm conviction that the Court below made a mistake. *Zaion, et al., v. Peter and Nenam,* 1 MILR (Rev.) 228, 233 (Jan 24, 1991), *Lobo v. Jejo,* 1 MILR (Rev.) 224, 226 (Jan 2, 1991). The United State Supreme Court has defined clearly erroneous as follows: "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." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395 (1948).

[4,5] Appellate Courts will not interfere with the findings of the trial court which are supported by credible evidence. *Ebot v. Jablotok*, 1 MILR (Rev.) 8, 9 (Aug 6, 1984). An Appellate Court must refrain from re-weighing the evidence and must make every reasonable presumption in favor of the trial court's decision. *Les Northup Boat Repair, et al., v. O/S Holly Elaine, et al.,*

1 MILR (Rev.) 176, 179 (Oct 2, 1989).

[6] There is credible evidence to support the findings of the trial court and this court will not re-weigh the evidence, but must make every reasonable presumption in favor of the trial court's decision. The Appellant fails to show clear error in the High Court's findings, and this Court cannot discern any. Therefore we find no clear error in the findings of the High Court.

[7] There is no evidence to dispute, and Plaintiff fails to set forth any reasons to contradict, the findings that an iroij (Kabua Kabua) must notify and consult with his successor and/or Bwij, before executing a testamentary statement allocating a certain amount to be paid to another (Plaintiff herein) from the iroij's share of land use payment. There was no evidence to the contrary presented. Kabua Kabua's payment of $8,000.00, which is far less than one-half of the total payments, fails to support Plaintiffs demands for one-half. It merely confirms the iroij's discretion to pay a sum to another person during his lifetime.

[8,9] Appellant complains that the Traditional Rights Court's refusal to permit the admission of "newly discovered evidence," being a tape recording of the 1990 Constitutional Convention dated March 15, 1995 (1995 obviously an error in date for a 1990 Convention) was prejudicial. The Court ruled that the exhibit was not on the Plaintiff's original list of exhibits and further that it was hearsay. The appellant has failed to explain why an exhibit 7 years in existence is newly discovered. Also there is no showing that it would be an exception to the hearsay rule or how it is relevant to these proceedings. Generally evidentiary matters are said to be committed to the discretion of the trial court. The trial court's decision will be reviewed only for an abuse of discretion. *United States v. Abel*, 469 U.S. 45 (1984); *Campbell v. Gregory*, 867 F.2d 1146 (8th Cir. 1989). The Court finds no abuse of discretion.

[10] The Appellant cites as error, the Traditional Rights Court allowing Defendant to present a genealogy of the "Rikwalalein clan," that was not submitted in the pre-trial list of exhibits. Defendant offered to supply a copy of the exhibit to Plaintiff following the testimony of the witness and presumably prior to any cross examination. Appellant has not presented any showing of prejudice. Assuming the evidence was improperly admitted, such admission "is not

grounds for reversal if it appears there is sufficient evidence to justify the decision, independently of the evidence to which the objection was made." *Samuel Bulale, et al. v. Robert Reimers, et al.*, 1 MILR (Rev.) 259 (May 8, 1992). Further any such error must affect "a substantial right of the party" otherwise it will be deemed harmless error. Federal Rules of Evidence 103(a). Appellant fails to show that the error was other than harmless.

Appellant objects to the admission of Defendant's exhibit C. Apparently this exhibit was only page 7 of a 7 page document, written by a Chaplain Buckingham. The entire 7 pages were before the Court and Appellant failed to move into evidence the first 6 pages. It is the responsibility of the attorney to insure that all documents are offered into evidence before he can complain of error.

Appellant's offer to the High Court of the first 6 pages as "newly discovered evidence" fails since the evidence was marked as an exhibit and discussed by counsel in the Traditional Rights Court and the failure to offer it as evidence at that time bars its later introduction before the High Court as "newly discovered." Apparently Buckinham's evidence as to Korab's parentage came only from Korab himself.

The Judgment is affirmed, and all money held shall be released to Defendant, Neimata Nakamura (Kabua).

Atbi A. Riklon for Plaintiff-Appellant
John M. Silk for Defendant-Appellee

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

ARROWHEAD ENTERPRISES LIMITED,

Plaintiff-Appellant,

-v-

TRENTON INTERNATIONAL, INC.,

Defendant-Appellee.

S.CT. CIVIL NO. 99-05
(High Ct. Civil Action 1999-178)

STIPULATION OF DISMISSAL OF APPEAL, WITH PREJUDICE

The parties each through counsel hereby stipulate to the dismissal, with prejudice, of the above captioned appeal pursuant to Rule 42(b) of the Supreme Court Rules of Procedure for the Republic of the Marshall Islands. Pursuant to the above mentioned Rule of Procedure neither party requests costs and no fees are currently due.

/S/
Dennis Reeder
Date: December 10, 1999
For Plaintiff/Appellant

/S/
Carl Ingram
Date: December 10, 1999
For Defendant/Appellee

ORDER

Pursuant to the stipulation as stated above and Rule 42 (b) of the Supreme Court Rules of Procedure for the Republic of the Marshall Islands the above captioned appeal is hereby dismissed with prejudice with each party to bear its own costs and fees.

Dated: December 16, 1999.

/S/
Chief Justice A. Fields
Supreme Court, Republic of the
Marshall Islands

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

IN THE MATTER OF THE ESTATE OF MARIA PETER, Deceased,

S.CT. CIVIL NO. 95-02
(High Ct. Probate No. 1994-002)

By: HENSE HENSENE,

Petitioner-Administrator

-v-

WITTEN T. PHILIPPO,

Respondent,

and

OKJEN KOBAIA

Respondent-Real Party in Interest.

ORDER DENYING MOTION FOR REHEARING, VACATION OR MODIFICATION

JANUARY 10, 2000

FIELDS, C.J.

James McCaffrey, acting in violation of P.L. 1994-87, being the Probate Code (Amendment) Act of 1994 and certified and became law on March 3, 1994, filed a "Petition for Writ of Mandate, Prohibition or other Appropriate Relief" on November 22, 1995. The petition was properly denied by Chief Justice Clinton Ashford; his Order dated December 13, 1995,

Thereafter Attorney McCaffrey began an assault upon the integrity of the Acting Chief Justice of the High Court, Witten Philippo, as well as upon the Chief Justice of the Supreme Court, Clinton R. Ashford. McCaffrey filed several unwarranted requests with the Judicial Service Commission in an attempt to circumvent the Republic of the Marshall Islands Constitution and to interfere with the independence of the Judiciary. The second request was on

June 25, 1996, following the resignation of both Justice Witten Philippo and Chief Justice of the Supreme Court, Clinton R. Ashford. Both resignations were a direct result of McCaffrey's unwarranted and unjustified accusations made to the then Cabinet of the RMI. McCaffrey had no standing to appear and represent the administrator in this action since he was clearly prevented from doing so by a valid and duly enacted law of the Nitijela. (P.L 1994-87). His continued appearance was also contrary to a direct Order issued by Judge Philippo. McCaffrey's direction to the Clerk of the High Court to remove a letter to the Court from opposing Counsel, from the file may well be a violation of Title 31, Section III of the Revised Code as well as Disciplinary Rules.

The deliberate misleading and unwarranted actions of Attorney McCaffrey resulted in the resignation of the two of the finest justices to serve the Judiciary and the citizens of the Marshall Islands.

This Court takes judicial notice of two letters written by Justice Witten Philippo. One letter dated February 8, 1996 addressed to then President, Amata Kabua, setting forth McCaffrey's inappropriate conduct which was contrary to the Constitution of the RMI. The second letter, dated June 30, 1996, directed to then Justice Daniel Cadra, as Chief Justice of the High Court and Chairman of the Judicial Service Commission, pointing out the false statements of Attorney McCaffrey.

The purpose of P.L. 1994-87 was to prevent private attorneys from taking money awarded Marshallese citizens for Nuclear Claims damages. The purpose of the Act was to insure that the compensation go to the injured Marshallese citizens. The RMI Legal Aid or the Public Defender was to provide legal services free to the citizens. This Act was declared constitutionally valid in *In the Matter of Public Laws Nos. 1993-56 and 1994-87*, 2 MILR 27 (Feb 3, 1995).

To allow McCaffrey to make a belated claim that he is hired by Legal Aid would be to circumvent the will of the Nitijela. In addition any money paid to McCaffrey by Legal Aid would deplete the budget of Legal Aid, thus preventing deserving Marshallese citizens from free legal services as directed by the Nitijela.

IN THE MATTER OF THE ESTATE OF PETER (rhe.)

There is nothing presently pending in the Supreme Court in this matter. This Court has validly denied the writ filed by McCaffrey. McCaffrey has absolutely no legal standing to file any papers or motions in this Court or the High Court in the matter of the Estate of Maria Peter.

There is no stay Order in the High Court since there is no appeal pending in the Supreme Court in this matter. Thus all Orders issued by Justice Witten Philippo shall remain in full force and effect.

IT IS ORDERED that the Public Defender shall be the Attorney for the Administrator.

The High Court shall appoint a substitute administrator in this action.

IT IS FURTHER ORDERED that James McCaffrey shall abstain from all attempts to represent the Administrator in this matter in the High Court and in this Court. Any attempt to violate this Order in any way shall result in a contempt of court and any other sanctions, including the suspension to practice law in the RMI. In addition, the High Court has on November 23, 1995, issued an Order ordering McCaffrey to cease further filings in this case.

IT IS FURTHER ORDERED that the Clerks of the Courts shall not accept any motions or other filings from James McCaffrey in this matter, as they would violate the Act of the Nitijela, the Order of the High Court, and the Order of the Supreme Court.

The High Court is directed to proceed with the orderly distribution of the assets of the decedent, Maria Peter.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

SIMON ANTOLOK AND LISA ANTOLOK as Guardian Ad Litem for LINNE ANTOLOK,

Plaintiff-Appellees,

-v-

The Estate of PETRUS LAKBEL aka Petrus Langbil,

Defendant-Appellant.

S.CT. CIVIL NO. 98-02
(High Ct. Civil No. 1997-127)

APPEAL FROM THE HIGH COURT

MAY 4, 2000

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

SUMMARY:

The High Court entered a judgment for damages in favor of plaintiff who, as a four year old girl, had been sexually assaulted by the defendant. The defendant challenged the sufficiency of evidence of damages. The Supreme Court affirmed.

DIGEST:

1. DAMAGES – *Pain and Suffering*: When the undisputed evidence establishes as a fact that the wrongdoer caused physical and mental suffering, that there was damage to tissue and loss

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

[2]Honorable Daniel Cadra, Senior Judge, Palau National Judiciary, sitting by designation by the Cabinet

of blood, and that the battery resulted in a lasting, if not indeed, permanent psychological disorder, the victim is entitled to such an award of money damages as in the reasonable judgment of the trier of fact is appropriate to make the victim as whole as possible by the imperfect means of a money judgment.

2. DAMAGES – *Same*: The award of damages for pain and suffering, physical or mental, will be left to the sound judgment of the trial judge.

OPINION OF THE COURT BY GOODWIN, A.J.

In 1992, the late Petrus Lakbel was convicted of two counts of aggravated sexual assault upon a four year old female child. As the child grew older she showed evidence of psychological disorder. After considering the evidence of the post traumatic damage, which included hemorrhage as well as contusions suffered by the child, the trial court assessed damages against the estate of the deceased wrongdoer and entered judgment for $30,000 with interest to run until paid. The estate has appealed: challenging only the sufficiency of the evidence of damages.

We have jurisdiction of this timely appeal pursuant to Art. VI, Section 2(a) of the Marshall Islands Constitution, and we affirm.

[1] No dispute as to the events giving rise to the cause of action, nor to the admissibility of evidence, appears in the record. The sole question on appeal is whether, in an action for damages for aggravated assault and battery, the trier of fact is authorized to award a specific sum of general damages for pain and suffering, when the record contains no evidence of economic loss, and no evidence of medical expenses or other financial loss. We have examined such authority as has been cited to us, and such as we have found in the decision of other courts, and have concluded that when the undisputed evidence establishes as a fact that the wrongdoer caused physical and mental suffering, that there was damage to tissue and loss of blood, and that the battery resulted in a lasting, if not indeed, permanent psychological disorder, the victim is entitled to such an award of money damages as in the reasonable judgment of the trier of fact is appropriate to make the victim as whole as possible by the imperfect means of a money

judgment. *See State Rubbish Collectors Ass'n v. Siliznoff*, 38 Cal. 2d 330 (1952).

It is a rare case when a reviewing court can say with confidence that a proposition is "Hornbook" law. In this case, we can turn to Charles T. McCormick, Damages (Hornbook Series) West 23rd Reprint, 1985. There we find at Section 88, page 315, the following "black letter" words:

> One who sustains bodily injury may recover damages for past and future physical pain and serious mental suffering accompanying such injury or produced thereby. This includes fright and shock at the time of the injury, pain during treatment, fear of future incapacity, and, in most suits, the humiliation . . . . The law has no standard by which to measure pain and suffering in money. This must be done by the jury in their discretion, subject to review by trial and appellate courts, only in cases of obviously unreasonable awards.

The text is followed by scores of cited cases.

[2] Indeed, the standard jury instructions leave the amount of money to be awarded to the sound discretion of the jury in those judicial systems that employ lay jurors to try personal injury cases and to fix the amount of appropriate compensation. *See Loth v. Truck-A-Way Corp.*, 60 Cal. App. 4th *757* (1998), *reviewed denied* (Apr. 15, 1998). Those courts ordinarily do not receive evidence on the "value" of pain and suffering, physical or mental, but leave the award of such damages to the common sense of the jury. *Id*. Thousands of courts that do not employ the services of a jury allow the trial judge to make such an award as in his or her sound judgment will substitute monetary reparation when the damage actually done by the wrongdoer is essentially irreparable.

The only remaining question in this appeal is whether the sum of $30,000 is a reasonable amount of money to award as reparation for the injury suffered by the minor child whose parents and guardians have resorted to court to vindicate her right We find nothing in law or precedent to say that the award made by the able trial judge in this case was unreasonable. *See generally Siliznoff*, 38 Cal. 2d at 340-341. If the injured child in this case is fortunate enough to enjoy the average longevity of a child in the Marshall Islands, she may live for another 70 years, more or

less, with the memory of that attack when she was four years old. The sum of $30,000, divided by the number of months in 70 years comes out to about $36.95 per month. Even when enhanced by investments, the return on $30,000 is not a sum that is shocking in its munificence.

AFFIRMED.

Costs of appeal are awarded to Plaintiffs-Appellees.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS

Plaintiff-Appellee,

-v-

LEMJEIK KATWON,

Defendant-Appellant.

S.CT. CRIMINAL NO. 98-01
(High Ct. Crim. No. 1997-040)

APPEAL FROM THE HIGH COURT

NOVEMBER 14, 2000

FIELDS, C.J.

The Motion [to Dismiss] having been served upon Appellant and Counsel on November 9, 2000, and there being no response to this motion and there being good cause shown for the granting of this Motion to Dismiss Appellant's appeal the Motion is here by GRANTED and this case is returned to the High Court for final action.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

KOTTA LOKKAR,

Plaintiff-Appellant,

-v-

LANBO KEMOOT,

Defendant-Appellee.

S.CT. CIVIL No. 99-04
(High Ct. Civil No. 1997-124)

APPEAL FROM THE HIGH COURT

NOVEMBER 28, 2000

FIELDS, C.J.

SUMMARY:

The Supreme Court denied Plaintiff-Appellant's motion for a sixth continuance to file an opening brief and dismissed the appeal for failing to timely file an opening brief.

DIGEST:

1. EVIDENCE – *Affidavits – In General*: Affidavits must be based on facts and not belief.

The Notice of Appeal was filed in this matter on April 14, 1999, from a Judgment entered and filed on March 12, 1999.

A motion for Enlargement to file the opening brief was filed on 11-24-99 requesting a delay of up to 12-31-99.

Another request was filed on 12-28-99 requesting up to 1-31-2000.

Again a request was filed on 1-27-2000 for an additional 25 days. On 1-28-2000 a request was for an additional 20 days from 1-28-2000.

Again a request was filed on 3-27-2000 for up to April 11, 2000.

Plaintiff filed a request on 9-25-2000 stating that this was his final request and wanted 21 days to get an attorney and then 45 days to file his opening brief.

On November 27, 2000, Plaintiff filed a new request asking to file his opening brief on 1-29-2001. This request was accompanied by affidavits from Hemos Jack and David Lowe. Hemos Jack stated he would not be able to be counsel of record for Appellant if Lowe was not co-counsel. Lowe states that he "believes" they could file an opening brief by January 29, 2001. **[1]** An affidavit must be based on facts and not a belief. Therefore Lowe's purported affidavit is insufficient to be considered as an affidavit. Under any circumstances there is not reasonable cause to grant any further continuances.

The appeal was filed from a Judgment entered over 21 months ago. No further enlargement will be granted. No good cause for a continuance has been shown.

It is ordered that the purported appeal in this matter be dismissed and the matter is returned to the High Court for such further proceedings as may be necessary.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

THE REPUBLIC OF THE MARSHALL,

Plaintiff,

-v-

AMERICAN TOBACCO COMPANY, *et al.*,

Defendants.

S.CT. CIVIL NO. 00-04
(High Ct. Civil No. 1997-261)

APPEAL FROM THE HIGH COURT

MARCH 7, 2001

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

SUMMARY:

Defendants filed an action in the Supreme Court seeking a writ of prohibition or *mandamus* directed to the High Court. The Supreme Court declined to issue the writ because the petition sought relief from an interlocutory order and Defendants, if prejudiced, had a remedy by appeal from a final judgment.

DIGEST:

1. WRITS, EXTRAORDINARY – *Requirements – Matters of Public Importance*: The Supreme Court will hear writs of *mandamus* or prohibition challenging High Court action in cases of extraordinary public importance.

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

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

MARSHALL ISLANDS, SUPREME COURT

2. WRITS, EXTRAORDINARY – *Writs In Lieu of Interlocutory Appeals Disfavored*: Interlocutory rulings of the trial court can be assigned as error on appeal from a final judgment.

3. WRITS, EXTRAORDINARY – *Same – Same*: Assuming that the writ procedure can sometimes be utilized as a substitute for an interlocutory appeal, in the rare case where such an appeal is available, it should be noted that interlocutory appeals are not favored.

4. WRITS, EXTRAORDINARY – *Same – Same*: Common law courts have learned from experience that interlocutory and piecemeal appeals in most cases are wasteful of both time and judicial resources. Extraordinary writ practice employed in lieu of an interlocutory appeal suffers from many of the same infirmities.

[1] Pursuant to Rule 21 (b), Defendants have filed and served their petition for writs of *mandamus* or prohibition to challenge the continuing jurisdiction of the High Court to proceed with this litigation. In cases of extraordinary public importance we have considered, and ruled upon, petitions for similar relief in the past. *See Kabua v. High Court, et al. (2),* 1 MILR (Rev.) 27, 30 (Mar 17, 1986). This case meets the public importance standards cited in *Kabua*. Accordingly, we have set the petition for oral argument. Now, after argument, and after our examination of the papers submitted by the parties, we deny the writ because the petition does not reveal sufficient grounds for departure from established judicial procedure of trial and appeal.

The propriety of continuing this litigation was appropriately tested in the High Court by a Rule 12 (b) (6) motion to dismiss for failure to state a claim, which was denied without prejudice to further consideration of narrowly focused motions as the case progresses in the High Court. Contrary to the assertions by the Petitioner that the High Court summarily denied the dismissal motion, the record shows that the Court considered the tendered questions on their merits and ruled according to its understanding of the record and relevant law at that time.

[2] We express no opinion on the merits of the interlocutory rulings of the trial court, but note that any errors of law that may occur in the trial court can be assigned as error on appeal from a final judgment. *See e.g., Bauman v. United States District Court,* 557 F.2d 650 (9th Cir. 1977).

[3] The petitioner's quest for termination by way of an extraordinary writ is not helped by the argument that waiting for an appeal of a final judgment is costly in time and client resources. The generality of that claim is not peculiar to this litigation. Assuming that the writ procedure can sometimes be utilized as a substitute for an interlocutory appeal, in the rare case where such an appeal is available, it should be noted that interlocutory appeals are not favored by most of the English speaking judicial systems that have been called to our attention.

[4] Common law courts have learned from experience that interlocutory and piecemeal appeals in most cases are wasteful of both time and judicial resources. *See, e.g., Johnson v. Jones*, 515 U.S. 304, 309 (1995). Extraordinary writ practice employed in lieu of an interlocutory appeal suffers from many of the same infirmities. In the case at bar, for example, major questions of law remain to be decided in a final, appealable judgment. Interlocutory statements by the trial judges at various stages of pretrial may alarm one or more of the parties, but do not constitute final and appealable judgments.

Petition denied without prejudice to legal questions being renewed upon timely appeal. No party to recover costs in this petition.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff,

-v-

AMERICAN TOBACCO COMPANY, *et al.*,

Defendants.

S.CT. CIVIL NO. 00-06
(High Ct. Civil No. 1997-261)

REMOVAL BY THE HIGH COURT

MARCH 27, 2001

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

SUMMARY:

The Supreme Court denied Defendants' motion to dismiss conditionally without prejudice to re-file in a proper forum. The Court found that the courts of the Republic and potential jurors did not have disqualifying interests in the outcome of the litigation.

DIGEST:

1. APPEAL AND ERROR – *Review – Discretionary Matters – Motions in General*: The standard of review of the High Court's order denying the motions may be reversed only for an abuse of discretion.

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

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

RMI v. AMERICAN TOBACCO, *et al.* (3)

OPINION BY FIELDS, C.J.

Defendants filed a motion to disqualify the courts in the Republic of the Marshall Islands from hearing this action and requesting that this action be dismissed conditionally without prejudice, to re-file in a proper forum.

It is alleged as a basis for this motion that (1) the judges and jurors alike have a disqualifying interest in the outcome of the litigation; (2) the relationship between the citizens of the Republic and their government, the translational barriers and the absence of jury experience in the Republic; (3) the RMI's government early termination of a judge's contract originally assigned to this case; and (4) an alleged long history of the RMI's government interference with the judiciary.

The trial court denied Defendants' motion to disqualify the courts and granted Defendants' motion ordering this matter removed to the Supreme Court pursuant to Art. VI, Section 2(3) of the RMI's Constitution, which provides for the removal of "any question arising as to the interpretation or effect of the Constitution in any proceeding of the High Court." Defendants allege the constitutional question is whether the Defendants' right to due process of law guaranteed by Art. II, Section 4 would be violated by a trial by a jury of RMI citizens or by a judge in the Marshall Islands.

[1] The standard of review of the High Court's order denying the motions may be reversed only for an abuse of discretion. *Thomassen v. United States*, 835 F.2d 727 (9th Cir, 1987).

Defendants arguments are without merit. The judges and jurors of the Marshall Islands are not parties to this law suit and will not directly receive any damages that may be recovered. While the attorneys appearing in this case are trained in the law in the United States and some are licensed and continue to practice there, they have failed to cite any case from the United States that prevents judges or jurors in those jurisdictions from hearing these same claims brought before them.

The Constitution of the Republic of the Marshall Islands was adopted in 1979 and insures certain rights to all citizens, especially those set forth in Article II, entitled "Bill of Rights." Art.

MARSHALL ISLANDS, SUPREME COURT

I, Section 1(1) provides "This Constitution shall be the supreme law of the Republic of the Marshall Islands; and all judges and other public officers shall be bound thereby." Article I, Section 2(2) states "Any other action taken by any person or body on or after the effective date of this Constitution which is inconsistent with this Constitution, shall, to the extent of the inconsistency, be unlawful." Article I, Section 3(2) states "In all cases, the provisions of this Constitution shall be construed to achieve the aims of fair and democratic government, in the light of reason and experience."

Prior to the constitutional guarantees of the rights given to all citizens, the iroij had virtually complete domination over their subjects. The Constitution was enacted with the full support of the iroij. The complete dominion by the iroij over their subjects no longer exists. The Preamble of the Constitution states "WE THE PEOPLE OF THE REPUBLIC OF THE MARSHALL ISLANDS, trusting in God, the Giver of our life, Liberty, identity and our inherent rights, do hereby exercise these rights and establish for ourselves and generations to come this Constitution, setting forth the legitimate legal framework for the governance of the Republic." The citizens are free to exercise their own minds and not be influenced by others. The President of the Republic, who is not an Iroij was elected and has prevailed over the Iroij. There is no doubt that the citizens can serve as fair and impartial jurors in any trial in the Marshall Islands.

Translational difficulties can be involved in any trial. Until the courts throughout the world provide for only jurors as well as judges who are experts in the subject matter in the controversy before the courts, there may be some problems. In the meantime we must rely upon the expertise of the attorneys in conducting their *voir dire* of the jurors, and in their presentation of the evidence during the course of the trial.

The Constitution provides in Article VI for the Judiciary in the Republic. Section 1 of that Article provides in (1) "The judicial power of the Republic of the Marshall Islands shall be independent of the legislative and executive powers and shall be vested in a Supreme Court, a High Court, a Traditional Rights Court, and such District Courts, Community Courts and other subordinate courts as are created by law, each of these courts possessing such jurisdiction and

powers and proceeding under such rules as may be prescribed by law consistent with the provisions of this Article." The term of the non-Marshallese judge shall be for a term of one or more years set by the Cabinet. Art. VI. Section 1(4).

Historically the term has been set by the Cabinet, and the Judge is confirmed by the Nitijela for the usual term which has been for a total of 4 years. Either party, after two years, may terminate the employment without stating any reason. A judge may be removed during these two years only by impeachment.[3]

The judges of the Marshall Islands have subscribed to and are dedicated to the concept of the independence of the judiciary, as set forth in the Constitution of the Republic. *See* the attached appendix "A" being a report of the Judiciary to the Nitijela, by the Chief Justice of the Supreme Court and dated February 9, 1998, and the attached "Beijing Statement" wherein the Marshall Islands is a signatory to the accord.

Judges do not serve at the pleasure of the Government, but rather for the terms set forth by the Cabinet. In all the cases set forth by the Defendants no judge was fired, but instead they resigned. This does not excuse the attempted interference with the judiciary. No judge made any decision to please the government, rather they gave up their employment. The decisions to resign were great losses to the judiciary and more importantly a greater loss to the Marshallese people. The resignations of the Chief Justice of the High Court, Witten Philippo, and the Chief Justice of the Supreme Court, Clinton Ashford, were a result of the most egregious conduct of an American attorney, James McCaffrey. He was formerly an employee of the Nitijela who became dissatisfied with the decisions of the both judges, and went to the Cabinet and distorted the truth either through ignorance or a direct attempt to advance his own position of power or influence.[4]

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[3]On March 8, 2000, the most recent appointment to the courts by the Nitijela was for a 6 year term, without any option to terminate. 21th Constitutional Regular Session, Resolution No. 18 reappointing to the Supreme Court, Chief Justice Allen P. Fields.

[4]The Supreme court in file No. S.Ct. Civil No. 95-02 dated January 10, 2000, in dismissing McCaffrey's claims stated "The deliberate misleading and unwarranted actions of

MARSHALL ISLANDS, SUPREME COURT

In the most recent case of attempted interference with the Judiciary, again it was an American attorney, David Lowe, who was acting as the legal advisor to the President, Imata Kabua, and as legal advisor to the RMI Cabinet, who was the author of an initially anonymous unjustified scurrilous diatribe against the then Chief Justice of the High Court, Dan Cadra. His later acknowledgment as the author came when the Marshall Islands Journal on Friday, October 9, 1998, re-printed his statement. This newspaper article has been cited in Defendants' Index of Pleadings at tab 3, exhibit K. It is unfortunate that the attorneys omitted the other articles on the same page wherein several opposition Senators spoke out in opposition to Lowe's position and stated "It was expected that political interference by foreign advisors such as David Lowe would advise the government party to disregard the judicial decisions rendered by the High court as has been the case in previous court judgments involving David Lowe as counsel." Also on the same page and also omitted from Defendants citation are the statements by a former Chief Justice of the High Court and then Senator, Witten Philippo, who is presently the Minister of Justice. Minister Philippo was quoted as saying "Lowe had no business issuing such an inflammatory statement against the High Court Chief Justice. The executive branch should treat the judicial branch with due deference, just as the judiciary does to the executive."

Also omitted from Defendants' citation is the article in the Marshall Islands Journal dated October 22, 1999, wherein Senator Wilfred Kendall in reference to Lowe's statement was quoted as saying "those trying to interfere with the Judiciary wanted the government to be an outlaw not a government of law. People are losing confidence in the government because of actions like attorney David Lowe's criticism of the judges."

The Minister of Justice at that time, Hemos Jack, in responding to High Court Chief Justice Dan Cadra's notice that he would serve out his term and then become a judge in Palau,

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Attorney McCaffrey resulted in the resignation of the two finest justices to serve the Judiciary and the citizens of the Marshall Islands." He was further ordered to abstain from taking any further action in that case and any violation of those orders could result in suspending his right to practice law in the Marshall Islands." *See* Appendix B, attached, 2 MILR 157 (Jan 10, 2000)

mistakenly considered this notice as a resignation. The Minister was advised in a letter dated June 9, 1999, from the Chief Justice of the Supreme Court, that Cadra could only be removed at that time by a mutual agreement of the judge and the Cabinet. This was ultimately done. The Minister was further advised to discuss this matter with David Lowe the legal advisor to the Cabinet. Assuming the Minister did so, he still persisted in treating Cadra's notice as a resignation.[5] The Defendants again only cite half of the story in their citation in tab 3, exhibit N, being the article under the headline "Supreme Court Ignorant?." The article quotes Lowe's criticism of the Supreme Court's affirmation of Cadra's decision in *In the Matter of the 19th Nitijela Const. Reg. Ses.*, 2 MILR 134 (Sep 8, 1999). *See* Marshall Islands Journal October 1, l999. To complete the story the attorneys should have referred to the Marshall Islands Journal headlines of October 15, 1999. "Supreme Court Chief to Pres. Imata Kabua, LOWE NEEDS ENGLISH LESSON," and the article following, including the letter addressed to the President that was also printed therein. *See* attached Appendix D.

While much is made of the attempted interference by the government, no mention is made of the support for the judiciary by other members of the Nitijela including the present President, Kessai Note. As reported in the Marshall Islands Journal of May 5, 2000, under headlines "President, Kessai Note says gov't must keep HANDS-OFF THE COURTS." The article states "Majuro-Marshall Islanders have to insure that the court's constitutional right to act independently is not violated by political leaders, President Kessai Note said in remarks at the swearing in of Supreme Court Chief Justice Allen Fields Wednesday. "During the past 20 years, we've seen the independence of the judiciary chipped away by personal interests involved in the judicial system . . . . It's incumbent upon ourselves — the citizens of the RMI — to return to the judiciary its rightful authority and power so it can exercise its independent responsibility under the constitution." Note reiterated his administration's support of the independence of the judiciary to insure that the courts are kept free "of any political influence that might hamper the

[5](*See* letter dated June 9, 1999 attached as Appendix C, from Chief Justice of the Supreme Court also advising the Minister as to the independence of the judiciary.)

court's duties to deliver fair and just decisions for the Marshallese people." He thanked the panel of three Supreme Court judges – which included former High Court C.J. Dan Cadra and U.S. Circuit Court of Appeals Judge Alfred Goodwin – for their earlier rulings that had a "profound effect" on democracy in the Marshall Islands."

The Marshall Islands Journal on December 22, 2000, quoted the powerful U.S. Senator from North Carolina, Jesse Helms, "I will be hard-pressed even to consider supporting the RMI's request (for future U.S. financial support) or, for that matter, engaging in serious discussion regarding renegotiation of the Compact. I share the view that the process of renegotiating the Compact of Free Association should be seen for what it is – an opportunity to promote the implementation of democratic principles in the RMI." He then goes on to discuss the alleged interference with the courts and particularly, Judges Cadra, and Johnson, both American citizens serving as Judges in the Marshall Islands. It can be gleaned from his comments that his information has come from the pleadings filed by the Defendants in this case. It is obvious that he is relying only on part of the true facts, and some of his statements even though they are an attempted inference not only with the judiciary but with the government of the RMI as well, can be excused because of the limited information given to him.

In Defendants' Memorandum of points and authorities on page 1 there appears the statement that "But the action cannot be tried to the Court either because of the Government's repeated pattern of infringing the independence of the judiciary (including the unconscionable and illegal firing of the former Chief Justice in this very case) has rendered the judicial structure of this country constitutionally inadequate to the task of ensuring the fair and impartial bench trial of this suit, in which the Government has an overwhelming interest . . . . Apparently the American attorneys are unfamiliar with the continuing struggle of the courts in the United States to have and to keep their independence. With the election of Thomas Jefferson as President of the United States, in 1800, along with the then called "Republicans" that later became known as "Democrats" that controlled the House as well as the Senate, a reign of terror descended upon the Judiciary. Jefferson controlled the executive and legislative branches and set out to replace all

the federalist judges appointed by his predecessor, President Adams. To accomplish this, the Judiciary Act of 1801 would first be abolished by the new Congress. By repealing the Act of 1801, they would abolish the positions and the 38 federal judges appointed by the Federalists. President Jefferson asserted that he alone, as President, had the authority and power to decide the constitutionality of federal laws. The debate was so heated that several states discussed leaving the Federal Union. The Jeffersonian Republicans decided to first impeach Associate Justice Samuel Chase from the Supreme Court and then would follow with the impeachment of John Marshall, their main target. Jefferson stated "To consider the judges as the ultimate arbiters of all constitutional questions would place us under the despotism of an oligarchy." Chief Justice Marshall responded "The constitution is either a superior paramount law, unchangeable by ordinary means or it is on a level with ordinary legislative acts alterable when the Legislature shall please to alter it. It is emphatically the province and duty of the judicial department to say what the law is. This is the very essence of judicial duty." Marshall then in the case of *Marbury v. Maddison*, pronounced that the Supreme Court had the power to decide Constitutional questions. The attacks upon Marshall and the Supreme Court continued throughout Jefferson's term as President. *See* "The Life of John Marshall" by Albert Beveridge, Volume III, of four volumes, Chapters 1, 2, and 3, pages 1-222, published in 1919.

The fight against interference with the U.S. Supreme Court and the struggle to maintain its independence continues to this day. There was a concerted effort during the time Earl Warren was Chief Justice. The John Birch Society had the support of many Legislators and put up signs on large bill boards throughout the United States calling for the impeachment of the Chief Justice. In 2000, Governor Gray Davis, following his election as Governor of the State of California, called for the resignation of any Judge who he appointed that did not follow his ideas as to the law. On February 3, 2001, the Associated Press reported that Justice Ruth Ginsburg of the U.S. Supreme Court, in a speech to the University of Melbourne Law School on February 1, 2001, regarding the independence of the Judiciary, had some harsh words about House Republican Whip Tom Delay's 1997 proposal to impeach federal judges whose rulings he

believed did not follow the law. It is fortunate today that the officials in the government of the Marshall Islands no longer follow their counterparts the United States, by attempting to interfere with the judiciary.

The Defendants' motion to disqualify the Courts in the Marshall Islands is hereby denied.

GOODWIN AND KURREN ARE CONCURRING SPECIALLY

We concur in the denial of the motion to disqualify the courts. We do not join in the historical material contained in the Order for the reason that we do not believe that material to be necessary to our decision on the removed question before us.

PUBLISHER'S NOTE: FOR EXHIBITS SEE S.CT.'S FILE.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

DORA KIBIN and LARI DAN,

S.CT. CIVIL NO. 00-02
(High Ct. Civil No. 1997-149)

Plaintiffs-Appellants,

-v-

KOMA DOCTOR and
YASHIKO DOCTOR,

Defendants-Appellees.

ORDER OF DISMISSAL

AUGUST 21, 2001

FIELDS, C.J.

Defendants-Appellees[' motion] by Counsel David Strauss and Public Defender Tiantaake Beero [] to dismiss the Plaintiffs' appeal is hereby GRANTED pursuant to Supreme Court Rules of Procedure, Rules 30 and 43b.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

AIR MARSHALL ISLANDS, INC.

Plaintiff-Appellee,

-v-

DORNIER LUFTFAHRT, GmbH,

Defendant-Appellant.

S.CT. CIVIL NO. 01-01
(High Ct. Civil No. 2000-195)

ORDER DISMISSING NOTICE OF APPEAL

AUGUST 22, 2001

FIELDS, C.J.

SUMMARY:

The Supreme Court dismissed an appeal from an interlocutory order as premature.

DIGEST:

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: An appeal shall lie only from a final judgment.

[1] The previous notice of appeal heretofore filed is dismissed as being premature. There can only be an appeal from a final judgment. The request for clarification is denied as the matter is now moot. A final judgment of the High Court was entered and filed on August 17, 2001. There can only be an appeal from this final judgment.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

THE REPUBLIC OF THE MARSHALL ISLANDS

S.CT. CIVIL NO. 01-05
(High Ct. Civil No. 1997-261)

Plaintiff-Appellant,

-v-

AMERICAN TOBACCO COMPANY*, et al.,*

Defendants-Appellees.

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AMERICAN TOBACCO COMPANY*, et al.,*

Defendants-Cross-Appellants,

-v-

THE REPUBLIC OF THE MARSHALL ISLANDS,

Plaintiff-Cross-Appellee.

APPEAL FROM THE HIGH COURT

MAY 9, 2002

MARSHALL ISLANDS, SUPREME COURT

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

Argued and Submitted April 17, 2002

SUMMARY:

Plaintiff, the Republic of the Marshall Islands ("RMI"), sued a number of tobacco manufactures and distributors for damages allegedly caused by selling defective cigarettes to its residents and thereby creating medical expenses which the RMI government was required by its own laws to pay. On defendants' motion for summary judgment, the High Court concluded that the Government had presented no admissible evidence of damages and entered judgment for defendants on all common law causes of action. The High Court retained jurisdiction to review a statutory claim asserted under the Consumer Protection Act. The RMI then moved unsuccessfully to reopen the record and introduce alternative evidence of damages. Thereafter, the parties stipulated to dismissing the remaining statutory claim "with prejudice" so that a final, appealable judgment could be entered. The Supreme Court affirmed.

DIGEST:

1. APPEAL AND ERROR – *Decisions Reviewable – Finality of Determination*: Only final judgments are reviewable.

2. APPEAL AND ERROR – *Same – Same*: Voluntary dismissals, granted without prejudice are not final decisions and do not transform an earlier partial dismissal or partial summary judgment order into a final decision.

3. APPEAL AND ERROR – *Review – Discretionary Matters – Evidentiary Matters*: The standard for review of evidentiary ruling is abuse of discretion.

4. EVIDENCE – *Expert Testimony*: Before admitting expert testimony, trial courts have a unique obligation to inquire into the reliability of the expert's methodology, considering factors as: whether the proffered theory or technique has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error; the standards for controlling the

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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.

technique's operation; and the degree to which it is accepted as reliable within the relevant scientific community. *Kumho Tire*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. 592-94).

5. EVIDENCE – *Same*: Contradictory opinions from an expert is an acceptable ground for disqualification.

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

7. APPEAL AND ERROR – *Review – Questions of Law – Summary Judgments*: The standard of review for summary judgment is *de novo.*

8. DAMAGES – *Generally*: A court cannot hold defendants liable for engaging in lawful activities (i.e., selling and distributing cigarettes in the Marshall Islands). Without evidence linking defendants' allegedly illegal activities to claims of damages, the Court declined to consider the plaintiff's claims beyond summary judgment.

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

10. CIVIL PROCEDURE – *Motions – Summary Judgments – Proof of Damages*: Without a reasonable methodology, summary judgment against the Government is appropriate because the jury is left with no proper proof of damages. *City of Vernon v. Southern Gal. Edison Co.*, 955 F.2d at 1372.

11. APPEAL AND ERROR – *Review – Discretionary Matters – Motions in General*: The standard of review for the denial of a motion to reopen discovery is abuse of discretion.

OPINION BY GOODWIN, A.J.

The Republic of the Marshall Islands ["RMI"] sued a number of tobacco manufactures

and distributors for damages allegedly caused by selling defective cigarettes to its residents and thereby creating medical expenses, which the RMI government was required by its own laws to pay. The government appeals the summary judgment in favor of the defendants, granted by the High Court, Justice Johnson, presiding. We have jurisdiction pursuant to Article VI, Section (2) of the Marshall Islands Constitution, and we affirm.

FACTS AND PROCEDURAL HISTORY

The Republic of the Marshall Islands is a sovereign nation with a population of approximately 50,000. Under its constitution, the RMI government ("the Government") provides its citizens and residents free medical benefits and services, including treatment in public clinics and hospitals throughout the country. The Government alleges that, since the 1950's tobacco companies have conspired to conceal and misrepresent the health risks associated with smoking. As a result of the conspiracy, the Government alleges that the public was kept unaware of the health effects of smoking, and that many RMI residents thereby became addicted to smoking and developed lung cancer, among other afflictions. Not all smokers could pay for treatment. For those who could not afford care, the Government alleges that, pursuant to its constitutional obligation, it has borne the cost of treating tobacco-related illnesses.

On October 20, 1997, the Government filed an action for damages and injunctive relief against each of the eighteen originally named defendants. The Government sought recovery under various legal theories, including one statutory claim under RMI's Consumer Protection Act, and ten common law causes of action including fraud, conspiracy, products liability, negligence, and breach of warranty. All defendants filed timely motions to dismiss for lack of personal jurisdiction. The High Court granted the motions to all but five "manufacturer" defendants ("Tobacco").[3]

Tobacco then moved to dismiss for failure to state a claim pursuant to [Marshall Islands

[3]The Tobacco defendants are: American Tobacco Company; Brown & Williamson Tobacco Corporation; Philip Morris Incorporated; Philip Morris Products, Inc.; and R.J. Reynolds Tobacco Company.

Rules of Civil Procedure] Rule 12(b)(6), alleging that the economic injuries were too remote to satisfy the common law's requirement proximate causation. When the motion was denied without prejudice, Tobacco filed a petition for writs of *mandamus* or prohibition to challenge the continuing jurisdiction of the High Court to proceed with this litigation. We declined to consider the merits of the interlocutory rulings of the trial court and denied the petition without prejudice, but noted that any errors of law that might occur in the trial court could be assigned as error on appeal from a final judgment. *See RMI v. ATC, et al. (1),* 2 MILR 133, 133 (Apr 5, 1999).

While the above-described petition was pending in this Court, the High Court issued a series of scheduling orders. Of particular concern in this appeal is the testimony of Dr. Vincent Miller, produced in keeping with a scheduling order on the discovery of expert testimony.

Dr. Miller created an economic model to calculate the dollar amount that the Government had already spent ("past damages") and would reasonably spend on tobacco-related health care ("future damages"). Both damage estimates depend on the rate at which smokers utilize RMI medical services more than non-smokers. Also known as the "smoking attributable fraction" ("SAF"), this rate, when multiplied by past and future health care costs, yields the total cost of additional health care utilization attributable to smoking.

Based on survey responses from approximately five percent of the RMI population. Dr. Miller initially reported that smokers use the RMI medical system 14.6 percent more than non-smokers (SAF = 14.6%), and produced a total damage estimate of $4.6 billion. He later withdrew that estimate because of errors in coding the RMI survey responses. Once corrected, the model yielded an SAF that was close to zero percent, indicating that RMI smokers do not use medical services measurably more than non-smokers.

Tobacco argued to the High Court that Dr. Miller's model failed to produce any evidence of damages, and moved for summary judgment. Even though discovery had concluded, the High Court deferred ruling on the motion and permitted the Government to rework its damage analysis. On the second attempt, Dr. Miller abandoned the RMI data and based his economic model on the National Medical Expenditure Survey ("NMES"), a database containing medical

profiles of approximately 25,000 Americans, residing in the United States.

Tobacco then challenged Dr. Miller's substitution and renewed its motion for summary judgment. At the end of a two-day hearing, the High Court excluded Dr. Miller's proposed expert testimony as unreliable. Concluding that the Government had presented no admissible evidence of damages, the High Court entered judgment for Tobacco on all common law causes of action. The High Court retained jurisdiction to review the statutory claim asserted under the Consumer Protection Act.

The Government moved unsuccessfully to reopen the record and introduce alternative evidence of damages. Thereafter, the parties stipulated to dismissing the remaining statutory claim "with prejudice" so that a final, appealable judgment could be entered. This appeal followed.

JURISDICTION

We have jurisdiction over this appeal because the partial summary judgment became a final order when the parties stipulated to dismiss the Government's remaining claim "with prejudice" and the High Court entered final judgment in favor of Tobacco.

The Government urges this Court to review the appeal without requiring dismissal of the statutory claim "with prejudice." The Government contends that the "with prejudice" rule creates unfair choices for the party who lost on partial summary judgment: it must either pursue the remaining claims and incur additional litigation fees, or completely give up viable claims for the sole purpose of expediting an appeal.

[1-2] The Government's argument overlooks well-established principles of jurisprudence, and flies in the face of its own Constitution. Article IV, Section 2(2)(a) of the RMI Constitution authorizes this Court to review appeals from a final decision of lower courts. *See Bokmej v. Lang and Jamodre*, 1 MILR (Rev.) 85, 86 (Nov 13, 1987); *RMI v. Balos, et al. (2)*, 1 MILR (Rev.) 67, 68 (Jan 30, 1987) (only final judgments are reviewable by this Court). By limiting our jurisdiction, the final judgment rule ensures that all claims are raised in one appeal, thereby avoiding piecemeal adjudication of a single controversy. *Cobbledick v. United States*, 309 U.S.

323, 325 (1940). Voluntary dismissals, granted without prejudice are not final decisions and do not transform an earlier partial dismissal or partial summary judgment order into a final decision.

A contrary rule invites multiplicity of litigation and unnecessarily expends judicial resources. If we reverse the High Court in an interlocutory appeal of an order granting summary judgment on only parts of a claim, the Government will surely reinstate any claim previously dismissed "without prejudice." Upon the final disposition of that claim, the losing party would seek an appeal to this Court, in endless cycles of litigation.

Because dismissal of some claims without prejudice always leaves open the possibility that the dismissing party would re-file them in the event of reversal, we construe Article IV, Section 2(2)(a) to mean exactly what it says. Literal reading will protect the judicial branch from piecemeal appeals. Similar concerns have led us to decline reviewing an earlier petition of writ from Tobacco. *See ATC, et al. (1), supra* (interlocutory and piecemeal appeals in most cases waste time and judicial resources). Our precedent as well as pragmatism guide our conclusion that exercising jurisdiction when the parties have dismissed remaining claims "without prejudice" undermines the policies that are the basis of the final judgment rule.

THE MERITS OF THE SUMMARY JUDGMENT

I Exclusion of Dr. Miller's Testimony

[3] The Government contends that the High Court erred when it excluded Dr. Miller's damage estimates. We review alleged errors in the High Court's evidentiary rulings for an abuse of discretion. *Block v. City of Los Angeles*, 253 F.3d 410, 416 (9th Cir. 2001).

At issue is the scientific trustworthiness of Dr. Miller's approach to calculating the SAF and, in particular, his substitution of American for RMI population data. The Government argues that Americans and Marshallese have similar physiological responses to smoking because human biology is the same regardless of nationality. In other words, because an American smoker is just as likely to develop tobacco-related illnesses as his RMI counterpart, statistics gathered in one place are as good as those gathered elsewhere. Therefore, Dr. Miller's substitution, the government argues yields reasonable, if not perfect, estimates of medical expenditures incurred

by the RMI as a result of smoking.

The flaw in the Government's argument is that in addition to being a reasonable proxy for actual damages, evidence of injury must also be reliable. The High Court correctly recognized the relevance of *Daubert v. Merrel Dow Pharm, Inc.*, 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court imposed a "gate-keeping" obligation on trial courts to distinguish science from mere speculation. *Daubert*, 509 U .S. at 589-90. This gate-keeping requirement ensures that "an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Go., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999).

[4] The trustworthiness concerns expressed in *Daubert* and its progeny are applicable here. Before admitting expert testimony, trial courts have a unique obligation to inquire into the reliability of the expert's methodology, considering factors as: whether the proffered theory or technique has been tested; whether it has been subjected to peer review and publication; the known or potential rate of error; the standards for controlling the technique's operation; and the degree to which it is accepted as reliable within the relevant scientific community. *Kumho Tire*, 526 U.S. at 149-50 (citing *Daubert*, 509 U.S. 592-94).

The High Court aptly considered these factors before excluding Dr. Miller's testimony. During its two-day hearing, the High Court heard Tobacco recite from transcripts of Dr. Miller's deposition, in which he essentially conceded that his methodology failed under *Daubert*. For example, Dr. Miller testified that the model using American data has never been applied to draw conclusions about the SAF of a foreign population. Dr. Miller also admitted that no published literature has reported, and no scientific community has recognized, SAF results derived from substituting American for a foreign population. Dr. Miller even admitted that, without more corroborative data, he would not submit results from his own model for publication. Finally, Dr. Miller admitted that no evidence supported his conclusion that the new SAF represents a reliable proxy for actual medical utilization rates in the Marshall Islands. On the basis of his own

testimony, Dr. Miller disqualified himself as an expert witness on damages.

Although given the opportunity to defend Dr. Miller's methodology, the Government did not do so on *Daubert* grounds. The Government does not claim that its assertion is scientifically reliable, and does not offer evidence of reliability under *Daubert*. Instead, it argued before the trial court, as it does on appeal, that results based on American population data provide a reasonable proxy because of similar physiological responses to smoking. Under the facts presented, the High Court did not err in finding Dr. Miller's methodology unreliable and excluding his testimony.

[5-6] The High Court excluded Dr. Miller's testimony on the additional ground that he had given contradictory opinions. Although considering an expert's conflicting testimony is not mentioned in *Daubert*, the approach is consistent with common sense and clearly acceptable. *See. e.g., Kumho Tire*, 526 U.S. at 152 (trial courts have broad latitude in their approach to determining reliability). Dr. Miller initially disapproved of using American rather than RMI population data in his model because he considered the substitution unscientific and inappropriate. When the original model yielded unsatisfactory results, however, Dr. Miller switched position: not only did he begin using the American data, he also defended the resulting estimates as a "reasonable proxy" to actual damages. Mere speculations by an expert, however, do not make them expert opinion. *See Stokes v. L. Geismar, S.A.*, 815 F.Supp. 904, 910 (E.D. Va. 1993), *aff'd*, 16 F.3d 411(4th Cir. 1 994) ("the proffering of an expert . . . who will bless a guess-based theory will not suffice to withstand summary judgment."). The courtroom is not the appropriate venue for casual musings of scientists, and the High Court properly discredited Dr. Miller's testimony on the basis of his contradictory opinions.

II Other Evidence of Damages

[7] We next consider the High Court's conclusion that summary judgment in favor of Tobacco is appropriate where, without Dr. Miller's testimony, the Government had failed to offer other reliable evidence of damages. We review a lower court's grant of summary judgment *de novo. Owens Corning v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 257 F.3d 484, 491 (6th

Cir. 2001); *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000).

A Fact of injury

The Government's damage claims all share a common premise – that Tobacco's tortious conduct caused economic injury to the Government. *See, e.g., Schmanski v. Church of St. Casimir of Wells*, 243 Minn. 289, 292 (1954) (The elements of a negligence claim are "(1) duty; (2) breach of that duty; (3) that the breach of duty be the proximate cause of plaintiffs injury; and (4) that plaintiff did in fact suffer injury."). While anecdotal evidence can probably he found to assert that Tobacco's marketing behavior caused certain smoking-related illnesses and therefore some health care costs, the Government offers no evidence to quantify such a contention.[4]

The government offers the testimony of Dr. Neal Palafox, who concludes that smoking increases the incidence of tobacco-related illnesses in the RMI and therefore responsible for a substantial portion of the RMI health care budget. The Government also quotes Tobacco, which admits that smoking causes a number of health problems. While today, no one disputes that smoking can have negative health effects, by itself, that truism does not translate into an actionable claim against Tobacco.

Because smoking makes some persons sick and some sick persons go to hospitals, and the Government pays the bill, the Government claims that it has been unquestionably injured. Accordingly, the issue is not whether there is injury but how much injury. The Government contends that its tobacco-caused injury equals RMI's total expenditures on smoking-related health care. Under this theory, the High Court cannot grant summary judgment to Tobacco if there is evidence to indicate that the Government has spent even one dollar to treat smokers. However, the Government claimed confidentiality of medical records as a reason for withholding all evidence of individual medical care costs.

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[4]Because injury is not an element of conspiracy, the High Court erred by dismissing that claim for lack of evidence on damages. The Government does not argue the dismissal of its conspiracy claim, however, and we consider the issue waived. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998).

This strategy is flawed. By equating injury with total cost, the Government is alleging that Tobacco's misconduct is responsible for the consumption of every cigarette on the Marshall Islands and therefore, the medical treatment of every tobacco-related illness. Such a broad assertion cannot survive summary judgment without evidentiary support. As the record stood at the end of discovery, there was no evidence to connect the alleged misconduct of tobacco to a single hospital expense paid by the Government.

The Government offers remarks in an earlier stage of the litigation by High Court Justice Cadra, who found that the court had personal jurisdiction over Tobacco and that the Government had made a *prima facie* showing that "the use of cigarettes manufactured by defendants ha[s] caused injury [to the Government]." Justice Cadra's statement, however, goes to the more general issue of cigarette smoking. It does not shed light on the specific claim that Tobacco's illegal acts have caused injury.

[8] Nor has the Government offered evidence that a percentage of its health care costs is attributable to Tobacco's alleged misconduct. *See City of Vernon v. Southern Cal. Edison Co.*, 955 F.2d 1361, 1372 (9th Cir. 1992); *see also Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 15 (Minn. 2001) ("[I]n order to prove their claims for damages . . . [plaintiffs] must establish a causal nexus between their alleged damages and the conduct of the defendants alleged to violate the statutes."). The closest estimates were furnished by Dr. Miller's damage model. Those numbers are misleading, because they focus on cost attributable to smoking generally as opposed to Tobacco's alleged misconduct. Moreover, Dr. Miller's testimony cannot be considered because his methodology was found to be unreliable. Nothing else offered by the Government establishes a causal nexus between its alleged damages and Tobacco's misconduct. A court cannot hold Tobacco liable for engaging in lawful activities (i.e., selling and distributing cigarettes in the Marshall Islands). Without evidence linking Tobacco's allegedly illegal activities to claims of damages, we decline to consider the Government's claims beyond summary judgment.

B Amount of injury

[9-10] Additionally, the evidence tendered by the Government fails to sufficiently quantify its claims of damages. Although the amount need not be certain or definite, the evidence must nevertheless provide the jury with some guidance on damage estimates. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 808 (9th C ir. 1988); *see also* Restatement (Second) of Torts § 912 (1979) ("One to whom another has tortiously caused harm is entitled to compensatory damages . . . if, but only if . . . he establishes . . . the amount of money representing adequate compensation with as much certainty as the nature of the tort and the circumstances permit."). Without a reasonable methodology, summary judgment against the Government is appropriate because the jury is left with no proper proof of damages. *City of Vernon v. Southern Gal. Edison Co.*, 955 F.2d at 1372.

The Government contends that the High Court used the wrong damage rule, and that is the reason it found no evidence of damages. The Government contends that the proper inquiry is whether the Government can show that it has spent, or in the future will spend, any money to treat smoking-related diseases caused by Tobacco's misconduct. The Government argues that the High Court ignored this standard and adopted a new rule. Under this "new" rule, damages equal the additional health care costs spent on smokers over non-smokers.

The Government's argument does not advance its damage claims under either definition. Other than Dr. Miller's testimony, which was properly excluded, the Government presented no alternative methodology to calculate damages (until after summary judgment). As noted, testimony that smoking causes cancer does not address the health care costs needed to treat the cancer. The "Infrastructure Damages" expert, Mr. Jerry Kramer, estimated the cost of building and operating future Marshall Islands health care facilities. However, general operating and maintenance costs do not reflect costs attributable to Tobacco's allegedly illegal acts. Finally, the Marshall Islands Five-Year Comprehensive Health Plan lists the percentages of various illnesses linked to smoking. The incidence of smoking-related illnesses, without more, does not allow a fact-finder to reasonably infer a proper damage amount. Accordingly, we reject the Government's claims of damages where the evidence tendered fails to quantify alleged damages

with a reasonable degree of precision.

III Motion to reopen discovery

[11] The Government maintains that, after excluding Dr. Miller's testimony, the High Court erred by not allotting the Government more time to present an alternative damage analysis. We review the denial of the motion to reopen discovery for an abuse of discretion. *Ortiz v. Norton*, 254 F.3d 889, 899 (10th Cir. 2001).

The High Court had given the Government ample opportunity to present its case before ruling on summary judgment. When Dr. Miller's model using RMI population data yielded no damages, the High Court permitted the Government to recalculate its estimates. Instead of using a different economic model or resorting to other RMI databases, the Government stuck with Dr. Miller's model, this time using American rather than RMI data. After the substitution, the Government fully supported the revised model. It did not move to reopen the record even when prompted by the High Court, but filed the motion only after losing on summary judgment. The Government cannot fault the High Court for denying its untimely request.

IV Disqualification, proximate causation

We do not reach the additional issues raised by the Government because none of them survives the Government's failure to provide evidence of damages. We also decline to consider the merits of Tobacco's cross-appeal in light of our decision to affirm the High Court judgment. AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

MICHELLE STANLEY,

Plaintiff-Appellee,

-v-

CURTIS STANLEY,

Defendant-Appellant,

S.CT. CIVIL NO. 00-03
(High Ct. Civil No. 1997-066)

APPEAL FROM THE HIGH COURT

JUNE 5, 2002

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

Argued and Submitted April 17, 2002

SUMMARY:

Plaintiff filed for divorce from defendant. After failed attempts to serve defendant with the divorce papers, plaintiff obtained authorization from the High Court to serve defendant by publication. Defendant failed to appear at the divorce proceeding, and default judgment was entered against him, awarding plaintiff all marital assets, including control of the couple's company and custody of their two children. Defendant then moved the High Court to set aside the default judgment, which it refused to do. The Supreme Court affirmed.

DIGEST:

1. APPEAL AND ERROR – *Review – Default Judgments*: The standard of review for a High Court's refusal to set aside a default judgment under MIRCP Rule 48(a) is abuse of

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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.

discretion.

2. CIVIL PROCEDURE – *Default Judgments – Disposition on the Merits Preferred*: A trial on the merits is favored over default judgment and that close cases should be resolved in favor of the party seeking to set aside default judgment.

3. CIVIL PROCEDURE – *Default Judgments – Burden of Proof to Set Aside*: When a default judgment has been entered, the party seeking to set aside the judgment bears the burden of proving that MIRCP Rule 48(a) relief is justified and that a meritorious defense exists.

4. APPEAL AND ERROR – *Review – Questions of Law*: Purely or predominantly legal issues are reviewed *de novo.*

5. APPEAL AND ERROR – *Same – Same*: Although typically the standard of review for a denial of a motion to vacate a judgment under MIRCP Rule 48(a) is abuse of discretion, where the motion to vacate is based on an assertion of a void judgment under MIRCP Rule 48 (a)(4), the standard of review is *de novo*.

6. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)(4)*: Judgment may be vacated as void under MIRCP Rule 48(a)(4) only if the rendering court lacked personal jurisdiction, subject matter jurisdiction, or acted in a manner inconsistent with due process of law.

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

8. CIVIL PROCEDURE – *Service of Process – Service by Publication*: Where plaintiff's attempts to serve defendant at his last know address are to no avail, service by publication is the only option remaining and is therefore appropriate.

9. CIVIL PROCEDURE – *Same – Same*: Service of process by court ordered service by publication is effective and proper under 27 MIRC § 255.

10. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)(1)*: The High Court has the discretion to deny a MIRCP Rule 48(a)(1) motion if (1) the defendant's culpable conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside.

11. JUDGMENTS – *Same – Same*: Defendant's actual or constructive notice of the filing of an action and his failure to answer is culpable conduct that precluded relief from default judgment under MIRCP Rule 48(a)(1).

MARSHALL ISLANDS, SUPREME COURT

12. JUDGMENTS – *Same – MIRCP Rule 48(a)(3)*: In order to obtain relief under MIRCP Rule 48(a)(3), the moving party must demonstrate misconduct, like fraud and misrepresentation, by clear and convincing evidence, and must than show that the misconduct foreclosed full and fair preparation or presentation of his case.

OPINION BY KURREN, A.J.

Michelle Stanley ("Michelle") filed for divorce from Curtis Stanley ("Curtis"). After failed attempts to serve Curtis with the divorce papers, Michelle obtained authorization from the High Court to serve Curtis by publication. Curtis failed to appear at the divorce proceeding, and default judgment was entered against him, awarding Michelle all marital assets, including control of the couple's company and custody of their two children. Curtis then moved the High Court to set aside the default judgment, which it refused to do. The instant appeal followed. We have jurisdiction pursuant to Article VI, Section (2) of the Marshall Islands Constitution, and we affirm.

FACTS AND PROCEDURAL HISTORY

Curtis and Michelle were married in Reno, Nevada in 1988 and have two school-age children. In 1990, they moved to the Marshall Islands where Curtis started and later incorporated an import/export business, Pacific Basin Company, Inc. ("Pacific"). By 1994, Pacific was grossing nearly two million dollars. In 1994 or 1995, Curtis moved to Honolulu, Hawaii in order, he claims, to develop new products for the business. He asserts he left Michelle in charge of watching the money and paying the bills. Michelle contends she was left to "run" Pacific.

On March 24, 1997, Michelle traveled to Honolulu where she met with Curtis and allegedly informed him that she was about to file for divorce and would seek custody of the children as well as division of ownership of Pacific. A week later, on April 1, 1997, Michelle filed a Complaint for divorce, an *ex parte* motion for temporary restraining order ("TRO") to enjoin Curtis from interfering with the operations of Pacific, and a motion for service by mail to authorize service of the Complaint on Curtis at his last known address, 773 Kapulena Loop, Honolulu, Hawaii 96825. The court authorized service by mail the same day. The court also granted the TRO and set the hearing for a preliminary injunction for April 11, 1997.

The next day, on April 2, l997, Michelle's counsel sent the Complaint and Summons, the TRO, and notice of hearing to Curtis at the Kapulena Loop address, by registered mail with return receipt requested. As neither the receipt nor letter was returned, Michelle hired a Honolulu attorney to serve Curtis personally. The attorney enlisted the services of the Honolulu Sheriff. The Sheriff, however, could not find Curtis at the Kapulena Loop address. Michelle's attorney then contacted Curtis' landlord who informed them that Curtis was delinquent in rent and had "apparently abandoned" his residence.

Meanwhile, Michelle contends that Curtis told her he was aware of the action against him but would not accept the summons unless she put money in his account. She claims that she gave him money, but that he still would not accept service.[3]

In or around the beginning of April, Curtis attempted to access Pacific's accounts at the Bank of Hawaii, but was prohibited from doing so. The Vice-President of the Bank informed him that Pacific's accounts were closed to him due to a TRO prohibiting the Bank from recognizing Curtis as a signatory on the account. Curtis made no further inquiries.

The hearing on the preliminary injunction was held on April 11, 1997, but Curtis failed to show.

In late April, Curtis sent his brother to the Marshall Islands to look into Curtis' interests at Pacific. His brother was denied access to Pacific's offices and records and was informed of the TRO. He relayed this information to Curtis.

Following her inability to serve Curtis by mail or through the Sheriff, on July 1, 1997, Michelle moved for an order authorizing service by publication. On July 2, 1997, the High Court granted the motion and ordered service of process on Curtis by placing a notice containing the

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[3]Since Curtis' move from the Marshall Islands to Hawaii, he made approximately $350,000 in withdrawals from, or charges on, Pacific's bank accounts or charge accounts. It is unclear whether these charges were authorized. Michelle contends that the money was for Curtis' personal use; Curtis contends that a great portion of the funds was used for business purposes and that regardless, since he owned Pacific he had every right to access its funds. Nevertheless, it is undisputed that the money was withdrawn and/or charged.

summons in a newspaper of general circulation in Honolulu to be run for seven consecutive days. Michelle placed notice in the Honolulu Advertiser from July 10 through 16, 1997.

In late July 1997, Curtis himself traveled to the Marshall Islands to look into his interests at Pacific. He spoke by phone with Michelle, who told him he could not obtain money from Pacific but that he would be provided with an airline ticket back to Hawaii. Curtis returned to Hawaii.

On August 21, 1997, a default hearing was held. Curtis did not appear. Judgment was entered in favor of Michelle, awarding her all of Curtis' property, including his controlling interest in Pacific, and sole custody of their children.

A year later, on August 21, 1998, Curtis filed a Motion for Relief from Judgment pursuant to Marshall Islands Rule of Civil Procedure ("MIRCP") Rule 48(a), arguing that (1) he had never been served with the summons or complaint; (2) he was not aware that a complaint for divorce had been filed against him; and (3) misrepresentations were made to the court regarding certain issues with respect to custody and division of property.

The matter came on for hearing before the High Court on February 22, 2000. On March 3, 2000, the High Court issued an Order Overruling Defendant's Motion to Set Aside Judgement, finding that although service on Curtis was defective, Curtis had "actual constructive notice," and thereby had waived any complaint for failure to be served.

Curtis appealed the High Court's ruling on March 10, 2000, arguing that the High Court should have set aside the default judgment under MIRCP Rule 48(a)(4) as void; under MIRCP Rule 48(a)(1) on the grounds of mistake, inadvertence, surprise, or excusable neglect; and under MIRCP Rule 48(a)(3) on the grounds of fraud, misrepresentation, or other misconduct.

STANDARD OF REVIEW

[1-3] We review a High Court's refusal to set aside a default judgment under MIRCP Rule 48(a)[4] for abuse of discretion. *TT Soc. Sec. Sys. Board v. Kabua*, 1 MILR (Rev.) 83, 84 (Nov 12,

[4]MIRCP 48(a) is identical to Fed. R. Civ. P. 60(b).

1987). Review should be guided by the well-established principles that a trial on the merits is favored over default judgment and that close cases should be resolved in favor of the party seeking to set aside default judgment. Default judgments are generally disfavored. *See Hammer v. Drago (In re Hammer)*, 940 P.2d 524, 525 (9th Cir. 1991); *Anilina Fabrique de Colorants v. Aakash Chems. & Dyestuffs, Inc.*, 856 F.2d 873, 878-79 (7th Cir. 1988); *Zawadski de Bueno v. Bueno Castro*, 822 F.2d 416, 420 (3rd Cir. 1987); *Gulf Coast Fan Inc. v. Midwest Elecs. Importers, Inc.*, 740 F.2d 1499, 1510 (11th Cir. 1984); *United Coin Meter Co. v. Seaboard Coastline R.R.*, 705 F.2d 839, 846 (6th Cir. 1983); *Seven Elves. Inc. v. Eskenazi*, 635 F.2d 396, 401-02 (5th Cir. 1981); *Jackson v. Beech*, 636 F.2d 831, 835 (D.C. Cir. 1980). However, when a default judgment has been entered, the party seeking to set aside the judgment bears the burden of proving that MIRCP Rule 48(a) relief is justified and that a meritorious defense exists. *See In re Hammer*, 940 F.2d at 526.

[4-7] Purely or predominantly legal issues are reviewed *de novo*. *See Torres-Lopez v. May*, 111 F.3d 633, 638 (9th Cir. 1997). Thus, although we typically review a denial of a motion to vacate a judgment under MIRCP Rule 48(a) for an abuse of discretion, where the motion to vacate is based on an assertion of a void judgment under MIRCP Rule 48 (a)(4), our review is *de novo*. *See Retail Clerks Union Food Center, Inc.*, 938 F.2d 136, 137 (9th Cir. 1991) ("We review *de novo* [] a district court's ruling upon a Rule 60(b) (4) motion to set aside a judgment as void, because the question of the validity of a judgment is a legal one"); *Recreational Properties, Inc. v. Southwest Mortgage Service Corp.*, 804 F.2d 311, 313-14 (5th Cir. 1986); *Compton v. Alton S.S. Co.*, 608 F.2d 96, 107 (4th Cir. 1979). Consequently, judgment may be vacated as void under MIRCP Rule 48(a)(4) only if the rendering court lacked personal jurisdiction, subject matter jurisdiction, or acted in a manner inconsistent with due process of law. *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 871 (4th Cir. 1999). Findings of fact, on the other hand, are reviewed for clear error. *See* MIRC, Title 27, Chap. II, § 266(2) ("[t]he findings of fact of the High Court in cases tried by it shall not be set aside by the Supreme Court unless clearly erroneous").

DISCUSSION

I. MIRCP Rule 48(a)(4)

Curtis argues that service, upon him was defective for two reasons: first, that service by publication was unjustified, and second, the High Court committed clear legal error in ordering publication for a period of seven, as opposed to fourteen, days. Curtis maintains that as a result of defective service, the judgment rendered against him was void.

A. Service by publication warranted

Curtis first contends that in procuring the order for service by publication, Michelle and/or her attorney made certain misrepresentations to the Court and that, consequently, service by publication should never have been granted in this case.

[8] Michelle first attempted to serve Curtis by registered mail. Neither the letter nor the receipt was returned. Through her attorney, Michelle then enlisted the Honolulu Sheriff to serve Curtis, which also proved unsuccessful. Michelle thereafter moved for an order permitting service by publication. In the supporting affidavit, Michelle's attorney Dennis Reeder stated that Curtis had "abandoned" his home at Kapulena Loop and moved to another location. Curtis insists that he had not abandoned Kapulena Loop; that he resided there during the period in question; that certain facts prove his residence at this address; and that furthermore Michelle could have taken certain remedial steps, such as contacting his sister, to discover where he in fact lived. Nevertheless, Curtis fails to appreciate that Michelle attempted to serve him at the correct address, but to no avail. Service by publication was the only option remaining and was therefore appropriate.

B. Order for service by publication not contrary to RMI law

Curtis next argues that the High Court's order for publication in a Honolulu newspaper for a period of seven days was contrary to the law of the RMI, which requires service by publication for a period not less than 14 days, rendering service defective and, as a result, the default judgment void.

[9] The motion for an order granting service by publication was brought pursuant to Title 27,

Div. 2, which is, contrary to Curtis' assertion, the applicable provision.[5] Title 27, Div. 2 is entitled "CIVIL JURISDICTION OVER NONRESIDENT" and provides that:

> A person who has lived in a marital relationship within the territorial limits of the Republic is subject to the jurisdiction of the courts of the Republic as to alimony, child support and property rights under the laws of the Republic relating to domestic relations, marriage, annulment and divorce, adoption, reciprocal enforcement of support, child abuse and family law generally, notwithstanding his departure from the Republic, if the other party to the relationship continues to reside in the Republic.

Title 27, § 251(2) (emphasis added). This section fits squarely the facts of this case. Section 252 of the same provision provides that "Service of process may be made upon any person subject to the jurisdiction of a court of the Republic under this Division [established to be Curtis] by personally servicing the process on him outside the territorial limits of the republic." While Title 27 provides that such service outside the jurisdiction must be made in the same manner as service within the territorial limits, *see* Section 252(2), the provision specifically provides that "Nothing in this Division limits or affects the right to serve process in any other manner provided by law or by the Rules of Court, or allowed by order of the court concerned." Title 27, Div. 2, § 255. Therefore, ordering service by publication for a period of seven days was within the discretion of the High Court, and in accordance with the laws of the RMI.[6] As there is no argument that the

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[5]Curtis claims the applicable provision is Title 29, Part III, which covers "ABSENT DEFENDANTS." Curtis is more appropriately defined as a "nonresident," as discussed herein.

[6]Therefore, the High Court's findings that service by publication neither complied with RMI law nor was done in a way reasonably calculated to give Curtis notice of the lawsuit (Findings of Fact 1 and 2) are clearly erroneous, as service by publication in fact complied with Title 27. Had service been defective, however, the default judgment would indeed have been void, for actual or constructive knowledge of a lawsuit can never cure defective service. *See Friedman v. Estate of Presser*, 929 F.2d 1152, 1155 (6th Cir. 1991) ("For the great majority of Courts, [] actual knowledge of the lawsuit does not substitute for proper service of process under Rule 4(c) (2) (C) (ii)"). Consequently, the High Court also erred when it concluded that "[c]onstructive actual notice of the suit for divorce herein fulfills the requirements of the law of

(continued...)

order for service by publication was not followed, service in this case was effective and proper. As a result, the High Court had personal jurisdiction over Curtis when it entered default judgment against him. Accordingly, the High Court did not commit error in refusing to set aside the default judgment as void.

II. MIRCP Rule 48(a)(1)

Curtis argues that the High Court abused its discretion in denying his motion to set aside the default judgment based on mistake, inadvertence, surprise, or excusable neglect, arguing that he failed to answer the complaint due to illness which was out of his control.[7] He further attests that the problems with his bank account, which the High Court found should have placed Curtis on notice that a lawsuit had been filed against him, did not alert him in any way as he had had problems with his accounts in the past and expected Michelle to remedy them, as she had done in the past.

[10-11] A High Court has the discretion to deny a MIRCP Rule 48(a)(1) motion if (1) the defendant's culpable conduct led to the default, (2) the defendant has no meritorious defense, or (3) the plaintiff would be prejudiced if the judgment is set aside. *See Meadows v. Dominican Republic*, 817 P.2d 517, 521 (9th Cir. 1987); *See also Davis v. Musler*, 713 F.2d 907, 915 (2nd Cir. 1982). We balance the three factors in determining whether to grant relief for excusable neglect under MIRCP Rule 48(a)(1). *See Zawadski*, 822 F.2d at 419; *Jackson*, 636 F.2d at 835; *Seven Elves*, 635 F.2d at 402; *Berthelsen v. Kane*, 907 F.2d 617, 620 (6th Cir. 1990) ; *Meehan v. Snow*, 652 F.2d 274, 277 (2nd Cir. 1981). However, where a defendant has received actual or constructive notice of a lawsuit, relief under this provision is precluded. *Hammer v. Drago (In re*

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[6](...continued)
the RMI for notice" (Conclusion of Law C).

[7]In February 1997, while working on the prototype of a childproof socket cover, Curtis accidentally burned himself with molten plastic. The burn became infected and spread to his arms, causing debilitating fever and other complications. He was admitted to the hospital where doctors removed significant amounts of tissue from his arms.

Hammer), 940 F.2d 524, 526 (9th Cir. 1991) (a defendant's action is culpable if he has received actual or constructive notice of the filing of the action and failed to answer); *Direct Mail Specialists, Inc. v. Eclat Computerized Techs, Inc.*, 840 F.2d 685, 690 (9th Cir. 1988) (defendant's actual notice of filing of action and his failure to answer was culpable conduct that precluded relief from default judgment) .

At the hearing before the High Court on Curtis' motion to set aside the default judgment Curtis testified that when he traveled to Majuro in late July 1997, after the service period in question but prior to entry of default in the case, Curtis was aware that "something was wrong:"

> [Curtis]: . . . Michelle called me at the hotel and said, we're not paying for any more days this room. The company will buy you a ticket and that's it. They'll take care of the ticket, you're out of here.
>
> . . .
>
> [Atty]: Did you think at that point that something might be wrong?
>
> [Curtis]: Oh, yeah I knew there was something wrong. Sure.
>
> [Atty]: Why didn't you do anything?
>
> [Curtis] Well, first of all I had no cash, no place to stay and I was still quite sick at the time.

Given the accumulation of clues by that point – the TRO on Curtis' bank accounts, both his and his brother's inability to access Pacific, as well as the manner in which Michelle treated Curtis – it is difficult to believe that Curtis was not aware that a divorce suit had been filed against him.[8]

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[8]Curtis cites *Rooks v. American Brass Co.*, 263 F.2d 166 (6th Cir. 1959) and *American Alliance Ins. Co., Ltd. v. Eagle Ins. Co.*, 92 F.3d 57 (2nd Cir. 1996), in support of his contention that the High Court should have found excusable neglect based on his incapacitating illness. These cases, however, are distinguishable as the courts found in both cases that the defendant had no knowledge whatsoever that a case had been filed against him. Here, in contrast, Curtis had constructive knowledge of the suit.

In the High Court's Order, the High Court found this very trip to Majuro as one telling event in a string of events supporting the finding that Curtis had constructive notice of the lawsuit. As such a conclusion is a reasonable deduction of the facts, this Court does not find an abuse of discretion. Accordingly, as Curtis had constructive notice of the lawsuit, relief under MIRCP Rule 48(a)(1) is precluded, *see Direct Mail*, 840 F.2d at 690 (defendant's notice of filing of action and his failure to answer was culpable conduct that precluded relief from default judgment), and the High Court did not commit error in refusing to set aside the default judgment on these grounds.

III. MIRCP Rule 48(a)(3)

Curtis argues that the district court [High Court] abused its discretion in denying Curtis' motion to set aside the default judgment based on fraud, misrepresentation, or other misconduct of an adverse party.

[12] In order to obtain relief under MIRCP Rule 48(a)(3), the moving party must demonstrate misconduct, like fraud and misrepresentation, by clear and convincing evidence, and must than show that the misconduct foreclosed full and fair preparation or presentation of his case. *See, e.g., In re M/V Peacock v. M/V Peacock*, 809 F.2d 1403, 1404-05 (9th Cir. 1987); *Harre v. A.H. Robins Co.*, 750 F.2d 1501, 1503 (11th Cir. 1985); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3rd Cir. 1983); *Square Construction Co. v. Washington Metropolitan Area Transit Authority*, 657 F.2d 68, 71 (4th Cir. 1981); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978) ; *Londsdorf v. Seafeldt*, 47 F.3d 893, 897 (7th Cir. 1995).

Curtis' allegations that Michelle committed fraud in her procurement of the order for service by publication, in her representations to the bank in order to obtain a TRO against Curtis' bank accounts, and in her deliberate nondisclosure of the lawsuit to him, whether or not they are true, are inconsequential as Curtis knew that something was amiss after these alleged occurrences – and because of these occurrences – and should have taken the steps necessary to protect his interests. The Court can only conclude that Curtis' failure to timely engage in this lawsuit is a product of his own omissions. As Curtis' own actions are the only conduct foreclosing full and

fair presentation of his case, relief under MIRCP Rule 48(a)(3) is not warranted.

AFFIRMED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

RITOK H. JACK,

Plaintiff-Appellant,

-v-

TOKIO HISAIAH and DAVID HISAIAH,

Defendant-Appellees,

S.CT. CIVIL NO. 01-02
(High Ct. Civil No. 1999-250)

APPEAL FROM THE HIGH COURT

DECEMBER 23, 2002

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

Argued and Submitted November 20, 2002.

SUMMARY:

Plaintiff appealed from a High Court decision (i) that a weto purchased by her now deceased father was held by her mother and brother as alap and senior dri jerbal, respectively, (ii) that plaintiff did not hold alap and dri jerbal rights in the weto, and (iii) that her mother's children by a previous marriage had any present or future claims to the weto. The Supreme Court affirmed in part and reversed in part affirming defendants as the alap and senior dri jerbal, finding that plaintiff could continue to occupy a portion of the weto and complete construction in progress, and that the mother's children by a prior marriage did not have present or future rights in the weto.

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.

JACK v. HISAIAH and HISAIAH

1. APPEAL AND ERROR – *Review – Questions of Law*: The standard of review for this Court is if the alleged error is one of law, the court will review the matter *de novo*.

2. APPEAL AND ERROR – *Review – Findings of Fact*: If the alleged error is based upon factual findings, the court will reverse or modify if the findings are clearly erroneous.

3. APPEAL AND ERROR – *Review – Findings of Fact – Clearly Erroneous*: A finding is clearly erroneous when the entire record produces a definite and firm conviction that the court below made a mistake.

4. CUSTOM – *Factual Inquiry*: Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense.

OPINION BY FIELDS, C.J.

Ritok H. Jack appeals a judgment in favor of Tokiko Hisaiah and David Hisaiah as to land rights.

FACTS AND PROCEDURAL HISTORY

Ritok H. Jack sued her mother, Tokiko, and her brother David Hisaiah, for "Declatory (Declaratory) Judgment and Injunctive Relief." The dispute is over the land rights on Wojalikok Ean weto, Arrak, Majuro. The land was purchased by Andrew Hisaiah, the husband of the defendant, Tokiko, and father of defendant David Hisaiah, as well as the father of plaintiff Ritok H. Jack.

The land is on the Jebdrik side of Majuro, and thus there is no iroij. The issue in dispute is, who holds the rights as alap and also senior dri jerbal?

Plaintiff claims that under customary law, the spouse of a deceased husband does not inherit the land rights of the husband, but that such rights normally go to the children. Plaintiff thus claims the rights because she is the oldest child who lives on and works the land.

Defendant Tokiko Hisaiah, the widow of the deceased Andrew Hisaiah, claims title to the rights of alap, and David Hisaiah claims the right to senior dri jerbal.

DISCUSSION

The matter was properly referred to the Traditional Rights Court by the High Court to determine who were the proper persons to be the alap and senior dri jerbal on the weto. The Constitution of the Republic of the Marshall Islands provides in Article VI, Section 4 (3) "[t]he jurisdiction of the Traditional Rights Court shall be limited to the determination of questions relating to titles or to land rights . . . depending wholly or partly on customary law and traditional practice in the Marshall Islands." In [Article VI, Section 4] (5) it provides the resolution of the question referred to the Traditional Rights Court "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."

The Traditional Rights Court heard the case on October 23 - 30, 2000, at the Courthouse on Majuro Atoll and rendered its opinion in answering the question presented to it on November 16, 2000. The Traditional Rights Court recognized that this case is the first of its kind to come before the court. The court further stated that "custom plays a major role in resolving the dispute in this case."

The court stated that if this land was bwij land, the surviving wife would have no rights to the land. She would return to her own people and live with them. Under custom the bwij land would be inherited by the children.

The Traditional Rights Court after listening to all the witnesses, mostly for the defendants, (only plaintiff and, Tarkien Inok, the seller of the land to Andrew, the deceased father, testified for plaintiff) and found that the weto in question was not bwij land. They further found that the land was purchased by Andrew, not just for himself, but also for his wife and his children. The court found that under the facts of this case that "[t]he properties of the husband are also properties of the wife." The court found that it is the custom that the wife came first and then the children and that was in Andrew's mind. The Court found that Plaintiff did not meet her burden of proof that she was entitled to the alap and senior dri jerbal rights. The court rejected outright the claim of Tarkien that she retained any right to the land, or to declare who held the

alap and dri jerbal rights, following the sale of the land in question.

The High Court adopted and confirmed the findings of the Traditional Rights Court and entered a judgment that Tokiko Hisaiah held the alap rights and that her son David held the senior dri jerbal rights. The lease between the Defendants and their sister Kathy Kramer is valid.

The High Court is to give substantial weight to the findings of the Traditional Rights Court, after their determination is made "wholly or partly on customary and traditional practice." Republic of the Marshall Islands Constitution, *supra*.

[1-4] The standard of review for this Court is if the alleged error is one of law, the court will review the matter *de novo*. If the alleged error is based upon factual findings, the court will reverse or modify if the findings are clearly erroneous. A finding is clearly erroneous when the entire record produces a definite and firm conviction that the court below made a mistake. The error urged here is based upon the factual finding as to custom. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lobo v. Jejo*, 1 MILR (Rev.) 224, 226 (Jan 2, 1991).

In reviewing the record before us, there is abundant evidence to sustain the factual findings and there is no basis for us to upset those findings or the judgment rendered herein, with the exception to that part of the opinion declaring that Tokiko Hisaiah's own children from her previous marriage have any present or future claim to the land in question. The evidence was clear that Andrew Hisaiah purchased the land for his wife and for his own children. There is no evidence that it was to include the children of his wife by a prior marriage. Since this is not bwij land, therefore special rules apply to carry out the intention of Andrew's purchase of the land. To rule otherwise would mean that the normal rules of succession would apply and that Tokiko would have no interest in the land. Thus Tokiko cannot give away or convey her interest in the land and upon her death all rights, that she presently holds, go exclusively to all the children of Andrew. In the meantime, plaintiff, Ritok, as the daughter of Andrew, is allowed to continue to

occupy a portion on the weto and can complete her construction in progress.

The Judgment is affirmed as herein directed with the changes as to future rights in the weto in question.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

AIR MARSHALL ISLANDS, INC.,

S.CT. CIVIL NO. 02-12
(High Ct. Civil No. 2000-195)

Plaintiff-Appellee,

-v-

DORNIER LUFTFAHRT, GMBH,

Defendant-Appellant,

APPEAL FROM THE HIGH COURT

DECEMBER 24, 2002

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

Argued and Submitted November 20, 2002

SUMMARY:

The Supreme Court affirmed the High Court's default judgment over the Defendant-Appellant's objections that the High Court erred when it denied Defendant's motion to compel arbitration, when it entered default despite Defendant's attempts to defend, and when it violated Defendant's right to due process by not granting Defendant an opportunity to brief and argue several motions. The Supreme Court found no error in the High Court's determination that there was no arbitration agreement and that the default not be set aside. Further the Supreme Court found that the High Court's decision not to hold an evidentiary hearing on the 12(b)(1), if error was harmless error. The Supreme Court also affirmed the High Court's decision not to award punitive damages.

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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

DIGEST:

1. ARBITRATION – *Agreement to Arbitrate*: It is well-settled that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

2. ARBITRATION – *Agreement to Arbitrate*: The existence of an agreement to arbitrate must be determined by the court.

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

4. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)*: The factors to be considered in determining "good cause" under FRCP 55(c) [MIRCP44] and "excusable neglect" under FRCP 60(b) [MIRCP48(a)] are the same; a court will deny relief if (l) there was culpable conduct by the defaulting party causing the default, (2) the defaulting party had no meritorious defense, or (3) such relief will prejudice the non-defaulting party. A court may deny relief even if only one of the above elements exists.

5. CIVIL PROCEDURE – *Default Judgements – Grounds to Set Aside*: Defendant's failure to answer complaint was culpable when defendant had filed motions to extend their time to answer, indicating an ability to deal with legal requirements.

6. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)*: Defendant's failure to answer complaint was culpable when defendant had filed motions to extend their time to answer, indicating an ability to deal with legal requirements.

7. CIVIL PROCEDURE – *Default Judgements – Grounds to Set Aside*: To show the existence of meritorious defense, the defaulting party must make a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party.

8. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)*: To show the existence of meritorious defense, the defaulting party must make a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party.

AMI v. DORNIER

9. CIVIL PROCEDURE – *Default Judgements – Grounds to Set Aside*: With respect to prejudice to the non-defaulting party, the standard is whether plaintiff's ability to pursue its claim will be hindered.

10. JUDGMENTS – *Grounds to Vacate – MIRCP Rule 48(a)*: With respect to prejudice to the non-defaulting party, the standard is whether plaintiff's ability to pursue its claim will be hindered.

11. CIVIL PROCEDURE – *Default Judgments – Entry of Default*: No notice or hearing is required for entering default.

12. DAMAGES – *Punitive Damages – in General*: In the absence of a finding of fraud, the court did not error in not awarding punitive damages.

OPINION BY GOODWIN, A.J.

Fairchild Dornier, GmbH[3] ("Dornier") appeals a default judgment in favor of Air Marshall Islands ("AMI) for approximately $4.2 million. AMI cross-appeals for punitive damages.

Facts and Procedural History

AMI is a Republic of the Marshall Islands (RMI") corporation and is wholly-owned by the RMI. Dornier is a German public corporation in the business of aircraft manufacture.

On February 11, 1999, Tony A. de Brum, RMI Minister of Finance, signed a contract for the purchase of two aircraft manufactured by Dornier (the "Manila Agreement"). Three provisions of the Manila Agreement are relevant to this appeal. The first is Article 3, which requires a pre-delivery payment of 15% of the price of each aircraft to Dornier, due on February 25, 1999. Dornier agreed to arrange the financing for the remaining 85% of the purchase price. The second is Article 19.10, which provides that the Manila Agreement "shall come into force upon its signature" but conditions "effectiveness" on the occurrence of (1) Dornier's receipt of the pre-delivery payment, (2) AMI board approval, issued on or before February 19, 1999, and

[3]Dornier was sued under the name Dornier Luftfahrt, GmbH.

(3) written approval by the Cabinet of the RMI, issued on or before February 19, 1999. The final paragraph of this Article states:

> This Agreement is valid only if accepted and executed by Purchaser, the resolution and approval [of the AMI board and Cabinet] is [sic] issued on or before February 19, 1999 and the pre-delivery payment . . . is received on or before February 25, 1999.

Finally, Article 18 provides that any "dispute arising out of or in connection with" the Manila Agreement will be submitted to an arbitration panel of three, in Munich Germany, and will be settled in accordance with the rules of the international Chamber of Commerce.

None of the conditions precedent to effectiveness was satisfied in accordance with the terms of the Manila Agreement. AMI asserts that it informed Dormer in April and May of 1999 that AMI considered the Manila Agreement null and void. Dornier responded that it considered the Manila Agreement "suspended." In any event, the failure to satisfy the agreement's conditions precedent is problematic.

Because AMI continued to be in need of new aircraft, representatives of the two companies met in South Bend, Indiana, on May 18, 1999. There, according to AMI, Dornier represented that it would re-market the two aircraft unless AMI made an immediate $500,000 payment. The parties orally agreed that if AMI made a payment of $2.1 million to Dornier by the end of June 1999, Dornier would reserve one aircraft and make delivery "as soon as possible." On June 6, 1999, AMI paid $500,000 to Dornier. AMI paid another $1.6 million to Dornier on October 15, 1999, on the belief that this payment was necessary to obtain financing. Prior to payment, however, AMI secured a letter agreement from Dornier (the "Refund Agreement") stating that "in case of non-availability of . . . financing until delivery of the aircraft," the $1.6 million would be refunded to AMI. Interestingly, the Refund Agreement refers to Article 3 of the Manila Agreement. AMI never obtained financing, and Dornier did not refund the $1.6 million despite a demand from AMI.

On September 11, 2000, AMI filed a complaint in the High Court, alleging fraud and duress in connection with the two payments made to Dornier, and negligent misrepresentation in

connection with the Refund Agreement. The complaint also alleged wrongful interference by Dornier with an unrelated contract between AMI and a third party (JAS), as well as wrongful interference with prospective economic advantage by blocking a potential sale of a Saab 2000 aircraft by AMI to CityJet.

To this complaint, Dornier filed a 12(b) motion and moved to compel arbitration. On February 9, 2001, AMI moved to stay arbitration on the ground that no agreement to arbitrate was made because (1) the Manila Agreement never became effective since the conditions precedent to effectiveness were not satisfied, (2) the person that signed the Manila Agreement on behalf of AMI did not have authority to bind the company, and (3) in any case, AMI's claims of interference with the unrelated contract are not subject to the arbitration clause. AMI also filed an amended complaint, which clarified the negligent misrepresentation claim, added several new claims (including conversion and unjust enrichment claims with respect to Dornier's retention of the $2.1 million payment), and reasserted the claims of the original complaint. AMI requested return of the $2.1 million, general damages, punitive damages, and costs.

The High Court denied Dornier's motion and granted AMI's motion on February 26, 2001. In its order, the High Court stated that Dornier failed to provide any grounds or legal basis for dismissing AMI's action. The High Court also found that the Manila Agreement was not an enforceable agreement to arbitrate, and ordered Dornier to answer AMI's complaint by March 15, 2001.

On March 15, 2001, Dornier moved for reconsideration of the February 26 order and for expedited discovery on the issue of AMI's agreement to arbitrate, attaching supporting affidavits. The High Court denied the motion on March 20, 2001, finding the affidavits insufficient to support an agreement to arbitrate. On March 21, 2001, Dornier moved for further reconsideration of the February 26 order, expedited discovery, and extension of time to file an answer. The High Court denied the reconsideration motion on April 18, 2001, but granted an extension to answer until May 10, 2001. Dornier also appealed the February 26 and March 20 orders to this Court on March 28, but that interlocutory appeal was dismissed for want of a final

judgment. We also denied Dornier's motion to stay the litigation pending that appeal.

On May 10, 2001, Dornier filed another Rule 12(b) motion. Dornier once again challenged the jurisdiction of the High Court, and argued that AMI's complaint either did not plead with sufficient specificity or failed to state a claim. In response, AMI filed a motion for default judgment. The High Court entered Dornier's default on May 18, 2001, on the ground that Dornier had failed to answer AMI's amended complaint. Because damages were unliquidated, the court deferred the calculation of damages pending an evidentiary hearing. Dornier moved to set aside the default on July 2, 2001.

On August 17, 2001, the parties appeared before the High Court. Dornier's motion was denied after argument from each party, and the High Court entered a default judgment. The High Court found that (1) Dornier had failed to answer AMI's complaint in accordance with the RMI Rules of Civil Procedure, (2) the February 11, 1999, instrument was not a valid or binding contract between AMI and Dornier, and (3) AMI was entitled to approximately $4.2 million in damages. The High Court denied any award of punitive damages.

Discussion

1 Denial of Motion to Compel Arbitration

Dornier argues, assuming the existence of a valid arbitration contract, that the High Court erred when it denied its motion to compel arbitration because the arbitration provision of the contract requires that arbitrability issues be decided by an arbitral tribunal. This argument fails because it assumes away the threshold issue: whether an agreement to arbitrate exists.

[1, 2] It is well-settled that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648 (1986) (citation and internal quotation marks omitted). Here, because the very existence of the agreement has been challenged by one of the parties, the court may not compel such party to arbitrate. The existence of an agreement to arbitrate must be determined by the court. *See Three Valleys Municipal Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140-41(9th Cir. 1991).

The High Court found that the Manila Agreement was never entered into by AMI because it was signed only by the Minister of Finance of the RMI, and not by anyone purporting to be an authorized signatory for AMI. The Court found no evidence that Minister de Brum had authority to bind the AMI corporation to the Manila Agreement, other than an affidavit from Minister de Brum himself. The High Court held this evidence to be insufficient, and noted that the conditions precedent relating to board and Cabinet approvals signaled that Minister de Brum did not have signatory authority and the Manila Agreement needed to be ratified. The record contains no evidence of ratification of the Manila Agreement by AMI.

Dornier argues, however, that circumstantial evidence tends to prove the existence of some kind of a contract that included an arbitration agreement. For example, Dornier asks why AMI would transfer $2.1 million to Dornier in exchange for an oral agreement to negotiate a new aircraft purchase agreement in the future. Moreover, Dornier points out that the record contains no objection by AMI to the Refund Agreement's reference to the Manila Agreement. However, the unanswered allegations contained in AMI's complaint, as well as the uncertain status of the Manila Agreement itself, left the High Court in an almost impossible position to find that an agreement to arbitrate had been entered into by the parties. Therefore, the court committed no error when it denied the motion to compel arbitration. Likewise, the High Court also did not err when it denied Dornier's several motions for reconsideration of its February 26 order to stay arbitration.

2 Entries of Default and Default Judgment

Dornier also contends that the High Court erred when it entered a default order despite Dornier's attempts to defend. Rule 55(a) of the Federal Rules of Civil Procedure (FRCP) provides that default is proper where "a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules."

The timing of the parties' filings are crucial for resolution of this issue. AMI filed its original complaint on September 11, 2000. On December 19, 2000, Dornier submitted its first 12(b) motion and motion to compel arbitration. On February 9, 2001, AMI filed a motion to stay

arbitration as well as an amended complaint pursuant to FRCP 15(a). Under FRCP 15(a), Dornier had ten days after service of the amended complaint to respond. As of February 26, 2001, the date of the High Court's order denying the 12(b) motion, Dornier had not filed a response to the amended complaint, or any opposition to AMI's motion to stay arbitration.

In its February 26 order, the High Court found Dornier's 12(b) motion defective (as it evidently did not contain "any moving grounds, points, authorities or arguments pertaining to the issues of jurisdiction, venue, or the nominal failure to state a claim"). Rather than treating Dornier's 12(b) motion as mooted by AMI's amended complaint, the High Court exercised its discretion to consider Dornier's 12(b) motion of December 19. In the February 26 order, the High Court denied Dornier's motions and required it to file an answer on or before March 15, 2001.[4]

Dornier never filed an answer, despite several court-ordered extensions of the deadline to do so. Instead, its final defensive filing was another 12(b) motion filed on May 10, 2001. Therefore, we conclude that the High Court did not abuse its discretion in entering Dornier's default for failure to file a substantive answer to defend the Claim.

Dornier next mistakenly asserts that the High Court should have set aside the entry of default under FRCP 60(b) [MIRCP48(a)]. This mistake may have been invited by the High Court's choice of words in the memorandum calling the entry of default a partial "default judgment." In fact, FRCP 55(c) [MIRCP44] allows a trial court to set aside an entry of default for "good cause shown." FRCP 60(b) [MIRCP48(a)] provides relief from a judgment where there is, *inter alia*, "mistake, inadvertence, surprise, or excusable neglect." FRCP 60(b)

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[4]In the Memorandum Opinion accompanying the order, the High Court noted that it deemed waived any "complaints to jurisdiction, venue, or the nominal failure to state a claim" because of the defects in the 12(b) motion. This memorandum sewed confusion, if not error, because complaints to subject matter jurisdiction and failure to state a claim are nonwaiveable. *See Van Voorhis v. District of Columbia*, 240 F.Supp. 822, 824 (D.C. D.C. 1965) (failure to state a claim); *Trustees of the Puritan Church v. United States*, 191 F.Supp. 670, 671 (D.C. D.C. 1960) (jurisdiction).

[MIRCP48(a)](l).

[3,4] The United States Ninth Circuit has held that the standards for "good cause" under FRCP 55(c) [MIRCP44] and "excusable neglect" under FRCP 60(b) [MIRCP48(a)] are substantially identical. *See TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001). Other circuits have found that "good cause" under FRCP 55(c) [MIRCP44] is a more lenient standard than "excusable neglect" under FRCP 60(b) [MIRCP48(a)]. *See, e.g., Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781, 783 (8th Cir. 1998); *Am. Alliance Ins. Co., Ltd. v. Eagle ins. Co.*, 92 F.3d 57, 59 (2d Cir. 1996). Despite this difference, the factors to be considered are the same; a court will deny relief if (l) there was culpable conduct by the defaulting party causing the default, (2) the defaulting party had no meritorious defense, or (3) such relief will prejudice the non-defaulting party. *TCI Group Life*, 244 F.3d at 696. A court may deny relief even if only one of the above elements exists. *American Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108-09 (9th Cir. 2000).

[5,6] The High Court did not set out its specific findings with respect to good cause. Evidence in the record reveals, however, that Dornier engaged in culpable conduct resulting in its default. There was no reason for Dormer to believe that another 12(b) motion would comply with the High Court's orders to file an answer. Dornier was represented by local counsel and should have known that the High Court's February 26 order unequivocally denied its 12(b) motion and required an answer. Dornier now claims that (1) its first 12(b) motion was rendered moot by the amended complaint, (2) the High Court erroneously considered its motions for reconsideration as 12(b) motions, and (3) it was, therefore, entitled to file the 12(b) motion on May 10, 2001. These assertions are disingenuous. There is no mistaking that the High Court considered the first 12(b) motion in the absence of a new or amended response from Dornier. Moreover, in its March 15 motion for reconsideration, Dornier specifically moves "the Court for an order reconsidering and vacating the Court's February 26, 2001 Order, *and dismissing the First Amended Complaint*, or in the alternative, staying the litigation pending arbitration[.]" (emphasis added). Dornier again refers to the overruling of its motion to dismiss in its March 21, 2001 motion. In light of its own

moving papers, Dornier cannot now insist that the original 12(b) motion was mooted or that it subsequently never moved to dismiss the complaint. Instead of filing an answer, Dornier (1) made successive motions for reconsideration to compel arbitration, (2) requested extensions of time to answer the amended complaint, and (3) admitted that it did not want to jeopardize arbitrability of the Manila Agreement by formally participating in discovery. *See, e.g., Benny v. Pipes*, 799 F.2d 489, 494 (9th Cir. 1986) (holding that defendants' failure to answer complaint was culpable when defendants had filed motions to extend their time to answer, indicating an ability to deal with legal requirements). Dornier took three months to submit its 12(b)(1) and 12(b)(6) motions, both of which had been denied previously and more than once. Finally, Dornier has no answer to AMI's assertion that during the hearing on its motion to set aside the default, Dornier refused to commit to answer the amended complaint.

[7,8] Moreover, Dornier has failed to show that it has any meritorious defense. To show the existence of meritorious defense, the defaulting party must make "a presentation or proffer of evidence, which, if believed, would permit either the Court or the jury to find for the defaulting party." *United States v. Maraud,* 673 F.2d 725, 727 (4th Cir. 1982); *see also Enron Oil Corp. v. Diakuhara,* 10 F.3d 90, 98 (2d Cir. 1993) (defaulting party must present evidence that, if proven at trial, would constitute a complete defense). Dornier presented to the High Court little to no evidence other than repetitious assertions relating to the existence of the Manila Agreement. Dormer does not point to any meritorious defense in its brief, nor does it argue that it has any meritorious defense before this Court.

[9,10] Finally, with respect to prejudice to the non-defaulting party, "the standard is whether [plaintiffs] ability to pursue his claim will be hindered." *TCI Group Life,* 244 F.3d at 701 (alteration in original) (citation and internal quotation marks omitted). There is little evidence that AMI would be prejudiced in proving its claim if the default had been set aside, but the delay, with no sign of an answer on the merits, was costly and prejudicial in terms of AMI recovering money paid for goods not delivered, and apparently not in being.

Because Dornier acted culpably and because its final 12(b) motion does not constitute a

"meritorious defense," the High Court did not err when it entered the order of default and then proceeded to hear testimony on damages. Its refusal to file an answer and the absence of any meritorious defense are fatal to Dornier's cause under either Rule 55(c) or 60(b).

3 Due Process

Dornier's final claim on appeal is that its due process rights were violated because the High Court did not grant it an opportunity to brief and argue its several motions. A trial court generally is not required to hear oral argument before deciding motions. *See* Fed. R. Civ. P. 78; *Greene v. WCI Holdings Corp.*, 136 F.3d 313, 315-16 (2d Cir. 1998); *Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir. 1994). Ordinarily, where material factual disputes are raised in a 12(b)(l) motion, a court should hold an evidentiary hearing unless (1) the parties have had a full and fair opportunity to discover and present relevant facts and arguments, or (2) neither party requested an evidentiary hearing. *See Valentin v. Hospital Bella Vista*, 254 F.3d 358, 364 (1st Cir. 2001). The record before this court shows that Dornier did not request an evidentiary hearing until the filing of its final 12(b) motion on May 10, 2001. In light of the fact that Dornier was given more than the requisite number of days after AMI's filings to respond, Dornier also had full and fair opportunity to submit its arguments and papers.

Moreover, any error resulting from the High Court's decision not to hold an evidentiary hearing on the 12(b)(1) motion was harmless, and in any case corrected by the High Court's consideration of Dornier's motions for reconsideration, in the first of which the High Court examined additional evidence Dornier does not point to any harm that resulted from the lack of a formal hearing; it does not indicate that it would have presented previously unavailable evidence or a new legal theory that would have made a difference to the disposition of any of its motions.

[11] Dornier's assertion that it did not have an opportunity to oppose AMI's motion for default judgment also lacks merit. Although the High Court's May 18 order was called "Default Judgment (Partial)," it was effectively an entry of default only. *See Enron Oil*, 10 F.3d at 97 ("[A] default judgment cannot be entered until the amount of damages has been ascertained"). No notice or hearing is required for entering default. *See Hawaii Carpenters' Trust Funds v.*

Stone, 794 F.2d 508, 512 (9th Cir. 1986). Dornier had an opportunity to appear before the High Court and present its arguments on August 17, 2001, before default judgment was entered. Therefore, the High Court's procedures satisfied due process requirements.

4 Punitive Damages

Section 162 of the Civil Procedure Act of the Marshall Islands reads:

> In civil cases where the defendant has been found liable because of fraud, or deceit, or misrepresentation, the court shall add to the judgment, as punitive damages, an amount equal to three (3) times the actual amount of damages found by the trier of facts.

AMI argues that because default judgments are treated as judgments on the merits, it should have been awarded an additional $4.8 million for fraud relating to the $1.6 million payment to Dornier. Dornier argues that the High Court never found liability for fraud or misrepresentation, but instead awarded damages of $1.6 million for breach of contract, a claim that was never pled by AMI and which argument is inconsistent with the High Court's finding that the Manila Agreement was not an enforceable contract.

[12] The default judgment order does not state the factual or legal findings of the High Court with respect to the award of damages. The relevant portions of the transcript indicate that the damages award consisted of the $2.1 million paid by AMI to Dornier and the losses related to the collateral sale of the Saab 2000. The $2.1 million awarded by the High Court could have been supported under a number of well-pled claims that AMI raised in its amended complaint, including unjust enrichment, conversion, or duress. Neither party was able to point to a finding of liability for fraud or misrepresentation in the order or the transcript. While Count III (Fraud) of the amended complaint could have been joined by an answer and proceeded to trial, it was never matured as an issue. Even if AMI might be entitled to punitive damages under § 162, as an abstract proposition, the High Court found as a matter of fact that punitive damages were not appropriate on the record before the court. We detect no legal error in that finding.

The judgment is affirmed.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

S.CT. CIVIL NO. 01-03
(High Ct. Crim. No. 2000-074)

Respondent-Appellee,

-v-

MIRAM DE BRUM,

Defendant-Appellant,

APPEAL FROM THE HIGH COURT

DECEMBER 27, 2002

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

Submitted June 20, 2002.

SUMMARY:

The Supreme Court affirmed the defendant-appellant's conviction on four counts of Failure to Report Gross Income rejecting defendant-appellant's contentions (1) that the convictions violated her right to due process in that the tax law provision she was found to have violated was not expressly defined as a criminal offense, (2) that the erroneous inclusion of the element "knowingly" in the charges violated her constitutional right to be informed of the accusations against here and prejudiced her defense, (3) that the two-year probation sentence was unlawful, and (4) that the sentence imposed was too severe.

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 – *Questions Reviewable – Asserted Below*: As a general rule, an appellate court will not consider any matter that was not raised by way of an objection in the trial court.

2. APPEAL AND ERROR – *Same – Same*: The decision of whether to reach the merits of an issue not raised below is a decision within the discretion of the court.

3. APPEAL AND ERROR – *Questions Reviewable – Questions of Law*: An appellate court may take up a question of law, on its own motion, if there is a basis for it in the record.

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

OPINION BY KURREN, A.J.

BACKGROUND AND PROCEDURAL HISTORY

Defendant-Appellant, Miram de Brum ("Appellant" or "Ms. de Brum"), is a citizen of the Republic of the Marshall Islands (the "Republic" or "Appellee"). Following a two-day trial in the High Court, Ms. de Brum was convicted of four counts of Failure to Report Gross Income in violation of § 110(1) of the Marshall Islands Revised Code, 48 MIRC § 110(1), ("the Income Tax Act of 1989"). By order dated June 15, 2001, Ms. de Brum was sentenced to a one year term of imprisonment and a fine of $4,000.00. However, the entire term of imprisonment, and $2,000.00 of the fine was stayed for two years subject to certain specific conditions.[3]

[3]The conditions provide that Ms. de Brum shall: (1) obey all laws of the Republic of the Marshall Islands; (2) perform two hundred and forty (240) hours of community service with the National Police on Majuro Atoll at the rate of ten (10) hours per month for the period of her probation, with proof of the required hours of service provided to the Clerk of the Court by the last day of each month starting on July 31, 2001; (3) pay a $2,000.00 fine on or before January 15, 2002; (4) make restitution to the RMI government by signing four Form 090's prepared by the tax authority and file them in the court within thirty (30) days and pay $3,105.13 within ninety

(continued...)

On March 25, 2002, Ms. de Brum filed the instant appeal challenging her conviction and sentence on four separate grounds. First, Ms. de Brum argues that a violation of § 110(1) is not expressly defined as a criminal offense, and thus, her conviction violates her constitutional right to due process (the "due process claim"). Secondly, Ms. de Brum argues, the inclusion of the element "knowingly" in the charges against her violates her constitutional right to be informed in detail of the nature and cause of the accusation against her, and prejudiced her ability to form a defense at trial. Third, Ms. de Brum argues that the probation sentence imposed by the trial court is unlawful and/or that the two-year probation period is unlawful. Finally, Ms. de Brum argues, the sentence imposed by the trial court is too severe.

On June 10, 2002, the Republic filed a brief in response to Ms. de Brum's appeal. By stipulation dated June 20, 2002, the parties agreed, with the approval of the Court, that the instant appeal would be decided on the briefs submitted and filed by the parties. In addition, Appellant waived the filing of a reply brief. For the reasons set forth below, the Court AFFIRMS Appellant's conviction and sentence.

DISCUSSION

1. Due Process Claim

As a threshold matter, the Court must determine whether Ms. de Brum is precluded from raising her due process claim in this appeal. According to the Republic, Ms. de Brum waived the right to raise her due process claim on appeal by failing to first present the issue to the trial court. Ms. de Brum acknowledges that the due process claim was not presented to the trial court. Nonetheless, she argues, this Court should reach the merits of the claim, because several exceptions to the general rule barring review of issues first raised on appeal apply to this case.

In crafting her first argument, Ms. de Brum starts with the proposition that a violation of § 110(1) is not a crime, because that section does not include "precise" language stating that a violation is a criminal offense. Thus, Ms. de Brum contends, the information charging her with

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[3](...continued)
(90) days, on or before October 15, 2001.

four felony violations of § 110(1) is invalid and the trial court lacked jurisdiction over her trial. Based on these propositions, Ms. de Brum concludes that her due process claim is premised on an assertion that the trial court lacked jurisdiction, and thus, she argues, the claim may be reviewed by this Court even though it was never presented to the trial court.[4]

Alternatively, Ms. de Brum argues, the due process claim may be addressed on the merits by this Court, because the issue presented is of sufficient public concern.[5] Ms. de Brum also argues that, when as here, an issue is strictly a matter of law, an appellate court may take up the issue even if it was not raised at trial.[6] Finally, Ms. de Brum asserts, appellate courts may address constitutional issues such as her due process claim even if the issue was not presented to the trial court.[7]

[1-3] As a general rule, an appellate court will not consider any matter that was not raised by way of an objection in the trial court. *See, e.g., RMI v. Digno*, 1 MILR (Rev.) 18, 19 (Aug 6,

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[4] Ms. de Brum cites *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) . The Court questions the authority of this case for the proposition stated. Nonetheless, Appellant's assertion that a claim of a lack of jurisdiction in the trial court gives rise to an exception to the general rule barring review of issues not raised at trial is squarely supported by *RMI v. Digno*, 1 MIRC 18, 19 (Aug 6, 1984).

[5]The case cited for this proposition is *United States v. Western Pac. R. Co.*, 352 U.S. 59 (1956). However, the issue before the Supreme Court in that case was not the ability of an appellate court to review a matter not raised at trial, but rather, whether the Supreme Court could address a matter decided by the lower court that neither party had questioned on appeal. Accordingly, the case does not support the proposition for which it is cited.

[6]Appellant cites *Koch v. Rodlin Enter., Inc.*, 223 Cal. App.3d 1591 (Cal. Ct. App. 1990) (matter may be raised for first time on appeal if facts are not disputed and the issue merely raises a question of law); *Nutt v. Knutson*, 795 P.2d 30 (Kan. 1989); and *Crittenden v. Chrysler Corp.*, 443 N.W.2d 412 (Mich. Ct. App. 1989) (appellate court will address an issue not decided below if it is an issue of law for which all the necessary facts were presented).

[7]Citing *Fardig v. Municipality of Anchorage*, 803 P.2d 879 (Alaska Ct. App. 1990); *Gosewisch v. American Honda Motor Co., Inc.*, 737 P.2d 376 (Ariz. 1987); *Conservatorship of Delay*, 199 Cal. App.3d 1031 (Cal. Ct. App. 1988); *Sharp v. Sharp*, 422 N.W.2d 443 (S. D. 1988).

1984); *see also Grey Poplars, Inc. v. One Million Three Hundred Seventy-One Thousand One Hundred (1,371,100) Assorted Brands of Cigarettes*, 282 F.3d 1175 (9th Cir. 2002). The decision of whether to reach the merits of an issue not raised below is a decision within the discretion of the court. *See, e.g., Singleton v. Wulff*, 428 U.S. 106 (1976) (determination of when to consider issues for the first time on appeal is within the discretion of the courts of appeals); *see also City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001) (same). Under Marshall Islands law, an appellate court may take up a question of law, on its own motion, if there is a basis for it in the record. *See Digno* at p. 19. For example, if the record on appeal reveals a fatal defect in the jurisdiction of the trial court, the appellate court may take up the matter even though there was no objection to the trial court's jurisdiction in the court below. *Id.*

[4] In the Ninth Circuit, appellate review of a claim raised for the first time on appeal is permitted if: (1) there are "exceptional circumstances" why the issue was not raised at trial; (2) the new issue arises while the appeal is pending because of a change in the law; (3) the issue presented is purely one of law and the opposing party will suffer no prejudice as a result of the failure to raise the issue at trial; or (4) plain error has occurred and injustice might otherwise result. *United States v. Echavarria-Escobar*, 270 F.3d 1265 (9th Cir. 2001); also *United States v. Antonakeas*, 255 F.3d 714 (9th Cir. 2001). Most federal circuit courts of appeal have adopted similar exceptions.[8] The Court finds the Ninth Circuit's articulation of the four general

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[8]*See, e.g., Amcel Corp. v. International Executive Sales, Inc.*, 170 F.3d 32 (1st Cir. 1999) (issue not raised below considered on appeal if the failure to review would result in gross miscarriage of justice, or if it is constitutional, or of continuing public importance, or a matter of law and there is no risk of prejudice to the other party); *Booking v. General Star Mgmt. Co.*, 254 F.3d 414 (2d Cir. 2001) (court will consider an issue raised for the first time on appeal if it is a purely legal issue or a failure to would lead to a substantial injustice); *Brown v. Philip Morris Inc.*, 250 F.3d 789 (3d Cir. 2001) (issue raised for the first time on appeal is waived unless there are exceptional circumstances – e.g., public interest requires the issue to be heard, or manifest injustice would result from failure to consider); *Williams v. Prof'l Transp. Inc.*, 294 F.3d 607 (4th Cir. 2002) (issue not raised below considered if a failure to do so would result in plain error or a miscarriage of justice); *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870 (5th

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exception categories helpful and consistent with current Marshall Islands law. Accordingly, the Court adopts these exceptions as the law of the Marshall Islands.

Applying the exceptions, the Court concludes that Ms. de Brum's due process claim falls squarely within the third exception. The claim is unquestionably a pure issue of law because it does not depend on the factual record developed below. *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cit. 2002). Further, nothing in the record before the Court indicates that the Republic suffers any prejudice from Ms. de Brum's failure to raise the issue at trial. Accordingly, the Court will proceed to the merits of Ms. de Brum's due process claim.

Pursuant to § 110(1) each business shall make a full, true and correct return showing all gross revenue received, accrued or earned, and the amounts deducted, and set aside on account thereof during the preceding quarter by the deadlines provided.[9] Section 110(3) clearly and

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[8](...continued)
Cir. 2002) (issue not raised below considered if it is a purely legal question and a failure to address it would result in a grave injustice); *Pfennig v. Household Credit Servs., Inc.*, 295 F.3d 522 (6th Cit. 2002) (issue not raised below reached if it is a question of law or where proper resolution is beyond any doubt); *U.S. Dep't of Labor v. Rapid Robert's Inc.*, 130 F.3d 345 (8th Cir. 1997) (appellate court may resolve an issue not raised below if proper resolution is beyond any doubt or where an injustice might otherwise result); *First Bank Investors' Trust v. Tarkio Coll.*, 129 F.3d 471 (8th Cit. 1997) (issue not raised below considered if purely legal issue or if manifest justice might otherwise result); *Creative Gifts, Inc. v. UFO*, 235 F.3d 540 (10th Cir. 2000) (issue not raised below considered under exceptional circumstances or to prevent manifest injustice); *Wright v. Hanna Steel Corp.*, 270 F.3d 1336 (11th Cir. 2001) (issue not raised below considered on appeal if: (1) it is a pure question of law; (2) there was no opportunity to raise it below; (3) substantial justice is at stake; (4) proper resolution is beyond doubt; or (5) it presents significant questions of general impact or of great public concern).

[9]Specifically, § 110(1) states that: "[e]very business, on or before the last day of the month following the close of each quarter (on or before April 30, July 31, October 31, and January 31) shall pay, based on its gross revenue of the preceding quarter, the amount of tax imposed by this Chapter to the Secretary of Finance. Each business shall, on or before the date provided for payment of the tax under this Subsection, make a full, true and correct return showing all such gross revenue received, accrued or earned, and the amounts deducted, and set aside on account thereof during the preceding quarter, and which shall be required by the
(continued...)

unequivocally states that a violation of § 110(1) – i.e., a failure to make the required return in accord with the law – subjects the violator to the penalties outlined in §§ 140 and l41.[10] While § 110(1) does not expressly state that a violation is a criminal offense, such "precise" language is not necessary given the plain language of §§ 110(3), 140 and 141. In other words, when all of these provisions are read together, as they must be, there is little doubt that the legislature explicitly provided that a violation of § 110(1) may be defined and prosecuted as a criminal offense. Accordingly, the criminal information charging [sic] conviction and sentence.

2. Inclusion of "Knowingly" in the Charges

Ms. de Brum contends that her constitutional right to be informed in detail of the nature and cause of the accusations against her was violated, because the element "knowingly" was included in the charges in the criminal information, but it is not actually an element of the offenses charged.[11] Further, Ms. de Brum argues, the inclusion of "knowingly" impeded her ability to form a defense at trial. The Republic responds arguing that under Marshall Islands law, this claim is untimely because objections to the content of the criminal information should have

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[9](...continued)
Secretary of Finance. The Secretary of Finance, for good cause, may extend the time for making payments and returns, but not beyond the last day of the first month succeeding the regular due date thereof."

[10]Section 110(3) states that: "[f]ailure to comply with the provisions of this Section shall be punishable by the penalties prescribed by this Chapter." Section 140 is titled "Criminal Penalties" and provides that: "[e]very person or business committing an offense under the provisions of this Chapter shall, upon conviction, in addition to the penalties imposed under Section 141 of this Chapter, be liable to a fine not exceeding one thousand dollars (US $1,000) or, if a natural person, to a term of imprisonment not exceeding one year, or both." Section 141 is titled "Civil Penalties" and provides in pertinent part that: "[t]he criminal penalties imposed by Section 140 of this Chapter for violation of provision of this Chapter shall be separate from, and in addition to, all other penalties or interest provided for in the Section."

[11]Pursuant to Article II, section 4(4) of the Marshall Islands Constitution, "in all criminal prosecutions, the accused shall enjoy the right to be informed promptly and in detail of the nature and cause of the accusation against him."

been raised, but were not, before trial. In other words, according to the Republic, Ms. de Brum waived her right to raise this issue on appeal by failing to timely raise the issue below. Alternatively, the Republic argues, the criminal information charging Ms. de Brum contained, as required, all of the elements of the offenses charged and sufficiently apprised her of the charges against her. Finally, the Republic argues, "knowingly" is mere surplusage, and thus, it does not vitiate an information that otherwise conforms with the law.

The Republic correctly asserts that under Rule 10 of the Marshall Islands Rules of Criminal Procedure, objections based on alleged defects in a criminal information must be raised before trial.[12] Neither of the exceptions incorporated into Rule 10(a)(2) is applicable here. From the record of the proceedings below, it is clear that the issue that "knowingly" was erroneously included as an element of the charges against Ms. de Brum was not raised, as required, before Ms. de Brum's trial. Consequently, the failure to timely raise this issue below results in a waiver of the issue on appeal, and the Court will not reach the merits of the claim.

3. Lawfulness of Two Year Term of Probation

In her third assignment of error, Ms. de Brum argues that the trial court did not have authority to impose a sentence of probation. Specifically, according to Ms. de Brum, the trial court lacked authority to impose a sentence of probation because such an option is not authorized by § 140, the criminal penalty provision of the Income Tax Act of 1989. Alternatively, Ms. de Brum contends that the two-year probation period is unlawful because a period of probation cannot exceed the maximum term of imprisonment authorized by the law which, in this case, according to Ms. de Brum, is one year.

Ms. de Brum's arguments are without merit. First, the trial court is plainly authorized pursuant to 31 MIRC § 190(1) to impose a sentence of probation rather than a term of

[12]Rule 10(a) (2) of the Marshall Islands Rules of Criminal Procedure provides in relevant part that: "[t]he following must be raised prior to trial . . . . (2) Defenses and objections based on defects in the complaint or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceeding)."

imprisonment for a criminal violation of § 110(1).[13] Further, Ms. de Brum's argument that the two-year probation period exceeds the permissible maximum term of imprisonment is based on a fundamental misunderstanding of the permissible maximum sentence authorized in this case. Ms. de Brum was convicted on four (4) separate counts of violating § 110(1). The maximum term of imprisonment authorized by § 140 is one year for each of the four violations/counts which results in a total permissible maximum sentence of four (4) years, not one (1) year as claimed by Appellant. The two-year probation period imposed by the trial court is clearly less than the permissible four year maximum term of imprisonment, and thus, it is lawful.

4. Severity of the Sentence Imposed

Ms. de Brum argues that the actual sentence imposed by the trial court is too severe because it is the maximum sentence permitted under the law. According to Ms. de Brum, the trial court should not have imposed the maximum sentence because mitigating factors supported a lesser sentence. Specifically, Ms. de Brum argues, the Court should have taken into account that: (1) she had no prior convictions, (2) she is of good character; and (3) she cooperated with the Tax Department. The basic premise underlying Ms. de Brum's argument is faulty.

As explained above, the maximum term of imprisonment that the trial court could have imposed on Ms. de Brum was four years, not one year. Given the permissible maximum term of imprisonment, as also noted above, the maximum probationary period that the trial court was permitted to impose pursuant to § 190(1) was also four years. Accordingly, the two-year probationary period Ms. de Brum actually received from the trial court is not a maximum sentence. In light of the fact that Ms. de Brum was not sentenced to the maximum, the argument

[13]Section 190(1) provides in relevant part that: "[u]pon entering a judgment of conviction of *any offense not punishable by life imprisonment*, the court, when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served, may suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence which may be imposed, and upon terms and conditions which the court determines, and shall place the person on probation, under the charge and supervision of a probation officer or any other person designated by the court, during the suspension." (Emphasis added).

that her sentence is too severe because it is the maximum is completely devoid of merit.

AFFIRMED.

ED. NOTE: The decision in this case by the Supreme Court as purportedly vacated by a July 14, 2003 order issued by the Supreme Court Chief Justice sitting alone. His order was in turn vacated by a July 14, 2004 order by the Supreme Court sitting *en banc*.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

S.CT. CIVIL NO. 01-03
(High Ct. Crim. No. 2000-074)

Respondent-Appellee,

-v-

MIRAM DE BRUM,

Defendant-Appellant,

ORDER VACATING JUDGMENT
AND SETTING ASIDE OPINION
FILED ON DECEMBER 27, 2002

JULY 14, 2003

FIELDS, C.J.

SUMMARY:

The Chief Justice of the Supreme Court siting alone vacated an earlier Supreme Court decision affirming the High Court's conviction of the defendant. The Chief Justice vacated the pervious decision because the Republic had failed to prove that the defendant had received the money she allegedly failed to pay taxes upon.

DIGEST:

1. CRIMINAL LAW AND PROCEDURE – *Convictions – Double Jeopardy*: Due to the concept of "double jeopardy" the defendant cannot be retried because of the error in the prosecution's case, in failing to present all the necessary evidence, unless a conviction after trial has been reversed on the Defendant's appeal.

2. CRIMINAL LAW AND PROCEDURE – *Crimes – Elements – Receipt of a Check*: Receipt of a check is not the equivalent to receiving money. A check is merely an offer to pay the amount when it is tendered for payment.

MARSHALL ISLANDS, SUPREME COURT

OPINION BY FIELDS, C.J.

On August 31, 2000, a criminal information was filed by Assistant Attorney General John P. Young alleging that the defendant, Miram De Brum, failed to file a return showing "all such gross revenue received." The information contained four separate counts. On September 19, 2000, defendant was arraigned and was represented by Ms. Beero, Chief Public Defender. Ms. Beero waived a preliminary hearing and stipulated to probable cause on February 12, 2001.

On June 12 and 13, 2001, defendant was tried in the High Court before Chief Justice Charles Henry. Assistant Public Defender Daniel D. Goundar represented the defendant and John P. Young, Assistant Attorney General, represented the Republic, during the trial. Defendant was found guilty of all four counts following a court trial before Judge Henry. The formal judgment was prepared by the assistant attorney general and signed by him on June 1, 2001, and subsequently signed by defense counsel and Judge Henry on June 15, 2001, and filed with the court on that same day.

Defendant filed the notice of appeal and filed her opening brief on March 25, 2002. Thereafter the assistant attorney general filed his brief in response to defendant's brief. Counsel for the defendant did not file a reply brief. On June 19, 2002, both the Office of the Attorney General and defense counsel signed and filed with the court a stipulation that the appeal be decided on the briefs filed by both parties without an argument before the Supreme Court. The Supreme Court on November 20, 2002, at its next regularly scheduled session ordered the matter submitted without oral argument.

[1] In the Republic of the Marshall Islands, a democratic government, the basic concept in any and all criminal prosecutions is that the defendant is presumed innocent (Const., Art. II, Sec. 4(2)) and cannot be forced to testify against themselves in a court of law. (Const., Art. II, Sec. 4(7)). Furthermore the prosecution must prove the guilt of the defendant beyond a reasonable doubt. (Const., Art. II, Sec 4(2)). Failure to prove the guilt means that a defendant must be found not guilty and the criminal charges must be dismissed. Due to the concept of "double jeopardy" the defendant cannot be retried because of the error in the prosecution's case, in failing

to present all the necessary evidence, unless a conviction after trial has been reversed on the defendant's appeal. (Const., Art. II, Sec. 4(9)).

[2] In this prosecution, the thrust of the prohibited action is in receiving money and not declaring it on the appropriate forms and paying taxes on the amount received. It appears that the attorney general in this matter presented evidence that checks were given to the defendant and that she failed to report the income and pay taxes on those amounts. Receipt of a check is not the equivalent to receiving money. A check is merely an offer to pay the amount when it is tendered for payment. Therefore it appears that the attorney general failed to prove that the check was actually presented for payment and that she received money as a result.

Since it has been brought to the Court's attention, after the opinion was filed that a very serious injustice may have occurred with the conviction of the defendant, the Court must insure that justice prevails in all criminal matters even when the attorney has failed to raise the issue on appeal. The Court cannot let stand a conviction knowing it was rendered erroneously either by the judge or through ineffective counsel, or both. While the attorney should bring this matter to the attention of the Court, in this case the public defender would have a conflict in continuing to represent the defendant because the injustice was a result of the failure of the defense counsel in raising the issue in the course of the appeal. The counsel for the defense raised four points in his brief in support of the appeal. The issue of lack of evidence was not one of them. In the absence of a writ being filed, this Court on its own motion will and hereby orders that the opinion filed in this case on December 27, 2002, be VACATED and the opinion is WITHDRAWN.

This action by the Court is akin to a writ of *Habeas Corpus* or a common law writ of *Coram Nobis* being filed, and is not a reversal because of defense counsel's appeal. To the contrary it is in spite of his appeal. As a result, the Republic cannot retry this case because of the prohibition of double jeopardy. (Const. Art. II, Sec. 4(9)).

The Court hereby orders that the attorney general and the defendant either *pro per*, or with an attorney of her choice, review the transcript of the proceeding is this case, in order to

determine whether a stipulation can be reached to resolve this issue. The defendant has a right to defend herself in person or through legal assistance of her own choice and in the event she lacks funds to procure such assistance she has the right to receive counsel free, if the interest of justice so require. In the event that a stipulation cannot be reached resolving this matter then the parties are ordered to file briefs on this issue and set the matter for further proceedings before the Supreme Court, at the next scheduled session.

IT IS SO ORDERED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

DENNIS P. MOMOTARO and JOHN AND JANE DOES NOS. 1-20,

Plaintiffs-Appellants,

-v-

HEMLEY BENJAMIN, in his capacity as the Chief Electoral Officer,

Defendant-Appellee,

S. CT. CIVIL NO. 04-02
(High Ct. Civil No. 2003-213)

APPEAL FROM THE HIGH COURT

JUNE 22, 2004

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

Argued and Submitted May 10, 2004

SUMMARY:

The Supreme Court affirmed the High Court's dismissal of the complaint because it was a nullity when filed, i.e., the complaint was brought in the name of unknown persons. The Supreme Court reversed the High Court's grant of the motion to amend the complaint to add Dennis Momotaro as a named plaintiff. Because of the complaint was a nullity, it could not be amended. The Supreme Court vacated as moot the High Court's holding that the Chief Electoral Officer had properly declined to count ballots mailed together.

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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

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Law – Lack of Jurisdiction*: The Supreme Court reviews *de novo* a dismissal of a complaint for want of jurisdiction.

2. APPEAL AND ERROR – *Review – Questions of Law – Failure to State a Claim*: The Supreme Court reviews *de novo* a dismissal of a complaint for failure to state a claim.

3. APPEAL AND ERROR – *Questions Reviewable – Questions of Law*: The Supreme Court may affirm a dismissal on any ground supported by the record, whether or not the High Court relied on other grounds or reasoning.

4. JURISDICTION – *Case and Controversy*: To establish High Court jurisdiction, a controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.

5. SAME – *Same – Unknown Persons*: A complaint filed on behalf of unknown persons cannot establish a "definite and concrete" controversy because there is only a possibility that a plaintiff will come forward and agree to litigate.

6. CIVIL PROCEDURE – *Parties – Proceeding Anonymously*: Marshall Islands Rule of Civil Procedure Rule 10's counterpart in the Federal Rules of Civil Procedure has been construed to permit a plaintiff to proceed anonymously under special circumstances, e.g., to avoid retaliation, to avoid disclosure of HIV-positive status, and in abortion and birth control cases.

7. JURISDICTION – *Subject Matter – Failure to Contest*: A defendant's failure to contest a jurisdictional defect in the complaint cannot confer subject matter jurisdiction any more than a defendant could consent to subject matter jurisdiction.

8. SAME – *Same*: The High Court acted properly in dismissing *sua sponte* the complaint.

9. CIVIL PROCEDURE – *Pleadings – Amendments*: Because the complaint was a nullity, it could not be amended.

10. JURISDICTION – *Subject Matter – Lack of*: If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities.

OPINION BY GOODWIN, A.J.

Dennis Momotaro and twenty unnamed persons (collectively, "Plaintiffs") appeal the

dismissal of their complaint in which they sought to compel the Chief Electoral Officer, Hemley Benjamin ("CEO Benjamin"), to accept and count postal ballots not mailed individually to the election office. We are presented with two issues: (1) whether the High Court erred in dismissing the complaint because no plaintiff was known when the complaint was filed; and (2) whether a complaint without a party plaintiff could be amended after filing to provide a plaintiff. We do not reach a third question: whether the defendant properly rejected Plaintiffs' postal ballots.

I.

A general election was held in the Republic of the Marshall Islands on November 17, 2003. Persons living away from the island where they have land rights were eligible to cast either an "absentee" or a "postal" ballot. An absentee ballot is available if a voter lives on an island other than his or her home island. A postal ballot is available if a voter lives outside of the Marshall Islands. To complete a postal ballot, a voter must mark the ballot, seal the ballot in the ballot envelope, complete an affidavit and place the ballot envelope and the affidavit in a covering reply envelope. The covering reply envelope must be mailed with a postmark on or before the date of the election and be received by the Electoral Office within fourteen days of the election. The Electoral Commission provided stamps to pay the postage required to return the ballots.

Before the election, CEO Benjamin instructed the electoral officials dispatched to the United States to inform voters that postal ballots must be returned individually. Claudia Philippo deBrum, an election official who traveled to the United States, stated that she informed Marshallese voters living in Oregon to return their ballots individually.

Of the more than two-thousand postal ballots received, CEO Benjamin states that twenty-six were not counted because they arrived in envelopes with other ballots, which is to say that one envelope contained more than one ballot. The record is not entirely clear about how the twenty-six ballots arrived. What is clear is that three Express Mail envelopes arrived containing one ballot each, and those ballots were counted. Three other Express Mail envelopes arrived

containing two, three and eight ballots, respectively, and those ballots were not counted because they were not sent individually.

On December 8, 2003, twenty "John and Jane Does" filed a complaint. The complaint stated: "The identities of Plaintiffs John and Jane Does Nos. 1-20 . . . are unknown at this time. The complaint will be amended to allege their true names, as appropriate, when their identities are ascertained." The complaint sought to compel CEO Benjamin to count all returned ballots and to preclude the announcement of the results in any election decided by fewer than twenty votes.

On December 12, 2003, CEO Benjamin filed his answer. He admitted paragraphs one through nine, which included Plaintiffs' intention to add real persons as plaintiffs as they were located. CEO Benjamin denied that ballots mailed together must be counted.

At a hearing on December 16, 2003, the High Court questioned whether unidentified plaintiffs could bring an action. Plaintiffs responded by amending the complaint to add Momotaro, a candidate for the Nitijela from Mejit Island, as a plaintiff. After further briefing, Plaintiffs filed affidavits from persons living in Oregon who had returned postal ballots. The affidavits explained that the voters returned the ballots in Express Mail envelopes to ensure the ballots arrived in a timely fashion.

On February 17, 2004, the High Court ruled that "[n]amed plaintiffs do not have the capacity to maintain an action and the action is a nullity that can not be amended." (Emphasis omitted.) The High Court found that, contrary to Plaintiffs' assertions, Plaintiffs did not use pseudonyms to protect their identities; Plaintiffs identities were unknown when the complaint was filed. The High Court also concluded that amending the complaint to include Momotaro as a plaintiff did not cure the defect, because, pursuant to *Clanton v. Riklon, (No. 2)* 1 MILR (Rev.) 156, 159 (Aug 2, 1989), Momotaro did not have standing to litigate on behalf of a class of voters.

In the alternative, the Court reached the merits of the complaint and ruled that CEO Benjamin properly rejected the ballots "based not on the fact that they were in multiples but because the covering reply envelopes were not postmarked as required." The Court denied the

request for declaratory judgment.

This appeal ensued.

II.

Plaintiffs argue that the High Court erroneously relied on the absence of identifiable plaintiffs to dismiss the complaint, and that the High Court cannot dismiss a complaint for lack of a proper party, unless the issue is raised by the defendant, which did not occur here. Plaintiffs also contend that Momotaro has standing as a plaintiff, and that the High Court erred by not granting leave to amend to add the Oregon voters' names.

[1-3] We review *de novo* a dismissal of a complaint for want of jurisdiction and a dismissal for failure to state a claim. *Skokomish Indian Tribe v. United States*, 332 F.3d 551, 556 (9th Cir. 2003) (jurisdiction); *Libas Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003) (failure to state a claim). We may affirm a dismissal on any ground supported by the record, whether or not the High Court relied on other grounds or reasoning. *Flamingo Indus. (USA) v. U.S. Postal Serv.*, 302 F.3d 985, 997 (9th Cir. 2002). Although the High Court did not base its dismissal on a want of jurisdiction, we conclude that the High Court has no jurisdiction over an action commenced without a known plaintiff.

[4, 5] Much like the United States Constitution, which extends federal judicial power to "cases" and "controversies," the Republic of the Marshall Islands Constitution states that the "High Court shall be a superior court of record having general jurisdiction over controversies of law and fact in the Marshall Islands." Art. VI, Sec. 3(1). The U.S. Supreme Court has explained that "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937). A complaint filed on behalf of unknown persons cannot establish a "definite and concrete" controversy because there is only a possibility that a plaintiff will come forward and agree to litigate. *Cf. Nat'l Commodity and Barter Ass'n v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989) ("the federal courts lack jurisdiction over the unnamed parties, as a case has not been commenced with respect to them").

[6] Moreover, Marshall Islands Rule of Civil Procedure 10(a) ("Rule 10") states that "[i]n the complaint the title of the action shall include the names of all the parties." Rule 10's counterpart in the Federal Rules of Civil Procedure has been construed to permit a plaintiff to proceed anonymously under special circumstances. *See, e.g., Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) (to avoid retaliation); *Roe v. City of Milwaukee*, 37 F. Supp. 2d 1127, 1129 (E.D. WI 1999) (to avoid disclosure of HIV-positive status). As the U.S. Court of Appeals for the Ninth Circuit recognized in *Advanced Textile*, the U.S. Supreme Court has implicitly condoned the use of pseudonyms by plaintiffs. 214 F.3d at 1067 n.9 (*citing, inter alia, Roe v. Wade*, 410 U.S. 113 (1973) (abortion); *Poe v. Ullman*, 367 U.S. 497 (1961) (birth control)).

Here, we need not decide whether a voter's interest in maintaining the secrecy of his or her ballot permits the voter to proceed anonymously. As the High Court observed, the complaint omitted the Plaintiffs' names because they were unknown, not because the Plaintiffs wanted to maintain the secrecy of their ballots. The inability to name a plaintiff is not a special circumstance that excuses the requirement in Rule 10 that the plaintiff's name be listed. Thus, the complaint also violated Rule 10.

[7, 8] Plaintiffs' assertion that the High Court acted *ultra vires* in dismissing the complaint is also unavailing. A defendant's failure to contest a jurisdictional defect in the complaint cannot confer subject matter jurisdiction any more than a defendant could consent to subject matter jurisdiction. *Cf. Sosna v. Iowa*, 419 U.S. 393, 398 (1975) ("While the parties may be permitted to waive non-jurisdictional defects, they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual 'case or controversy' . . . ."). The High Court acted properly in dismissing *sua sponte* the complaint. *Cf. Gibbs*, 886 F.2d at 1245 n.3 (A complaint filed by unnamed persons, without permission from the court to proceed anonymously, "is jurisdictional and the court may consider it *sua sponte*.").

[9, 10] We also agree with the High Court that, because the complaint was a nullity, it could not be amended. The Ninth Circuit has stated: "[W]e must examine [plaintiff's] original

complaint to determine whether the claim alleged therein was one over which the district court had jurisdiction. If jurisdiction was lacking, then the court's various orders, including that granting leave to amend the complaint, were nullities." *Morongo Band of Mission Indians v. Cal. State Bd. of Equalization*, 858 F.2d 1376, 1381 (9th Cir. 1988) (as amended). Momotaro was not named in the original complaint; he was added as a plaintiff in an attempt to cure the jurisdictional defect. Without jurisdiction to consider the complaint, the High Court could not allow the complaint to be amended to add Momotaro as a plaintiff. It follows that the High Court properly denied Plaintiffs' request for leave to the amend the complaint.

Finally, we must add a word about the procedural posture of this case. The record indicates that the attorney, acting on his own volition,[3] sought to contest the election by filing an action on behalf of unknown persons whom he intended to identify and whom he believed would be dissatisfied by defendant's refusal to count their ballots. This exceeds the bounds of an attorney's role in the judicial system. No matter how laudable the goal, an attorney cannot file an anticipatory complaint, then seek and locate a proper plaintiff and attempt an untimely amendment.

III.

The High Court's dismissal of the complaint is AFFIRMED. Because the complaint was a nullity when filed, we REVERSE the High Court's grant of the motion to amend the complaint to add Momotaro. The High Court's alternative holding, that CEO Benjamin properly declined to count ballots mailed together, is VACATED as moot.

[3]We acknowledge that the attorney may have acted at the direction of a real person wishing to contest the election. However, without evidence in the record to support this hypothesis, we may not assume that the attorney acted for a client with a bona fide claim.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

PACIFIC INTERNATIONAL, INC.,

Plaintiff-Appellee,

-v-

UNITED STATES OF AMERICA and UNITED STATES DEPARTMENT OF THE ARMY,

Defendant-Appellant,

S. CT. CIVIL NO. 03-02
(High Ct. Civil No. 1995-140)

APPEAL FROM THE HIGH COURT

JUNE 28, 2004

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

Argued and Submitted May 10, 2004

SUMMARY:

The Supreme Court reversed the High Court's decision that plaintiff's claims for monetary damage were "based upon" a "commercial activity" of the United States in the Republic invoking the "commercial activity" exception to the rule of sovereign immunity as set forth in Section 174(d) of the Compact.

[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.

PAC. INT'L, INC. v. U.S.A. and U.S. DEPT. OF THE ARMY

DIGEST:

1. APPEAL AND ERROR – *Review – Questions of Law*: The Court reviews the denial of a motion to dismiss based upon a claim of foreign sovereign immunity *de novo*.

2. EVIDENCE – *Burden of Proof – Sovereign Immunity*: Once the plaintiff offers evidence that a Foreign Sovereignty Immunity Act exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply.

3. SAME – *Same – Same*: The foreign state has no obligation to affirmatively eliminate all possible exceptions to sovereign immunity, only those exceptions specifically raised by the plaintiff.

4. STATUTES – *Construction and Operation*: Section 174(d) of the Compact is analogous to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602(a)(2), which provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." Due to the similarity in language, the legislative history and judicial interpretation of FSIA § 1602(a)(2) guide the analysis of what constitutes "commercial activity" under Section 174(d) of the Compact.

5. SAME – *Same – Commercial Activity*: The analysis of whether the "commercial activity" exception applies must begin with identifying the particular conduct "upon" which the action is "based."

6. SAME – *Same – Based Upon*: The phrase "based upon" means something more than a mere connection with, or relation to, commercial activity.

7. SAME – *Same – Commercial Activity*: Conduct by a state is considered "commercial activity" where the state exercises "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns.

8. SAME – *Same – Same*: Operation of military bases, including control of access thereto, is universally considered a purely governmental function and, as such, sovereign in nature, as opposed to commercial.

OPINION BY KURREN, A.J.

MARSHALL ISLANDS, SUPREME COURT

The United States awarded contractor Wallace O'Connor ("WOC") a contract to perform various construction projects on the United States Army Kwajalein Atoll base. The contract gave the United States Base Commander discretion as to who could enter onto or reside on the base or both. WOC subsequently entered into a subcontract with Pacific International, Inc. ("PII"). PII requested permission from the Base Commander for several of its employees to reside on base. The Base Commander refused the request. PII then filed suit against the United States for, *inter alia*, Tortious Interference with Prospective Contractual and Business Relations and Economic Advantage. The United States asserted immunity from the suit pursuant to the Compact of Free Association, an agreement between the United States and the Republic of the Marshall Islands ("RMI") regarding, amongst other things, mutual immunity from each other's courts except under certain circumstances. The High Court found that the United States was not immune because the acts complained of fell within the "commercial activity" exception to the applicable foreign sovereign immunity doctrine. The instant appeal followed. We have jurisdiction pursuant to Article VI, Section (2) of the Marshall Islands Constitution, and we REVERSE the High Court's ruling with respect to the issue of sovereign immunity, finding that the United States in this instance is immune from the claims brought by PII.

FACTS AND PROCEDURAL HISTORY

On April 13, 1993, the United States Army Engineer District, Honolulu ("HED") awarded contractor WOC a Contract for various construction projects to be performed at the United States Army Kwajalein Atoll base ("USAKA") (collectively referred to as the "Project").

Clause H.11 of WOC's Contract, entitled "CLEARANCE, ENTRY AND SECURITY REQUIREMENTS," provides:

> (a) No employee or representative of the Contractor will be admitted to the site of the work unless he furnishes satisfactory proof that he is a citizen of the United States, or if an alien resident of the United States, that his residence within the United States is legal. Access by Marshallese to the project site is governed by the clause entitled "Restrictions on Local Hire. [Clause H.12]"

The "Restrictions on Local Hire" clause prohibits any person not a United States citizen

or legal alien to reside on the USAKA base without the permission of the Base Commander. Specifically, the Contract states in relevant part:

> (a) Local hire is limited to Marshallese and to citizens or legal alien residents of the United States, and shall be subject to the written approvals of the Contracting Officer and the Commander of USAKA . . . .
> (b) Persons who are not United States citizens or legal alien residents of the United States will not be permitted to reside on any United States defense site in the Kwajalein Atoll without written permission from the Commander of USAKA, but will be permitted to take meals at the Pacific Dining Room, the Kwajalein Snack Bar, and other USAKA facilities on a per-meal cash basis.

Contract at H.12 (emphasis added).

On June 29, 1993, WOC entered into a subcontract with PII for work on the Project (hereinafter the "Subcontract"). PII was aware of the "Clearance, Entry, and Security Requirements" and "Restrictions on Local Hire" clauses in the Contract before it entered into the Subcontract.

On September 30, 1993, PII, in a letter to WOC which was provided to the HED on the same date, formally requested permission for "residence on Kwajalein for four employees who hold Permanent Resident Alien status with the Republic of Marshall Islands." HED rejected the request because the four employees were not members of that class of persons permitted to reside on the USAKA base under the Contract. The HED letter stated:

> Your request was discussed with the [USAKA] Commander and he stated that only United States Citizens or permanent legal alien residents of the United States will be allowed to reside on USAKA. He will allow permanent resident aliens of the [RMI] to work on USAKA, but not to live on USAKA. This position has been established USAKA policy and complies with the restrictions outlined in Special Contract Requirements [sic], H.12, Restriction [sic] on Local Hire.

On May 15, 1995, PII filed a Complaint against the United States of America, the United States Department of the Army, the United States Army Corps of Engineers, and the United States Army Kwajalein Atoll, alleging: (1) Tortious Interference with Contract; (2) Tortious Interference with Prospective Contractual and Business Relations and Economic Advantage; (3)

Violation of the RMI Constitution; (4) Violation of the Status of Forces Agreement ("SOFA") and the Compact of Free Association; (5) Misrepresentation and Breach of Warranty; (6) Punitive Damages; (7) vicarious liability; (8) Declaratory Relief on the issue of whether the U.S. 20% Bid Preference is discriminatory against RMI contractors; and (9) Injunctive Relief. Extensive motion practice ensued, as well as a failed attempt at Alternative Dispute Resolution.

On January 15, 2003, PII filed a First Amended Complaint ("FAC") against the United States and the United States Department of the Army (hereinafter collectively referred to as the "United States"), alleging: (1) Tortious Interference with Contract; (2) Tortious Interference with Prospective Contractual and Business Relations and Economic Advantage; (3) Violation of the RMI Constitution; (4) Violation of the SOFA and the Compact; (5) Misrepresentation/Breach of Warranty; (6) Punitive Damages; (7) Declaratory Relief and Damages; (8) Injunctive Relief; (9) Bad Faith/Misrepresentation for ADR Process; and (10) De Facto Debarment. The United States filed a motion to dismiss the Complaint, asserting, among other arguments, that the claims are barred by the doctrine of foreign state immunity under Section 174 of the Compact of Free Association (hereinafter "Compact").

The motion to dismiss came on for hearing before the High Court on April 16, 2003. In its Memorandum Opinion Pertaining to Preliminary Motions ("Memorandum Opinion") and Order Pertaining to Preliminary Motions, both filed May 13, 2003, the High Court dismissed Counts III through IX of the FAC on the grounds that PII failed to state a claim upon which relief can be granted. The High Court refused to dismiss Count I (Tortious Interference with Contract), Count II (Tortious Interference with Prospective Contractual and Business Relations and Economic Advantage), and Count X (De Facto Debarment), holding that the transactions underlying these Counts were commercial in nature and therefore not subject to foreign sovereign immunity. The instant appeal followed.

STANDARD OF REVIEW

[1] The Court reviews the denial of a motion to dismiss based upon a claim of foreign sovereign immunity *de novo*. *See Honduras Aircraft Registry, Ltd. v. Government of Honduras*,

129 F.3d 543, 546 (11th Cir. 1997), *cert. denied*, 524 U.S. 952 (1998); *accord In re Tamini*, 176 F.3d 274, 277 (4th Cir. 1999) ("[w]e review applications of the [Foreign Sovereign Immunities Act ("FSIA")] *de novo*"); *see also Samson v. Rongelap Atoll Distribution Authority*, 1 MILR (Rev.) 280, 284 (Nov 19, 1992) (question of law reviewed *de novo*).

[2,3] "Once the plaintiff offers evidence that an FSIA exception to immunity applies, the party claiming immunity bears the burden of proving by a preponderance of the evidence that the exception does not apply." *Joseph v. Office of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1021 (9th Cir. 1987). The foreign state "has no obligation to affirmatively eliminate all possible exceptions to sovereign immunity," only those exceptions specifically raised by the plaintiff. *Rodriguez. v. Transnave Inc.*, 8 F.3d 284, 287 n.6 (5th Cir. 1993).

DISCUSSION

The question before the Court is whether the High Court erred in holding that PII's claims were based upon a "commercial activity" of the United States in the RMI, thereby invoking the "commercial activity" exception to the rule of sovereign immunity as set forth in Section 174(d) of the Compact. Further, if PII's claims fall within the "commercial activity" exception of Section 174(d) of the Compact, thereby subjecting the United States to the jurisdiction of the RMI Courts, the question is whether the United States is immune from jurisdiction by virtue of the Military Use and Operating Rights Agreement ("MUORA") and Article XV of the SOFA, which establish an exclusive procedure for contractual and non-contractual claims against the United States. Because this Court concludes that the claims do not fall within the "commercial activity" exception of Section 174(d) of the Compact, as discussed below, this Court need not reach the second question.

I. Foreign Sovereign Immunity

On June 25, 1983, the United States and the RMI concluded the Compact which, with other related agreements, created a framework for the mutual relations between the RMI and the United States. *See* Compact of Free Association, reprinted in 48 U.S.C.A. § 1901, Historical and

Statutory Notes; *see also* Presidential Proclamation No. 5564, 51 Fed. Reg. 40,399 (1986), reprinted in 48 U.S.C.A. § 1681 note. The Compact provided, in part, for the United States' and the RMI's respective immunity from each other's courts.

II. Commercial Activity Exception

In Section 174(d) of the Compact, the United States expressly waives sovereign immunity in instances where its activities are commercial in nature:

> The Government[] of the Marshall Islands . . . shall not be immune from the jurisdiction of the courts of the United States, and the Government of the United States shall not be immune from the jurisdiction of the courts of the Marshall Islands . . . in any case in which the action is based on a commercial activity of the defendant Government . . . .

In the case below, analyzing what constitutes a "commercial activity," the High Court appears to have reasoned that because the underlying construction Contract between the United States and WOC was clearly commercial in nature, all acts which flowed from this Contract, such as preventing certain employees from residing on or near the work-site, must be commercial as well:

> . . . The Court is then faced with primarily a factual issue: is the transaction forming the basis of Plaintiff's First Amended Complaint a commercial transaction or not?
>
> . . . The transaction underlying Plaintiff's suit is a commercial building contract in which defendant was owner and Plaintiff was a subcontractor. This is [not] [sic] a sovereign act. This is a commercial transaction. The United States is subject to suit for alleged damages flowing from this commercial transaction.
> . . .
>
> One thing Defendant has tried to do is to isolate certain events that occurred in the performance of this building contract and argue that these isolated events were non-commercial sovereign acts. Insofar as the threshold issue of jurisdiction is concerned, these actions involving the performance of the contract do not change the foundation character of the transaction as a commercial one.

Memorandum Opinion, at 2. We do not agree.

[4] Section 174(d) of the Compact is analogous to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602(a)(2), which provides that a "foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is based upon a commercial activity carried on in the United States by the foreign state." Due to the similarity in language, the parties agree, the legislative history and judicial interpretation of FSIA § 1602(a)(2) guide the analysis of what constitutes "commercial activity" under Section 174(d) of the Compact.

[5,6] The United States Supreme Court instructs that the analysis of whether the "commercial activity" exception applies must begin with identifying the particular conduct "upon" which the action is "based." *Saudi Arabia v. Nelson*, 507 U.S. 349, 356 (1993). The phrase "based upon" has been extensively reviewed by the United States Supreme Court, which has determined that the phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case." *Nelson*, 507 U.S. at 357 (citing *Callejo v. Bancomer, S.A.*, 764 F.2d 1101, 1109 (5th Cir. 1985) (the focus should be on the "gravamen of the complaint")). Significantly, the phrase "based upon" means "something more than a mere connection with, or relation to, commercial activity." *Nelson*, 507 U.S. at 357-58. Here, the conduct upon which PII's action is based – indeed the gravamen of its complaint – was the Base Commander's refusal to allow certain of PII's employees to reside on the base at Kwajalein Atoll. The gravamen of the complaint is *not* the contract between the United States and WOC, as was determined by the High Court.[3]

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[3] The circumstances in this case are analogous to those in Nelson, 507 U.S. 349. In Nelson, an American employee at a Saudi hospital and his wife brought suit against Saudi Arabia for injuries arising from the employee's alleged detention and torture by the Saudi Government in retaliation for his being a "whistle blower." Plaintiffs pointed to the employee's recruitment by the hospital and his employment contract as evidence of the alleged commercial nature of the acts. In rejecting the claim, the United States Supreme Court found that the gravamen of the complaint was torture and punishment inflicted on the plaintiff by Saudi officials, actions peculiarly sovereign in nature: "[w]hile [the employment of Nelson] led to the conduct that

(continued...)

[7,8] The next inquiry is whether the action at issue – the Base Commander's control over access to the base – is commercial in nature. Conduct by a state is considered "commercial activity" where the state exercises "only those powers that can also be exercised by private citizens, as distinct from those powers peculiar to sovereigns." *Nelson*, 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)) (internal quotation marks omitted). A Base Commander's control over the access to a defense site and decisions regarding who may or may not reside thereupon are not activities which a private citizen would exercise. Rather, operation of military bases, including control of access thereto, is universally considered a purely governmental function and, as such, sovereign in nature.[4] *See, e.g., United States of America v. Public Service Alliance of Canada*, [1992] 2 S.C.R. 50, 91 D.L.R. (4th) 449, 1992 Carswell Nat 1005 (with respect to a military base in Canada leased by the United States, the Supreme Court of Canada stated, "I can think of no activity of a foreign state that is more inherently sovereign than the operation of such a base. As such, the United States government must be granted the unfettered authority to manage and control employment activity at the base")); *Holland v. Lampen-Wolfe* [2000] 3 All E.R. 833, [2001] I.L.Pr. 49, 2000 WL 976034 (HL) ("[t]he maintenance of the base itself was plainly a sovereign activity. As Hoffman L.J. (Now Lord Hoffman) said in Littrell v. United States (No. 2), this looks about as imperial an activity as could be imagined"); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 896 (1961) ("the

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[3](...continued)
eventually injured the Nelsons, they are not the basis for the Nelsons' suit . . . and those facts alone entitle the Nelsons to nothing under their theory of the case." *Nelson*, 507 U.S. 357. Here, as in *Nelson*, while the Base Commander's refusal to allow certain of PII's employees to live on the military base would not have occurred but for the construction contract, it is the Base Commander's actions which are at issue here, not the construction contract.

[4]PII argues that evidence indicates that regulation of access by the Base Commander was for commercial purposes. This assertion is irrelevant because "the commercial character of an act is to be determined by reference to its 'nature' rather than its 'purpose'[.]" *Nelson*, 507 U.S. at 360. Whether or not the *purpose* of preventing residence on base of certain personnel is commercial, the *nature* of regulating access to a secure military base is purely governmental.

governmental function . . . here was . . . to manage the internal operation of an important federal military establishment. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control") (internal citations omitted).

Therefore, because the action complained of is the Base Commander's decision to refuse residence on base to four of PII's Permanent Resident Alien employees, and such action is purely sovereign in nature, the Court concludes that the United States in this instance is immune from the jurisdiction of the RMI Courts. Accordingly, the decision of the High Court is REVERSED.

IN THE SUPREME COURT
REPUBLIC OF THE MARSHALL ISLANDS

REPUBLIC OF THE MARSHALL ISLANDS,

S. CT. CIVIL NO. 01-03
(High Ct. Crim. No. 2000-074)

Respondent-Appellee,

-v-

MIRAM DE BRUM,

Defendant-Appellant,

ORDER VACATING JULY 7, 2003 "ORDER VACATING JUDGMENT AND SETTING ASIDE OPINION FILED ON DECEMBER 27, 2002"

JULY 14, 2004

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

Argued and Submitted May 10, 2004.

SUMMARY:

The Supreme Court, sitting en banc, vacated the July 7, 2003, Order vacating the Court's December 27, 2002 decision in this case affirming the High Court's conviction of defendant for violating tax laws. The Supreme Court expressly vacated the July 7, 2003 order without prejudice to the defendant seeking appropriate relief before the High Court.

DIGEST:

1. COURT – *Supreme Court – Jurisdiction*: A single judge of the Supreme Court has no

[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.

authority or lacks "jurisdiction" to vacate the decision previously entered by the fully comprised three member Supreme Court.

The relevant procedural history can be concisely stated. Defendant-Appellant appealed from a judgment of conviction entered by the High Court. Defendant-Appellant's conviction was affirmed by Supreme Court Opinion filed on December 27, 2002. On July 7, 2003, the then Chief Justice *sua sponte* entered an "Order Vacating Judgment and Setting Aside Opinion Filed on December 27, 2002." That "Order" raised the issues of ineffective assistance of appellate counsel and sufficiency of the evidence to sustain defendant's conviction. The "Order" required briefing on those issues in the event the parties were unable to resolve this matter by stipulation. Unable to resolve the manor by stipulation, the parties submitted briefs on the issues raised by the "Order."

[1] Appellee, Republic of the Marshall Islands, urges that a single judge of the Supreme Court has no authority or lacks "jurisdiction" to vacate the decision previously entered by the fully comprised three member Supreme Court. Defendant-appellant concedes as much.

There being no issue for this Court to decide, Judge Fields's July 7, 2003 Order is hereby VACATED without prejudice to defendant-appellant seeking appropriate relief before the High Court.

David Lowe, for Defendant-Appellant
Resina Senikuraciri, Assistant Attorney General, or Plaintiff-Appellee