

**IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION**

ESTATE OF MYLA MIRA,
Appellant,
v.
REPUBLIC OF PALAU,
Appellee.

Cite as: 2023 Palau 14
Civil Appeal No. 22-016
Appeal from 20-076

Decided: May 4, 2023

Counsel for Appellant Vameline Singeo
Counsel for Appellee Kathleen Burch

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice, presiding
JOHN K. RECHUCHER, Associate Justice
FRED M. ISAACS, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice.

OPINION

PER CURIAM:

[¶ 1] The Estate of Myla Mira (“the Estate”) filed a complaint alleging medical malpractice and wrongful death, which failed to include critical facts. The Trial Division gave extensive instructions on how to fix the deficiency and allowed the Estate many opportunities to file an amended complaint. Because the deficiency was not remedied after several attempts, the Trial Division dismissed the case. The Estate then filed this appeal, arguing that the Trial Division should have heard its arguments.

[¶ 2] Because we find that the Trial Division properly dismissed the case for lack of subject matter jurisdiction and failure to state a claim, we **AFFIRM.**

BACKGROUND

[¶ 1] On June 18, 2018, decedent Myla Mira (“Mira”) underwent a tonsillectomy at the Belau National Hospital. During the tonsillectomy, a blood vessel was severed, and Mira experienced important bleeding which required a second surgery. A few days after undergoing the tonsillectomy, Mira was released from the hospital. On the same day, Mira was brought back to the Hospital due to her bleeding. She passed away shortly after arriving at the Hospital on June 23, 2018, from hypovolemic shock caused by her blood loss.

[¶ 2] The Republic of Palau (“ROP”) through its Ministry of Health and Canvasback Mission Inc. (“Canvasback”) entered an agreement under which Canvasback provides a medical team of ear, nose, and throat specialists to the Belau National Hospital. The doctor who performed the tonsillectomy, Dr. John Kim, is a Canvasback doctor. Under the terms of the agreement, the ROP agreed to indemnify, hold harmless, and defend Canvasback and its employees for any claims and liabilities arising out of their performance of the agreement.

[¶ 3] The procedural history of this case is complex, and we summarize its relevant facts as follows. On June 19, 2020, the Estate of Myla Mira, represented by Mira’s family members, filed a complaint alleging medical malpractice and wrongful death, alleging that the tonsillectomy resulted in the decedent’s death. The complaint named as defendants the Republic of Palau, the Ministry of Health, Minister of Health Emais Roberts, Dr. Glenda Santos, and John and Jane Doe. This initial complaint stated that Mira was under the care of Dr. Santos, an ROP doctor, who forcibly discharged Mira from the hospital after her surgery, despite Mira asking to remain admitted and complaining of dripping in her throat. The complaint also stated that Minister Emais Roberts, as the Minister of Health, had a duty to ensure the proper care of patients in the Belau National Hospital. Crucially, this first amended complaint did not name Canvasback as a defendant, nor did it name the doctor who had performed the tonsillectomy.

[¶ 4] Shortly thereafter, on June 23, 2020, the statute of limitations expired for all causes of actions arising out of the medical care that Mira received at the Belau National Hospital.

[¶ 5] On July 10, 2020, the ROP filed its response and motion to dismiss, in which it denied liability for the death of Mira and claimed sovereign immunity and qualified immunity. The ROP also impleaded Canvasback through a third-party complaint pursuant to ROP R. Civ. P.14(a), alleging that Dr. John Kim performed the surgery on the decedent. This third-party complaint led to some litigation then was later dismissed on August 17, 2021, after the ROP and Canvasback entered a settlement agreement.

[¶ 6] Because the Appellants' initial complaint was incomplete, the Trial Division granted Appellants leave to amend their complaint. The first amended complaint, filed on August 31, 2020, named the same defendants as the prior complaint. It stated that Dr. Kim performed the tonsillectomy during which he "cut a blood vessel" and maintained the allegations regarding Dr. Santos and Minister Emais Roberts. It pursued the theory that Mira was in the care of the ROP and the ROP owed her a duty of care to properly perform the tonsillectomy. However, the first amended complaint did not name Canvasback or Dr. Kim as defendants, nor did it state any cause of action against them.

[¶ 7] After some lengthy back and forth, on November 4, 2021, the Trial Division ruled on several motions to dismiss filed by the ROP. The Trial Division dismissed the Estate's claims against the ROP pertaining to Canvasback's actions because Canvasback was not an ROP employee, and as a result, the ROP had not waived immunity under 14 PNC § 501(a)(3).¹ The Trial Division's order described how the litigation ought to proceed, by stating:

¹ The statute states in relevant part that actions may be brought against the government upon the following claims:

(3) civil actions against the government . . . on claims for money damages, accruing on or after September 23, 1967, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of *any employee of the government* while acting within the scope of his office or employment, under circumstances where the government of the Trust Territory or Republic, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(emphasis added)

[The Estate] can sue Canvasback for the medical negligence, who in turn might, depending on the terms of settlement, seek indemnification and representation from ROP based on the contract and 14 PNC § 502(a)(2), but [the Estate] cannot go directly to ROP for claims against Canvasback.

Order on Mot. to Dismiss, Granting in Part and Den. In Part (Tr. Div. Nov. 4, 2021) (quotations omitted).² In addition, the Order explicitly stated that the Estate could move to amend its complaint.

[¶ 8] After this clarification on the correct procedure, on December 7, 2021, the Trial Division granted the Estate another leave to properly amend the Complaint “to join Canvasback as a defendant,” noting that it did so in the “interest to protect the parties from mistakes of their lawyer” and “in the interest of justice.” The Estate thus filed a second amended complaint. This complaint named Canvasback as a defendant, but still argued that the ROP could be held liable and that it had waived its sovereign immunity under 14 PNC § 501(a)(3). This second amended complaint pursued the theory that Canvasback and the ROP are jointly and severally liable to the Estate for their breached duty of care to Mira by severing the blood vessel and failing to take appropriate steps to ensure her health before her discharge.

[¶ 9] On January 18, 2022, the Estate filed a motion for leave to file a third amended complaint, which the Trial Division denied on February 9, 2022. On February 14, 2022, the Trial Division clarified in a further order that while it would allow the Estate the opportunity to file an amended complaint, the complaint had to comply with the November 4, 2021 and December 7, 2021 orders. The court explained that neither the second amended complaint nor the proposed third amended complaint complied with the orders. The order clearly stated:

[The Estate] cannot pursue a claim against ROP where it argues that ROP was negligent in

² We note that the Trial Division misquoted the relevant statute and meant to cite 14 PNC § 502(b). The Trial Division recognized and clarified this error in its July 15, 2022 Order.

choosing Canvasback. Further, [the Estate] must distinguish the allegations made against Canvasback from ROP. [The Estate] is pursuing this claim against Canvasback, and whether they indemnify from ROP or not is between them only. [The Estate] cannot pursue ROP for Canvasback's actions. The only claim that [the Estate] may bring against ROP is for their negligent acts taken in accordance with Canvasback, but not for any of Canvasback's actions.

The Trial Division then once again ordered the Estate to file an amended complaint.

[¶ 10] On March 16, 2022, the Estate made another motion to file a third amended complaint, with a proposed second version of the third amended complaint. This amended complaint named Canvasback as a defendant and pursued the theory that the ROP was liable for Canvasback's negligence, as the ROP's independent contractor, and that defendants were jointly and severally liable for breach of duty of care. On May 13, 2022, the Trial Division denied the motion, finding that this fourth version of the amended complaint was "nearly identical to the two previous complaints, which [the Trial Division] has already deemed to be insufficient."

[¶ 11] On July 15, 2022, the Trial Division granted the ROP's motion to dismiss the first amended complaint. The court stated that it did not take into account the second nor the third amended complaints due to their deficiencies. The Trial Division held that the claim against the ROP for its own negligence and the actions of an independent contractor fail as a matter of law because the ROP did not waive sovereign immunity. Because the first amended complaint failed to state a separate claim against Canvasback, and the ROP had not waived its sovereign immunity, the Trial Division dismissed the case.

STANDARD OF REVIEW

[¶ 12] We review a trial court’s order granting a motion to dismiss *de novo*. *Palau Pub. Lands Auth. v. Koror State Pub. Lands Auth.*, 19 ROP 24, 27 (2011). In reviewing a motion to dismiss, we accept all allegations in the plaintiff’s complaint as true and determine whether those allegations state a claim for relief. *Id.*

[¶ 13] “Review of a trial court’s refusal to permit the filing of an amended complaint generally implicates an abuse of discretion standard. Failure to grant leave to amend pleadings is ordinarily not reversible error, although the court’s discretion must not be abused and refusal to permit amendment must have a justifying reason.” *Gibbons v. Republic of Palau*, 1 ROP Intrm. 634, 645 (1989) (omitting internal citations). “[D]iscretionary decisions are evaluated under the abuse of discretion standard, where a Trial Division’s decision will not be overturned unless the decision was arbitrary, capricious or manifestly unreasonable, or because it stemmed from an improper motive.” *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008).

[¶ 14] The issue of whether there is a waiver of sovereign immunity presents a question of law that we review *de novo*. *Becheserrak v. Republic of Palau*, 8 ROP Intrm. 147, 147 (2000) (citing *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 21 (1994)). The party raising a claim against the government bears the burden of demonstrating the waiver of sovereign immunity. *Ochedaruchei Clan v. Oilouch*, 2021 Palau 33 ¶ 8.

DISCUSSION

[¶ 15] The Estate argues that the Trial Division erred in dismissing the case and not addressing the two claims included in the third amended complaint: first, that the ROP is liable for Canvasback’s negligence as an independent contractor for the ROP and second, that the ROP and Canvasback are jointly and severally liable for causing Mira’s death. Before we turn to this question, we first address the inadequacy of the Estate’s brief.

I. Inadequate Briefing

[¶ 16] Our Appellate Rules and the Court’s case law impose both formal and substantive requirements for adequate appellate briefing. Regrettably, the

Estate's Opening Brief falls short of meeting many of these substantive requirements.

[¶ 17] The burden of demonstrating error on the part of a lower court is on the appellant. *Ngetchab v. Lineage v. Klewei*, 16 ROP 219, 221 (2009) (“[I]t is the job of Appellant, not the Court, to search the record for errors.”). Lacking clarity and precision in the appellant's argument, this Court will not “trawl the entire record for unspecified error.” *Id.*; see also *Idid Clan v. Demei*, 17 ROP 221, 229 n.3 (2010) (“It is not the Court's duty to interpret . . . broad, sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply.”). To demonstrate such error, it is incumbent upon the party asserting error to cite relevant legal authority in support of his or her argument. *Aimeliik State Pub. Lands. Auth. v. Rengchol*, 17 ROP 276, 282 (2010) (“Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court's opinion and leave it to this Court to undertake the research.”).

[¶ 18] The Estate provides no authority to support its contentions, with the exception of two United States cases that explain the principle of joint liability. We have repeatedly ruled that “[u]nsupported legal arguments need not be considered by the Court on appeal.” See *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 (2006). The Estate's brief is so wholly inadequate that it would be well within the Court's discretion to ignore it entirely and find the appeal procedurally defaulted. It is only out of recognition for the decedent's family that we endeavor to explain our reasoning further.

II. Procedural Waivers and Denial of the Amended Complaints

[¶ 19] The ROP maintains that the Estate failed to raise below that the ROP and Canvasback were jointly and severally liable for the death of Mira, and that the ROP is liable for the negligence of Canvasback as its independent contractor. Indeed, “[n]o axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue.” *Ochedaruchei Clan v. Oilouch*, 2021 Palau 33 ¶ 11. Nevertheless, we do find that these arguments were raised, although unartfully so: the second amended complaint briefly raises the question of joint liability, and the third amended complaint mentions liability for an

independent contractor. The relevant question is whether the Trial Division erred in denying the Estate leave to file these complaints.

[¶ 20] The Court has authority to grant a motion for leave to amend a pleading even after a party's case has been presented. *In re Estate of Debelbot*, 3 ROP Intrm. 364, 365 (Tr. Div. 1990). Courts are granted wide latitude of discretion to decide whether or not to permit an amendment. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330 (1971). We review such decisions under an abuse of discretion standard. *Gibbons*, 1 ROP Intrm. at 645.

[¶ 21] While a court should generally be quite liberal in allowing amendments to pleadings, we find that the Trial Division is entitled to refuse amended complaints that repeatedly fail to state a cause of action.

[¶ 22] Out of respect for the tragic facts of this case, and with regard to its complex history,³ the Trial Division explicitly and repeatedly explained how to remedy the deficiencies in the Estate's complaint. It gave the Estate numerous opportunities to file amendments. Yet, the Estate was unable to follow the clear directions of the Trial Division through five different versions of the complaint. The decision to deny leave to amend the complaint for a third time was not "arbitrary, capricious or manifestly unreasonable," nor did it stem from "an improper motive"—it simply recognized that despite the Trial Division's leniency, the Estate had yet to successfully state a cause of action after five attempts and two years of litigation, and that such shortcomings put a heavy burden on the ROP. *See Ngoriakl*, 16 ROP at 107.

[¶ 23] Therefore, the Trial Division did not abuse its discretion in denying leave to amend the complaint, after offering the Estate several opportunities to do so. It properly decided to take into consideration only the first amended complaint.

³ The Trial Division acknowledged that confusion arose over the third-party complaint between the ROP and Canvasback, and over the misquoted statute in the November 4, 2021 order.

III. Failure to State a Claim and Lack of Subject-Matter Jurisdiction

[¶ 24] We now turn to why the issues raised by the amended complaints did not state a cause of action. Under ROP R. Civ. P. 12(b)(6), a party may make a motion to dismiss for failure to state a claim. Such motion should not be granted “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief.” *Allied Boston Bank, Inc. v. Registrar of Corps.*, 10 ROP 198, 199 (Tr. Div. 2002). Under ROP R. Civ. P. 12(b)(1), a party may make a motion to dismiss for lack of jurisdiction over the subject matter.

[¶ 25] First, joint and several liability is not a cause of action, but a theory for recovering damages. *See* 14 PNC § 3503 (“joint tortfeasors' means two or more persons jointly or severally liable in tort for the same injury to person or property”). As such, merely stating principles of joint and several liability is not enough: the Estate should have first established that Canvasback committed some wrongful conduct, clearly separate from the ROP’s conduct. The amended complaints only state that the ROP and Canvasback acted “in concert” to cause the death of Mira. They do not attribute specific acts to Canvasback, which makes it impossible for the Trial Division to distinguish whether the Estate properly stated a cause of action.

[¶ 26] Second, the Estate avers that the ROP is liable for the actions of its independent contractor, Canvasback. Throughout their complaints, the Estate asserts that the ROP waived its sovereign immunity under 14 PNC § 501(a)(3). The Trial Division held that this was not the case in its November 4, 2021 order.

[¶ 27] The government is immune from lawsuits except to the extent it consents to be sued, and the terms of that consent define a court’s jurisdiction to entertain the suit. *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994). We have previously held that a waiver of sovereign immunity cannot be implied. It “must be unequivocally expressed by statute.” *Superluck Enterprises, Inc. v. Republic of Palau*, 6 ROP Intrm. 267, 271 (1997).

[¶ 28] Under 14 PNC § 501(a)(3), sovereign immunity is waived for the negligent acts of ROP *employees* that do not fall within the discretionary function exception set out in 14 PNC § 502(b). The statute is clear that the

ROP has not waived its sovereign immunity for the acts of its independent contractors. In the absence of a waiver, the Trial Division has no jurisdiction to entertain such suits.⁴

[¶ 29] Therefore, the Trial Division did not err in dismissing the first amended complaint. Because the ROP has not waived sovereign immunity, the Trial Division has no jurisdiction to hear claims against the ROP's independent contractors. Because the Estate has failed to state a claim against Canvasback, the Trial Division was entitled to dismiss the claim. The Court is extremely sympathetic to Mira's family members in the face of such tragedy. We regret that counsel for the Estate's failure to abide by the Trial Division's instructions led to this result.

CONCLUSION

[¶ 30] For the reasons set above, we **AFFIRM** the Trial Division's judgment.

NGIRAIKELAU, Chief Justice, concurring:

[¶ 31] I concur with the Court's well written opinion. I write separately to underscore a lawyer's duty to provide competent legal service to clients, and when such service cannot be provided in a particular case to refer the same to another lawyer whom he believes is reasonably competent.

[¶ 32] Myla Mira's life was cut short and it appears from the trial record that medical negligence may have been at play. No major surgery is without its risks. Nevertheless, when a person dies shortly after a routine surgery, some avenue should be available for the family to ascertain what happened and to be awarded compensation if justice so requires. A review of the trial record convinces me that the Estate should have received an opportunity to make their case. Unfortunately, it appears that counsel for the Estate accepted

⁴ The Estate also argued in its third amended complaint that the ROP cannot invoke sovereign immunity because surgery is an inherently dangerous activity and that the ROP is liable for the negligent hiring of Canvasback. We do not entertain such questions, as they were not raised on appeal.

this case without the requisite learning and skill to do a competent job and, as a result, Mira’s family was deprived of any chance of compensation.

[¶ 33] Lawyers owe a fiduciary duty to their clients to represent their interests fastidiously and to provide the services that a lawyer of ordinary knowledge, skill and diligence reasonably should provide. Indeed, the ABA Model Rules of Professional conduct, which apply to all attorneys admitted to practice law in Palau, state that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Model Rules of Prof’l Conduct R. 1.1 (2023).

[¶ 34] This case provides a wake-up call for all members of the Palau Bar to think twice before accepting a case that you may lack competency to handle. You should refer such cases to a lawyer colleague whom you believe to be competent. However, if you decide to take on such cases, you should be willing and able to acquire sufficient learning and skill to do a competent job, or consult or associate with a lawyer colleague whom you believe to be competent. This is not only the right thing to do, but is also required under the ABA Model Rules. As this case teaches us, your failure to do so deprives your clients of the competent service they are entitled to and exposes you to a potential malpractice lawsuit.