IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

REPUBLIC OF PALAU, BUREAU OF LANDS AND SURVEY, and BORMAN TELTULL,
Appellants,
v.
NGATPANG STATE PUBLIC LANDS AUTHORITY, NGATPANG STATE GOVERNMENT, and INGLAI CLAN,
Appellees.

Cite as: 2023 Palau 7
Civil Appeal No. 22-003
Appeal from Civil Action 21-159

Decided: February 9, 2023

Counsel for Appellants .... Kathleen M. Burch
Counsel for Appellee Ngatpang State Public Lands Authority............ C. Quay Polloi
Counsel for Appellee Ngatpang State Government .... William Ridpath
Counsel for Appellee Inglai Clan .... Allison Nixon

BEFORE: JOHN K. RECHUCHER, Associate Justice, presiding
KATHERINE A. MARAMAN, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice, presiding.

OPINION[1]

PER CURIAM:

[¶ 1] This appeal asks us to determine the scope of the doctrines of sovereign and official immunity in Palau. Appellants, the Republic of Palau

[1] Although Appellants request oral argument, we resolve this matter on the briefs pursuant to ROP R. App. P. 34(a).

and government agency employee Borman Teltull, appeal the Trial Division's determination that they are not entitled to sovereign and official immunity.

[¶ 2] Because sovereign immunity bars the suits against the ROP and Teltull in his official capacity, we **VACATE** the Trial Division's decision and **DISMISS** the suits. Because the Trial Division has not yet addressed the issue of Teltull's official immunity in his personal capacity, we cannot decide the issue, and we **DISMISS** the appeal.

BACKGROUND

[¶ 3] This case is born from a dispute over the boundary between Aimeliik State and Ngatpang State. The geographic boundaries of each state, as respectively set out in the Aimeliik State Charter and the Ngatpang State Charter, have an overlapping portion of 11,783,562 square meters (approximately 2911 acres). This overlapping area includes the three parcels of land at issue in the underlying case, Cadastral Lot Nos. 101 M 02, 100 M 01, and 101 M 01, also known as *Ongsekikl*.

[¶ 4] The Bureau of Lands and Surveys assigned its employee Borman Teltull as the Land Registration Officer to this case, and charged him with determining in which state the land is located. Teltull determined that the parcels are located in Aimeliik State.

[¶ 5] On August 5, 2021, Appellee Ngatpang State Public Lands Authority ("NSPLA") filed suit seeking to quiet title to *Ongsekikl*. In its first complaint, NSPLA alleged violations of constitutional and statutory due process and fraud, and sought a declaratory judgment declaring the determinations of ownership and certificates of title issued to Trei Clan were null and void. The complaint named numerous defendants, including Trei Clan, individuals claiming status and/or strength within Trei Clan, Aimeliik State Government, Aimeliik State Public Lands Authority, the Aimeliik State Boundary Commission, the Republic of Palau by its agency the Bureau of Lands and Surveys, and Borman Teltull in his official capacity as a former Land Registration Officer as well as in his individual capacity. Amongst these defendants, only the Republic of Palau ("ROP") and Borman Teltull (collectively "Appellants") appeal the Trial Division's decision.

[¶ 6] Two additional parties intervened in this case. Ngatpang State Government and Inglai Clan filed a suit to quiet title on the same land and against the same parties, making similar claims of fraud and violation of due process as NSPLA. NSPLA, Ngatpang State Government and Inglai Clan are collectively referred to as "Appellees".

[¶ 7] Appellants filed Motions to Dismiss for Lack of Subject Matter Jurisdiction, which argued (1) that NSPLA's claims for fraud and request for punitive damages were barred by sovereign immunity, (2) that NSPLA's requests for attorney's fees, expenses, and costs, were barred by statute, (3) that NSPLA's claims for constitutional due process violations failed to state a cause of action because the Palau Constitution does not grant government entities constitutional rights, and (4) that Borman Teltull had been an improperly named defendant as he was no longer an employee of the ROP.

[¶ 8] On February 9, 2022, the Trial Division issued an Order denying the Motion to Dismiss the suit against Borman Teltull in his personal capacity. The Trial Division found that Appellees were entitled to explore their claim through the trial and discovery process, even if that claim was unlikely to be successful. The Trial Division specified that if the Appellees failed to demonstrate the significantly high threshold required to pierce absolute or qualified immunity, the Court would entertain a motion for summary judgment or find in favor of Teltull, but that a motion to dismiss is not the stage in which to grant the dismissal.

[¶ 9] On February 22, 2022, the Trial Division issued an Order granting in part and denying in part the ROP's Motions to Dismiss. The Order granted the Motion to Dismiss on the first two issues and denied it on the last two, as such: (1) the trial court dismissed the Appellees' claim based on fraud and request for punitive damages as barred by sovereign immunity, (2) it dismissed NSPLA and Inglai Clan's requests for attorney's fees, expenses, and costs, as barred by sovereign immunity, (3) it held that states and agencies do have a fundamental constitutional right to due process, and (4) it found that Appellees were entitled to argue that an exception to sovereign immunity applies to Borman Teltull in his official capacity, for the same reasons stated in the February 9, 2022 order.

STANDARD OF REVIEW

[¶ 10] 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.*

[¶ 11] 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

[¶ 12] Appellants allege that (1) the ROP has not waived sovereign immunity for claims based on violations of the ROP Constitution, (2) that the Constitution does not state a right to due process for state agencies such as NSPLA,[2] (3) that a government employee cannot be sued in their "former official capacity", and (4) that Borman Teltull is entitled to official immunity in the suit against him in his personal capacity.

I. Sovereign Immunity

[¶ 13] The sovereign immunity doctrine is inherent to the government's status as a sovereign. *Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994). 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. *Id.* (citing *United States v. Mitchell*, 445 U.S. 535, 538 (1980)). 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).

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[2] On May 27, 2022, this Court issued an Order dismissing this portion of the interlocutory appeal, determining that it did not meet the requirements of the collateral order doctrine. Therefore, we do not address this issue.

> There can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms. The consent necessary to waive traditional immunity must be express, and it must be strictly construed.

Id. at 271-72 (citations and internal quotations omitted). "The express waiver rule requires us to construe an asserted waiver of immunity strictly, and precludes us from recognizing any intent to hold the government liable where that intent 'is not translated into affirmative statutory . . . terms.'" *Becheserrak*, 8 ROP Intrm. at 148 (quoting *Superluck*, 6 ROP Intrm. at 271-72).

[¶ 14] Appellants argue that the 14 PNC §§ 501-503 does not unequivocally express a waiver of immunity for claims based on violations of the ROP Constitution. § 501 provides a list of claims that may be brought against the Republic, and provides in relevant part that sovereign immunity is waived for "any other civil action or claim accruing on or after September 23, 1967, against the government of the Trust Territory or Republic *founded upon any law of this jurisdiction or any regulation issued under such law*." 14 PNC § 501 (emphasis added). The following provision, § 502, provides a list of exceptions under which immunity is not waived. This case thus requires us to interpret § 501(a)(2) and whether its use of the word "law" includes the Constitution.

[¶ 15] We first look at general principles of constitutional interpretation. Under Article II Section 1 of the Palau Constitution, "[t]his Constitution is the supreme law of the land." Whenever we are tasked with defining a term or word within a statute or constitution, we attempt to identify its plain meaning, and where there is no ambiguity, we refrain from straying to other canons of interpretation. *Republic of Palau v. Oilouch*, 20 ROP 109, 111 (2013). Under this canon of construction, the Constitution is a law under § 501(a)(2).

[¶ 16] We must also construe 14 PNC § 501-03 in its context. *See Becheserrak*, 8 ROP Intrm. at 148 (analyzing the context of a statutory provision to determine whether it waived sovereign immunity); *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991). This Court previously noted that

"[t]he clear effect of 14 PNC § 502 . . . is to preserve the Republic's sovereign immunity in certain cases, including suits based on malicious prosecution and abuse of process." This conclusion, moreover, is consistent with Section 502's heading: 'Exceptions.'" *Tell*, 4 ROP Intrm. at 228-29. Accordingly, the structure of the statute suggests a broad waiver of immunity, only restricted by the exceptions in § 502.

[¶ 17] Although these general principles indicate that the ROP may have waived its immunity, Palau has interpreted its sovereign immunity statutes by following the construction given to the U.S. statutes that inspired it. It is a "well-established principle of statutory construction that when one jurisdiction adopts the statute of another jurisdiction as its own, there is a presumption that the construction placed upon the borrowed statute by the courts of the original jurisdiction is adopted along with the statute." *Becheserrak*, 7 ROP Intrm. at 115 (quoting *United States v. Aguon*, 851 F.2d 1158, 1164 (9th Cir. 1988)).

[¶ 18] Chapter 5 of Title 14 in the Palau National Code was originally enacted as Chapter 6 of the Trust Territory Code. *Compare* 6 TTC §§ 251-53 *with* 14 PNC §§ 501-03. This Court has recognized that the Trust Territory, when it enacted Chapter 6, most likely borrowed the language from the U.S.'s Tucker Act. *See Giraked v. Estate of Rechucher*, 12 ROP 133, 147 (2005) ("[T]he language of § 501(a)(2) is similar to, and likely based upon, the Tucker Act").

[¶ 19] The ROP argues that the Trust Territory intentionally left out the section where the Tucker Act included a waiver of constitutional claims. *Compare* 6 T.T.C. § 251(1)(b) ("founded upon any law of this jurisdiction or any regulation under such law, or upon any express or implied contract with the government of the Trust Territory, or for liquidated or unliquidated damages in cases not sounding in tort") *with* 28 U.S.C. § 1491(a)(1) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, any Act of Congress or any regulation of an executive department, or upon any express or implied contract of the United States, or for liquidated or unliquidated damages not sounding in tort.")

[¶ 20] This Court has previously used the Tucker Act to interpret the language of 14 PNC § 501(a)(2). *Giraked*, 12 ROP at 147-48 (finding that, like

in the United States, the waiver of immunity for any express or implied contract with the government in 501(a)(2) did not include implied-in-law (quasi) contracts.). We also note that the presumption that the U.S.'s construction was borrowed alongside the adopted statute survived the enactment of the Palau National Code. "[T]he Trust Territory Code—and now the Palau National Code—'must be read in the same light' as the Federal Tort Claims Act from which it was 'largely drawn.'" *Ochedaruchei Clan*, 2021 Palau at ¶ 29 (Dolin J., concurring); *see also Antonio v. Trust Territory*, 7 TTR 123, 127 (Tr. Div. 1974).

[¶ 21] Thus, the language between § 501(a)(2) and the Tucker Act differ in significant ways, and those divergences suggest that the Trust Territory purposefully decided to exclude the Constitution from the scope of the waiver in § 501(a)(2). This language change is decidedly compelling and weighs heavily in our assessment of the statute framers' intent. Because a waiver "must be unequivocally expressed," and we must strictly construe the consent necessary to waive traditional immunity, we find that the ROP did not waive its immunity for constitutional claims. *See Superluck*, 6 ROP Intrm. at 271. As a result, the suit against NSPLA for constitutional violations is barred by sovereign immunity.

[¶ 22] The suit against Teltull in his official capacity is similarly barred. When government officials are sued in their official capacities, the case is still one against the government itself. *Fanna v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 12 (1999) (citing *Jungels v. Pierce*, 825 F.2d 127 (7th Cir. 1987)). As a result, the suit against Teltull in his official capacity is barred by sovereign immunity, and we do not reach the question of whether a government official can be sued in his "former official capacity." We do note that we would not have reached this question regardless of sovereign immunity, as Appellants failed to properly raise this argument in front of the Trial Division, and "[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." *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004); *see also Ngiratereked v. Erbai*, 18 ROP 44 (2011) (holding that arguments not made and preserved below are waived on appeal).

II. Suit Against an Official in a Personal Capacity

[¶ 23] Appellants argue that Borman Teltull, in his capacity as Land Registration Officer, is entitled to both absolute official immunity and qualified immunity from the suit against him in his personal capacity. Appellants assert that official immunity is a common law doctrine and that it must apply here because United States common law principles are the rules of decision in the absence of applicable Palauan statutory or customary law. 1 PNC § 303.

[¶ 24] We find that we need not resolve this dispute. Appellants appeal an order in which the Trial Division did not decide official immunities. Instead, the court determined that a motion to dismiss was not the stage in which to grant the dismissal. The Trial Division specifically stated that if Appellees were unable to demonstrate the high threshold for piercing the veil of official immunity, "the Court will entertain a motion for summary judgment, or ultimately find in favor of Teltull in his personal capacity."

[¶ 25] Like we have done before in *Akiwo v. ROP*, 6 ROP Intrm. 105 (1997), we assume, without deciding, that government officers are entitled to claim official immunity for their actions.[3] Official immunity is viewed as a means of protecting government officials from the burdens associated with participating in discovery and trial. *See Harlow v. Fitzgerald*, 457 U.S. 800, 816 (1982) (qualified immunity is designed to eliminate "the substantial costs [that] attend the litigation of the subjective good faith of government officials"). Under U.S. law, a government officer can raise the qualified immunity defense at both the motion-to-dismiss and the summary-judgment stage, and clearly establishes that an order rejecting the defense at either stage is a "final" judgment subject to immediate appeal. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *see also Malley v. Briggs*, 475 U.S. 335, 341 (1986) ("The *Harlow* standard is specifically designed to 'avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment,' and we believe it sufficiently serves this goal."); *Butz v.*

[3] Accordingly, we leave for another day the question of whether such immunity is part of the "common law", as expressed in the Restatement or otherwise, such that it is applicable in Palau pursuant to 1 PNC § 303. *See Tell v. Rengiil*, 4 ROP Intrm. 224, 227 (1994) (applying the doctrine of prosecutorial immunity as set forth in Section 656 of the Restatement (Second) of Torts).

Economou, 438 U.S. 478, 508 (1978) ("[D]amages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity . . . .").

[¶ 26] This Court "ha[s] long adhered to the premise that the proper time to consider appeals is after final judgment." *Republic of Palau v. Black Micro Corp.*, 7 ROP Intrm. 46, 47 (1998). This Court abides by this final judgment rule because "piecemeal appeals disrupt the trial process, extend the time required to litigate a case, and burden appellate courts. It is far better to consolidate all alleged trial court errors in one appeal." *Id.* The Court will accept a few ways of filing an interlocutory appeal. First, the party can comply with ROP Civ. Proc. R. 54(b) and obtain a certification from the trial court before filing. Appellants in this case did not do so. We then turn to the two exceptions to the final judgment rule: the collateral order doctrine and the "real-world effects" exception. *See Koror State Legis. v. KSPLA*, 2019 Palau 38 ¶ 7. We will only expand on the collateral order doctrine, which is relevant here. The doctrine allows for "an immediate appeal of an interlocutory order entered during trial that determines important rights of the parties but that is not related to the relevant cause of action." *Black Micro Corp*., 7 ROP Intrm. at 47. "For the collateral doctrine to apply, an order must, at minimum, satisfy three conditions: It must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Kebekol v. Ikluk*, 2020 Palau 24 ¶ 6.

[¶ 27] Thus, under the first condition of the collateral order doctrine, our jurisdiction to review the issue on appeal depends upon whether the trial court actually ruled on and determined the issue. *See Bradford v. Huckabee*, 330 F.3d 1038, 1040 (8th Cir. 2003); *Szwedo v. Arkansas*, 284 F.3d 826, 827 (8th Cir. 2002) ("[B]ecause the district court did not address the qualified immunity defense, it did not enter a final appealable order with respect to qualified immunity [sufficient] to confer appellate jurisdiction."); *Krein v. Norris*, 250 F.3d 1184, 1188 (8th Cir. 2001) ("Because there has been no decision, conclusive or otherwise, rendered below on the disputed question of qualified immunity, the defendants' appeal is premature."). In this case, the Trial Division did not address the official immunity defense but merely delayed it.

Because there was no determination, the collateral order doctrine does not apply, and we have no jurisdiction to review the Trial Divisions' order on that issue. Nonetheless, we note that because of the importance of sparing discovery costs to government officials, the Trial Division has a duty to act expeditiously when determining official immunities. As such, it may sometimes be appropriate for the Trial Division to decide official immunities at the motion-to-dismiss stage. Because the Trial Division has not yet done so, we cannot exercise jurisdiction over this issue and we dismiss the appeal.

CONCLUSION

[¶ 28] For the reasons stated above, we **VACATE** the Trial Division's judgment and **DISMISS** the suits against the ROP and Borman Teltull in his official capacity. We **DISMISS** the appeal of the Trial Division's order in the suit against Borman Teltull in his personal capacity.