

**KOROR STATE GOVERNMENT, and  
GOVERNOR YOSITAKA ADACHI, in  
his official capacity,  
Appellants,**

v.

**ALAN MARBOU, DARVIN INABO,  
LAMP OLKERIIL MINOR, CLEOFFAS  
IYAR, JASON LEE PEDRO, RDIALUL  
RUMONG, and MISIA ORRUKEM,  
Appellees.**

CIVIL APPEAL NO. 10-035  
Civil Action No. 10-062

Supreme Court, Appellate Division  
Republic of Palau

Decided: July 18, 2011<sup>1</sup>

[1] **Constitutional Law:** Sovereign  
Immunity

Palauan states do not have a common law  
right to state governmental immunity.

[2] **Constitutional Law:** Sovereign  
Immunity

The Constitution provides that state powers  
must be expressly granted, or else they belong  
to the National Government. ROP Const. art.  
X, § 2.

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<sup>1</sup> The Court finds this case appropriate for  
submission without oral argument. *See* ROP R.  
App. P. 34(a).

BEFORE: KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellants Koror State Government and Governor Yositaka Adachi, in his official capacity, seek review of the Trial Division's Order granting in part and denying in part Appellants' motion to dismiss. For the following reasons, we affirm the Trial Division's decision.<sup>2</sup>

### **BACKGROUND**

Following his victory in the gubernatorial election in November 2009, Governor Yositaka Adachi issued letters to certain state employees. On December 3, 2009, Misia Orrukem received a letter terminating her due to downsizing. She was terminated on December 16, 2009. On April 6, 2010, Alan Marbou, Darvin Inabo, Lamp Olkeriil Minor, Cleoffas Iyar, Jasen Lee Pedro, Rdialul Rumong, and Misia Orrukem each received letters from Governor Adachi that informing them they were demoted or were being reassigned.

Appellees sued the Koror State

Government and Governor Adachi in his official capacity (collectively "KSG"). They sued as a group, bringing two Counts:

(1) breach of their implied contract with KSG arising from the KSG Policies and Procedures Manual ("KSG Manual"); and (2) retaliation or wrongful termination contrary to public policy because the terminations occurred due to the employees' exercise of their constitutional right to free expression. Prior to trial, KSG filed a motion to dismiss for lack of subject matter jurisdiction under ROP R. Civ. P. 12(b)(1). KSG argued that the employees lacked standing to seek a remedy because they are employees at will; the employees failed to exhaust administrative remedies; the case is a non-justiciable political question; the employees brought a non-existent tort; and KSG did not waive sovereign immunity.

On August 18, 2010, the Trial Division issued an order on the motion, denying it in part and granting it in part. First, the court held that the employees has standing to sue under the implied contract theory because the KSG Manual altered the terms of their "at will" employment. Second, it rejected the exhaustion of administrative remedies argument because the Supreme Court's jurisdiction is broader than the United States courts' jurisdiction, and the Court therefore has discretion to determine whether exhaustion of remedies is a prerequisite. According to the Court, exhaustion is not a jurisdictional issue, and because KSG argued that the court lacked subject matter jurisdiction for that issue, that argument failed. The court also noted that the facts showed that exhaustion of administrative remedies would have been futile because Governor Adachi was the final decision-maker

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<sup>2</sup> Appellants request oral argument. After reviewing the briefs and record, the Court finds this case appropriate for submission without oral argument. ROP R. App. P. 34(a) ("The Appellate Division on its own motion may order a case submitted on briefs without oral argument.").

in the grievance procedure, so the employees' use of the grievance procedure would have been pointless.

The court also rejected KSG's argument that the complaint presents a non-justiciable political question because KSG did not cite any authority eliminating the judiciary's power to resolve the conflict. As to the wrongful/retaliatory termination claim, the court granted KSG's motion to dismiss for all employees except Orrukem. The court reasoned that because those employees were not constructively discharged from employment, they have no termination claim. However, the court denied dismissal as to Orrukem because discharge did occur.

Turning to the sovereign immunity argument, the Trial Division held that KSG may have sovereign immunity depending on the facts elicited at trial. The court began by acknowledging that state sovereign immunity is an issue that has not been fully resolved in Palau. It considered the Restatements for the proposition that U.S. states enjoy sovereign immunity and the power to waive immunity. However, it ultimately did not apply the Restatement authority because Palauan and U.S. states differ in ways relevant to the appropriateness of sovereign immunity. The court noted that Palauan states are unique in that they do not have individual court systems, and Palauan states are more constitutionally limited in power than U.S. states because our Constitution does not expressly delegate to the states the power to waive sovereign immunity. ROP Const. art. XI, § 2.

Having recognized the distinction between Palau and U.S. states, the court turned to Palauan authority, using *Metes v.*

*Airai State*, 1 ROP Intrm. 261, 263 (Tr. Div. 1985) for guidance. In *Metes*, Airai State sought sovereign immunity. Because the state constitution did not speak to immunity, the court applied the principles of the Trust Territory immunity statutes to Airai State. The court concluded that Airai did not have sovereign immunity because the Trust Territory government would not have had sovereign immunity. *Id.* In reviewing *Metes*, the Trial Division found it to be a helpful and fair approach to addressing state sovereign immunity. Thus, the court looked to the national immunity statutes that replaced the Trust Territory immunity statutes—14 PNC §§ 501–03.

Applying those statutes, first, the court held that KSG waived sovereign immunity as to the employees' wrongful/retaliatory termination claim. Under 14 PNC § 503, the government waives immunity to certain claims. Thus, applying this statute to KSG by analogy, the court held that the employee's wrongful/retaliatory termination claims are not barred by sovereign immunity.

Second, as to the breach of contract claim, the court looked to 14 PNC § 501(a)(2). This statute provides that the national government waives sovereign immunity on express or implied contracts, with the exception that claims are barred when the government employee—in carrying out a law or regulation—exercised due care or a “discretionary function or duty.” 14 PNC § 502(b).

In applying this statute to the breach of

contract claim alleged, the court held that KSG may have waived immunity. The court reasoned that the waiver exception may not apply because the employees allege that Governor Adachi completely ignored the KSG Manual in writing the letters, his actions may not have been a discretionary application of the procedure in place. The court further noted that KSG's action may not even qualify as an exception under 14 PNC § 502(b) because the KSG Manual sets the procedure for termination and demotion, so the action may be ministerial, not discretionary. Finally, the court concluded that sovereign immunity only applies to the employees' claims for compensatory relief, so the employees' reinstatement claim was barred by the doctrine of sovereign immunity.

Having addressed each argument, the court granted in part and denied in part KSG's motion to dismiss. Specifically, the court denied the motion to dismiss as to the contract claim, noting that KSG may have sovereign immunity depending on the facts presented at trial. The court granted the motion to dismiss for the wrongful/retaliatory termination claim as to the demoted plaintiffs, but denied it as to Plaintiff Orrukem.

Thereafter, KSG sought and was granted a stay pending the appeal of the sovereign immunity ruling. KSG requested that the court permit a collateral appeal of the trial court's order related to sovereign immunity. The court agreed that the collateral order doctrine should apply. It noted that the requirements of a collateral order are that (1)

the trial court conclusively determined a disputed question of law; (2) the issue resolved must be important and "completely separate" from the merits of the underlying case; and (3) the issue must be effectively unreviewable on appeal and affect a substantial public interest. *See Will v. Hancock*, 126 S. Ct. 952, 957 (2006).

As to the first and second prongs of this analysis, the court found that its decision conclusively determined that KSG has no right to absolute immunity, and that the immunity issue is distinct from the legal issues of breach of contract and wrongful/retaliatory termination. Turning to the third prong, the court concluded that immunity cases are unreviewable because immunity issues deal with the right to avoid trial, and that right would be lost if a trial took place before appeal of that issue could occur. And, finally, immunity decisions affect the substantial public interest of whether states have a right to absolute sovereign immunity. Thus, the court granted the stay pending resolution of KSG's immunity claim by this Court. This appeal followed.

## STANDARD OF REVIEW

We review conclusions of law under the de novo standard. *Estate of Rechucher v. Seid*, 14 ROP 85, 88–89 (2007).

## DISCUSSION

KSG raises four issue for appeal: (1) whether the court erred in applying 14 PNC §§ 501–03 to KSG's sovereign immunity argument; (2) whether the court erred in refusing to directly apply the Restatements to KSG's sovereign immunity argument; (3)

whether the court erred in holding that KSG was not entitled to common law governmental immunity; and (4) whether the court erred in its analysis of exhaustion of administrative remedies.

Initially, we dismiss issue #4 without prejudice. There has not been a final judgment in this case, and the general rule is that the Appellate Division only has jurisdiction after the Trial Division enters final judgment. Using an exception to this rule, the Trial Division applied the collateral order doctrine and limited this appeal to address sovereign immunity. Issue #4 addresses the doctrine of exhaustion of remedies, which was not the subject of the collateral order. KSG attempts to tie its exhaustion argument to sovereign immunity by stating that the grievance procedure within the KSG Manual constitutes KSG's only arguable waiver of governmental immunity. Yet the substance of the argument discusses exhaustion of remedies, not governmental immunity; it describes the grievance procedure and contract and employment law, not sovereign immunity. As the question for this appeal is not exhaustion of remedies—only whether KSG has absolute sovereign immunity—we hold that this issue is not ripe. This holding is without prejudice and allows later review if necessary.

### **1. Application of the National Immunity Statutes**

Turning to the issues relevant to this appeal, KSG first argues that the Trial Division's application of national immunity statutes constitutes reversible error. KSG

contends that the national immunity statutes do not apply to the states but principles from the U.S. Restatements of common law do.

We disagree with KSG's view. Section 303 does not require applicability of the Restatement. Rather, this section states that in the absence of applicable Palauan authority, courts apply the U.S. Restatements of law. As will be discussed below, the Restatement is not mandatory authority in this instance.

KSG further argues that the Trial Division erred in using *Metes* to apply the national immunity statutes. According to KSG, the statute the court addressed in *Metes* was repealed in 1986 and replaced by §§ 14 PNC 501–03, any subsequent reliance on that decision is an error. Because the Olbiil Era Kelulau (“OEK”) did not include state waiver in the new statutes, KSG claims not only that states enjoy the right to sovereign immunity, but that the only possible waiver of its immunity could occur pursuant to the KSG Manual. Thus, it contends that the Trial Division erred in finding that states could waive governmental immunity based on the principles of sections 501–03.

For two reasons, this position fails. First, KSG's argument bypasses the issue of whether the states possess the inherent right to sovereign immunity in the first place, and moves on to contend that because there are no state waiver statutes, the Restatement must apply. But, as will be discussed in greater detail below, Palauan states do not possess the inherent right to sovereign immunity. The Trial Division acknowledged this but in

fairness concluded that states—like the national government—have limited sovereign immunity.

Second, the Trial Division used the reasoning in *Metes* for guidance, not as mandatory authority, so the repeal of the statutes applied in *Metes* does not matter. In *Metes*, the court applied the immunity statutes from the Trust Territory period to determine whether Airai State had sovereign immunity. The *Metes* court concluded that it was unclear whether Palau states may exercise sovereign immunity and applied the principles of the Trust Territory's immunity statutes. *Metes*, 1 ROP Intrm. at 263.

In the decision here, the trial court stated:

However artificial, the “*Metes* Compromise”—applying the national immunity statutes to the states—is the fairest deployment of the law under these circumstances. Either extreme—failing to recognize any state sovereign immunity or recognizing absolute immunity—works injustice.

(Order at 10.) It reviewed the approach taken in *Metes*, concluded that it was a fair approach, and applied the principles of the relevant national immunity statutes, sections 501-503. Well aware that the statutes do not expressly apply to the states, the Trial Division applied the statutes by analogy, holding that there might be limited sovereign immunity to be determined by the facts submitted at trial. This is not an error, and we agree with the Trial Division that this

approach reaches a fair middle ground between absolute immunity and no immunity. We affirm the Trial Division on this issue.

## 2. Application of the Restatements to Appellants

KSG next contends that rather than applying the national immunity statutes, the Trial Division should have applied the Restatement's principle that states have sovereign immunity unless waived. We disagree with KSG and affirm on this ground as well.

Section 303 states that the Restatements apply “in applicable cases, in the absence of written applicable law.” 1 PNC § 303. KSG correctly points out that there is no controlling written law regarding state sovereign immunity. Its position is that the controlling law lies in the Restatements addressing state sovereign immunity and state governor discretionary immunity. *See* Restatement (Second) of Torts §§ 895B, 895D(3)(a). According to KSG, the Trial Division erred in not applying the principles of the Restatements.

There are limits to the Restatement's applicability. This case presents one such limit. The Trial Division acknowledged the general Restatement rule that a state is not subject to suit without consent. *See* Restatement (Second) of Torts § 895B(1) (1979). However, the Trial Division did not apply the Restatement due to a significant difference between the Palauan and U.S. constitutions. The court noted that the Palau Constitution expressly states that “governmental powers not expressly delegated by this Constitution to the states nor denied to

the national government are powers of the national government.” ROP Const. art XI, § 2. Conversely, in the U.S., the Tenth Amendment states that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” Whereas in Palau state powers must be expressly granted, in the U.S., state powers are automatically reserved unless barred.

The Trial Division noted that one result of this constitutional difference is that Palauan states do not have independent courts, but the U.S. states do. Palauan states do not face lawsuits within their own court systems. Accordingly, the Trial Division did not apply the Restatement and turned to Palauan authority for guidance.

We agree with the Trial Division. The purpose of immunity is to protect the government from suits in its own forum. The fact that the states cannot be sued in their own state eviscerates the need for state sovereign immunity. *Kawanankoa v. Polybank*, 27 S. Ct. 526, 527 (1907) (“A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical grounds that there can be no legal right as against the authority that makes law on which the right depends.”). Further, given that the Restatement is a compilation of U.S. common law where each state exercises broad powers, if we applied the Restatement here, we would completely ignore Palau’s unique structure where the states have limited power. The Trial Division’s approach was logical, consistent with the Constitution, and not reversible error.

### **3. Common Law Governmental Immunity**

KSG contends Palauan states have common law governmental immunity, and that the Trial Division erred by treating state sovereign immunity as a power rather than an inherent right of the states. It claims that the states have an inherent right to sovereign immunity because the Trust Territory recognized this concept, this concept existed prior to the U.S. Constitution and the Palau Constitution, and it is one of the rights retained by the states under ROP Const. art. XV, § 5. We disagree.

KSG begins its argument by noting that governmental immunity was recognized during the Trust Territory period. Certainly this authority is relevant to the concept of national governmental immunity. However, this point is unpersuasive because KSG cites no Palauan authority to connect Trust Territory immunity to the concept of state sovereign immunity. Moreover, this argument is inconsistent with KSG’s argument that the Trial Division should not have applied the national government’s immunity statutes to these facts. Hypothetically, if we were persuaded by KSG’s position, we would accept that the Trust Territory recognized the concept of immunity. It would logically follow that we would also have to accept the Trust Territory immunity waiver statutes, leading to the same conclusion the Trial Division made. Thus, the Trust Territory’s recognition of sovereign immunity does not translate to an absolute right of state sovereign immunity.

KSG then argues that governmental immunity is a necessary component of

statehood. But it cites no Palauan authority in support, only U.S. case law. For example, KSG cites *Alden v. Maine* for the proposition that “as the Constitution’s structure, and its history, and the authoritative interpretations by this Court make clear, the States’ immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before ratification of the Constitution, and which they retain today . . . .” 119 S. Ct. 2240, 2246–47 (1999). However, KSG does not acknowledge that the U.S. Constitution’s structure, history, and interpretation differ from that of the Palau Constitution. But they certainly do. In the U.S., the states developed independent of one another, with separate laws, courts, and governments. And the drafters of the U.S. Constitution emphasized that retaining state powers was imperative. Given the presence of state court systems and each state’s broad power, the concept of state sovereign immunity became a logical accommodation so that the states do not face suit in their own courts. *See Kawanakoa*, 27 S. Ct. at 527.

[1] Conversely, here the Constitution was drafted with the emphasis on permitting states certain powers as long as those powers did not interfere with the national government. State powers are limited, and the Supreme Court’s jurisdiction is extremely broad, including the power to handle matters where state governments are parties. ROP Const. art. X, § 5 (“The trial division of the Supreme Court shall have original and exclusive jurisdiction over . . . those matters in which the national government or a state government is a party.”). As noted above, without individual state court systems, the need for states to protect themselves from suit in its state is unnecessary. Therefore, given this Court’s

broad jurisdiction and the states’ limited power, it makes sense that the Trial Division did not follow U.S. case law acknowledging the common law right to sovereign immunity.

Finally, KSG argues that sovereign immunity is an inherent right retained by the states under the Palau Constitution. ROP Const. art. XV, § 5 provides the following:

Nothing in Section 3 or 4 of this Article shall be deemed to constitute a waiver or release of the Administering Authority, the Trust Territory of the Pacific Islands, or any other government entity or person from any continuing or unsatisfied obligation or duty owing to the citizens of Palau, or the national government or state governments of Palau. The national government and state governments as well as the citizens of Palau shall retain all rights, interests, and causes of action not specifically and expressly released or waived.

KSG claims that this provision dictates that one of the rights the states retained is the inherent right of governmental immunity. It points out that each state has its own constitution, budget authority, and guarantee that it will follow democratic principles, which were not specifically delegated powers. According to KSG, sovereign immunity should also be a power, or else the “rights and interests” retained after the Constitution was adopted will lose all meaning.

[2] This argument is unconvincing. KSG's proposed interpretation of the "rights and interests" provision is taken out of context. Article XV of the Constitution addresses Palau's transition from the Trust Territory to independence. The purpose of this article was to ensure a smooth transition, and so it is logical that Section 5 would state that the national and state governments retain the rights that were in place prior to the Constitution's adoption. And Section 5 must be read in conjunction with other constitutional provisions. As noted above, the Constitution provides that state powers must be expressly stated, or else they belong to the national government. ROP Const. art XI, § 2. Given that backdrop, if the drafters of the Constitution wanted to provide the states with powers under Section 5, they could have phrased this section so that "powers, privileges, and immunities" were retained by the states. Because it did not—and in light of the fact that state powers must be expressly delegated by the national government—the logical interpretation of the rights retained does not automatically include immunity.

Although state sovereign immunity may be an inherent right in the U.S., Palau's Constitution, history, and precedent do not indicate that it is an inherent right here. The Constitution does not expressly or impliedly provide for state sovereign immunity. Historically, Palauan states have more limited power than U.S. states and they have not exercised sovereign immunity. And finally, nothing before us indicates that the Supreme Court's exercise of its broad jurisdiction over the states hinders state operations. In fact, the only indication that state sovereign immunity exists, even in a limited sense, is the *Metes* decision. We therefore find the Trial

Division's interpretation that state sovereign immunity may exist in a limited sense logical and not a reversible error.

## CONCLUSION

For the foregoing reasons, the Trial Division's decision denying Appellants' motion to dismiss for lack of subject matter jurisdiction due to sovereign immunity is **AFFIRMED**.