IN THE SUPREME COURT OF GUAM

FRANK SAN AGUSTIN,
Petitioner-Appellant,

v.

DAFNE MANSAPIT-SHIMIZU in her official capacity as the Director of the Department of Revenue and Taxation,
Respondent-Appellee.

Supreme Court Case No. CVA19-015
Superior Court Case No. SP0061-19

OPINION

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Appeal from the Superior Court of Guam
Submitted on the briefs December 10, 2019
Hagåtña, Guam

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BEFORE: F. PHILIP CARBULLIDO, Chief Justice; ROBERT J. TORRES, Associate Justice; and KATHERINE A. MARAMAN, Associate Justice.

CARBULLIDO, C.J.:

[1] Petitioner-Appellant Frank San Agustin filed a whistleblower complaint with the Guam Department of Revenue and Taxation ("DRT"), which DRT denied. San Agustin petitioned the Superior Court to review that denial. The court dismissed his petition on sovereign immunity grounds and found the waiver of sovereign immunity contained in Guam's False Claims and Whistleblower Act ("Whistleblower Act") was inorganic. We disagree and vacate the Superior Court's findings, remanding for further proceedings not inconsistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] In 2016, San Agustin filed a Form 211 Whistleblower Complaint with DRT, alleging a Guam taxpayer was avoiding owed taxes. DRT eventually informed San Agustin it closed the case without having assessed additional taxes or penalties on that taxpayer. San Agustin appealed DRT's denial of his whistleblower complaint to the Superior Court. DRT moved to dismiss.

[3] The court granted DRT's motion, finding that: (1) appeals based on the Whistleblower Act, like San Agustin's, require Guam's waiver of sovereign immunity; (2) the Guam Legislature waived sovereign immunity for those appeals through 5 GCA § 37103(a)(4); but (3) that waiver was inorganic because "[t]he Organic Act contains clear limiting language which bars the Guam Legislature from waiving sovereign immunity for any claims outside of tort or contract," Record on Appeal ("RA"), tab 10 at 5 (Dec. & Order, Aug. 12, 2019).

[4] San Agustin timely appealed the trial court's decision. Before us, he argues Guam exercises inherent sovereign immunity based on its status as a sovereign, which the Organic Act recognized alongside Guam's power to waive such immunity for claims that sound in tort or

contract. Appellant's Br. at 12-13 (Dec. 10, 2019). San Agustin suggests upholding the Superior Court's findings would invite us to find other statutes like the Administrative Adjudication Law ("AAL") inorganic, since like the Whistleblower Act, that law allows judicial review of agency decisions without limitation to tort or contract claims. *Id.* at 27.

[5] The Office of the Attorney General of Guam ("OAG"), which represents DRT, did not submit an opposition brief within 30 days after San Agustin's opening brief, as Rule 17(a) of the Guam Rules of Appellate Procedure ("GRAP") requires. Instead, the OAG filed a GRAP 13(i) letter discussing cases the OAG claims provide "controlling law" that the government of Guam may inherently waive sovereign immunity. OAG's GRAP 13(i) Letter at 1 (Jan. 8, 2020) (citing *Marx v. Gov't of Guam*, 866 F.2d 294, 298, 301 (9th Cir. 1989); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353-54 (1907); *People of Porto Rico v. Rosaly y Castillo*, 227 U.S. 270, 274-75 (1913)).

[6] San Agustin responded with a letter to this court, where he urges that, despite the OAG's statements, his appeal is not moot since the trial court's decision continues to deprive San Agustin of his rights to an administrative appeal and award from the whistleblower claim. San Agustin's GRAP 13(i) Letter at 1 (citing *Guam Election Comm'n v. Responsible Choices for All Adults Coal.*, 2007 Guam 20 ¶ 31). San Agustin also notes neither party has sought to dismiss his appeal. *Id.* at 2.

II. JURISDICTION

[7] This court has jurisdiction over appeals from final judgments and orders of the Superior Court of Guam under 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 116-223 (2020)); 7 GCA §§ 3107(b), 3108(a), and 25102(a) (2005); and 5 GCA §§ 37103(b)(4), 9240, and 9241 (2005).

[8] "Sovereign immunity implicates a court's subject matter jurisdiction." *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 22 (citing *Wood v. Guam Power Auth.*, 2000 Guam 18 ¶ 10). "If sovereign immunity applies, the court lacks subject matter jurisdiction, and the action is barred." *Bautista v. San Agustin*, 2015 Guam 23 ¶ 16 (citing *Pac. Rock Corp. v. Perez*, 2005 Guam 15 ¶ 24). We assess whether sovereign immunity applies to San Agustin's claim independent of the OAG's reliance on the defense. *See Sumitomo Constr.*, 2001 Guam 23 ¶ 22 ("[T]he defense of sovereign immunity can be raised at any time, either by a party or by the court. The failure of the government to raise the issue does not constitute a waiver." (citations omitted)).

III. STANDARD OF REVIEW

[9] The Superior Court dismissed San Agustin's appeal for failure to state a claim, under Rule 12(b)(6) of the Guam Rules of Civil Procedure. We review dismissals under Rule 12(b)(6) *de novo*. *See Ukau v. Wang*, 2016 Guam 26 ¶ 19. We also review *de novo* jurisdictional issues and questions involving the government of Guam's waiver of sovereign immunity. *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 11.

IV. ANALYSIS

A. San Agustin's Claim Invokes Guam's Sovereign Immunity

[10] As a threshold issue, the trial court was correct that San Agustin's suit invokes Guam's sovereign immunity. San Agustin filed his appeal against Dafne Mansapit-Shimizu in her official capacity as DRT's then-acting director, and he sought relief that, if granted, would have been paid with government of Guam funds.

[11] "A suit against an officer constitutes a suit against the sovereign if 'the judgment sought would expend itself on the public treasury or domain . . . .'" *Guam Fed'n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 19 (quoting *Smith v. Grimm*, 534 F.2d 1346, 1351 n.6 (9th Cir.

1976)); *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1371 (9th Cir. 1992) ("[A] judgment against a state official in his or her official capacity runs against the state and its treasury." (citation omitted)). And in determining when sovereign immunity applies to a suit against the government of Guam, we look at the practical effect of a judgment, not its formal appellation—analyzing whether the judgment would be indistinguishable to an award of damages against the state. *See Edelman v. Jordan*, 415 U.S. 651, 668 (1974) (recognizing sovereign immunity nonetheless applied to what lower court termed as equitable restitution, where award would "to a virtual certainty be paid from state funds, and not from the pockets of the individual state officials who were the defendants in the action. . . . It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.").

[12] San Agustin's appeal asked the Superior Court to "redetermin[e]" DRT's denial of his whistleblower complaint. RA, tab 1 at 6 (Appeal from Denial Pet'r's Whistleblower Award, Mar. 27, 2019). A favorable redetermination from that court would have resulted in DRT's payment of the whistleblower award to San Agustin, paid not by Mansapit-Shimizu but from the government of Guam's funds. The trial court was correct in finding San Agustin's claim invokes sovereign immunity.

B. The Whistleblower Act's Waiver of Sovereign Immunity is Proper Under the Organic Act

[13] The trial court held the Whistleblower Act's waiver of sovereign immunity was inorganic because the Organic Act allows Guam's waiver of immunity only in cases of tort or breach of contract, but not administrative appeals. We disagree and find the Whistleblower Act's waiver is proper under the Organic Act.

1. The government of Guam possesses inherent sovereign immunity

[14] The Superior Court's holding behooves us to discern the source of Guam's sovereign immunity and the corresponding power to waive that immunity. States exercise sovereign immunity in their courts, which they have retained from before the Constitution. *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, 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 the ratification of the Constitution, and which they retain today . . . ."). The Eleventh Amendment embodies or exemplifies—but does not define the scope of—that broader concept of immunity. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 72 (1996) (recognizing "the background principle of state sovereign immunity embodied in the Eleventh Amendment"); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267-68 (1997) (recognizing "the broader concept of immunity, implicit in the Constitution, which we have regarded the Eleventh Amendment as evidencing and exemplifying"); *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 753 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity."). The Framers were well-aware of those principles: "[That] fundamental aspect of the States' 'inviolable sovereignty' was well established and widely accepted at the founding." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019).

[15] None of the parties before us propose the government of Guam exercises that same "broader concept of immunity," *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 267-68, which States exercise. But the U.S. Supreme Court has said territories like Guam are immune from suit due to their status as sovereigns—and the federal courts governing our jurisdiction have affirmed Guam's "inherent sovereign immunity," *Marx*, 866 F.2d at 298, which has allowed Guam to "enjoy[] a

level of autonomy similar to that of the States," *Ramsey v. Muna*, 849 F.3d 858, 860 (9th Cir. 2017).

[16] Analyses of Guam's inherent sovereign immunity typically begin with the U.S. Supreme Court's decision in *Kawananakoa v. Polyblank*, 205 U.S. 349 (1907). In *Kawananakoa*, the appellants contested the deficiency judgment on a mortgage foreclosure where the then-Territory of Hawai'i owned part of the mortgaged property, but the Territory withheld consent to the suit. *Id.* at 352. The Court considered whether the Territory was liable to suit since its waiver statutes did not apply. *Id.* at 352-53. The Court found the Territory immune, not due to the expression of sovereign immunity in its statutes, but from its status as a sovereign:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. . . . [T]he territory itself is the fountain from which rights ordinarily flow.

Id. at 353; *accord Williams v. United States*, 289 U.S. 553, 577 (1933).

[17] Federal courts in the Ninth Circuit continue to rely on *Kawananakoa*'s premises, and further view *Marx v. Government of Guam*, 866 F.2d 294 (9th Cir. 1989), as authoritative on the issue. *Marx* was an *in rem* admiralty case involving two shipwrecks off Guam's coast—Marx claimed the wrecks as their first finder, while Guam claimed the wrecks under its Underwater Historic Property Act. *Id.* at 296. Marx filed an *in rem* action in the district court. *Id.* Instead of filing an admiralty claim, Guam specially appeared and moved to dismiss based on its sovereign immunity. *See id.* The Ninth Circuit reversed the trial court's dismissal, finding Guam had standing to move to dismiss based on its "inherent sovereign immunity," notwithstanding its failure to file the admiralty claim. *Id.* at 298. Citing *Kawananakoa* favorably, the court found:

> The Supreme Court and this court have recognized that territorial governments have a form of inherent or common law sovereign immunity. . . .

> Although the Guam Organic Act does not expressly grant broad immunity, the legislative history of the 1959 amendment to the Act indicates that both Congress and the Executive Branch believed that Guam had inherent sovereign immunity.

Id. at 297-98. The court found "Guam already had sovereign immunity" before the Organic Act, *id.* at 298, and Congress's passage of the waiver provision in 48 U.S.C.A. § 1421a served as a "limitation" on that immunity.[1] *Id.*; *cf. Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 38-39 (1st Cir. 2000) ("Puerto Rico became an American dependency in 1898, and the Supreme Court recognized its common-law sovereign immunity almost immediately thereafter." (citing *Rosaly y Castillo*, 227 U.S. at 273)).

[18] In line with Ninth Circuit precedent, the District Court of Guam also has recognized that Guam exercises "a form of inherent or common law sovereign immunity," *United States v. Gov't of Guam*, Civil Case No. 17-00113, 2019 WL 1867426, at *3 (D. Guam Apr. 25, 2019), "more accurately viewed as that accorded a sovereign that is not a state covered by the Eleventh Amendment," *id.*, at *2 (citations omitted). "Thus, Guam's sovereign immunity protects it from suit by individuals in much the same way as the Eleventh Amendment protects states." *Id.*, at *3.

[19] These cases guide our approach. As we have discerned: "There is no question that the Government of Guam possesses *inherent* sovereign immunity from suit without its consent pursuant to the Organic Act." *Guam YTK Corp. v. Port Auth. of Guam*, 2014 Guam 7 ¶ 39 (emphasis added).

[20] We continue to find, based on compelling authority, that "Guam already had sovereign immunity" before the Organic Act. *See Marx*, 866 F.2d at 298. The issue of first impression

[1] *Marx* was not the first or only Ninth Circuit case that has described Guam's inherent sovereign immunity. In *Crain v. Government of Guam*, 195 F.2d 414, 415 (9th Cir. 1952), the Ninth Circuit found Guam's sovereign immunity barred the appellants from seeking a declaratory judgment finding that the income tax provisions in 48 U.S.C.A. § 1421i did not create a territorial income tax.

before us is whether the Organic Act limits the government of Guam's ability to waive that immunity to cases involving torts or contract. We find it does not.

2. The government of Guam's inherent sovereign immunity entails the inherent power to waive that immunity

[21] The Organic Act provides:

> The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, with the consent of the legislature evidenced by enacted law, may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.

48 U.S.C.A. § 1421a. The text of the Whistleblower Act states: "Any determination regarding an award . . . may, within thirty (30) days of such determination, be appealed to the Unified Judiciary of Guam (and the Unified Judiciary of Guam shall have jurisdiction with respect to such matter)." 5 GCA § 37103(b)(4).

[22] The trial court found the Whistleblower Act provision above was inorganic because, as DRT argued, the Organic Act "allows the Guam Legislature to waive sovereign immunity in cases of tort or breach of contract, but not in cases involving administrative appeals." RA, tab 10 at 5 (Dec. & Order). But the court provided no support for that supposition. Instead, it ignored precedent from this court and federal courts, none of which have interpreted the Organic Act as imposing limits on the kinds of cases for which Guam may waive its inherent sovereign immunity.

[23] We have never read 48 U.S.C.A. § 1421a as a constraint on Guam's ability to waive its sovereign immunity only in cases involving torts and contracts. Instead, we have viewed that provision as stating the specific method by which the government of Guam waives its immunity: through the Guam Legislature. *See Sumitomo Constr.*, 2001 Guam 23 ¶ 8 ("While sovereign immunity is inherent, Congress has provided a specific mechanism by which sovereign immunity may be waived." (citing 48 U.S.C. § 1421a (1987))); *Gange v. Gov't of Guam*, 2017 Guam 2 ¶ 34

("The Legislature may waive sovereign immunity where it would otherwise apply."); *Bautista*, 2015 Guam 23 ¶ 18; *Kittel v. Guam Mem'l Hosp. Auth.*, 2020 Guam 3 ¶ 14. The Superior Court's conclusion relies on no prior support from this court.

[24] We see no reason now to validate the trial court's reading. Our position is grounded in the U.S. Supreme Court's and the Ninth Circuit's "recogni[tion] that territorial governments have a form of inherent or common law sovereign immunity." *Marx*, 866 F.2d at 297. And since "Guam already had sovereign immunity" based in common law before the Organic Act, *id.* at 298, the government of Guam's power to waive its inherent sovereign immunity also predated that Act. Section 1421a of the Organic Act prescribes the process by which the government of Guam exercises its waiver—through legislative enactments in cases involving torts or contracts—but does not limit the government of Guam's waiver to *only* those causes of action, nor does it purport to supersede the government of Guam's ability to waive its inherent sovereign immunity under common law. Upholding the trial court's interpretation would mean reading into the Organic Act an implied abrogation of Guam's inherent sovereign immunity, which would be contrary to *Marx*, or an implied supersession of Guam's inherent power to waive. We refuse to imbue either meaning into the Organic Act's express terms.[2]

[25] Under common law, "[o]nly the sovereign's *own* consent could qualify the absolute character of [sovereign] immunity." *Alden*, 527 U.S. at 738 (emphasis added) (quoting *Nevada v. Hall*, 440 U.S. 410, 414 (1979), *overruled on other grounds by Hyatt*, 139 S. Ct. at 1492-99). And

[2] "The starting point for [the court's] interpretation of a statute is always its language." *United States v. Olander*, 572 F.3d 764, 768 (9th Cir. 2009) (quoting *Tahara v. Matson Terminals, Inc.*, 511 F.3d 950, 953 (9th Cir. 2007)). And "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The plain text of the Organic Act states the government of Guam "may be sued upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers," 48 U.S.C.A. § 1421a—not that the government "may be sued *only*" with respect to those types of action.

states have widely recognized that principle: "[T]he rule here, and in England, was that the government could not be sued without *its* consent." *Bale v. Ryder*, 286 A.2d 344, 346 (Me. 1972) (emphasis added); *see also City of Houston v. Williams*, 353 S.W.3d 128, 134 (Tex. 2011) ("Under the common-law doctrine of sovereign immunity, the sovereign cannot be sued without its consent."); *Bergner v. State*, 130 A.2d 293, 284 (Conn. 1957) ("It is a well-established rule of the common law that a state cannot be sued without its consent."). That understanding survived the States' entry into the Union: "When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts." *Alden*, 527 U.S. at 715; *see also, e.g.*, *The Federalist No. 81*, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.").

[26] We also rely on courts of highest authority from past U.S. territories, which have since been incorporated into the Union, in reaching these findings. In *Coffield v. Territory of Hawaii*, 13 Haw. 478 (1901), the Supreme Court of the Territory of Hawai'i dismissed on sovereign immunity grounds a negligence claim against the Territory. *Id.* at 478-79. That court observed, regarding sovereign immunity, that the Territory of Hawai'i was more like a state than a municipal corporation. *Id.* at 481.

[27] Other early territorial courts were in accord with that high court. For example, in *Territory of Wisconsin v. Doty*, 1 Pin. 396 (Wis. 1844), the Territory of Wisconsin reversed partly on sovereign immunity grounds a conversion claim judgment against the Territory for allegedly misspending public funds, finding: "It is a general rule that a judgment cannot be rendered against a sovereignty, unless authority therefor is given by law. . . . For all necessary purposes of government, Wisconsin is as a sovereignty, and should be entitled to the same immunities." *Id.* at

405, 407. In *Langford v. King*, 1 Mont. 33 (1868), the Supreme Court of the Territory of Montana reversed on similar immunity grounds the plaintiff's successful challenge to a statute that disallowed use of territorial warrants to pay taxes or other dues. The court found the Territory could not be sued without the territorial or federal government's consent:

> Montana Territory is a government created, it is true, by a law of Congress. Yet that law gives it very extensive powers. The reason of the law, which declares that no government can be sued without its consent, applies to this territorial government as well as to any other government.
>
> We hold, therefore, that unless permitted by some law of this Territory, or of the general government, no citizen of this Territory can sue it.

Id. at 38.[3] These cases confirm early territorial courts have viewed the governments of those territories as inherently immunized from suit—unless the territory consents.[4]

3. The Superior Court's conclusion sets an insupportable precedent

[28] The trial court found: "The Organic Act contains clear limiting language which bars the Guam Legislature from waiving sovereign immunity for any claims outside of tort or contract." RA, tab 10 at 5 (Dec. & Order). As we have said before, the court offered no authority to support that claim.

[29] The trial court's conclusion, if not vacated, would stand in contrast to the line of cases in which this court and the District Court of Guam relied on statutes like the Whistleblower Act when analyzing judicial review of administrative agency decisions. Guam's AAL for example, provides: "Judicial review may be had of any agency decision by any party affected adversely by it." 5 GCA § 9240. And the Guam Ancestral Lands Commission Act provides: "If disputes arise from an application which cannot be resolved by the [Guam Ancestral Lands] Commission, then any of

[3] The Montana court recognized that same finding in *Fisk v. Cuthbert*, 2 Mont. 593, 598 (1877).

[4] We do not discuss here the U.S. government's waiver of Guam's sovereign immunity, whether in local or federal courts, since that question is not before us. The question here concerns the government of Guam's ability to waive inherent sovereign immunity in its own court.

the opposing parties may invoke the judicial process at the party's expense." 21 GCA § 80104(g) (2005); *see also Crawford v. Antonio B. Won Pat Int'l Airport Auth.*, Civil Case No. 15-00001, 2016 WL 1273191, at *4 (D. Guam Mar. 31, 2016) (analyzing 21 GCA § 80104(g), finding it properly waives sovereign immunity). Similarly, we have found "[t]he Guam Legislature can waive the sovereign immunity of a public entity by granting it the 'right to sue and be sued,'"—without finding the waivers for those entities limited only to claims in tort or contract. *Bautista*, 2015 Guam 23 ¶ 28.

[30] Before the trial court's decision, no statute or case concerning Guam has expressed that the government of Guam may waive its inherent sovereign immunity only for claims lying in tort or contract. Tellingly, both parties on appeal now reject the trial court's analysis. We find no reason to uphold the trial court's decision.

V. CONCLUSION

[31] We **REVERSE** the Superior Court's order granting DRT's motion to dismiss on sovereign immunity grounds, **VACATE** the Judgment for DRT, and **REMAND** for further proceedings not inconsistent with this opinion.

/s/
ROBERT J. TORRES
Associate Justice

/s/
KATHERINE A. MARAMAN
Associate Justice

/s/
F. PHILIP CARBULLIDO
Chief Justice