FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ALVIN OWENS, **Plaintiff,** **vs.** **BERNADETTE SACCOMANNO, ET AL.,** **Defendant.**	**Civil Action No. 04-0288E** **ORDER GRANTING PLAINTIFF LEAVE TO FILE AMENDED COMPLAINT**

I. INTRODUCTION

THIS MATTER came on for hearing October 20, 2005 at 1:30 p.m. for Plaintiff's Motion to Amend Complaint. Counsel George Hasselback appeared on behalf of Plaintiff, Alvin Owens. Assistant Attorney General David Lochabay appeared on behalf of Defendant, Commonwealth Health Center (CHC) and Gregory Baka for Defendant Bernadette Saccomanno. The hearing was brought pursuant to Plaintiff's motion to amend the expert witness list and to amend its complaint to add Dr. Southcott as an additional Defendant for "Negligence–Malpractice." With respect to the expert witness motion, the Parties informed the Court that they had resolved the matter per stipulated agreement. With respect to Plaintiff's motion for leave to amend, CHC grounded its opposition to Plaintiff's motion on its interpretation of the Government Liability Act of 1983, 7 CMC §§ 2201, *et seq.* and the Public Employee Legal Defense and Indemnification Act of 1986, 7 CMC §§ 2301, *et seq.* Defendant Bernadette Saccomanno joined in CHC's opposition.

II. DISCUSSION

Plaintiff seeks leave of this Court to amend his complaint to add Dr. Southcott as a defendant

pursuant to Rule 15 of the Commonwealth Rules of Civil Procedure. Defendants have opposed Plaintiff's motion to amend, citing the Government Liability Act and the Commonwealth Public Employee Legal Defense and Indemnification Act in support of their opposition.

Rule 15 of the Commonwealth Rules of Civil Procedure provides that, after a responsive pleading has been served, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Com. R. Civ. P. 15. The U.S. Supreme Court has interpreted this clause in the Federal Rules of Civil Procedure as creating a burden upon the party opposing an amendment to the complaint to demonstrate why the amendment should not be permitted. This creates a strong presumption in favor of granting leave to amend. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). Therefore, absent a showing of

> undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc. - - the leave sought should, as the rules require, be 'freely given.'

Id.

In its opposition to Plaintiff's motion to amend his complaint to add Dr. Southcott, CHC relies on several code sections from the Government Liability Act of 1983, 7 CMC §§ 2201, *et seq.*, and the Public Employee Legal Defense and Indemnification Act of 1986, 7 CMC §§ 2301, *et seq*. (PELDIA). Specifically, Section 2202 of the Government Liability Act limits to $100,000 the damage amount recoverable from the Government and its employees for tort liability arising from the negligent acts of its employees. 7 CMC § 2202(a). CHC also cites Section 2302 of PELDIA, which explains that the Government has elected to "self-insure" its employees in order to "provide protection to government employees against the high cost of the legal defense and the judgments for injuries arising out of actions occurring within the scope of their employment." 7 CMC § 2302.

CHC's reliance on these code sections in their opposition impliedly asserts that Plaintiff's venture to add Dr. Soucthcott as an additional defendant would be futile with regard to damages recoverable in light of the Government Liability Act limitation on tort recovery for negligence. In short, CHC will be liable for the negligent acts of its employees only up to $100,000, regardless of whether one employee was negligent, or more. Thus, in keeping with the CHC's logic, the overall

damages cap under 7 CMC § 2202 will prevent Plaintiff from recovering more than the allowed $100,000 even if both Drs. Saccomanno and Southcott were to be found liable.

However, CHC's liability only extends to employee acts or omissions "within the scope of their office or employment." 7 CMC § 2211(b). At this point in the litigation it is unclear what degree of liability any of the defendants will face, and whether the facts will clearly invoke the damages cap imposed by the Government Liability Act, or whether the level of malpractice, if any, will exceed its coverage. Therefore, Defendants' argument that the damages cap provided by Section 2202 of the Government Liability Act will make Plaintiff's addition of Dr. Southcott unduly cumulative and futile in terms of the overall damages permitted is insufficiently persuasive to thwart the presumption in favor of granting Plaintiff leave to amend his complaint.

More importantly, the Court is inclined to allow Plaintiff's amendment to further expedite the underlying litigation as a practical matter. It is the policy of this Court to "construe[] and administer[]" the Rules of Civil Procedure in a manner that achieves "the just, speedy, and inexpensive determination of every action." Com. R. Civ. P. 1. Plaintiff's proposed addition of Dr. Southcott to this lawsuit will aid the Court's stated policy by adding Dr. Southcott as a *party*, and making him subject to discovery rules inapplicable to non-parties.

Indeed, the Commonwealth Rules of Civil Procedure are replete with discovery rules, which only apply to parties to the underlying litigation. *See, e.g.*, Com. R. Civ. P. 33 ("[A]ny party may serve upon any other *party* written interrogatories . . . ") (*emphasis added*); Com. R. Civ. P. 34 ("Any party may serve on any other *party* a request (1) to produce . . . documents . . . ") (*emphasis added*); Com. R. Civ. P. 36 ("A party may serve upon any other *party* a written request for the admission . . . of the truth of any matters within the scope of Rule 26(b) . . . ") (*emphasis added*). In addition, Rule 37 of the Commonwealth Rules of Civil Procedure provides that sanctions may be awarded against the *party* whose conduct fails to comply with the discovery rules stated *supra*. Com. R. Civ. P. 37. This, in part, ensures that those parties subject to discovery requests cooperate in the exchange of information pertaining to the underlying litigation.

Here, Plaintiff's proposed amendment will add Dr. Southcott to the list of defendants in the litigation, and thereby subject Dr. Southcott to the discovery requirements, and their accompanying

enforcement mechanisms, which apply solely to litigants. The record shows that Dr. Southcott allegedly examined and treated Plaintiff at a time relevant to this litigation, thus making Dr. Southcott a critical witness if not a participant in the events leading to the litigation. *See Opposition of Defendant CHC to Motion to Amend Complaint and Set Status Conference and Motion to Approve Amended Expert Disclosures*, filed Sept. 26, 2005, pg. 2, lines 4-8.

Dr. Southcott, like Dr. Saccomanno, is currently residing outside the Commonwealth in Windsor, Ontario, Canada--beyond the direct jurisdiction of this Court--and not subject to its subpoena power. Consequently, Dr. Southcott could choose to ignore requests for his participation as a witness without incurring the penalties that accompany violating a court order. It is also on record that Defendant, Dr. Saccomanno, has consistently failed to timely respond to Plaintiff's original complaint, or submit to deposition. Although this Court has no reason to expect that Dr. Southcott would behave similarly, his addition to this case as a party will doubtlessly aid in ensuring his timely participation.

Lastly, CHC has identified no discernible prejudice or undue delay that would result from the addition of Dr. Southcott as a defendant. In citing Section 2302 of PELDIA, the Government suggests that because of it its statutorily required participation in the defense of its employees, it will incur undue expense if Dr. Southcott is added to the suit. However, the Government fails to articulate exactly how Dr. Southcott's defense expense will be undue, even in light of the Government Liability Act. Furthermore, the Government's suggestion that adding Dr. Southcott will cause undue delay is unconvincing given the discovery history in this case.

III. CONCLUSION

In short, the Government has failed to meet its burden of showing undue delay, bad faith or dilatory motive on the part of the Plaintiff, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice, or futility in allowing Plaintiff's amendment. Therefore, given the strong presumption in favor of granting Plaintiff's request to amend his complaint, the Plaintiff's motion to amend its complaint to add Dr. Southcott as a defendant is GRANTED.

SO ORDERED this 27th day of October 2005.

/s/
David A. Wiseman, Associate Judge