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

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AKIHITO OIKAWA, as personal) Civil Action No. 94-39
representative of Hisako)
Oikawa, deceased,)
)
Plaintiff,) **DECISION AND ORDER ON**
) **MOTIONS: 1) TO DISMISS**
v.) **FOR LACK OF PERSONAL**
) **JURISDICTION; 2) TO**
NIIZEKI INTERNATIONAL SAIPAN,) **DISMISS FOR IMPROPER**
CO., LTD. MDA JAPAN K.K.,) **APPOINTMENT OF PERSONAL**
TAKASHI AOKI, MR. MURAYAMA,) **REPRESENTATIVE; 3) TO**
DOE INSURANCE COMPANIES ONE) **STRIKE JURY DEMAND; 4)**
THROUGH FOUR,) **TO DISMISS PUNITIVE**
) **DAMAGES CLAIM**
Defendants.)
_____)

This wrongful death action came before the Court on March 16, 1994, on a series of motions by Defendants Niizeki International Saipan Co., Ltd. ("NIS"), MDA Japan K.K. ("MDA") and Kazuo Murayama. Vicente Salas appeared on behalf of NIS. Patricia Halsell and Lecia Eason appeared on behalf of MDA and Mr. Murayama. William Fitzgerald appeared on behalf of Plaintiff Akihito Oikawa. MDA argues that this Court lacks personal jurisdiction over MDA. NIS asserts that Plaintiff has no right to a jury trial. Defendants jointly assert that Plaintiff is an improper personal representative in this wrongful death action,

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1 and that punitive damages are not available under the
2 Commonwealth's wrongful death statute. Plaintiff opposes all
3 motions.

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5 **I. FACTS**

6 According to the First Amended Complaint on file in this
7 matter, Hisako Oikawa was a Japanese tourist who died while scuba
8 diving at the Grotto on Saipan on September 5, 1993. See First
9 Amended Complaint (Mar. 30, 1994). The Complaint alleges that
10 Defendants provided "grossly negligent" scuba instruction to Ms.
11 Oikawa prior to her death, in "willful and wanton disregard of her
12 personal safety." The Complaint further claims Defendants were
13 grossly negligent in organizing and leading the Grotto dive which
14 resulted in Ms. Oikawa's death. Finally, the Complaint charges
15 that Defendants committed fraud when they represented to Ms.
16 Oikawa that the scuba training and supervision she would receive
17 were up to the internationally-recognized standards of the
18 Professional Association of Dive Instructors.

19 Plaintiff **Akihito** Oikawa is the brother of the deceased and
20 a resident of Japan. He filed this suit on January 18, 1994 and
21 was appointed Ms. Oikawa's personal representative in an ex parte
22 proceeding. His Complaint prays for general damages in the amount
23 of \$3,000,000 and punitive damages in the amount of \$10,000,000.
24 The Complaint also contains a demand for a jury trial.

25 Defendants' motions followed. At the March 16, 1994 hearing,
26 the Court ruled that service of process upon Defendants NIS and
27 Murayama was proper, denying motions to dismiss on that ground.
28 The Court took Defendants' other motions under advisement.

1 **II. ISSUE**

2 Four issues are presented for decision:

3 1. Whether the Court has personal jurisdiction over MDA, a
4 Japanese corporation alleged to have employed the scuba
5 instructors who taught and guided Ms. Oikawa;

6 2. Whether Plaintiff, as a non-resident of the CNMI, is the
7 proper personal representative to bring suit under the
8 Commonwealth's wrongful death statute, 7 CMC § 2101-2103;

9 3. Whether Plaintiff has a right to a jury trial in this
10 action;

11 4. Whether punitive damages are authorized under the
12 wrongful death statute.

13
14 **III. ANALYSIS**

15 **A. PERSONAL JURISDICTION OVER MDA**

16 The Commonwealth's long-arm statute, 7 CMC § 1101, subjects
17 both residents and non-residents to the Court's jurisdiction to
18 the fullest extent allowable under the due process standards of
19 the U.S. Constitution. 7 CMC § 1101(e); CNMI v. Toronto-Dominion
20 *Matthews & Wright Group, Ltd.*, 3 CR 930, 931 (D.N.M.I. 1989).
21 Under the statute, a person submits to the Court's jurisdiction by
22 doing any of the following: 1) transacting any business within the
23 Commonwealth (§ 1101(a)(1)); 2) contracting to supply goods and
24 services within the Commonwealth (§ 1101(a)(2)); or 3) causing
25 tortious injury within the Commonwealth; even if the act causing
26 the injury is done outside the Commonwealth (§ 1101(a)(5)).

27 If a defendant is a non-resident, two alternative
28 jurisdictional tests apply. If the defendant has such systematic

1 contacts with the Commonwealth that jurisdiction would not offend
2 notions of fair play and substantial justice, the Court has
3 general jurisdiction. *h or onto-Dominion, supra*, 3 CR at 931 citing
4 *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945).
5 In the absence of such continuous contacts, the Court may still
6 exercise specific jurisdiction if the party's contacts with the
7 forum are significant in relation to the cause of action. *Id.*,
8 citing *Data Disc, Inc. v. Systems Technology Associates*, 557 F.2d
9 1280, 1286 (9th Cir. 1977). Plaintiff bears the burden of proving
10 facts supporting the Court's jurisdiction. *Haisten v. Grass*
11 *Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1396 (9th
12 Cir. 1986).

13 Here, Defendant MDA's contacts with the Commonwealth satisfy
14 the test for general jurisdiction. MDA does not contest the fact
15 that it has provided scuba equipment and operates scuba tours on
16 Saipan, beginning in May, 1993. See MDA's Memorandum in Support
17 of Motion to Dismiss at 2-3. Plaintiff has submitted to the Court
18 an advertisement in the magazine *Hafa Adai* in which these services
19 are advertised locally to tourists. See Exhibit C to the
20 Affidavit of Noriyasu Horiguchi. Pictured in the advertisement
21 are Defendant Kazuo Murayama and a Mr. Takahashi, whom
22 acknowledges to be one of its corporate directors. See Affidavit
23 of Kiyoshi Doi. Finally, Plaintiff has submitted a "diving
24 logbook," allegedly found among Ms. Oikawa's effects after her
25 death, for a dive at Obyan Beach, Saipan on September 3, 1993.
26 See Horiguchi Affidavit, Exh. B. The card bears the signature of
27 Mr. Murayama, whom MDA acknowledges to be its employee. See Doi
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1 Affidavit. These facts show continuous and systematic contacts
2 between MDA and the Commonwealth.

3 MDA points to the facts that **it** has no corporate charter or
4 business license in the Commonwealth, and that its services in the
5 Commonwealth are marketed exclusively to non-residents, *i.e.*,
6 Japanese tourists. For these reasons, MDA argues that the
7 Commonwealth has no real interest in the case, which would be
8 better adjudicated in Japan. The Court disagrees. As Plaintiff
9 points out, the Commonwealth Legislature has passed Public Law 7-
10 47, the "Safe Diving Act of 1990," in which it declared the
11 following public policy:

12 It is the intent of this chapter to require dive
13 instructors and tour leaders to be certified and obtain
14 substantial liability insurance in order to insure that
15 only skilled divers who adhere to the strict standards
16 of safe diving established by national and international
organizations will be permitted to provide, for profit,
recreational dive services to residents and tourists in
the Commonwealth. 3 CMC § 5602.

17 This statute demonstrates the Commonwealth's serious concern with
18 the competence and care with which dive tours are operated within
19 this jurisdiction. Scuba tour operators are required to obtain
20 business and operational licenses, as well as to maintain
21 liability insurance, to protect against negligence of the type
22 alleged here. The fact that **MDA** did not in fact obtain these
23 licenses does not place it outside the sphere of this public
24 concern.

25 In sum, the fact that **MDA** was regularly conducting scuba
26 tours for hire in the Commonwealth is an ample basis for this
27 Court's personal jurisdiction. The fact that a death occurred
28 during one of these tours raises significant public policy

1 concerns that have been identified by the Legislature, giving this
2 forum a strong interest in the adjudication of this action.

3
4 **B. PERSONAL REPRESENTATIVE**

5 Defendants NIS, Murayama and MDA argue that Plaintiff is an
6 improper personal representative in this case because he is not a
7 CNMI resident. The Commonwealth's wrongful death statute, 7 CMC
8 § 2102, provides:

9 Every action for wrongful death must be brought in the
10 name of the personal representative of the deceased, but
11 shall be for the exclusive benefit of the surviving
spouse, the children and other next of kin, if any, of
the decedent as the Court may direct.

12 The term "**personal** representative" is not defined. Defendants
13 urge that the Court look to the Probate Code, 8 CMC § 2107(u); but
14 that section does not impose any restrictions on the residency of
15 the person selected as Plaintiff. The residency requirement
16 Defendants would like to see grafted into the wrongful death
17 statute is found in Rule 14 of the Commonwealth Rules of Probate
18 Procedure. In support of this position, Defendants cite In the
19 Matter of Capital Management and Trust Co., 697 P.2d 930 (Mont.
20 1985), which looked to the law of intestate succession for a
21 definition of the word "**heirs**" as used in a state wrongful death
22 statute, and Pantano v. United Medical Laboratories, Inc., 456
23 F.2d 1248 (9th Cir. 1972), which applied to the wrongful death
24 arena an Oregon statute prohibiting nonresidents from serving as
25 administrators.

26 However, the Court finds neither of these cases as applicable
27 as Chavez v. Regents of University of New Mexico, 711 P.2d 883,
28 886 (N.M. 1985), which involved a statutory scheme similar to the

1 Commonwealth's. While the *Chavez* court looked to the New Mexico
2 Probate Code for a definition of the term "personal
3 representative," the court clarified that "any recovery for
4 wrongful death has no relation to the decedent's estate; the
5 recovery does not become part of the estate **assets**." Thus, in a
6 wrongful death suit a personal representative

7 need not [...] have the full powers required by the
8 Probate Code, since his duties are merely to act as
9 nominal party for all the statutory beneficiaries in
order to centralize the claims and prevent multiple and
possibly contradictory lawsuits.

10 *Id.*, 711 P.2d at 886. See also *Henkel v. Hood*, 156 P.2d 790 (N.M.
11 1945) (Texas administrator allowed to act as personal
12 representative in New Mexico wrongful death action).

13 Here, as the Court pointed out at oral argument, Plaintiff
14 need not marshal the assets of an estate or respond to the claims
15 of local creditors, as an estate administrator must do. And while
16 there is some case authority for applying the restrictions of the
17 Probate Code to wrongful death actions, Defendants have cited no
18 authority to support application of the Rules of Probate *Procedure*
19 to a civil action such as this. Conversely, requiring non-
20 resident beneficiaries to locate a CNMI resident willing to act as
21 personal representative on their behalf before filing a wrongful
22 death suit frustrates the important public policy of promoting
23 easy access to courts by individuals seeking redress of wrongs.
24 For these reasons, the Court will not import a requirement from
25 the Probate Rules that a personal representative in a wrongful
26 death action be a Commonwealth resident.

27 Similarly, Defendants have cited no authority to convince the
28 Court that Plaintiff's appointment was improper because it was

1 done on an ex parte basis. Defendants had the opportunity to file
2 an objection to the appointment, and they did so. This is the
3 normal and proper procedure that flows in a wrongful death case.
4

5 **C. JURY TRIAL**

6 Defendant NIS argues that the Commonwealth provides Plaintiff
7 no right to a jury trial. This argument is flatly contradicted by
8 7 CMC § 3101(b), which entitles litigants in civil actions of over
9 \$1,000 to a jury trial on all legal issues "to the same extent and
10 under the same circumstances that they would be entitled to a
11 trial by jury if the case were pending in a United States District
12 Court [...]." The federal right to a civil jury trial "in actions
13 for damages to a person or **property**" is well settled. See, e.g.,
14 Ross v. Bernhard, 90 S.Ct. 733, 735 (1970). Plaintiff's suit is
15 an action at law for damages to a person. Section 3101(b) thus
16 plainly authorizes a jury trial in this action.

17 NIS cites to several tort suits involving scuba accidents
18 which were tried to the bench. But these cases cannot be read to
19 stand for the proposition that a jury trial is unavailable in
20 cases involving scuba accidents. Nor does it matter that federal
21 jury trial rights are governed by the Seventh Amendment to the
22 U.S. Constitution, whereas in the Commonwealth the right is
23 statutory in origin. The Legislature was free to apply federal
24 criteria for entitlement to civil jury trials, and they did so,
25 regardless of the source of the entitlement itself.
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D. PUNITIVE DAMAGES

Finally, Defendants ask the Court to depart from the precedent of the Commonwealth Trial Court in *Flowers v. Hyatt Regency Hotel*, 1 CR 692 (Com. Tr. Ct. 1983), and hold that punitive damages are not recoverable under the Wrongful Death Act. The Commonwealth Supreme Court ruled last year in *Ito v. Macro Energy, Inc.*, Appeal No. 92-020/022 (N.M.I. Oct. 26, 1993), slip op. at 41, that recovery under the statute is limited to actions the deceased person would have had if he had not been killed. *Ito* strictly construed the general damages recoverable under 7 CMC § 2103 to be the pecuniary loss to the deceased dependents, thus excluding loss of consortium damages to the decedent's spouse. However, *Ito* makes no mention either of *Flowers* or of punitive damages, which are assessed separately from any computation of compensatory damages and are awarded for a wholly different purpose. See *Masaki v. General Motors Corp.*, 780 P.2d 566, 570 (Haw. 1989) (punitive damages assessed in addition to compensatory damages for purpose of punishing defendant for outrageous misconduct).

Defendants point out that the Commonwealth's statute is a "Lord Campbell act" as opposed to a "survival act." According to the Restatement (Second) of Torts, § 925, cmt. c, punitive damages are not allowed under most wrongful death statutes. However, many states allow punitive damages for wrongful death under survival acts. See *Atlas Properties, Inc. v. Didich*, 226 So.2d 684, 688 (Fla. 1969); *Hennigan v. Atlantic Refining Co.*, 282 F. Supp. 667, 683 (E.D. Pa. 1967), *aff'd*, 400 F.2d 857 (3d Cir. 1968), cert. den., 89 S. Ct. 1739 (1969).

1 In *Flowers*, the Commonwealth Trial Court adopted the
2 reasoning of *Fields v. Huff*, 510 F. Supp. 238, 240-243 (E.D. Ark.
3 1981), which held a statute similar to the Commonwealth's to
4 permit recovery of punitive damages. The policy rationale of
5 *Huff*, echoed in *Flowers*, is summarized by the rhetorical question:

6 If defendant driver had only broken [plaintiff's] arm,
7 clearly [plaintiff] could have sued for punitive
8 damages. Should the driver and his employer escape the
consequences because his wilful and wanton conduct
killed [plaintiff]?

9 *Huff*, supra, 510 F. Supp. at 243; see also *Flowers*, supra, 1 CR at
10 703. This policy is especially relevant in light of *Ito's*
11 requirement that recovery be derived from causes of action the
12 deceased could have maintained if still living. *Ito*, supra, slip
13 op. at 41.

14 The late Dean Prosser notes that this policy critique of the
15 common-law majority rule has led in many jurisdictions to
16 legislative action liberalizing the restricted scope of damages
17 for wrongful death. Prosser on Torts, § 127 at 952. Here, the
18 history of 7 CMC § 2101 et seq. indicates that the Commonwealth
19 Legislature has been part of this trend towards liberalization.
20 The original act was codified in the 1966 Trust Territory Code.
21 It provided a maximum recovery of \$100,000. See 6 T.T.C. §
22 203(1). In the 1983 *Flowers* decision, the Trial Court recognized
23 this \$100,000 limit even as it authorized the recovery of punitive
24 damages, noting that "[t]he seemingly inconsistent result reached
25 herein does not escape the court. On one hand, punitive damages
26 (along with general damages) are allowed, but on the other hand,
27 the total recovery is still limited to \$100,000." *Flowers*, supra,
28 1 CR at 703, n. 3.

1 The following year, the Legislature passed Public Law 4-16,
2 amending the wrongful death statute to remove the \$100,000 limit
3 in suits against private individuals. The Report of the Senate
4 Committee on Judiciary, Government and Law to the Senate President
5 on the amendment stated: "[y]our Committee understands that the
6 restriction on wrongful death awards against private parties has
7 been criticized by the Commonwealth Trial Court and should be
8 reworked." Fourth Legislature, Standing Committee Report No. 4-50
9 (Sep. 6, 1984) at 2. The Court reads the Committee's
10 acknowledgement of "criticis[sm] by the Commonwealth Trial Court"
11 to be a direct reference to the Flowers decision. The Committee
12 also declared that the intent of the amendment was to allow "the
13 maximum amount of damages in a wrongful death action against a
14 private party [to] be determined by the trial court." Id.

15 Moreover, even if the Legislature had not referred to Flowers
16 when it amended the statute, it is a standard rule of statutory
17 construction that "an amended statute should be interpreted in
18 light of the court decisions that may have prompted the
19 amendment." 1A Sutherland Statutory Construction (1991) § 22.29;
20 Feminist *Women's* Health Center v. Codispoti, 821 P.2d 1198, 1202
21 (Wash. 1991). In particular, "[w]hen a statute is amended, the
22 judicial construction previously placed on the statute is deemed
23 approved by the [legislature] to the extent that the provision
24 remains unchanged." Rauschenberger v. Radetsky, 745 P.2d 640, 643
25 (Colo. 1987). The fact that the Legislature chose to remove the
26 \$100,000 recovery limit but not to disallow punitive damages
27 indicates legislative acceptance of -- and perhaps outright
28

1 reliance on -- *Flowers* as an authoritative interpretation of the
2 Wrongful Death Act.

3 Thus, although *Flowers* is not officially binding on its
4 decision here, the Court will not depart from a precedent which
5 appears to have played a direct role in the amendment of the
6 statute under consideration. The Court therefore reaffirms that
7 punitive damages are recoverable in an action brought under 7 CMC
8 § 2101 *et seq.*

9
10 **IV. CONCLUSION**

11 For the foregoing reasons, the Court ORDERS:

12 1. Defendant MDA's motion to dismiss for lack of personal
13 jurisdiction is DENIED.

14 2. Defendants' motion to dismiss this action for failure to
15 appoint a proper personal representative as Plaintiff is DENIED.

16 3. Defendant NIS's motion to strike Plaintiff's jury demand
17 is DENIED.

18 4. Defendants' motion to strike Plaintiff's prayer for
19 punitive damages is DENIED.

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21 So ORDERED this 3RD day of June, 1994.

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24 MARTY W.K. TAYLOR, Associate Judge