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

SUPERIOR COURT  
CLERK OF COURT

DANIEL BASALDUA,  
Plaintiff,  
v.  
HOBIE CAT COMPANY, et al.,  
Defendant.

Civil Action No. 94-487  
**ORDER GRANTING  
MOTION TO DISMISS**

This matter came before the Court on August 21, 1996 on the Defendant Marianas Visitors Bureau's ("MVB") Motion to Dismiss pursuant to Rule 12(b)(1) and 12(b)(6). Plaintiff Daniel Basaldua ("Plaintiff") opposes the motion. The Court has reviewed all pleadings in this matter<sup>1/</sup>, and now renders its decision.

**I. FACTS**

On July 13, 1993 Mr. Basaldua and a companion, Mr. Wayne Perry were sailing a Hobie Cat catamaran sport vessel on the Saipan lagoon. At some point, Mr. Basaldua's vessel became disabled and required a tow to shore. A speedboat named the "Superfly" which was in the vicinity and captained by Gregorio Esteves ("Esteves") offered to assist the Plaintiff by towing his vessel to shore. Plaintiff agreed and a tow line was secured to the disabled vessel. Plaintiff remained on the boat while it was being towed. While towing Plaintiff and his vessel to shore, Plaintiff alleges that Esteves

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<sup>1/</sup> The parties have waived oral argument in this matter.

1 increased the speed of the towing boat to such a point that it caused Plaintiff's disabled vessel to flip  
2 over, thereby injuring Plaintiff.

3 After the accident, it was discovered that the speedboat Superfly was owned and operated by  
4 a local company, defendant Saipan Trolling and Managaha Transport ("Saipan Trolling"), which was  
5 operated by defendant Isidro R. Lizama ("Lizama"). Lizama was operating Saipan Trolling under  
6 a lease agreement issued by defendant MVB (the "Lease Agreement") and was in the business of  
7 providing recreational services, mainly jet ski rentals to tourists. Esteves was an employee of Saipan  
8 Trolling at the time of the accident.

9 Plaintiff originally filed suit against five Defendants; Hobie Cat Company, Lizama, Esteves,  
10 Saipan Trolling and MVB. Defendant Hobie Cat settled with Plaintiff and was dismissed from the  
11 case on September 5, 1995. Entries of default were taken against Defendant Lizama, Esteves and  
12 Saipan Trolling, leaving MVB as the sole remaining Defendant to this litigation.

13 MVB is an agency of the Commonwealth Government established by statute at 4 CMC § 2101.  
14 MVB is primarily charged with the duty of promoting tourism in the Commonwealth. Its powers and  
15 duties include the power and duty to "encourage, authorize, license, regulate and control commercial  
16 uses on or near tourist sites and to monitor and police the same." 4 CMC § 2106(r).

17 Pursuant to its statutory obligations, MVB executed a Lease Agreement which authorized or  
18 licensed Saipan Trolling to operate a beach concession located between the Saipan Beach Hotel and  
19 the Hyatt Regency Saipan. The Lease Agreement recited that MVB was motivated to establish the  
20 concession as a necessary service to the public. The Lease Agreement contained numerous provisions  
21 which obligated the concessionaire, Saipan Trolling, to maintain a level of service and to ensure  
22 quality operations open to the public at the beach concession. The Lease Agreement also provides  
23 that the concessionaire shall maintain in force comprehensive general public liability insurance in the  
24 minimum amount of \$100,000 with respect to each person and \$300,000 per each accident. MVB  
25 is to be named as an additional insured under the policy. Lease Agreement, section 10.02. The Lease  
26 Agreement further provides that the concessionaire shall indemnify and hold harmless MVB, its

1 officials, agents, employees, against and from any claims, demands, debts, liabilities and causes of  
2 action (including attorney's fees and costs). Lease Agreement, section 10.01.

3 At the time of the accident, Saipan Trolling had not obtained the comprehensive general public  
4 liability insurance as was required under the Lease Agreement. Plaintiff complains, not that MVB  
5 is liable for negligently causing the accident, but that MVB should be liable to the Plaintiff for  
6 negligently failing to enforce the insurance provision of the Lease Agreement. Essentially, the  
7 Plaintiff contends that he is a third party beneficiary that has been injured by MVB's failure to enforce  
8 the Lease Agreement. In response, MVB argues immunity from suit in this action under the doctrine  
9 of sovereign immunity, and moves this Court to dismiss the Complaint against MVB for lack of  
10 subject matter jurisdiction pursuant to Rule 12(b)(1) Com.R.Civ.P. MVB further argues for dismissal  
11 under Com.R.Civ.P. 12(b)(6) in that Plaintiff has failed to state a cause of action against MVB which  
12 the law can recognize.

## 13 14 II. ISSUES

15 1. Whether Plaintiff can recover in tort, where the breach of duty is contractual and where  
16 it is not the proximate cause of Plaintiff's injuries.

17 2. Whether MVB is immune from suit in this action under the doctrine of sovereign  
18 immunity.

## 19 20 III. ANALYSIS

21 A. **Tort Liability.** Negligence is a breach of a duty owed to another which breach  
22 proximately results in an injury and is the cause in fact of an injury to one for which the duty was  
23 owed. *Gower v. CNMI*, 3 CR 211 (D.N.M.I. App. 1986); *San Nicolas v. CNMI*, 1 CR 144  
24 (D.M.N.I. App. 1981). The burden is on the plaintiff in a negligence action to demonstrate that the  
25 facts give rise to a legal duty on the part of the defendant. *Guerrero v. L & T International Corp.*,  
26 2 CR 1068 (N.M.I. Tr. Ct. 1987). A clear duty must be shown to exist by operation of law, separate  
27 and apart from the contractual duty. *Steiner Corp. v. American District Telegraph*, 683 P.2d 435 (Id.

1 1984); *Boise Cascade Corp. v. First Sec. Bank of Anaconda*, 600 P.2d 173 (Mont. 1979); *K Mart*  
2 *Corp. v. Ponsock*, 732 P.2d 1364 (Nev. 1987).

3 Plaintiff claims the duty owed to him by MVB arose under the Lease Agreement between  
4 MVB and Saipan Trolling. Plaintiff alleges that MVB was negligent in failing to enforce the  
5 insurance provision of the Lease Agreement under which Plaintiff claims to be a third party  
6 beneficiary. It is clear from Plaintiff's factual allegations that a duty, separate and apart from the  
7 contractual duty cannot be shown.

8 The Plaintiff contends that he is a third party beneficiary of the insurance clause cited above.  
9 Even if the Court were to accept this proposition on face value, then the Plaintiff must show  
10 contractual damages suffered. There are none. Basically, Plaintiff is either seeking to recover tort  
11 damages based on a contractual duty or in the alternative he is seeking to create some new tort of  
12 negligent enforcement of a contractual provision. But again, he fails because if the Court would  
13 accept this theory, there is no proximate cause between the breach and the damages.

14 The Plaintiff has cited *Becker v. Interstate Properties*, 569 F.2d 1203 (3rd Cir. 1977), which  
15 vested liability on a developer, for the inadequately insured subcontractor. This case is  
16 distinguishable from the case before the Court because it involved a private party, in the business of  
17 making a profit directly from the activity from which the injury resulted, and it also appears that, as  
18 a matter of public policy, the court did not want to leave the plaintiff without an adequate remedy.  
19 Here the defendant, Saipan Trolling, was engaged in a profit venture of its own, in which the  
20 governmental entity, MVB, had no proprietary or pecuniary interest. Furthermore, the injury did not  
21 result from the activity which the tenant was supposed to be engaged in. The Plaintiff was not a  
22 "patron" of Saipan Trolling.

23 In addition, under common law, a person who has sustained injuries due to the negligent  
24 conduct of another may recover from the tortfeasor provided that the negligent behavior was the  
25 proximate cause of the injuries suffered. *Baker v. City of Garden City*; 731 P.2d 278 (Kan. 1987);  
26 *Petersen v. State*, 671 P.2d 230 (Wash. 1983); Restatement (Second) Torts § 281. The "proximate  
27 cause" of an accident is any direct and immediate cause without which the accident would not have

1 occurred. *Sumner v. Amacher*, 437 P.2d 630 (Mont. 1968). Said another way, the conduct is not  
2 a proximate cause of plaintiff's injury if an event would have occurred regardless of defendant's  
3 conduct. *Litts v. Pierce County*, 515 P.2d 526 (Wash.App. 1973).

4 In the case at hand, the damages Plaintiff suffered were clearly due to some misadventure that  
5 occurred while the Plaintiff's vessel was being towed by Defendant Esteves. There is no connection  
6 between these injuries and the failure to require Saipan Trolling to maintain public liability insurance.  
7 The alleged negligent towing performed by Esteves was the proximate cause of Plaintiff's injuries,  
8 and not the failure of MVB to enforce a contractual provision which required Saipan Trolling to  
9 obtain a general liability insurance policy. The towing accident which injured Plaintiff would have  
10 occurred regardless of defendant's failure to enforce the liability insurance provision of the Lease  
11 Agreement.

12 Therefore, the Plaintiff cannot, under the facts alleged in his complaint, establish that  
13 Defendant MVB owed him a duty recognizable under common law or even if it did, there was no  
14 proximate causation to the damage he suffered. Furthermore, the Court is not ready to adopt  
15 Plaintiff's creative proposition that MVB committed a tort by its failure to provide a deep pocket for  
16 his injuries.

17 **B. Sovereign Immunity.** The CNMI and its agencies are generally protected from suits by  
18 the doctrine of sovereign immunity. *David v. CNMI*, 3 CR 157,161 (D.N.M.I. App. Div. 1987).  
19 The Commonwealth Legislature, however, has the authority to limit its liability when it consents to  
20 be sued in tort. *Gower v. CNMI*, 2 CR 414,427 (D.N.M.I. App. 1985). Under this authority, the  
21 CNMI has waived sovereign immunity to a limited extent through the Government Liability Act (the  
22 "Act"). 7 CMC §§ 2201, *et seq.* Section 2202 of the Act provides as follows:

23 The Commonwealth Government shall be liable in tort for damages  
24 arising from the negligent acts of employees of the Commonwealth  
acting within the scope of their office or employment, provided that:

25 (a) The Commonwealth and any employees engaged in the  
26 performance of services on behalf of the Commonwealth shall not  
be liable in a suit based on the performance of those services for more  
\$50,000 in an action for wrongful death and \$100,000 in any tort action.

27 This statute which waives the Commonwealth's immunity must be strictly construed in favor of the  
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1 sovereign and “not enlarged beyond what the language requires.” *David, supra* at 162, quoting  
2 *Ruckelhaus v. Sierra Club*, 103 S.Ct. 3274 (1983). The court in *David* further held that statutes  
3 purporting to waive the government’s sovereign immunity must be strictly construed since they are  
4 in derogation of general common law rule of immunity. *David v. CNMI*, 3 CR at 165.

5 Furthermore, the Appellate Division affirmed the Commonwealth Trial Court which held that  
6 the enactment of section 2202 of the Government Liability Act “further limited the extent of  
7 government liability than that found in the old statute because it deleted language making the  
8 government liable to the same extent that a private person would be liable.” *Id.* at 164. The  
9 Appellate Division agreed with the trial court that strict construction of section 2202 requires a  
10 conclusion that it apply only to employees and not independent contractors. *Id.* at 165.

11 The Act limits the right to sue public corporations of the CNMI. Extension of Limitation on  
12 Tort Liability, 7 CMC § 2211(a) provides as follows:

13 Sections 2202, 2203, 2204, 2206, 2207, 2251, 2252, and 2253 of  
14 Title 7 of the Commonwealth Code shall apply to public corporations,  
15 boards, and commissions organized and existing under and pursuant to  
the laws of the Commonwealth, and to the same extent as the sections  
apply to the Commonwealth itself.

16 In *MVB v. CNMI*, this Court held that “MVB is a non-profit organization contained within the  
17 Commonwealth and exercising quasi-corporate powers,” and “MVB is unquestionably an  
18 instrumentality of the Commonwealth Government.” *MVB v. CNMI*, Civ. Action No. 94-516, Slip  
19 Op. at p. 21 (N.M.I. Super. Ct. June 1994). Accordingly, under the terms of 7 CMC § 2211(a),  
20 MVB is immune from suit under the same terms as the Commonwealth itself is immune from suit.

21 The Government Liability Act, § 2202, clearly says that CNMI liability arises from the  
22 “negligent acts of employees.” Only torts committed by *employees* result in government liability.  
23 *David, supra*. Strict construction in favor of the CNMI of the phrase “negligent acts” leads to the  
24 conclusion that only where a tort is caused in fact by a CNMI employee will government liability  
25 arise. The statute leaves no room for vicarious liability for torts committed by someone not an  
26 employee of the CNMI government. *Id.*

1 The tort in this case was not committed by any of MVB's employees. Plaintiff's injuries  
2 occurred while Plaintiff was being towed by Esteves, an employee of Lizama and Saipan Trolling.  
3 MVB cannot be held vicariously liable for these acts. To do so would enlarge the waiver of sovereign  
4 immunity beyond what the language of the Government Liability Act requires. A liberal reading of  
5 Plaintiff's pleadings could give rise to the contention that the failure of MVB's employees to enforce  
6 the Lease Agreement is actionable. In the alternative, Plaintiff contends that the inclusion of a  
7 liability insurance clause in the Lease Agreement and some similar requirement by Coastal Resources  
8 Management in issuing permits has created a defacto waiver of sovereign immunity. The Court, as  
9 stated above in subparagraph A, is not prepared to recognize a "new" tort of failure to provide a deep  
10 pocket. Secondly, the Plaintiff has cited no authority to support his implied waiver of sovereign  
11 immunity. On the contrary, the authority found by the Court indicates that sovereign immunity can  
12 only be waived by statutory enactment which clearly expresses such intention. *David v. CNMI*, 3 CR  
13 at 162.

14 The facts alleged by Plaintiff's complaint do not come within the statutorily created waiver  
15 of sovereign immunity. Therefore, MVB is cloaked by the protection of sovereign immunity and its  
16 motion to dismiss must be granted.

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#### IV. CONCLUSION

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<sup>2/</sup> The Court finds that there is judicial economy in ruling on both contentions where the Plaintiff might appeal a ruling based on one ground alone and then later be faced with the second issue. The Court believes that both contentions should be addressed since they are raised by the parties rather than having the matter go on appeal and then returning to this forum to relitigate the issue and create the possibility of a second time consuming and costly appeal.

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So ORDERED this 11 day of September, 1996.

  
TIMOTHY H. BELLAS, Associate Judge