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

JAY FOSTER,
Plaintiff-Appellant,

v.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Defendant-Appellee.

Supreme Court No. 2017-SCC-0031-CIV
Superior Court No. 13-0160

OPINION

Cite as: 2019 MP 3

Decided May 24, 2019

Christopher M. Timmons, Chief of the Civil Division, Office of the Attorney General, Saipan, MP, for Defendant-Appellee.

Matthew J. Holley, Saipan, MP, for Plaintiff-Appellant.

BEFORE: ALEXANDRO C. CASTRO, Chief Justice; JOHN A. MANGLOÑA, Associate Justice; PERRY B. INOS, Associate Justice.

MANGLOÑA, J.:

¶ 1 Plaintiff-Appellant Jay Foster ("Foster") appeals the trial court's Order Granting the Commonwealth's Motion to Dismiss with Prejudice ("Order Dismissing with Prejudice") and Order Denying Plaintiff's Motion for Reconsideration ("Order Denying Reconsideration"). Foster argues the court improperly interpreted 7 CMC §§ 2202 and 2210 of the Government Liability Act ("GLA"). In particular, he asserts that (1) failing to indicate a sum certain equates with failing to first present a claim, and (2) failing to first present a claim allows a claimant to refile the claim with the Attorney General. For the following reasons, we REVERSE the Order Dismissing with Prejudice and Order Denying Reconsideration.

I. FACTS AND PROCEDURAL HISTORY

¶ 2 In 2013, Foster sued Dr. Ruben Arafiles ("Dr. Arafiles") for medical malpractice.[1] The Complaint requested various damages "in the amount to be proven at trial." *Foster v. Arafiles*, Civ. No. 13-0160 (NMI Super. Ct. July 25, 2013) (Complaint at 9) ("Complaint").

¶ 3 In 2016, the Commonwealth of the Northern Mariana Islands ("Commonwealth") filed a notice requesting substitution of the Commonwealth for Dr. Arafiles as the party-defendant pursuant to 7 CMC § 2210(a) ("Section 2210(a)") of the GLA.[2] The Commonwealth certified Dr. Arafiles as acting within the scope of his Commonwealth employment based on the Complaint. *Foster v. Arafiles*, Civ. No. 13-0160 (NMI Super. Ct. April 22, 2016) (Notice of Substitution for Dr. Ruben P. Arafiles and Commonwealth's Motion to Dismiss at 2) ("Notice of Substitution"). At the same time, the Commonwealth moved to dismiss Foster's Complaint alleging he had not presented his claim for damages to the Attorney General in accordance with the claim presentment requirement in 7 CMC § 2202(b) ("Section 2202(b)"), which states in relevant part: "An action shall not be instituted upon a claim against the Commonwealth . . . *unless the claimant shall have first presented the claim to the Attorney General* and the claim shall have been finally denied by the Attorney General . . . ." It argued that,

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[1] The underlying civil action was originally against Dr. Arafiles and Medical Associates of the Pacific, LLC.

[2] Section 2210(a) of the GLA states:

> Upon certification by the Attorney General that the defendant employee was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a court against an employee shall be deemed an action against the Commonwealth and the Commonwealth shall be substituted as the party defendant . . . . An order dismissing the employee from the suit shall be entered.

as a result, the court did not have subject matter jurisdiction and the Commonwealth was still entitled to its "90 day investigation period" as permitted by Section 2202(b). Notice of Substitution at 4. *See* 7 CMC § 2202(b) ("The failure of the Attorney General to make final disposition of a claim within 90 days after it is presented shall be deemed a final denial of the claim for purposes of this section."). Implicitly, the Commonwealth asserted that pursuant to 7 CMC § 2210(d) ("Section 2210(d)"), Foster's suit should be dismissed for failure to present a claim to the Attorney General, and he should be given 60 days to file his claim with the Attorney General. *See* 7 CMC § 2210(d) ("Whenever an action in which the Commonwealth is substituted as the party defendant is dismissed for failure to present a claim pursuant to the requirements of this title, such a claim shall be deemed to be timely presented under this title if . . . [t]he claim is presented to the Attorney General within 60 days after dismissal of the civil action."). Instead of ruling on the notice of substitution and the motion to dismiss, the court stayed the proceedings at the parties' request while Foster and the Attorney General attempted to resolve the Complaint.

¶ 4 Soon after, Foster submitted his claim to the Attorney General in the form of a letter with the Complaint attached and completely unchanged. In other words, Foster's requested relief as submitted to the Attorney General remained as "an amount to be proven at trial," thereby failing to indicate an actual, specific amount of damages. Complaint at 9. Foster attempted to resolve his case in a series of emails from his counsel but the case did not settle.

¶ 5 Foster subsequently requested to schedule the case for trial. The parties additionally filed a number of responses concerning the Commonwealth's pending motion to dismiss. Months later, the court granted the Commonwealth's motion substituting for Dr. Arafiles as the party-defendant. In the same order, it dismissed Foster's Complaint against the Commonwealth with prejudice.

¶ 6 In dismissing Foster's complaint with prejudice, the court determined "[a]lthough this Court now orders that the Commonwealth be substituted in this case, [Foster] had already presented [his] claim to the Attorney General." Order Dismissing with Prejudice at 5–6. It concluded that Foster's original claim that the amount of damages would be proven at trial did not comply with Section 2202(b)'s claim presentment requirement. Because Foster failed to comply with the GLA's claim presentment requirement insofar as it "requir[es] *a sum certain* for money damages," the court held that it did not have jurisdiction and that Foster was barred from pursuing an action against the Commonwealth. Order Dismissing with Prejudice at 11 (emphasis added).[3]

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[3] The court also held that "a sum certain for monetary damages must accompany a claim filed with the Attorney General for purposes of allowing prompt investigation and settlement by the Attorney General." Order Dismissing with Prejudice at 9.

Although neither the GLA nor any other CNMI statute explicitly defines 'sum certain,' the court and the parties appear to interpret 'sum certain' to mean a definite claim for

¶ 7 Foster moved for reconsideration. Although he agreed the court lacked jurisdiction over his claim, he disputed the dismissal with prejudice. Specifically, Foster argued that in failing to present a claim with a sum certain, he failed to present a claim at all. Thus, pursuant to Section 2210(d), he should have been allowed another 60 days to refile an appropriate claim. The court disagreed, stating "because an improper claim had already been filed with the Attorney General . . . [Foster] exhaust[ed] any possible recourse under Section 2210(d)." Order Denying Reconsideration at 6. This appeal followed.

II. JURISDICTION

¶ 8 We have jurisdiction over final judgments and orders of the Commonwealth superior court. NMI CONST. art. IV, § 3.[4]

III. STANDARDS OF REVIEW

¶ 9 There are two issues on appeal. First, we review whether the court properly interpreted Sections 2202 and 2210 of the GLA de novo. *Aurelio v. Camacho*, 2012 MP 21 ¶ 14. Second, we will review whether the court abused its discretion in dismissing Foster's suit with prejudice and in denying Foster's motion for reconsideration.[5] *Wabol v. Villacrusis*, 2000 MP 18 ¶ 2 (dismissal with prejudice); *Angello v. Louis Vuitton Saipan, Inc.*, 2000 MP 17 ¶ 3 (denial of reconsideration).

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money damages. The parties do not dispute this interpretation of sum certain; rather, the dispute is whether a sum certain is needed at all.

[4] The parties dispute at what point we acquired jurisdiction. Specifically, the Commonwealth asserts Foster filed his notice of appeal prematurely. Since an entry of judgment or order was never issued, the court's Order Denying Reconsideration was not "entered" until 150 days after it was issued—on April 24, 2018. *See* NMI SUP. CT. R. 4(a)(7). We thus acquired jurisdiction on that day.

We have held that "it is [not] prudent or efficient to dismiss an appeal of a case . . . simply because the decision being appealed was not final at the time the appeal was filed. There may be situations in which jurisdiction will be perfected during the pendency of the appeal." *Commonwealth v. Kumagai*, 2006 MP 20 ¶ 16. Here, because jurisdiction was perfected during the pendency of this appeal, we may entertain the case.

[5] Additionally, "[w]e review the trial court's denial of leave to amend for an abuse of discretion." *Syed v. Mobil Oil Marianas Islands, Inc*., 2012 MP 20 ¶ 9. We find the standard of review for denials of motions to amend analogous to dismissals with prejudice for GLA claims. A critical issue is whether Foster should have been given an opportunity to refile an appropriate claim. This is similar to a party being given leave to amend an otherwise defective pleading. Here, the defect is the claim for damages in the complaint. Instead of examining whether amending the complaint is appropriate, we examine whether Foster could refile a claim that states a sum certain. Despite this slight distinction, the potential procedure is the same: permitting a claimant to "amend" or "refile" an otherwise defective "pleading" or "claim."

IV. DISCUSSION

A. Government Liability Act

¶ 10 The Commonwealth argues the term 'claim' in the GLA should be interpreted broadly, and therefore when a claim does not state a sum certain, it logically follows that the amount demanded is zero dollars. The Commonwealth asserts that because Foster presented a claim lacking a sum certain, and thus equivalent to a zero dollar claim, the GLA precludes him from seeking monetary damages over that amount. It claims the court correctly found it lacked jurisdiction over Foster's complaint and dismissed his suit with prejudice. Foster maintains that when he submitted his claim without a sum certain, he failed to first present a claim at all. Under the GLA, Foster concludes the court should have allowed him to refile a claim with a sum certain to the Attorney General.

¶ 11 Foster's argument requires an examination of the GLA's claim presentment requirement in Section 2202(b) and clarified in 7 CMC § 2202(c) ("Section 2202(c)"). It also requires an examination of Section 2210(d), which governs dismissals of suits for failure to first present claims. Together, these provisions provide the framework for addressing whether Foster failed to first present a claim and whether Foster may refile anew with the Attorney General. We will look at each statute accordingly.

¶ 12 Whether the court correctly interpreted Sections 2202(b) and (c), and Section 2210(d) is reviewed de novo. *Aurelio*, 2012 MP 21 ¶ 14. We will subsequently review the court's Order Granting Motion to Dismiss with Prejudice and its Order Denying Reconsideration for an abuse of discretion. *Wabol*, 2000 MP 18 ¶ 2 (dismissal with prejudice); *Angello*, 2000 MP 17 ¶ 3 (denial of reconsideration). "We will find an abuse of discretion if the trial court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Commonwealth v. Palacios*, 2003 MP 6 ¶ 2 (citations and internal quotation marks omitted). We have previously stated that a court may grant a motion to reconsider where there is an "intervening change in the controlling law, the availability of new evidence, the need to correct a clear error or to prevent manifest injustice." *Angello*, 2000 MP 17 ¶ 11.

1. Section 2202

¶ 13 Interpreting the GLA's claim presentment requirement in Sections 2202(b) and (c) is an issue of first impression. While we have previously discussed the GLA in other circumstances, *see, e.g., Elameto v. Commonwealth*, 2018 MP 15 (finding the substitution provision in 7 CMC § 2210(a) did not infringe on a claimant's right to privacy); *Marine Revitalization Corp. v. Dep't of Land & Nat. Res.*, 2010 MP 18 (discussing 7 CMC § 2254 which governs the method of payment of judgments entered against the government pursuant to the GLA); *Kabir v. CNMI Pub. Sch. Sys.*, 2009 MP 19 (holding that scope-of-employment certification may be issued based on the determination that the tortious conduct did not occur), we have yet to address the GLA's claim presentment requirements.

¶ 14 The GLA limits tort liability for government employees who acted negligently while working within the scope of their employment. *See* PL 3-51, § 2(a). In 2006, the CNMI Legislature "amend[ed] the [GLA] to provide for [the] dismissal and/or representation of Commonwealth employees in court actions; to clarify the extent of government tort liability; and for other purposes." PL 15-22. The amendment modeled "almost verbatim" the Westfall Act, the federal statutory scheme "protect[ing] [f]ederal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by common law torts of [f]ederal employees with an appropriate remedy against the United States." *Kabir*, 2009 MP 19 ¶ 25 (citing Pub. L. No. 100-694, § 2(b), 102 Stat. 4563 (1988)).[6] Following Congress's cue, the amendments "would allow the Commonwealth to investigate claims and settle valid ones without the expense of litigation, resulting in less expense to the Commonwealth and greater net recoveries for deserving plaintiffs." PL 15-22, § 2.

¶ 15 Where a statute's language is clear and unambiguous, we construe the statute according to its plain meaning. *Aurelio*, 2012 MP 21 ¶ 15. "When a statute is [unclear], however, we look at the statute as a whole, not just an isolated set of words, to ascertain the legislature's intent." *Id*. (citation omitted). We may further look to other jurisdictions for guidance where a CNMI statute is nearly identical, or almost verbatim, to a federal provision. *Tudela v. Superior Court*, 2010 MP 6 ¶ 8; *see also Pac. Fin. Corp. v. Sablan*, 2011 MP 19 ¶ 9 (looking to other jurisdictions where plain language is unclear).

¶ 16 Section 2202(b) states:

> An action shall not be instituted upon a claim against the Commonwealth for money damages for injury . . . unless the claimant shall have *first presented the claim* to the Attorney General and the claim shall have been finally denied by the Attorney General . . . . The failure of the Attorney General to make final disposition of a claim within 90 days after it is presented shall be deemed a final denial . . . .

(emphasis added).[7] Section 2202(c) subsequently conveys that an "[a]ction shall

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[6] The Westfall Act "accords federal employees absolute immunity from common-law tort claims arising out of acts they undertake in the course of their official duties. . . . Upon the Attorney General's certification, the employee is dismissed from the action . . . [and t]he litigation is thereafter governed by the Federal Torts Claims Act." *Osborne v. Haley*, 549 U.S. 225, 229–30 (2007) (internal citations omitted).

Public Law 15–22 also states "[T]he Commonwealth [GLA] closely tracks provisions of the Federal Tort Claims Act, [which] raises the specter of individual liability for Commonwealth employees . . . ." PL 15–22, § 2.

[7] 7 CMC § 2202(b) has as its federal counterpart 28 U.S.C. § 2675(a) which states, in pertinent part:

not be later instituted for any sum in excess of the amount of the claim presented to the Attorney General . . . ."[8]

¶ 17 Section 2202(b) specifies that a claimant must first present a "claim" to the Attorney General. The Attorney General then has 90 days to render a "final disposition" of the claim. If the Attorney General does not render a final disposition within the 90-day period, the claim is effectively denied. Once a final disposition is made, whether by action or inaction, the statute clearly contemplates the trial court as the next stage for any dissatisfied claimant. Section 2202(c), however, limits any such suit to an amount of damages no greater than that originally sought from the Attorney General. Reading Section 2202(b) and (c) in harmony, we find Section 2202(c)'s mandate that a later suit cannot be for an amount greater than the initial claim dictates that there must be a sum certain in the first place. This comports with explicit legislative intent to provide "greater net recoveries for deserving plaintiffs." PL 15-22, § 2. Interpreting 'claim' broadly, as the Commonwealth would have us do, would create insurmountable hardship for deserving claimants. A claim of zero dollars would mean that a claimant could never pursue action against the Commonwealth. Instead, we find that the appropriate interpretation of these provisions requires finding that a claimant's failure to state a sum certain renders it a defective claim. Therefore, where a claimant first presents a defective claim, the claimant has effectively failed to first present a claim at all. Our interpretation is consistent with federal precedent interpreting the parallel provisions of the Federal Torts Claim Act ("FTCA").

¶ 18 In *Blair v. IRS*, the plaintiff's claims indicated that "[m]edical expenses are still being incurred, with no end presently in sight." 304 F.3d 861, 868 (9th Cir. 2002). Similar to Foster's case now before us, the issue in *Blair* was one of jurisdiction, namely whether claim was adequately presented to justify jurisdiction under the FTCA. The Ninth Circuit found that the requirement of a sum certain is derived directly from 28 U.S.C. § 2675 itself, the analog to Section 2202 governing the federal claim presentment requirement.[9] *Id.* at 865; *see also Adams v. United States*, 615 F.2d 284, 292 n.17 (5th Cir. 1980) (stating that 28 U.S.C. § 2675 "requir[es] by its own terms that a claimant place a dollar amount on his damages."); *Warren v. U.S. Dep't of Interior Bureau of Land*

> An action shall not be instituted upon a claim against the United States for money damages for injury . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency . . . . The failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial . . . .

[8] 7 CMC § 2202(c) has as its federal counterpart 28 U.S.C. § 2675(b) which states, in pertinent part: "[a]ction under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency . . . ."

[9] For a direct comparison of the language of the statutes, *see supra* notes 7 and 8.

Management, 724 F.2d 776, 779 (9th Cir. 1984) (same).[10] It reasoned that 28 U.S.C. § 2675(b)'s requirement "that an action cannot be instituted for any sum in excess of the amount of the claim presented makes it apparent that the claim must state a sum certain." *Blair*, 304 F.3d at 865; *see also Adams*, 615 F.2d at 292 n.17 (finding that 28 U.S.C. § "2675(b) anticipates that the claim will be for a definite amount"). As a result, the court determined that the failure to include a sum certain in medical expenses meant that his "claim for medical expenses *was not properly exhausted before the federal agency*, and thus, [was] not properly before the [trial] court." *Blair*, 304 F.3d at 869 (emphasis added). The Ninth Circuit subsequently remanded the case for further proceedings.

¶ 19 Other courts have similarly found that where a claimant fails to indicate a sum certain, the claimant has effectively failed to first present a claim at all. In *Avril v. United States*, the claimant did not specify any amount, leaving a blank space where he was to indicate a sum certain. 461 F.2d 1090, 1091 (9th Cir. 1972). In *Caton v. United States*, the claimant identified that the sum certain was "unknown at this time." 495 F.2d 635, 636 (9th Cir. 1974). In *Montoya v. United States*, the claimant likewise expressed that she would "request a settlement for . . . damages" when medical examinations were completed. 841 F.2d 102, 104 (5th Cir. 1988). In each of these cases, the courts reasoned similarly with one another that the claimant had presented a "fatally defective" claim, *Avril*, 461 F.2d at 1091, and therefore the claimant had presented no claim at all. *Caton*, 495 F.2d at 638. In other words, "[u]nless it is a claim for something, [it] is no claim at all." *Avril*, 461 F.2d at 1091. Claimants who bring suit without presenting a sum certain do so prematurely and preclude a trial court's jurisdiction over his or her suit. *Montoya*, 841 F.2d at 105.

¶ 20 Here, just as in *Blair*, Foster did not specify a sum certain in his claim. Instead, he presented a letter attached to his original complaint simply stating the amount of damages would be in an amount "to be proven at trial." Complaint at 9.[11] When Foster issued his letter pursuant to the GLA, he failed to present a sum

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[10] The court and the parties attempt to distinguish federal case law interpreting the analogous federal provisions on the basis that such case law relies on federal regulations the CNMI has not promulgated. This distinction is misplaced. As clearly indicated by cases such as *Blair*, a sum certain is required not on the basis of federal regulations, but rather by the statutes themselves. *See Blair*, 304 F.3d at 365. Where our statutes track the federal provisions "almost verbatim," federal case law is particularly persuasive authority. *Tudela v. Superior Court*, 2010 MP 6 ¶ 19 ("Given these similarities, this Court may therefore look to federal cases interpreting equivalent provisions of federal law to determine the issues raised in a given case." (internal quotation marks omitted)).

[11] We also note 7 CMC § 2210(e) allows the CNMI's Attorney General "to promulgate needed rules and regulations to implement the intent of [the GLA]." Despite this provision, there are no rules or regulations instructing claimants on the method of claim presentment. This leaves claimants guessing how to present their claims. In stark contrast, the federal government provides a relatively simple "Standard Form 95" to fill out claims under the FTCA. The form conspicuously contains a space to indicate

certain, and therefore failed to first present a claim at all. We must next ascertain what consequences follow as a result of Foster's failure to first present a claim.

2. Claim Resubmittal

¶ 21 Section 2210(d) prescribes the effects of failing to conform to the claim presentment requirements of Sections 2202(b) and (c). As with Sections 2202(b) and (c), we begin with the statute's plain language, and otherwise look to the statute as a whole, *Aurelio*, 2012 MP 21 ¶ 15, and other jurisdictions for guidance. *Sablan*, 2011 MP 19 ¶ 9. In furtherance of interpreting a provision, we look at the context of the entire provision at issue. *Peter-Palican v. Commonwealth*, 2012 MP 7 ¶ 6. Furthermore, we harmonize all parts of an enactment with each other and with the general intent of the whole enactment to give meaning and effect to all provisions. *Guerrero v. Dep't. of Pub. Lands*, 2011 MP 3 ¶ 11 (internal quotation marks omitted).

¶ 22 Section 2210(d) states:

> Whenever an action or proceeding in which the Commonwealth is substituted as the party defendant is *dismissed for failure to first present a claim* pursuant to the requirements of this title, such a claim shall be deemed timely presented under this title if:
>
> (1) The claim would have been timely had it been filed on the date the underlying civil action was commenced, and
> (2) *The claim is presented to the Attorney General within 60 days after dismissal of the civil action*.

(emphases added).[12]

¶ 23 We read Section 2210(d) similar to a savings clause. The statute dictates that an action may be "deemed timely" when four circumstances are met. First, the government must be substituted as the party-defendant. Second, the underlying civil action must be dismissed for failure to first present a claim, as provided by Section 2202(b). Third, the claim must be timely had it been filed on the date the underlying civil action occurred. And fourth, the claim is

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the sum certain amount. Although the Commonwealth argues Foster failed to present his claim, it did not provide any clear guidance on how to present a claim.

[12] 7 CMC § 2210(d) has as its federal counterpart 28 U.S.C. § 2679(d)(5) which states, in pertinent part:

> Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented . . . if—
>
> (A) The claim would have been timely had it been filed on the date the underlying civil action was commenced, and
>
> (B) The claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.

presented to the Attorney General within 60 days after dismissal of the civil action. Of particular relevance here, we find that failure to first present a claim in accordance with Section 2202(b) is one circumstance in which the savings clause in Section 2210(d) is triggered.

¶ 24 Other courts have similarly found that the savings clause is triggered upon substitution of the government as the party-defendant and a claimant's failure to comply with Section 2202(b)'s claim presentment requirements. *See Rosario v. Estado Libre Asociado De Puerto Rico*, 52 F. Supp. 2d 301 (D.P.R. 1999) (dismissing without prejudice); *O'Neill v. United States*, 732 F. Supp. 1254 (E.D.N.Y. 1990) (same). When this occurs, and a court determines the savings clause applies, "it typically dismisses the plaintiff's suit *without prejudice* and grants the plaintiff leave to file an administrative claim with the appropriate agency." *Phillips v. Generations Family Health Ctr.*, 723 F.3d 144, 148 (2d Cir. 2013) (emphasis added). Thereafter, a plaintiff gets a fresh period of 60 days to file the administrative claim. *Velez-Diaz v. United States*, 507 F.3d 717, 718 n.1 (1st Cir. 2007).

¶ 25 Here, the court did not find that Section 2210(d) was applicable and explicitly found that Foster exhausted any possible recourse under the savings clause. Order Denying Reconsideration at 6. However, the court reached its conclusion on an erroneous view of the law. As we just announced, when Foster failed to present a sum certain to the Attorney General, he failed to first present a claim at all. Consequently, the savings clause in Section 2210(d) should have been triggered under the circumstances here, giving Foster an opportunity to refile an appropriate claim. The court therefore abused its discretion in dismissing Foster's suit with prejudice and thereafter abused its discretion in denying him reconsideration.

V. CONCLUSION

¶ 26 For the foregoing reasons, the court's Order Denying Reconsideration and Order Dismissing with Prejudice is REVERSED and REMANDED for further proceedings consistent with this Opinion.

SO ORDERED this 24th day of May, 2019.

/s/
ALEXANDRO C. CASTRO
Chief Justice

/s/
JOHN A. MANGLOÑA
Associate Justice

/s/
PERRY B. INOS
Associate Justice