

Evelyn and Phillip DAVID  
vs.  
COMMONWEALTH OF THE  
NORTHERN MARIANA  
ISLANDS, et al.

Appellate No. 86-9018  
District Court NMI  
Appellate Division

Decided September 11, 1987

Affirming 2 CR 585 (CTC 1986)

**1. Appeal and Error - Standard of Review - Summary Judgment**

An appellate court reviews the grant or denial of a motion for summary judgment de novo.

**2. Sovereign Immunity - Commonwealth**

The right of self government by the people of the Northern Mariana Islands granted by the Covenant was intended to affirm the sovereign immunity of the CNMI, in that it cannot be sued on the basis of its laws without its consent. Covenant, §103.

**3. Sovereign Immunity - Waiver - Express**

A court will not find a waiver of sovereign immunity unless the waiver is express and there is a clear intention to waive governmental immunity.

**4. Sovereign Immunity - Waiver - Statutes**

A statute which waives the government's immunity must be strictly construed in favor of the sovereign and not enlarged beyond what the language requires.

**5. Principal and Agent - Independent Contractor**

The general rule is that a principal is not liable for the tortious conduct of an independent contractor.

**6. Sovereign Immunity - Waiver - Statutes**

Statutes purporting to waive the government's sovereign immunity must be strictly construed since they are in derogation of the general common law rule of immunity.

**7. Sovereign Immunity - Waiver - Independent Contractor**

The principle of apparent authority may not be applied to waive the sovereign immunity of the CNMI, which provides that it cannot be sued on the basis of its own laws without its consent. 7 CMC §2202.

**8. Sovereign Immunity - Waiver - Independent Contractor**

Commonwealth statute waiving Commonwealth's sovereign immunity in certain circumstances did not include a waiver for independent contractors of the Commonwealth. 7 CMC §2202.

**9. Sovereign Immunity - Waiver - Independent Contractor**

Absent any indication of legislative intent to include "apparent" employees within the scope of statute waiving sovereign immunity of the Commonwealth of the Northern Mariana Islands for those persons whose legal status is that of an employee, the statute cannot be read to apply to independent contractors by virtue of the principles of apparent authority or estoppel. 7 CMC §2202.

FILED  
Clerk  
District Court

SEP 11 1987

For The Northern Mariana Islands

By Cristobal C. Duenas  
(Dueson C. 1987)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN MARIANA ISLANDS  
APPELLATE DIVISION

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9	EVELYN and PHILLIP DAVID,	)	DCA 86-9018
10	Plaintiffs,	)	
11	vs.	)	
12	COMMONWEALTH OF THE NORTHERN	)	OPINION
13	MARIANA ISLANDS and	)	
14	DR. EDMUND GRILEY,	)	
15	Defendants.	)	

BEFORE: LAURETA, DUENAS\* and NIELSEN,\*\* District Judges

DUENAS: District Judge

COUNSEL:

FOR APPELLANTS

FOR APPELLEES

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\* The Honorable Cristobal C. Duenas, District Judge,  
District Court of Guam, sitting by designation.

\*\* The Honorable Leland C. Nielsen, Senior District Judge,  
U.S. District Court, Southern District of California, sitting  
by designation.

1 Plaintiffs-appellants, Evelyn and Phillip David, appeal  
2 from the trial court's order granting summary judgment in  
3 favor of defendant-appellee, Commonwealth of the Northern  
4 Mariana Islands (hereinafter "CNMI").

5  
6 STATEMENT OF THE CASE

7 Facts

8 The Davids brought this action against the CNMI and  
9 Dr. Edmund Griley, alleging that in the course of performing  
10 surgery on Mrs. David, Dr. Griley negligently punctured Mrs.  
11 David's bladder. Mrs. David was first referred to Dr. Griley  
12 by a staff doctor at Dr. Torres Hospital, (hereinafter  
13 "Hospital") a hospital operated, managed, and controlled by  
14 the CNMI where she was operated on by Dr. Griley. Mrs. David  
15 was told that Dr. Griley was a specialist from Guam.

16 Proceedings Below

17 The CNMI moved for summary judgement on the grounds that,  
18 since Dr. Griley is an independent contractor, the CNMI is  
19 immune from suit under 7 CMC §2202(a). In support of its  
20 motion the CNMI submitted a copy of Dr. Griley's contract,  
21 which showed that he was hired as an independent contractor.  
22 The CNMI also attached several affidavits which indicate that  
23 Dr. Griley is self-employed at Guam Polyclinic and all  
24 services performed by him at the Hospital are performed under  
25 the contract and that the Hospital deducts no taxes, social  
26 security, or insurance from Dr. Griley's pay. The CNMI

1 asserts that the Hospital exercises no control over the acts  
2 of Dr. Griley.

3 The Davids opposed the motion and submitted affidavits  
4 stating that they were under the impression that Dr. Griley  
5 was a Hospital employee and were never told he was an  
6 independent contractor. The Davids rely on the principle of  
7 apparent authority to argue that the Hospital was liable for  
8 the acts of Dr. Griley, whom the Hospital allegedly held out  
9 as their employee.

10 The trial court found that Dr. Griley is an independent  
11 contractor, and that the principle of apparent authority may  
12 not be applied to waive the sovereign immunity of the  
13 CNMI, which provides that it cannot be sued on the basis of  
14 its own laws without its consent. We regretfully affirm.

#### 15 16 ANALYSIS

17 ¶ An appellate court reviews the grant or denial of a  
18 motion for summary judgment de novo. Fidelity Financial Corp.  
19 v. Federal Home Loan Bank, 792 F.2d 1432, 1437 (9th Cir.  
20 1986); Lone Ranger Television v. Program Radio Corp., 740 F.2d  
21 718, 720 (9th Cir. 1984). The Davids do not contest that  
22 Dr. Griley is in fact an independent contractor and not an  
23 employee of the Hospital. They contend, however, that the  
24 trial court erred as a matter of law in its construction of  
25 CMC §2202 and its rejection of the theory of apparent  
26 authority.



1 by Section Analysis of the Covenant to Establish a  
2 Commonwealth of the Northern Mariana Islands, Marianas  
3 Political Status Commission, February 15, 1975, at 11.

4 The CNMI has by statute waived its sovereign immunity in  
5 some circumstances. 7 CMC §2202 provides:

6 The Commonwealth Government shall be liable  
7 in tort for damages arising from the  
8 negligent acts of employees of the  
9 Commonwealth acting within the scope of  
10 their office or employment, provided that

11 (a) The Commonwealth and any employees  
12 engaged in the performance of service on  
13 behalf of the Commonwealth shall not be  
14 liable in a suit based on the performance of  
15 those services for more than \$50,000 in an  
16 action for wrongful death and \$100,000 in  
17 any other tort action . . . .

18 [34] A court will not find a waiver of sovereign immunity  
19 unless waiver is express and there is a clear intention to  
20 waive governmental immunity. Lehman v. Nakshian, 453 U.S.  
21 156, 160-61, 101 S.Ct. 2698, 69 L.Ed.2d 548 (1981); Edelman v.  
22 Jordan, 415 U.S. 651, 673, 94 S.Ct. 1347, 39 L.Ed.2d 662,  
23 reh. denied, 416 U.S. 1000 (1974) (waiver by state of its  
24 protection under the Eleventh Amendment); Petty v. Tennessee-  
25 Missouri Bridge Co., 359 U.S. 275, 276, 79 S.Ct. 785, 31  
26 L.Ed.2d 804 (1959). A statute which waives the government's  
immunity must be strictly construed in favor of the sovereign  
and "not enlarged beyond what the language requires."  
Ruckelshaus v. Sierra Club, 463 U.S. 680, 685, 103 S.Ct. 3274,  
77 L.Ed.2d 938 (1983).

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1 We must determine whether strict construction of 7 CMC  
2 §2202 precludes application of the doctrines of apparent  
3 authority or estoppel in order to find that Dr. Griley,  
4 although an independent contractor, nevertheless constitutes  
5 an employee for purposes of CNMI's liability under 7 CMC  
6 §2202.

7 Apparent Authority

8 [5] The general rule is that a principal is not liable for  
9 the tortious conduct of an independent contractor. See  
10 generally, Restatement Second of Agency §2, Comment b. (1958).  
11 There are specific exceptions to the rule.

12 The Davids argue that the principle found in the  
13 Restatement Second of Agency §267 should have been applied by  
14 the trial court which would then have compelled the finding  
15 that Dr. Griley is an employee within the meaning of §2202.  
16 Section 267 provides:

17 One who represents that another is his  
18 servant or other agent and thereby causes a  
19 third person justifiably to rely upon the  
20 care or skill of such apparent agent is  
21 subject to liability to the third person for  
harm caused by the lack of care or skill of  
the one appearing to be a servant or other  
agent as if he were such.

22 This section sets forth an exception to the general rule  
23 precluding liability for the acts of independent contractors.

24 Section 2202 does not contain language making the  
25 sovereign liable to the same extent as a private person in  
26 like circumstances would be. By comparing §2202 with its

1 predecessor statute, which provided that the CNMI be liable to  
2 the same extent as a private person, and which the court found  
3 to be virtually identical to the Federal Tort Claims Act, 28  
4 USC §2674, the trial court held that the term "employee" in  
5 §2202 was not meant to include independent contractors.

6 It has been held under the Federal Tort Claims Act, 28  
7 USC §2674, that the federal government may be liable for the  
8 acts of an independent contractor if a common law exception to  
9 the rule precluding liability applies. Slagle v. United  
10 States, 612 F.2 1157, 1162 (9th Cir. 1980). The trial court  
11 in the instant case, however, correctly distinguished cases  
12 under the Federal Tort Claims Act on the grounds that the  
13 language of that statute permits the federal government to be  
14 liable for torts to the same extent that a private person  
15 would be liable. Cf. Bramer v. United States, 595 F.2d 1141,  
16 1144 n.8 (9th Cir. 1979); Slagle, supra, 612 F.2d at 1162  
17 n. 6.

18 The trial court found that the enactment of §2202  
19 "further limited the extent of governmental liability" than  
20 that found in the old statute because it deleted language  
21 making the government liable to the same extent that a private  
22 person would be liable. These findings are not disputed by  
23 the Davids, who simply contend that despite these findings the  
24 trial court should have found Dr. Griley to be within the  
25 terms of the statute by virtue of the doctrine of apparent  
26 authority.



1 independent contractor. Application of the theory of apparent  
2 authority does not convert the legal status of an independent  
3 contractor to that of an employee.

4 [8,9] A plain reading of §2202 indicates that sovereign  
5 immunity is waived only for those persons whose legal status  
6 is that of an employee. The Davids are asking the Court to  
7 read into §2202 a theory of vicarious liability that evidently  
8 was not intended by the legislature, the only entity with the  
9 power to waive the immunity of the sovereign. Absent any  
10 indication of legislative intent to include "apparent"  
11 employees within the scope of §2202, the statute cannot be  
12 read to apply to independent contractors by virtue of the  
13 principles of apparent authority or estoppel. We are bound by  
14 the language of the statute. Ruckelshaus, 463 U.S. at 685.  
15 The decision of the trial court is affirmed.

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19 CRISTÓBAL C. DUENAS, District Judge

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22 ALFRED LAURETA, District Judge

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25 LELAND C. NIELSEN, District Judge  
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FOOTNOTES

1/Section 2202 is set forth in more detail infra p.5.

2/The CNMI is correct that since the governmental/proprietary distinction was not raised below, it need not be considered here unless the proper resolution of the question is beyond any doubt, Turner v. City of Memphis, 369 U.S. 350 (1962), or is required because injustice might otherwise result. Hormel v. Helvering, 312 U.S. 552 (1941); see also, Pegasus Fund, Inc. v. Laraneta, 617 F.2d 1335, 1342 (9th Cir. 1980); Babb v. Schmidt, 496 F.2d 957, 960 (9th Cir. 1974). Whether the operation of this hospital was a proprietary and not a governmental function depends on particular facts which, since the question was not raised below, were not developed below.

The Davids' estoppel argument on appeal rests entirely on this distinction. They concede that estoppel seldom may apply against a state, but argue that since the CNMI was here acting in a proprietary capacity it may be estopped from asserting that Dr. Griley is an independent contractor. From the record it appears that both the estoppel argument and the governmental/proprietary distinction are raised for the first time on appeal, and therefore are not properly before the Court.

3/Section 103 came into full force and effect on January 9, 1978. See Proclamation No. 4534 of October 24, 1977, 42 Fed. Reg. 56593.