FOR PUBLICATION

Appeal Nos. 01-004, 01-008, 01-015 (Consolidated)

IN THE SUPREME COURT OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JEANNE H. RAYPHAND,
Plaintiff-Appellee-Cross Appellant,

v.

FROILAN C. TENORIO, Governor, et al.,
Defendant-Appellant-Cross-Appellee.

Opinion

Cite as: *Rayphand v. Tenorio,* 2003 MP 12

Civil Action No. 94-912

Hearing held March 22, 2002.
Submitted on supplemental briefs on April 22, 2002
Decided July 23, 2003

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BEFORE: MANGLONA, Associate Justice, NARAJA and UNPINGCO, Justices Pro Tempore.

MANGLONA, Associate Justice:

¶1 Appellant and Cross-Appellee, former Governor Froilan C. Tenorio, [hereinafter Governor Tenorio] appeals a final judgment of the Superior Court, holding him liable to the Commonwealth for misspent public monies. Appellee and Cross-Appellant Jeanne Rayphand [hereinafter Rayphand] appeals various Decisions and Orders of the Superior Court. We have jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and 1 CMC § 3102(a). We reverse and remand this case to the trial court.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 These consolidated appeals present eleven issues for our consideration:

I. Did the trial court err in holding that a taxpayer can sue a government official for monetary relief under Article X, Section 9 of the Constitution and the Commonwealth Planning and Budgeting Act of 1983, 1 CMC §§ 7101, *et seq*. [hereinafter Budget Act]?

II. Did the trial court err in holding that certain of the alleged violations of Article III, Section 9(a) of the Constitution and 1 CMC § 7402(d) arising out of reprogramming and expenditure decisions did not constitute nonjusticiable political questions?

III. Did the trial court err in holding that Commonwealth Public Law No. 9-23 did not render this case moot by releasing Defendants from any liability?

IV. Did the trial court err in holding that Governor Tenorio was not entitled to qualified immunity?

V. Did the trial court err in denying Froilan C. Tenorio's motion to intervene to set aside the judgment because of lack of personal service?

VI. Did Rayphand sufficiently establish that there were no genuine issues of material fact to support the trial court's granting of summary judgment?

VII. Did the trial court err in finding that alleged reprogramming and expenditures of funds violated Article III, Section 9(a) of the Constitution and 1 CMC § 7204(d)?

VIII. Did the trial court err in finding that Governor Tenorio had a fiduciary duty and that he breached such fiduciary duty?

IX. Did the trial court err in denying attorney fees for the work of Rayphand in her capacity as an employee of the Law Office of Theodore Mitchell?

X. Did the trial court err in denying an enhancement of the attorney fees award?

XI. Is the Commonwealth liable for Rayphand's attorney fees?

¶3 The first, second, third and fourth issues are questions of law; as such, they are reviewed *de novo. Mafnas v. Commonwealth*, 2 N.M.I. 248, 256 (1991). The fifth and sixth issues arose in the context of a granting of summary judgment. As such, they will be reviewed *de novo. Sablan v. Tenorio*, 4 N.M.I. 351, 355 (1996). The seventh issue is a mixed question of law and fact that will be reviewed *de novo. Rosario v. Quan*, 3 N.M.I. 269, 276 (1992). The eighth issue is a question of law that will be reviewed *de novo. Agulto v. Northern Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

¶4 The ninth issue presents a review of an award of attorney fees. Review of an award of attorney fees, insofar as it is based on the availability of fees in this case under Article X, Section 9, involves a question of law and is reviewed *de novo. Agulto*, 4 N.M.I. at 9. The propriety of the amount of fees is reviewed under an abuse of discretion standard. *Wabol v. Camacho*, 4 N.M.I. 388, 389 (1996). The tenth issue is reviewed under an abuse of discretion standard. *Id.* at 389. The eleventh issue is a question of law and is reviewable *de novo. Agulto*, 4 N.M.I. at 9.

FACTUAL AND PROCEDURAL BACKGROUND

¶5 In January 1994, Froilan C. Tenorio was inaugurated as Governor of the Commonwealth. The last annual budget, Public Law No. 8-2, that had been enacted prior to his inauguration was for Fiscal Year (FY) 1992 (Oct. 1, 1991 through September 30, 1992). The Legislature had failed to effect annual budgets and appropriations for FY 1993 and FY 1994 (October 1, 1992 through September 30, 1994).

¶6 Approximately two months after Governor Tenorio was inaugurated, the Attorney General rendered an opinion dealing with the authority of a Governor to allocate or

reprogram expenditures during a period of continuing appropriation. The Attorney General opined that during a period of continuing appropriation, the Governor had broad authority to reprogram government expenditures subject only to the total ceiling of the previous fiscal year's expenditure authority, and at that time and situation, 1 CMC § 7204(d) did not apply. Subsequently, Governor Tenorio allegedly authorized certain expenditures that are the subject of this action.

¶7 Rayphand filed a taxpayer action against Governor Tenorio on September 13, 1994. Service of the Complaint was made on Governor Tenorio through delivery to the Governor's secretary. Rayphand subsequently amended the complaint numerous times.[1]

¶8 On January 24, 1995, Lt. Governor Jesus C. Borja signed into law Public Law No. 9-23. This law purports to ratify actions taken by Governor Tenorio with respect to payments made for increased judicial salaries, Mitsubishi Generators, and a Public School System lawsuit settlement (described below). Section 6 of Public Law No. 9-23 states:

> No civil liability shall attach to any employee of the Commonwealth government for having carried out or assisted in the reprogramming of funds for the aforementioned Public School System lawsuit, payments for the CUC generators, or Judges' salary increase, nor for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992.

PL 9-23 § 6.

¶9 On February 7, 1995, the Government filed a Motion to Dismiss, claiming that the new legislation rendered the controversy moot. The trial court denied this motion in a Decision and Order filed on April 5, 1995. On July 31, 1996, Rayphand filed her Third

[1] It does not appear, on the record before this Court, that any Complaint named Governor Tenorio personally.

Amended Complaint. The Third Amended Complaint contained thirteen causes of action.[2] The Defendants answered the complaint. The Answer contained affirmative

[2] In the first Cause of Action (COA), Rayphand challenged the purchase of a Lincoln Town Car and a Cadillac for official use of the Governor and the Lieutenant Governor. She alleged that the total obligation for the cars was about $91,000, that these expenditures were not authorized by any appropriation law, and consequently that Governor Tenorio was personally liable to the Commonwealth to repay the $91,000 by virtue of § 7705 of the Budget Act.

In the second COA, Rayphand alleged, among other things: that Governor Tenorio staged, in June and July 1994, an activity called the Fiftieth Anniversary Celebration of the liberation of Saipan by the United States Armed Forces, which included a carnival; Governor Tenorio purchased, with public funds, various carnival rides; the rides were operated by government employees whose wages were paid with public funds; Governor Tenorio purchased stage shows (including a band, fireworks, a laser light show, etc); guests (including WWII veterans and a Navajo Code Talker) were flown in; all at public expense; this expense was approximately $250,000, none of which was appropriated by the Legislature; because Governor Tenorio was not authorized to spend the funds, he was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the third COA, Rayphand alleged, among other things: the Commonwealth had 28.4 million dollars in a bond trust account (the Bank of Guam was the trustee); these funds were public funds; the people of the Commonwealth are the beneficiaries of the trust; Governor Tenorio unlawfully entered into a partnership with the Department of the Interior, thereby giving the DoI significant control over the Commonwealth Utilities Corporation; (this includes a 10 million dollar payment to Mitsubishi from the trust money); the Speaker of the House of Representatives stated he would not appropriate the 10 million dollars; on September 7, 1994, Governor Tenorio paid $6.2 million to Mitsubishi, for the purpose of making partial payment of a debt incurred by the C.U.C. for the purchase of diesel fuel; Governor Tenorio failed to execute due diligence; the $6.2 million disbursement of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio is personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

Rayphand omitted the fourth cause of action.

In the fifth COA, Rayphand alleged, among other things: that Governor Tenorio disbursed $100,000 of public funds for the purpose of making a contribution to the Pacific Island Development Bank; this disbursement of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the sixth COA, Rayphand alleged, among other things: that Governor Tenorio transferred $500,000 from the Marianas Visitors Bureau to his own office budget; of this money, $200,000 was added to the Governor's Official Representation budget, $265,000 went to his Professional Services Account, and $35,000 to Building Improvements; at all times material hereto, Governor Tenorio was prohibited by law from exercising any reprogramming authority with respect to M.V.B.; this reprogramming of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the seventh COA, Rayphand alleged, among other things: that Governor Tenorio transferred the sum of $1,000,800 from the budget of the Commonwealth Health Center to a nonexistent account in the Executive Office of the Governor; this reprogramming was in violation of § 7402(a)(2) of the Budget Act; this reprogramming of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the eighth COA, Rayphand alleged, among other things: that Governor Tenorio transferred the sum of $1,050,000 to the Clerk of the United States District Court in partial payment of a settlement of a Title VII civil rights case involving the public school system; this reprogramming of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the

defenses, including Legislative ratification, mootness, a violation of the separation of powers doctrine, a lack of subject matter jurisdiction, and the failure to state a claim for which relief may be granted.

¶10 On November 12, 1996, Rayphand filed a document entitled "Statement of Undisputed Facts." This statement contained no citations or references to pleadings, depositions, answers to interrogatories, or admissions on file, nor was it supported by any affidavits. In essence, this document merely restates the allegations contained within Rayphand's Complaint.

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money by virtue of § 7705 of the Budget Act.

In the ninth COA, Rayphand alleged, among other things: that Governor Tenorio has a mandatory duty to prepare and submit a special budget message to the Legislature; that Governor Tenorio has failed to send this special message as mandated by § 7604 of the Budget Act.

In the tenth COA, Rayphand alleged, among other things: that the Governor's Office was allotted $1,181,100 in 1992; Governor Tenorio actually expended $11,069,583; Governor Tenorio was legally authorized to reprogram $295,275 to his Office; Governor Tenorio overspent for the Governor's office in an amount of $9,593,208; this reprogramming of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the eleventh COA, Rayphand alleged, among other things: that Public Law No. 8-15 increased the salary of the Chief Justice by $47,800, the salaries of the Associate Justices by $47,000, the Presiding Judge by $47,000, and the Associate Judges by $47,500; the 1992 appropriation provided for the Presiding Judge and two Associate Judges, and Governor Tenorio is paying for a third judge; no provision has appropriated for the extra judge now serving; Governor Tenorio is now paying all Judges and Justices the salaries specified in Public Law No. 8-15 even though there has been no appropriation for said salaries; these salaries are illegal; this expenditure of public funds was not authorized by an appropriation by the Legislature; Governor Tenorio was personally liable to the Commonwealth to repay the money by virtue of § 7705 of the Budget Act.

In the twelfth COA, Rayphand alleged, among other things: that, without an appropriation authorizing him to do so, Governor Tenorio expended public funds to pay for his inauguration, to establish a commonwealth office in Manila, and a representative office on Rota; Governor Tenorio should be restrained from continuing to expend funds without legal authorization to do so.

In the thirteenth COA, Rayphand alleged, among other things that: the total appropriation for FY 1992 was $158,657,591; Governor Tenorio spent more in FY1994 than $158,657,591; Governor Tenorio, by virtue of § 7705 of the Budget Act, is personally liable for the excess.

In the fourteenth COA, Rayphand prayed for attorney fees and costs by virtue of Article X, Section 9 of the Commonwealth Constitution.

¶11 On December 18, 1996, Rayphand filed a motion for summary judgment. On January 31, 1997, the Government filed its cross motion for summary judgment, as well as a memorandum in support of its motion and a memorandum opposing Rayphand's motion. At this time, the Government also filed a response to the Statement of Undisputed Facts. On February 18, 1997, the Defendants filed a reply in support of their motion for summary judgment; in this motion the defense of qualified immunity was raised. Appellee's Excerpt of Record [hereinaftert E.R.] at 331-33. On February 21, 1997, the trial court granted partial summary judgment in Governor Tenorio's favor as to the $6.2 million payment to Mitsubishi. The court determined that the payment presented a non-justiciable political question.

¶12 On June 10, 1997, the Superior Court issued its Decision and Order on the motion and cross motion for summary judgment. The court held that Rayphand had standing to sue for money damages under Article X, Section 9 of the Commonwealth Constitution. The court held that Governor Tenorio owed a fiduciary duty as a trustee of public funds; as such, Rayphand could sue for money damages for a breach of a fiduciary duty.

¶13 Next, the court held that the partial payment of the Public School System lawsuit settlement ($1.05 million) and the judicial salary increases were political questions. In support of this, the court cited the third and fourth parts of the six-part test described in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 663, 686 (1962) ("the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of the court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government.")

¶14 Next, the trial court decided that Governor Tenorio's expenditures constituted actionable breaches of fiduciary duty. As for the purchase of the automobiles, the expenditures for the fiftieth anniversary celebration and the $100,000 contributed to the Pacific Island Development Bank, the court held that, since there was no appropriation for these items in the 1992 budget, they were in violation of Article II, Section 5 of the Constitution. The court held that Governor Tenorio was without authority to reprogram the $500,000 from Marianas Visitors Bureau (citing 1 CMC § 7402(b)). Next, the court stated that the $1,000,800 reprogrammed for the scholarships was in violation of 1 CMC § 7402(a)(2). The court next stated:

> The parties do not dispute that although only 1,181,000.00 was budgeted for the Governor's Office for fiscal year 1992 . . . actual spending totaled $11,069,583.00 . . .Governor Tenorio obviously reprogrammed more than 25% cumulative and that he did so without obtaining prior approval [by the Legislature] pursuant to 1 CMC § 7402(d). He is therefore liable for $9,593,208.00

Rayphand v. Tenorio, Civ. No. 94-912 (N.M.I. Super. Ct. June 10, 1997) ([Unpublished] Memorandum Decision and Order on Plaintiff's Motion for Summary Judgement and Defendants' Cross-Motion for Summary Judgement at 14) [hereinafter June 10, 1997 Decision and Order] (*see* E.R. at 14). The court went on to note that the liaison office in the Philippines, the office in Rota and the inauguration expenses were all unauthorized ($252,921) and in violation of Article II, Section 5 of the Constitution. The court held that Rayphand is entitled to reasonable attorney fees and costs.

¶15 On June 23, 1997, the Government filed a Motion for Reconsideration and Governor Tenorio filed motion to intervene, claiming he had never been properly served. On November 24, 1999, Rayphand filed her Final Application for Fee Award. On February 7, 2001 the Superior Court issued its decision, denying the motion to reconsider

and the motion to intervene. The court then concluded that reasonable attorney fees and costs in the amount of $56,679 should be paid to Rayphand.

¶16 By an order dated May 3, 2001, the trial court denied Rayphand's request for an increase in the amount of attorney fees awarded. The court wrote:

> With regard to the award of attorney's fees, the court carefully considered the amount requested and determined that, although attorney's fees were warranted, the amount requested by Plaintiff was excessive. . . .[T]he court indicated that it was awarding Mr. Mitchell's attorney fees plus costs. The court did not include any fees incurred from work done by the Plaintiff herself. Additionally, the court does not believe any additional amount is warranted as it is the Commonwealth itself which has suffered as a result of the basis of the present lawsuit.

Rayphand v. Tenorio, Civ. No. 94-912 (N.M.I. Super. Ct. May 3, 2001) ([Unpublished] Order at 1). These timely appeals ensued.

¶17 At oral arguments held on March 22, 2002, Rayphand stated that the injunctive relief she sought was moot. The Commonwealth, in a settlement of a separate case, *Tenorio v. Commonwealth*, agreed to indemnify Tenorio for any judgment against him in this case. *See Tenorio v. Commonwealth*, App. No. 01-020 (N.M.I. Sup. Ct. Nov. 19, 2002) ([Unpublished] Order Dismissing Appeal). After oral arguments, we ordered supplemental briefing on the standing issue.

ANALYSIS

¶18 As a preliminary matter, we note that Rayphand's brief contains instances where she improperly attempts to "incorporate by reference as if set out in full" previously filed arguments.[3] This tactic is forbidden by Commonwealth Rule of Appellate Procedure

[3] *See* Rayphand's Response Br. at 4 ("Rayphand also incorporates herein by reference as if set out in full her motion for summary judgment, E.R. 116-117, and her reply to Defendants' opposition to motion for summary judgment, E.R. 312-323."); Rayphand's Response Brief at 22-23 ("Rayphand also incorporates herein by reference her Opposition to Defendants' Motion to Dismiss, Supp. E.R. 132-154.") Further, Rayphand's brief is replete with attempts to incorporate by reference various decisions and orders of the trial court. *See* Appellee's Response Br. at 2, 4, 22, 23, 27 and 31.

28(r).[4] As a consequence, the Order that follows contains an Order to Show Cause why Rayphand should not be sanctioned for every violation of Com. R. App. P. 28(r) in her briefs to this Court in this appeal.[5]

I. Did the trial court err in holding that a taxpayer can sue a government official for monetary relief under Article X, Section 9 of the Constitution and the Budget Act?

¶19 This dispute centers on Article X, Section 9 of the Commonwealth Constitution, which reads:

> Section 9: Taxpayer's Right of Action. A taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. The court shall award costs and attorney fees to any person who prevails in such an action in a reasonable amount relative to the public benefit of the suit
> .

N.M.I. Const. art. X, § 9.

¶20 We have interpreted Article X, Section 9 previously in *Mafnas v. Commonwealth*, 2 N.M.I. 248 (1991). The Government, urging a plain reading of Article X, Section 9 of the Commonwealth Constitution and citing *Mafnas*, argues that a taxpayer may bring a suit against Governor Tenorio solely in his official capacity, and for injunctive relief only.[6] Rayphand, citing the same authority, claims she has standing to maintain her suit

[4] Com. R. App. P. 28(r) reads, in pertinent part: "[p]arties must not append or incorporate by reference briefs submitted to the Superior Court or refer this Court to such briefs for their arguments on the merits of the appeal."

[5] Rayphand was questioned about her use of the tactic at oral arguments, and was unable to justify it.

[6] Governor Tenorio argues: "[o]ne searches in vain for any other provision in Section 9 that authorizes suits against individuals in their personal capacities much less one that authorizes a suit for a money judgment." Appellant's Br. at 27. Further:

> To find that Section 9 authorizes such an action [which Rayphand brings] this Court would have to insert "person" or "individual" into the phrase "action against the government or one of its instrumentalities" and to rewrite Article X, Section 9 to allow a taxpayer "to enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty and to recover monies expended for other than public purposes or for a breach of fiduciary

for damages against Governor Tenorio, and that he should be held personally liable. As such, a discussion of *Mafnas* is appropriate.

¶21 In *Mafnas*, Jose C. Mafnas [hereinafter Mafnas] filed suit in a taxpayer action seeking declaratory and injunctive relief[7] against the Commonwealth of the Northern Mariana Islands and Robert A. Hefner, [hereinafter Hefner][8] who, at the time of the suit, was the Presiding Judge of the Commonwealth Superior Court. *Id*. at 250-51. Mafnas alleged that Hefner unlawfully acted as Presiding Judge because he was never expressly appointed and confirmed to that office. *Id*.

¶22 The trial court dismissed Mafnas' petition with prejudice, ruling that Article X, Section 9 did not confer standing on Mafnas; that his suit was in essence a *quo warranto* action and that common law rules governing such actions applied; as such only the Government could bring an action against Hefner.[9]

¶23 On appeal, we addressed standing to sue, and noted that it is a "self-imposed rule of restraint: '[I]t is not a rigid or dogmatic rule but one that must be applied with some view to realities as well as practicalities. Standing should not be construed narrowly or

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duty.

Id. at 28. He argues that such judicial rewriting cannot be done, *id*., and that "[t]he extension of taxpayer actions under Section 9 to the recovery of monies from individuals should be left to the political process as it implicates profound political and social considerations." *Id*.

[7] Mafnas sought: (1) a declaration that Hefner did not hold the office of Presiding Judge; (2) an injunction preventing Hefner from exercising the powers of, and taking the benefits incident to, the office; (3) an order directing Hefner to repay the Commonwealth Treasurer sums he had received as salary since May 2, 1989, exceeding an annual rate of $66,000; (4) an injunction prohibiting the Commonwealth from paying Hefner a salary in excess of $66,000 per annum; and (5) attorney fees and costs.

[8] The suit was filed against Hefner in his personal capacity.

[9] The trial court found "that the Attorney General's Office ha[d] refused to question Hefner's title to office opting, instead, to vigorously defend his title to office, the authority by which he h[eld] the office, and the integrity of his appointment and confirmation." *Mafnas v. Commonwealth*, 2 N.M.I. 248, 256 (1991)(*citing Mafnas v. Commonwealth*, Civ. No. 89-1110 (N.M.I. Super. Ct. Mar. 30, 1990) ([Unpublished] Order of Dismissal of Petitioners First Amended Petition for Declaratory and Injunctive Relief at 5, 6)).

restrictively.'" *Id*. at 261 (citation omitted). We noted "the traditional view that actions to redress public wrongs or breaches of public duty ordinarily cannot be brought by private individuals," but stated "[i]n the NMI, the right of taxpayers to challenge allegedly illegal expenditures of public funds is expressly granted by our Constitution." *Id*. at 261. Discussing Article X Section 9, we stated, "[o]ur constitutional provision explicitly recognizes the right of Commonwealth taxpayers to call their government to account in matters pertaining to expenditures of public funds. It is remedial in nature and should be liberally construed." *Id*. We held that Mafnas had standing to bring the action as a taxpayer suit pursuant to Article X, Section 9.

¶24 It is evident that our determination that Mafnas possessed the requisite standing was not an affirmation that he possessed standing to sue for all of the relief he sought, for we then stated, "[a]s noted above, Mafnas seeks both declaratory and injunctive relief. It is necessary to determine whether he may properly do so in this type of action." *Id*. at 262. We noted that "a court must first find that public funds are being (or will be) expended for other than a public purpose or in breach of a fiduciary duty. It must issue a declaratory judgment to that effect" *Id*. Further, we stated:

> Mafnas contends that if Hefner is not legally the Presiding Judge, an injunction should issue preventing him from receiving the additional salary specified for the office. Such an injunction must necessarily be based upon a declaration that the money is not being expended for a public purpose because Hefner is not legally entitled to the office he occupies.[10]

[10] This statement determined an issue both parties spent much effort litigating, to wit: what is the definition of the "public purpose" requirement in Article X, Section 9? We stated, "[s]uch an injunction must necessarily be based upon a declaration that *the money is not being expended for a public purpose because Hefner is not legally entitled to the office he occupies*." *Mafnas*, 2 N.M.I. at 263 (emphasis added). Implicit in this statement is the fact that, in the Commonwealth, monies which are not expended pursuant to law are not spent for a "public purpose." The Public Purpose Definition Act of 1998 took effect on July 21, 1999. It is codified as sections 121 and 122 of Title 1 of the Commonwealth Code, and provides a new definition of "public purpose."

Mafnas, 2 N.M.I. at 262-63. We held that "Art. X, § 9 authorizes both declaratory and injunctive relief."[11] *Id*. at 263.

¶25 However, the fact that a party is entitled to declaratory relief does not in and of itself entitle that party to damages in that action. This is due to the nature of a declaratory judgment:

> A declaratory judgment or decree is one which simply declares the rights of the parties or expresses the opinion of the court on a question of law, without ordering anything to be done; its distinctive characteristic being that the declaration stands by itself, and no executory process follows as of course; and the action is therefore distinguished from other actions in that it does not seek execution or performance from the defendant or opposing party.

Burgess v. Burgess, 80 S.E.2d 280, 282 (Ga. 1954). The Commonwealth Superior Court is authorized to grant declaratory judgments pursuant to 7 CMC § 2421.[12]

¶26 We then went on to decide the merits of Mafnas' claims, and decided in Hefner's favor. *Mafnas*, 2 N.M.I. at 268. As such, there was no need to determine whether Article X, Section 9 granted Mafnas standing to sue to recover monies allegedly misspent, and we did not decide the issue.[13] As a result, we now must determine whether Article X, Section 9 grants a taxpayer standing to sue to recover misspent tax funds in an action to

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[11] Because declaratory relief was not authorized explicitly by Article X, Section 9, and was allowed because it was necessary to obtain the relief explicitly authorized by the Constitution, our holding in *Mafnas* is best interpreted as authorizing declaratory relief only insofar as it is necessary to obtain an injunction.

[12] Section 2421 of Title 7 of the Commonwealth Code reads:

> In a case of actual controversy within its jurisdiction, the Commonwealth [Superior] Court, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking the declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by the judgment.

7 CMC § 2421.

[13] At oral argument in this case, Rayphand conceded that "this is a case of first impression."

enjoin the expenditure of public funds for other than public purposes or for a breach of fiduciary duty. For the reasons that follow, we hold that it does.

¶27 To resolve this question we look first to the language of the Constitution itself. "Art. X, § 9 appears to authorize only injunctive relief." *Id*. at 262. This is so because the drafters of Article X, Section 9 used the specific legal language "in order to enjoin the expenditure of public funds for other than public purposes…." The drafters of Article X, Section 9 made no reference to an action for damages stemming from past expenditures. "For purposes of constitutional interpretation, the express mention of one thing implies the exclusion of another which might logically have been considered at the same time." *Aldan-Pierce v. Mafnas*, 2 N.M.I. 122, 161 (1991) (*quoting Washington ex rel. O'Connell v. Slavin*, 452 P.2d 943, 946 (Wash. 1969)).

¶28 The plain language of Article X, Section 9 looks to the present and the future, and makes no mention of redress for past actions. Thus, on its face, Article X, Section 9 would not seem to authorize a taxpayer to initiate a suit for damages in an action to enjoin the expenditure of public funds for other than public purposes. We are convinced, however, that the recovery of monies already misspent is encompassed in the standing granted to taxpayers by Article X, Section 9

¶29 In *Manglona v. Camacho*, the elected legislators from the island of Rota brought suit "to prevent the executive from continuing the employment of appointed resident department heads of certain line departments of government and to recover salary payments made to them and alleged to have been illegal." 1 CR 820, 821 (Dist. Ct. App. Div. 1983). The court noted that the Commonwealth Constitution:

> provides for the appointment of supervisory persons on Rota and Tinian and subjects such appointments to advice and consent of a majority of the

> legislators from the senatorial district in which any appointed resident department head is to serve. The legislators of Rota disapproved of the appointments and brought the action . . . after learning that the executive branch continued the rejected appointees in their positions.

Id. at 822.

¶30 After a thorough analysis of the issue, the Appellate Court upheld the trial court's determination that the legislators possessed standing to maintain the action based on their status as taxpayers. *Id*. at 827. The court then addressed the issue of whether the trial court properly required the repayment of the illegally spent funds, and stated:

> We adopt the reasoning of the trial court when it held:
>
> > *It would appear incongruous, indeed ludicrous, if the Court can enjoin the illegal payment of public funds but can do nothing about the recovery of monies already paid out*. None of the authorities cited by defendants convince this Court that it is without power to order the illegal payments recovered back into the public treasury.
> >
> > Equitable consideration aside, we hold that the better rule for this jurisdiction is that adopted by the trial court.

Id. at 825 (citation omitted) (emphasis added).

¶31 Since, prior to the ratification of Article X, section 9, in 1985, the (then) appellate court for the Commonwealth stated that it would be ludicrous "if the Court can enjoin the illegal payment of public funds but can do nothing about the recovery of monies already paid out," it is logical that the drafters of Article X, Section 9 would not feel compelled to mention the recovery of monies already illegally expended when drafting the amendment. Therefore, the express mention of injunctive relief does not, in this instance, imply that monetary recovery was meant to be excluded. In fact, based on the law of the Commonwealth at the time of its drafting, the express mention of injunctive relief in Article X, Section 9 *necessarily implies* the inclusion of the ability of the court to direct the repayment of illegally spent public funds.

¶32 We hold that a taxpayer, in a suit to enjoin the expenditure of public funds for other than public purposes, has standing to sue to recover public monies already misspent by a government official pursuant to Article X, Section 9.

¶33 Furthermore, Article X, Section 9 not only authorizes an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for other than public purposes, it also authorizes a taxpayer to maintain an action against the government or one of its instrumentalities for a breach of fiduciary duty.[14]

¶34 The legislative history of Article X, Section 9 reveals that the amendment was intended to allow an action for a breach of fiduciary duty. The Committee on Finance and Other Matters of the 1985 Second Constitutional Convention issued Committee Recommendation No. 59, which reads, in pertinent part:

> The second new section added to Article X is a taxpayer's and other person's right of action. The Committee feels the Constitution is an extremely important document to which the government and its instrumentalities must adhere. Sometimes when the government fails to adhere to the Constitution, a person cannot get the government to voluntarily respect the requirement of the Constitution. For example, although the Constitution may prohibit the government from incurring public debt for government operating expenses, *the government might ignore the provision and borrow money from a local bank to meet operating expenses.* As a practical matter, government officials who disagree with the government's action may not be in a position to stop the action. If the new Section on taxpayer's and other person's rights of action is approved, such persons could obtain a court decree requiring the government to adhere to the Constitution. . . .
>
> . . . .
>
> In addition, the fiscal management policy recognizes that because the Constitution sets forth minimum standards to guide the financial and other

[14] The government posits that a taxpayer is granted standing by Article X Section 9 only to enjoin a breach of fiduciary duty. This would require us to interpret Article X Section 9 as reading "[a] taxpayer may bring an action against the government or one of its instrumentalities in order to enjoin the expenditure of public funds for a breach of fiduciary duty." While it is possible to expend public funds in such a way so that the expenditure amounts to a breach of a fiduciary duty, we do not think it possible to expend public funds "for" a breach of fiduciary duty. However, insofar as we may be mistaken in that belief, the ambiguity created by the Government's construction is erased when one studies the legislative history of Article X, Section 9. *See infra* ¶¶ 34-35.

> conduct of the government, *it is the right of every taxpayer and other person (nonprofit or religious institution) to enforce and uphold those standards in the courts.*

Committee on Finance and Other Matters of the 1985 Second Constitutional Convention Recommendation No. 59 (emphasis added).

¶35 This is instructive, for the Committee on Finance and Other Matters of the 1985 Second Constitutional Convention did not relate a situation where the government was *contemplating* borrowing money to finance operating expenses; rather, the framers envisioned a situation where the government *had already* borrowed the money. The above cited language demonstrates that the drafters of Article X, Section 9 intended the amendment to grant standing to a taxpayer to remedy a breach of fiduciary duty that had already occurred.

¶36 The trial court succinctly stated:

> The Governor of the Commonwealth, as the trustee of the Treasury, owes a fiduciary duty to the people of the Commonwealth to lawfully expend and disburse public funds. *Murray v. Egan*, 256 A.2d 844, 847-48 (Conn. 1969). *Berghorn v. Reorganized School District No. 8*, 260 S.W.2d 573, 581-82 (Mo. 1953). A trust relationship exists between a public official with the power to expend public funds and each taxpayer [i]s an owner of the public funds. *Murray*, 256 A.2d at 847. A public authority is the trustee of public funds and a taxpayer has standing to sue for a trustee's misapplication of those funds. *Id*. at 848.
>
> The Governor is the trustee of the public funds of the commonwealth. If Governor Tenorio breached his duties as trustee of the public funds for the people of the Commonwealth, he would be liable for "any loss or depreciation in value of the trust estate resulting from the breach of trust." Restatement (Second) of Trusts §205(a) (1959). Thus, the Court finds that money damages are recoverable in this action for breach of fiduciary duty under Art. X, Section 9 of the Commonwealth Constitution.

June 10, 1997 Decision and Order at 7-8 (*see* E.R. at 353-54).

¶37 We agree with the trial court, and would only add that, due to the demographic characteristics of the Commonwealth, it is logical that the drafters of Article X, Section 9 would construct the amendment in such a way as to allow a post hoc action for a breach of fiduciary duty.[15] For, "[t]he smaller the population, the greater the pecuniary interest of its taxpayers in the treasury." *Manglona*, 1 CR at 824. Rayphand has standing to bring the present suit.

II. Did the trial court err in holding that certain of the alleged violations of Article III, Section 9(a) of the Constitution and 1 CMC § 7402(d) arising out of reprogramming and expenditure decisions did not constitute nonjusticiable political questions?

¶38 The Government posits that this appeal presents a nonjusticiable political question, arguing that, while the trial court properly found that the payment of the Mitsubishi debt, the federal court case settlement payment, and the judicial salaries involved political questions, the trial court erred in allowing the suit for the remaining causes of action to proceed. The Government argues that these expenditures involved difficult policy and political decisions, when considered in the context of the lack of a budget,[16] and are, therefore, "ill suited to post hoc judicial reexamination initiated by an individual whose motives could well be political." Appellant's Br. at 41. The Government argues that these decisions implicated "a lack of judicially discoverable and manageable standards . . . or the impossibility of deciding without an initial policy

[15] A public official's liability for a breach of fiduciary duty is, however, subject to questions of justiciablility, *see infra* ¶¶ 38-50, and, among others, the defense of qualified immunity. *See infra* ¶¶ 62-82.

[16] The Government argues that the remaining causes of action:

> were certainly difficult policy and political judgments, especially in the context of a two year budgetary void. . . In this case, where the government was staggering through two years without a budget, the executive branch had to make difficult decisions on spending matters to respond to conditions as they had evolved through this period in the absence of any legislative directive.

Appellant's Br. at 41.

determination of a kind clearly for non-judicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of the government. . . ." *Id*. Furthermore, the Government argues that "this case presents an unusual need to adhere to political decisions already made." Appellant's Resp. Br. at 11.

¶39 Rayphand argues that the initial policy decisions in this case were made by the Legislature in its appropriations bill, so this Court will not be making initial policy decisions. She contends that we can independently resolve this case without undercutting the respect due to coordinate branches of government, as "the decision to expend public funds without an appropriation for each of the expenditures at issue in this case is not a political decision. Indeed, all the plaintiff is asking this court to do is to construe and enforce existing laws, including the appropriations laws." Appellee's Br. at 25. Furthermore, she argues that the controversy in this case involves disputes normally resolved in court: breaches of fiduciary duty and the expenditure of public funds without appropriation.

¶40 The political question doctrine is a policy of judicial abstention wherein the judiciary declines to adjudicate a case, so as not to violate the separation of powers by interfering with a coequal branch of government. *Sablan v. Tenorio*, 4 N.M.I. 351, 363 (1996) ("The separation of powers concept came into being to safeguard the independence of each branch of the government and protect it from domination and interference by the others. [It] takes the form of the 'political question' doctrine in the context of judicial review of legislative and executive decisions." (quotation and citation footnote omitted)).

¶41 In *Sablan*, we stated that the political question doctrine "comes into play when the controversy brought before the court (1) involves a decision made by a branch of the government coequal to the judiciary, and (2) concerns a political matter." *Id*. Furthermore, the determination of whether any specific controversy is a nonjusticiable political question is to be made "on a case-by-case basis," based on the unique facts of the case itself. *Id.*

¶42 To determine whether the controversy "concerns a political matter," we adopted the test outlined in *Baker v. Carr*, 369 U.S. 186, 217, 82 S. Ct. 691, 710, 7 L. Ed. 2d 663, 685-86 (1962).

> A number of factors may be considered in this analysis: whether there is a textually demonstrable commitment of the issue to a coordinate branch of government; whether judicially discoverable and manageable standards for assessing the dispute are lacking; whether a court could render a decision without also making an initial policy determination that clearly should be left to another branch; whether it would be possible for a court independently to resolve the case without undercutting the respect due to coordinate branches of government; whether there is an unusual need to adhere to a political decision already made; or whether an embarrassing situation might be created by various governmental departments ruling on one question.

Sablan, 4 N.M.I. at 363.

¶43 After reviewing the facts unique to the present appeal, we are convinced that this appeal presents a justiciable controversy. This appeal, while admittedly complex, is properly determined in the courts. The Government's arguments that there is a lack of judicially discoverable and manageable standards to decide this issue, that it is impossible to decide the issue without our first making an initial policy determination of a kind clearly for non-judicial discretion and that it is impossible for us to undertake

independent resolution without expressing lack of the respect due coordinate branches of the government are easily dismissed.

¶44 At the outset, we should note that we begin with the presumption that this case is justiciable. This is due to the fact that the Constitution specifically grants taxpayers the right to maintain an action to enjoin the misspending of public funds. *See* N.M.I. Const. art. X, § 9. Far from presenting a nonjusticiable political question, in most cases, a public official who is allegedly misspending public funds should expect to justify his actions in court pursuant to the Commonwealth's Constitution. *See id*.

¶45 The Commonwealth's Constitution and statutes provide a thorough procedure by which funds are to be appropriated and money is to be spent. *See* Commonwealth Constitution Article II, Section 5(a) ("Appropriation and revenue bills may be introduced only in the house of representatives. Other bills may be introduced in either house of the legislature."); Article II, Section 5(b) ("A bill shall be confined to one subject except bills for appropriations or bills for the codification, revision or rearrangement of existing laws. Appropriation bills shall be limited to the subject of appropriations. Legislative compliance with this subsection is a constitutional responsibility not subject to judicial review."); Article III, Section 1 ("The executive power of the Commonwealth shall be vested in a Governor who shall be responsible for the faithful execution of the laws."); Article III, Section 9(a) ("The Governor shall submit to the legislature a proposed annual balanced budget for the following fiscal year . . . . If a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year."); Article X, Section 1 ("A tax may not be levied and an appropriation of public money may not be made, directly or

indirectly, except for a public purpose. The legislature shall provide the definition of public purpose."); 1 CMC § 7401 ("No expenditure of Commonwealth funds shall be made unless the funds are appropriated in currently effective annual appropriation acts or pursuant to 1 CMC § 7204(d). No Commonwealth official may make an obligation or contract for the expenditure of unappropriated Commonwealth funds, unless provided by law. . . "). *See also generally* the Commonwealth Planning and Budgeting Act of 1983, 1 CMC §§ 7101, *et seq.*

¶46 To resolve this dispute, we will not have to make any initial policy determinations and the standards by which the dispute is to be adjudicated are already set forth in the laws of the Commonwealth. The adjudication of this case will require us to do nothing more than to juxtapose Governor Tenorio's actions with the framework provided by existing Commonwealth law, and determine whether Governor Tenorio's actions were permitted by these laws.[17] These are tasks for which we are qualified.

¶47 Furthermore, Governor Tenorio's contention that his actions should not be reviewed judicially, due to the fact that there hadn't been a budget passed in two years, is also without merit.[18] A provision in the Constitution addresses what is to happen if a balanced budget is not passed by the beginning of the fiscal year. Commonwealth Constitution Article III, Section. 9(a) reads, in pertinent part: "[i]f a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year." Thus, in the

[17] We may of course, be called upon to determine the constitutionality of said laws as well.

[18] This is not a determination of the merits of the appeal; we merely state that the framework exists for us to determine whether Governor Tenorio acted properly.

absence of the enactment of a balanced budget, the executive branch is put on notice as to the amount of money it is allowed to spend.

¶48 The Government's final argument is that "this case presents an unusual need to adhere to political decisions already made." Appellant's Resp. Br. at 11. In support of this contention, the Government cites the passage of PL 9-23, which purports to exempt from civil liability any employee of the Commonwealth government for "having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992." PL 9-23 § 6. Far from eliminating the justiciability of the case, PL 9-23 has itself become the subject of judicial scrutiny. *See, infra*, ¶¶ 51-61 (determining the constitutionality of PL 9-23).

¶49 Furthermore, absolutely no argument is made that sheds any light on why there is an unusual need to adhere to an already-made political decision.[19] The Government cites no reasons why we should not review Governor Tenorio's actions, other than stating that the Legislature didn't seem to mind Governor Tenorio's actions. This is hardly persuasive. "While initial spending decisions are exclusively the domain of Congress, if a specific constitutional limit is exceeded judicial review is possible." *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995).

¶50 For the foregoing reasons, we hold that this case presents a justiciable question.

III. Did the trial court err in holding that Commonwealth Public Law No. 9-23 did not render this case moot by releasing Defendants from any liability?

[19] The entire argument reads: "[c]ertainly if any branch of Government might be expected to complain that Tenorio action infringed on its turf, it would be the Legislature. Instead, the Legislature passed legislation affirming and ratifying Tenorio's actions and absolving him of liability for actions he took during that dark period of legislative inaction." Appellant's Resp. Br. at 11-12.

¶51 In January 1995, the Legislature passed, and Acting Governor Jesus C. Borja signed, Public Law No. 9-23. This law contained, along with appropriations to pay for the PSS settlement,[20] the payment to Mitsubishi[21] and the judicial salary increases,[22] a section that purports to absolve from civil liability "any employee of the Commonwealth government" for "having carried out or assisted in the reprogramming of funds for the aforementioned Public School System lawsuit, payments for the CUC generators, or Judges' salary increase, nor for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992." PL 9-23, § 6. The trial court determined that Section 6 of PL 9-23 was facially unconstitutional insofar as it attempted to absolve from civil liability any government employee for having exceeded the overall budgetary spending limit, as the Legislature was Constitutionally prohibited from doing so.[23]

¶52 The Government argues that Public Law 9-23 effected a release under Commonwealth law; as such, this case has been mooted by the legislation. The Government begins by stating that the Legislature, in enacting Public Law 9-23, clearly intended to shield any government employee from liability during the time of continuing

[20] PL 9-23, § 2.

[21] PL 9-23, § 3.

[22] PL 9-23, § 4.

[23] The trial court also thoroughly analyzed the other portions of PL 9-23 and determined that PL 9-23 did not effect a change in the existing law governing Governor Tenorio's actions. Further, the trial court determined that an inadequate record existed to rule on whether the other portions of the law effected a release, and that the determination would best be made on a motion for summary judgment, when a more complete record was available. Subsequently, the payments for the Public School System lawsuit, CUC generators, and Judges' salary increase (the subjects of PL 9-23, §§ 2-4) were held to be nonjusticiable political questions. This determination was not appealed. Consequently, we now need only address the constitutionality of the purported release of liability in Section 6 of PL 9-23.

appropriations that is the subject of this suit. Next, the Government argues that the trial court failed to consider a Supreme Court case, *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992), and argues that, when one applies *Robertson* to the facts at hand, a release was effectuated.

¶53 Rayphand argues that Public Law 9-23 does not apply to Governor Tenorio. She states that the term "employee" is seldom construed so as to include public officers unless the provision in question expressly so stipulates (*citing* L.S. Tellier, Annotation, *Constitutional or Statutory Provision Referring to "Employees" As Including Public Officers*, 5 A.L.R. 415 (2002) and *Patton v. City of Philadelphia*, 190 A. 670 (Pa. 1937)). As Governor Tenorio is a government official, Rayphand argues that Public Law 9-23 does not apply.

¶54 We begin by determining whether PL 9-23 was intended to shield Governor Tenorio from liability. Contrary to Rayphand's assertion, we have no doubt that the Governor is intended to benefit of the protection purportedly provided by the law. This is due to the nature of reprogramming permitted by the Commonwealth Code.

¶55 Section 7402 of Title 1 of the Commonwealth Code grants to certain public officials and employees the authority to reprogram appropriated funds. 1 CMC § 7402. The Governor may reprogram funds. 1 CMC § 7402(b).[24] The public officials listed in 1 CMC § 7401(b) through (p) may reprogram funds. 1 CMC § 7402(c). The heads of all executive departments, offices, and agencies of the Commonwealth to which funds are appropriated by annual appropriation acts may, *with the written authority of the Governor and subject to such reporting requirements as the Governor may by regulation provide*, reprogram funds. *Id.* (emphasis added). Thus, since all reprogramming must be

[24] The Governor is also given reprogramming authority pursuant to 1 CMC §§ 7204, 7302 and 7403.

done by a specifically enumerated public official or with the Governor's written authority, it follows that the protection from civil liability pursuant to PL 9-23 extended to "any employee of the Commonwealth government for having carried out or assisted in the reprogramming of funds" necessarily includes public officials in general and the Governor specifically. Since PL 9-23 was intended to shield Governor Tenorio from civil liability for overspending the budget as a whole during the period in question, the inquiry now turns on whether the Legislature possessed the power to do so.

¶56 A legislature may validate by subsequent act anything it might have authorized previously or may make immaterial anything it might have omitted in the original act. *Goddard v. Frazier*, 156 F.2d 938, 941 (10th Cir. 1946); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 41.11 (6th ed. 2001). This power, however, is not absolute: a legislature may not pass a statute which prescribes a rule of decision in a pending case unless the legislation itself amends the substantive law underlying the case. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 20 L. Ed. 519 (1871). The Ninth Circuit has stated "[t]he constitutional principle of separation of powers is violated where (1) 'Congress has impermissibly directed certain findings in pending litigation, without changing any underlying law,' or (2) 'a challenged statute is independently unconstitutional on other grounds.'" *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1569 (9th Cir. 1993) (*quoting Seattle Audubon Soc'y v. Robertson*, 914 F.2d 1311, 1315-16 (9th Cir. 1990), *rev'd on other grounds*, 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992)).

¶57 Curiously, on appeal the Government has focused its entire argument on whether PL 9-23 sufficiently changed the underlying law. *See* Appellant's Br. at 35-37;

Appellant's Resp. Br. at 6-9. This argument relates to the first portion of the test (whether the release in § 6, per *Robertson*, changed the underlying law) and has totally failed to address the second portion of the test, which requires that the enactment be otherwise constitutional. *Gray*, 989 F.2d at 1569.

¶58 It is a longstanding doctrine that an Act passed by the Legislature and signed into law by the Governor is presumed to survive constitutional scrutiny. We will not "impute to the legislature an intent to pass legislation that is inconsistent with the Constitution as construed by this Court." *Estate of Faisao v. Tenorio*, 4 N.M.I. 260, 266 (1995). In fact, we have been presuming the validity of statutes since we began reporting cases. *Tenorio v. Superior Court*, 1 N.M.I. 1, 17 (1989) ("It is also true that there exists a rebuttable presumption in favor of the validity of a statute . . . unless a clear constitutional violation is shown."). That said, the portion of PL 9-23, Section 6 which purports to exempt from civil liability any employee of the Commonwealth government "for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992" cannot survive constitutional scrutiny.

¶59 Article III, Section 9(a) of the Commonwealth Constitution reads, in pertinent part, "[i]f a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year." This ceiling is required by the Commonwealth Constitution; it cannot be lifted by legislative act alone.

¶60 Nor, in an effort to save the statute, may we interpret the words "for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992" to exempt Governor Tenorio from civil

liability for all of the individual reprogramming decisions made during the budget logjam.[25] The trial court addressed this argument and stated, in part:

> The more general language of the second clause appears to reflect the Legislature's view that these three specific expenditures may have also been above and beyond the overall spending ceiling set by Art. III, § 9 (a). Such excess spending would constitute a separate violation of law from the act of exceeding statutory reprogramming authority. Thus, it was advisable to absolve Commonwealth employees from liability for both potential violations arising from these three acts. There is no basis in this plain language to imply a sweeping release from liability for all reprogramming acts not enumerated in the statute.

Rayphand v. Tenorio, Civ. No. 94-912 (N.M.I. Super. Ct. April 4, 1995) (Memorandum Decision and Order on Defendants' Motion to Dismiss at 17-18) [hereinafter April 4, 1995 Decision and Order) (*see* E.R. at 17-18). We agree with the trial court.

¶61 A plain reading of the specific language in Section 6 leads us to conclude that the Legislature did not mean to validate all of the individual reprogramming decisions made by Governor Tenorio. The portion of Section 6 that reads "for having exceeded the overall budgetary spending limit during the period of continuing appropriations beginning October 1, 1992" must be interpreted as saying exactly that, and nothing else.[26] Therefore, Section 6 of PL 9-23 must be read as impermissibly attempting to permit Governor Tenorio to overspend the budget ceiling mandated by the Commonwealth Constitution. The release contained in Section 6 of Public Law 9-23 did not render any portion of this case moot.

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[25] Appellant did not make this argument on appeal; however, in his motion for summary judgment in the trial court, he argued:

> [I]t strains logic to conclude that the Legislature would seek to accomplish this purpose by eliminating civil liability for the total expenditure for Fiscal Year 1994 while at the same time permitting civil liability to attach to individual expenditures that make up that total.

Appellant's Excerpts of Record at 17.

[26] Assuming, *arguendo*, that the language in question could be construed as being ambiguous, we must note that no legislative history of PL 9-23 exists to guide the Court in its interpretation.

IV. Did the trial court err in holding that Governor Tenorio was not entitled to qualified immunity?

¶62 Governor Tenorio sought a determination that he had qualified immunity in this instance, arguing that the laws guiding his actions during the period of continuing appropriation were not clearly established. Further, he sought and relied on an opinion rendered by the Attorney General, which he asserts proves the reasonableness of his actions. Lastly, Governor Tenorio argues that he may raise qualified immunity as an affirmative defense on a motion for summary judgment, if no prejudice is shown.

¶63 Rayphand presents three arguments against qualified immunity for Governor Tenorio. First, she claims that Governor Tenorio claimed qualified immunity three days before the hearing on motions for summary judgment.[27] Rayphand notes that Governor Tenorio did not plead the affirmative defense of immunity; as such, he should be barred from asserting the defense now. Next, Rayphand argues that this is a case brought pursuant to Article X, Section 9 of the Constitution for breach of fiduciary duty. She states, without citation, "Defendants have no immunity from a taxpayer's action for breach of fiduciary duty and for recovery of the full amount of all illegal expenditures of public funds." Appellee's Br. at 29. Finally, Rayphand argues that, given the

[27] Rayphand cites a US Supreme Court case, *Harlow v. Fitzgerald*, 457 U.S. 800, 815, 102 S. Ct. 2727, 2736, 73 L. Ed. 2d 396, 408 (1982), for the proposition that "[q]ualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." Further, Rayphand cites Commonwealth Rule of Civil Procedure 8(c) for the proposition that a defendant must plead any matter constituting an avoidance or affirmative defense.

constitutional and statutory parameters in place at the time of his actions, Governor Tenorio failed to act reasonably under the circumstances.[28]

¶64 The trial court did not address Governor Tenorio's qualified immunity claim in its Memorandum Decision and Order on Plaintiff's Motion for Summary Judgment and Defendants' Cross-Motion for Summary Judgment.[29]

¶65 Qualified immunity is available to officials "who err in their duties so long as the mistake is one that a 'reasonable' officer could have made." *Liu v. Phillips*, 234 F.3d 55, 57 (1st Cir. 2000)(citation omitted). This standard benefits the official, "protecting 'all but the plainly incompetent or those who knowingly violate the law,'" *Id.* (*citing Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 1096, 89 L. Ed. 2d 271, 278 (1986). For the purposes of qualified immunity, "a competent public official is also expected ordinarily to 'know the law governing his conduct' so far as it may be 'clearly established.'" *Id.* (*citing Harlow v. Fitzgerald*, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410-11, (1982); *accord Wilson v. Layne*, 526 U.S. 603, 614-15, 119 S. Ct. 1692, 1699, 143 L. Ed. 2d 818, 830-31 (1999); *United States v. Lanier*, 520 U.S. 259, 270, 117 S. Ct. 1219, 1227, 137 L. Ed. 2d 432, 445 (1997)).

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[28] Rayphand cites *Scheuer v. Rhodes*, 416 US 232, 247, 94 S. Ct. 1683, 1692, 40 L. Ed. 2d 90, 103 (1974):

> in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based.

[29] The trial court did, however, state: "[w]hat is obvious to any 8th grade student who has taken a civics class seems to have eluded Governor Tenorio in these expenditures" *Rayphand v. Tenorio*, Civ. No. 94-912 (N.M.I. Super. Ct. June 10, 1997) ([Unpublished] Memorandum Decision and Order on Plaintiff's Motion for Summary Judgement and Defendants' Cross-Motion for Summary Judgement at 15) [hereinafter June 10, 1997 Decision and Order] (*see* Appellee's Excerpts of Record [hereinafter E.R.] at 361), and "[g]iven the statutory scheme, . . . the Court emphasizes its position that the Defendant failed to act reasonably, now, even under advice of counsel" for the proposition that Governor Tenorio failed to act reasonably under the circumstances. *Rayphand v. Tenorio*, Civ. No. 94-912 (N.M.I. Super. Ct. Feb. 7, 2001) ([Unpublished] Memorandum Decision and Order on Defendants' Motion for Reconsideration, Plaintiff's Application for Fee Award and Defendant's Motion for Intervention at 6) (*see* E.R. at 424).

¶66 We reject Rayphand's assertion that Governor Tenorio waived his qualified immunity by failing to raise the defense prior to moving for summary judgment. *See Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993) (allowing defense of qualified immunity to proceed, absent a showing of prejudice, even though prison officials failed "to raise it as an affirmative defense in their answer to the complaint."); *Kleinknecht v. Gettysburg College*, 989 F.2d 1360, 1374 (3rd Cir. 1993) (allowing qualified immunity defense to proceed in motion for summary judgment absent a showing of prejudice to the plaintiff.) *See also Whisman v. Rinehart*, 119 F.3d 1303, 1309 (8th Cir. 1997) ("Qualified immunity is usually raised by a motion for summary judgment after a limited amount of discovery has been conducted"). In the instant case, Rayphand has made no claim that she was in any way prejudiced by the fact that Governor Tenorio raised this defense in his summary judgment motion rather than in his answer. The defense of qualified immunity was not waived.

¶67 Nor are we convinced, as Rayphand asserts, that Governor Tenorio is not entitled to qualified immunity solely because this is "a taxpayer's action for breach of fiduciary duty and for recovery of the full amount of all illegal expenditures of public funds."[30] Appellee's Br. at 29. Rayphand has directed us to no authority that states that qualified immunity is not available to an official in a claim for a breach of fiduciary duty. We direct her to *Price v. Akaka*, 3 F.3d 1220 (9th Cir. 1993) (trustees entitled to qualified

[30] Rayphand argues in another section of her Brief that, pursuant to RESTATEMENT (SECOND) OF TRUSTS, "[a] trustee commits a breach of trust not only where he violates a duty in bad faith, or intentionally although in good faith, or negligently, but also where he violates a duty because of a mistake as to the extent of his duties and powers." RESTATEMENT (SECOND) OF TRUSTS § 201 cmt. b (1959). We assume she relies on this when she states that Governor Tenorio is not shielded by qualified immunity in a taxpayer action for a breach of fiduciary duty.

immunity on a claim they misspent public funds because their actions did not violate clearly established law)[31].

¶68 When the defense of qualified immunity is asserted,

> [t]he first step is to determine whether a constitutional violation has, in fact occurred. Only after that has been determined should the court go further to assess whether the right in question was "clearly established" and whether a reasonable official would have known that his acts violated the right in question.

Charfauros v. Board of Elections, 1998 MP 16 ¶43. In this case, Governor Tenorio's expenditures amount to a violation of the Commonwealth Constitution.[32]

¶69 Article III, Section 9(a) reads, in pertinent part, "[i]f a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year." This portion of the Constitution is facially ambiguous, for it is unclear whether this provision confines the Governor, in a fiscal year for which no budget was passed, to expenditures which mirror the individual appropriation levels of the previously passed budget or whether the Governor is given plenary expenditure authority subject only to the overall total of the previously passed budget.

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[31] The court found that the defendants' actions not only didn't violate clearly established law, but that the law tended to permit the actions undertaken by the defendants.

> [T]here is no clearly established law prohibiting the OHA trustees from expending § 5(f) funds in support of the Single Definition Referendum which questioned the 50% or more blood quantumrequirement for native Hawaiian status. … To the contrary, established law suggests that amending the blood quantum requirement would benefit native Hawaiians.

Price v. Akaka, 3 F.3d 1220, 1225 (9th Cir. 1993).

[32] As will be seen *infra* ¶¶ 90-96, material facts remain in dispute. These facts include the sums of public monies that were actually expended. There are, however, some facts that are not in dispute. For example, Rayphand alleged in paragraphs 178 and 179 of her Third Amended Complaint that the total amount of the appropriation for Fiscal Year 1992 was $158,657,591 and that the total amount of public funds expended by Governor Tenorio exceeded the sum of $158,657,591. E.R. at 68. Governor Tenorio admitted both allegations. *See* E.R. at 75. Also, Rayphand alleges, "the Governor's expenditure of $100,000 to the Pacific Island Development Bank was not authorized by any appropriation law." E.R. at 49. Governor Tenorio admitted this. E.R. at 75. We refer to these undisputed facts for our discussion of qualified immunity. On remand, the trial court must discern which material facts remain in dispute for the causes of action that remain.

¶70 To resolve this ambiguity, we must delve into the legislative history of the amendment. We note that in the original Commonwealth Constitution, Article III, Section 9 read, in pertinent part, "[i]f a budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year." N.M.I. Const. art. III, § 9 (1978). Since the language of the original constitution was amended in 1985 solely by the insertion of the word "balanced," we are confident that no expansion or limitation of the Governor's expenditure authority was intended by the amendment, and that the intent of the framers of the original Constitution is determinative of the question today.[33]

¶71 The ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976) [hereinafter Analysis] is extremely persuasive authority when one is called upon to discern the intent of the framers when the language of the Constitution presents an ambiguity.

> The Analysis was prepared after the Constitutional Convention of the Northern Mariana Islands adopted the Constitution but before the Constitution was submitted to the electorate for approval. The purpose of the Analysis (as stated on page 1) is to explain and summarize the intent of the Constitutional Convention. The Analysis was approved by the Convention on December 6, 1976 and was made available to the electorate before voting on the Constitution.

Camacho v. Camacho, 1 CR 620, 627 (1983).

¶72 The analysis of Article III, Section 9(a) reads, in pertinent part:

> If the legislature does not approve a budget by the end of the fiscal year, the appropriations of the previous fiscal year continue at the same levels. This means that programs are funded and money may be expended by the executive branch *in the same manner as if the legislature had passed an omnibus appropriation bill containing the same figures as those of all the*

[33] The insertion of the word "balanced" throughout Article III, Section 9 reflects, in our opinion, the desire of the people that the Governor is to propose to the Legislature, and the Legislature is to pass, a balanced budget.

> *appropriation bills that passed in the previous year*. This is only an interim measure.

Analysis at 76 (emphasis added). Thus, the portion of Article III, Section 9(a) that reads "[i]f a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year" is properly interpreted as requiring the Governor to expend public funds in the same manner as if the Legislature had passed an omnibus appropriation bill containing the same figures as those of all the appropriation bills that passed in the previous year; the Governor does not have plenary expenditure authority for the period of time when a balanced budget has not been passed.

¶73 The question of whether, during a period of continuing appropriations, the Governor possesses any authority to reprogram funds, and if he may reprogram funds, to what extent may he do so, remains. The resolution of this question hinges on the interplay between Article III, Section 9(a) of the Constitution and Sections 7204(d) and 7402 of Title 1 of the Commonwealth Code. Based on our holding today, there can be only three answers to that question: The Governor possesses no reprogramming authority; the Governor possesses the limited reprogramming authority granted by 1 CMC § 7204(d); or the Governor possesses the reprogramming authority granted by 1 CMC § 7402. The disposition of this appeal does not require us to reach that question; therefore, we leave it unresolved.

¶74 Prior to the initiation of this lawsuit in fiscal year 1994, the last Commonwealth budget to have been enacted was for fiscal year 1992. Per the Constitution, in fiscal year 1994, the Governor was entitled to expend public funds in the same manner as if the Legislature had passed an omnibus appropriation bill containing the same figures as

those of all the appropriation bills that passed in the previous year.[34] This, Governor Tenorio did not do.

¶75 As we have determined that a constitutional violation did, in fact, occur, the analysis now shifts to whether the law governing Governor Tenorio's actions was "clearly established" and "whether a reasonable official would have known that his acts violated the right in question." *Charfauros*, 1998 MP 16 ¶43. It is evident that the law governing Governor Tenorio's spending authority during a period of continuing appropriations was not clearly established.

¶76 While the Budget Act clearly outlines the Governor's authority to spend public funds generally[35] and during a period of continuing appropriations,[36] it is not, as Rayphand argues, [37] the only authority pursuant to which the Governor may expend public funds.[38] Article III, Section 9(a) of the Commonwealth Constitution authorizes the Governor to expend public monies in the absence of the passage of a balanced budget for the current fiscal year. *See* N.M.I. Const. art. III, § 9(a).

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[34] As there was no balanced budget enacted for fiscal year 1993, per the Constitution, the Governor was limited to expenditures for government operations in fiscal year 1993 "at the level for the previous fiscal year," which was fiscal year 1992. When, in fiscal year 1994 a balanced budget still had not been passed, per the Constitution, the Governor was limited to expenditures for government operations in fiscal year 1994 "at the level for the previous fiscal year," which was fiscal year 1993. This level, as stated, mirrored the level of appropriations for fiscal year 1992.

[35] *See* 1 CMC §§ 7401-7409.

[36] *See* 1 CMC § 7204(d).

[37] Rayphand argues, "[i]n the absence of an appropriation law to cover Fiscal Year 1994, the Governor has no authority to expend any public funds for any purpose, except the authority given him by § 7402(d) of the Commonwealth Planning and Budgeting Act of 1983." Appellee's Br. at 6.

[38] The Budget Act does not permit a taxpayer to bring suit to recoup misspent public funds; Article X, Section 9 of the Commonwealth Constitution creates this right.

¶77 Prior to today's Opinion, Article III, Section 9(a) was facially ambiguous and had not been interpreted by this Court. *See, supra*, ¶ 69. Thus, it can not be said that the law governing Governor Tenorio's actions was "clearly established" for the purposes of qualified immunity.

¶78 We now turn to Governor Tenorio's actions, as alleged by Rayphand, to determine whether such actions were reasonable in light of the ambiguity presented by Article III, Section 9(a). Prior to today's Opinion, a reasonable Governor could have interpreted his constitutionally-granted expenditure authority in a fiscal year where no budget was passed as allowing for plenary expenditure authority subject only to the total of the previously passed budget.

¶79 Furthermore, Governor Tenorio sought the legal opinion of the Attorney General in this matter. Appellant's Br. at 42. It was the opinion of the Attorney General that the Governor has "broad authority during a period of continuing appropriation to allocate government expenditures, subject only to the total ceiling of the previous fiscal year's expenditure authority."[39] E.R. at 365.

¶80 Since Article III, Section 11 of the Commonwealth Constitution states that "[t]he Attorney General shall be responsible for providing legal advice to the Governor and executive departments," Governor Tenorio's actions are all the more reasonable, insofar as he followed the advice of the Attorney General, without regard to whether the Attorney General was ultimately correct.[40] *Cannon v. Taylor*, 493 P.2d 1313, 1315 (Nev.

[39] The Attorney General's Opinion, signed by two assistant attorneys general, was far from comprehensive. It failed to recognize that the spending authority granted to the Governor by Article III, Section 9(a) in a fiscal year where no budget was passed was carried over from the original Constitution and made no mention of the interpretation of the original Article III, Section 9(a) in the Analysis at page 76.

[40] Furthermore, a reasonable Governor might have sought the opinion of this Court.

> Whenever a dispute arises between or among Commonwealth officials who are elected by the people or appointed by the Governor regarding the exercise of their powers or

1972) ("[W]here government officials are entitled to rely on opinions of the state's Attorney General, and do rely in good faith, they are not responsible in damages to the governmental body they serve if the Attorney General is mistaken."); *Washington v. Martin*, 392 P.2d 435, 441 (Wash. 1964) ("State officials who take official action in accordance with the advice of the Attorney General are protected from liability in connection therewith."); *Oregon v. Mott*, 97 P.2d 950, 954 (Or. 1940) ("While the secretary of state was not bound to follow [the Attorney General's] opinion, he had the right to do so and is protected while acting in good faith even though it is assumed the same was erroneous.").

¶81 Applying the law to the facts of this case, it is apparent that Governor Tenorio is entitled to immunity from suit for most, but not all of the justiciable causes of action in Rayphand's Third Amended Complaint. Due to the ambiguity in Article III, Section 9(a) and the opinion of the Attorney General, a reasonable Governor could have mistakenly engaged in the actions characterized in Rayphand's First, Second, Fifth, Seventh, Tenth, and Twelfth Causes of Action[41] without realizing he was violating the law. As such, Governor Tenorio is immune from suit on the aforementioned causes of action.

> responsibilities under this constitution or any statute, the parties to the dispute may certify to the supreme court the legal question raised, setting forth the stipulated facts upon which the dispute arises. The supreme court may deny the request to rule on the certified legal question. If the request is accepted, then the ruling of the supreme court shall be binding upon the parties before the court.

N.M.I. Const. art. IV, § 11. Governor Tenorio's failure to seek the opinion of this Court, in this instance, does not render his reliance on the Attorney General's opinion unreasonable. *Wisconsin Retired Teachers Ass'n., Inc., v. Employee Trust Funds Bd.*, 558 N.W.2d 83, 94 (Wis. 1997) ("[T]rustees upheld their fiduciary duties…in good-faith reliance on the opinion of constitutionality rendered by the attorney general. Accordingly, we determine that the ETF Defendants did not breach their fiduciary duties by implementing Act 27 without first obtaining a court determination that the statute was constitutionally valid.").

[41] The Third, Eighth and Eleventh causes of action were determined to be nonjusticiable political questions. June 10, 1997 Decision and Order at 9-10 (*see* E.R. at 355-56). Rayphand conceded that her Ninth Cause of Action was moot.

Consequently, the summary judgment granted to Rayphand on these claims was erroneously granted. Furthermore, the summary judgment sought by Tenorio on these claims was erroneously denied.

¶82 Governor Tenorio is not, however, entitled to qualified immunity from the claim that he overspent the budget as a whole, listed as Rayphand's Thirteenth cause of action. No rational Governor could read Article III, Section 9(a) and believe that he was not restrained by the total ceiling of the last previously passed budget, regardless of when such budget was passed.[42] Nor did the Attorney General's Opinion, relied upon by Governor Tenorio, authorize him to spend over the total ceiling of the budget passed for fiscal year 1992.[43] As such, Governor Tenorio is not qualifiedly immune from a suit claiming he overspent the budget as a whole.[44]

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[42] Article III, Section 9(a) reads in its entirety:

> The Governor shall submit to the legislature a proposed annual balanced budget for the following fiscal year. The proposed balanced budget shall describe anticipated revenues of the Commonwealth and recommend expenditures of Commonwealth funds. The anticipated revenues may not be increased by the legislature without the consent of the Governor. In preparing the proposed balanced budget, the Governor shall consider submissions made by the mayors of Rota, Saipan, Tinian and Aguiguan, and the islands north of Saipan as to the budgetary needs of those islands and by the executive assistant appointed under Section 18 of this article. The Governor's submission to the legislature with respect to the budget shall state the Governor's disposition of the budgetary requests contained in these submissions and may include recommended legislation with respect to taxation. If a balanced budget is approved by the legislature, the Governor may not reallocate appropriated funds except as provided by law. If a balanced budget is not approved before the first day of the fiscal year, appropriations for government operations and obligations shall be at the level for the previous fiscal year.

N.M.I. Const. art. III, § 9(a). This portion of the Constitution requires the Governor to propose, and the Legislature to pass, a balanced budget, and provides a ceiling over which the Governor may not spend in the absence of a properly passed balanced budget. It strains credulity to think that, should a budget not be passed for more than one fiscal year, the Governor would then be given carte-blanche expenditure authority.

[43] While the Attorney General was of the opinion that portions of the Budget Act did not apply "where there has not been an enacted annual appropriation act for more than one fiscal year," a contention we need not and do not address, the Attorney General made no such determination concerning the expenditure authority granted the Governor by Article III, Section 9.

[44] Nor is he immune from suit on the Sixth Cause of Action, as he admitted personal liability for the conduct alleged therein. *See, infra*, ¶88.

V. Did the trial court err in denying Governor Tenorio's motion to intervene to set aside the judgment because of lack of personal service?

¶83 Governor Tenorio argues that the trial court should have set aside the judgment against him, as the summons and complaint were never served on him personally. He asserts that at no time did he ever answer the Complaint in his individual capacity. Further, he claims that the Attorney General's office is in no position to waive any of his personal defenses, since the Attorney General's office, as a governmental entity, stands to gain from the 12 million dollar judgment against Governor Tenorio in his personal capacity.

¶84 Rayphand's position is that there is only one Froilan C. Tenorio.[45] She contends that the complaint makes it clear that Governor Tenorio was being sued individually. Rayphand asserts that Governor Tenorio appeared in court on numerous occasions and did not raise the issue of lack of service. Rayphand states "[i]n February 1995, in his motion to dismiss, Defendant Tenorio expressly acknowledged that 'plaintiff seeks a judgment against the Governor, in his personal capacity.'" Appellee's Br. at 47.

[45] She argues:

> In what must be one of the strangest motions to have been filed in this or any lawsuit, Froilan C. Tenorio, who has been the prime party Defendant from the commencement of this suit in 1994 to the present, purported to appear in what he calls his "personal capacity," as if that were somehow different from the capacity in which he appeared, defended, and lost this case.
>
> There is only one Froilan C. Tenorio, legally and ontologically. The same juridical personality. The same human being, Froilan C. Tenorio, existed and acted, for purposes of this suit, in his "personal" and "official" capacities. He cannot now invent some other or different human identity and then claim, for this third Froilan C. Tenorio, the privilege of re-litigating this lawsuit from the start.
>
> Everything that was done in Tenorio's name in these proceedings by his former counsel is binding on Tenorio, in as many or whatever legal personalities [in which] he exists (or imagines himself to exist). The court and the other parties had no reason to doubt that Tenorio, the real Tenorio, was sued, served and engaged in this suit for all purposes.

Rayphand maintains that these facts mean that Governor Tenorio consented and submitted to the court's jurisdiction.[46]

¶85 We pause to note that the caption of Rayphand's Third Amended Complaint does not mention that she is suing Governor Tenorio in his personal capacity. "The plaintiffs should include this statement of 'capacity' in the caption, the allegations, and the prayer for relief," as this "will allow defendants to have an opportunity to prepare for a proper defense and eliminate the unnecessary litigation that arises when parties fail to specify the capacity." *Reid v. Town of Madison*, 527 S.E.2d 87, 90 (N.C. Ct. App. 2000).

¶86 It is clear that Rayphand's Third Amended Complaint is a suit against Governor Tenorio in both his official and personal capacities. Rayphand seeks money damages from Governor Tenorio personally and also sought "an injunction against defendant Tenorio compelling him to prepare and submit a budget plan to the Legislature which complies with § 7604 of the Budget Act" in his official capacity. "A suit against a defendant in his individual capacity means that the plaintiff seeks recovery from the defendant directly; a suit against a defendant in his official capacity means that the plaintiff seeks recovery from the entity of which the public servant defendant is an agent." *Reid*, 527 S.E.2d at 89 (*citing Meyer v. Walls*, 489 S.E.2d 880, 887 (N.C. 1997)).

¶87 It is undisputed that Rayphand properly served Governor Tenorio in his official capacity,[47] but there is nothing in the record to suggest that proper service was ever

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Appellee's Br. at 45.

[46] Rayphand cites Commonwealth Rule of Civil Procedure 12(h)(1) and *Goldey v. Morning News*, 156 U.S. 518, 15 S. Ct. 559, 39 L. Ed. 517 (1895) (among other cases) to bolster that proposition.

[47] An officer of the Commonwealth is properly served by delivering one copy of the summons and complaint to the Attorney General and one copy of the summons and complaint to the officer. *See* Com. R. Civ. P. 4 (i)(2).

effected on Froilan C. Tenorio personally.[48] However, one may submit oneself to the jurisdiction of the court by appearing in court and defending the case. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) ("Jurisdiction attaches if a defendant makes a voluntary general appearance, as by filing an answer through an attorney.").

¶88 In this instance, we must conclude that Froilan C. Tenorio submitted to the jurisdiction of the court. The Defendants' Answer to Rayphand's Third Amended Complaint contains the following admission, which reads, in pertinent part: "[o]n information and belief, Defendants admit paragraph[] . . . 121 . . . of the Third Amended Complaint." E.R. at 75. Paragraph 121 of Rayphand's Third Amended Complaint reads:

> 121. Because none of the $500,000 which the Governor took from the MVB budget was appropriated for the purpose of providing "Official Representation," "Professional Services," or "Building Improvements," the Governor's expenditure of the funds for those purposes was illegal and *the Governor and the Secretary of Finance are personally liable to the Commonwealth* for repayment of all expenditures which have been made to date out of the 500,000 which was reprogrammed into the Governor's budget, from MVB, by virtue of § 7705 of the Budget Act.

E.R. at 53 (emphasis added). In this instance, the Attorney General's Office admitted personal liability for Froilan C. Tenorio. Thus, we can only conclude that the Attorney General's Office was representing Governor Tenorio in his personal and official capacities when it filed the Answer.

¶89 Furthermore, prior to the motion to intervene for lack of service, Governor Tenorio asserted the defense of qualified immunity. *See supra* ¶¶ 11, 15. Once he did

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[48] An individual within a jurisdiction of the United States is properly served:

> by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

Com R. Civ. P. 4(e)(2).

this, the trial court had to find that he was defending the suit in his individual capacity. For:

> [w]hen it comes to defenses to liability, an official in a personal-capacity action may, depending on his position, be able to assert personal immunity defenses, such as objectively reasonable reliance on existing law. See *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity); *Pierson v. Ray*, 386 U.S. 547 (1967) (same); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (qualified immunity); *Wood v. Strickland*, 420 U.S. 308 (1975) (same). In an official capacity action, these defenses are unavailable. *Owen v. City of Independence*, 445 U.S. 662 (1980); see also *Brandon v. Holt*, 469 U.S. 464 (1985). The only immunities that can be claimed in an official-capacity action are forms of sovereign immunity that the entity, *qua* entity, may possess, such as the Eleventh Amendment.

Kentucky v. Graham, 473 U.S. 159, 166-67, 105 S. Ct. 3099, 3105-06, 87 L. Ed. 2d 114, 122 (1985) (footnote omitted). The assertion of this defense was made prior to any motion challenging service on Froilan C. Tenorio. "Defendants can waive the defect of lack of personal jurisdiction by appearing generally without first challenging the defect in a preliminary motion." *Jackson*, 682 F.2d at 1347. By admitting personal liability in the answer, and offering a defense on the merits of the case prior to raising the issue of improper service, Governor Tenorio submitted himself to the jurisdiction of the trial court. *Id*. Thus, it was not error for the trial court to fail to set aside the judgment due to Rayphand's failure to properly serve Governor Tenorio in his personal capacity.[49]

VI. Did Rayphand sufficiently establish that there were no genuine issues of material fact to support the trial court's granting of summary judgment?

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[49] We note that Assistant Attorneys General who represent government officials in both their private and public capacities court danger and risk violating ethical standards:

> The distinctions between suits against an official in his individual and official capacities give rise to differing and potentially conflicting defenses. Most notably, the government entity could defend itself by asserting that the official whose conduct is in question acted in a manner contrary to the policy or custom of the entity. Also, an individual capacity defendant could assert the defense of qualified immunity.
>
> Given the potential conflict between the defenses available to a government official sued in his individual and official capacities, we have admonished that separate representation for the official in his two capacities is a "wise precaution."

Johnson v. Bd. of County Cmm'rs., 85 F.3d 489, 493 (10th Cir. 1996) (citations omitted).

¶90 As we stated in *Furuoka v. Dai-Ichi Hotel*:

> The Commonwealth's summary judgment procedures and standards are clear and well-developed. A moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment. If a moving party is the plaintiff, he or she must prove that the undisputed facts establish every element of the presented claim. If a movant is the defendant, he or she has the correlative duty of showing that the undisputed facts establish every element of an asserted affirmative defense.

2002 MP 5 ¶22 (citations omitted). "Once the moving party satisfies the initial burden, the nonmoving party must respond by establishing that a genuine issue of material fact exists." *Id*. at ¶ 24 (citation omitted).

¶91 Two causes of action remain for summary judgment analysis: Rayphand's Sixth (MVA) and the Thirteenth (overspending budget as a whole) causes of action. The trial court granted summary judgment on Rayphand's behalf on these two claims,[50] stating "it is clear to the Court that no factual issues are in dispute in this case as both parties have, of their own volition, separately moved for summary judgment." June 10, 1997 Decision and Order at 15 (*see* E.R. at 361). The fact that each party has moved for summary judgment, however, is not determinative of whether summary judgment should be granted. *See Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030, 1037 (9th Cir. 2000) ("Notwithstanding the fact that both sides moved for summary judgment and agreed that summary judgment was appropriate one way or the other, genuine issues of material fact remain."); *United States v. Fred A. Arnold, Inc.*, 573 F.2d 605, 606 (9th Cir. 1978) ("the filing of crossmotions for summary judgment…does not vitiate the court's responsibility

[50] The trial court granted summary judgment in Rayphand's favor on all the claims she asserted. Governor Tenorio was qualifiedly immune from suit on many of these claims. *See, supra*, ¶¶62-82.

to determine whether disputed issues of material fact are present. A summary judgment cannot be granted if a genuine issue as to any material fact exists.")

¶92 Since summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," Com. R. Civ. P. 56(c), we must look to the record to determine if any genuine issues of material fact exist for each of Rayphand's remaining claims. In this case, the record includes Rayphand's Third Amended Complaint,[51] Governor Tenorio's Answer to the Third Amended Complaint,[52] a document submitted by Rayphand entitled "Plaintiff's Statement of Undisputed Facts,"[53] exhibits attached to Rayphand's motion for summary judgment,[54] as well as an affidavit by Froilan C. Tenorio that was attached to his Opposition to Plaintiff's Motion for Summary Judgment.[55]

¶93 "Plaintiff's Statement of Undisputed Facts" is better described as anything other than a statement of undisputed facts. Rayphand listed, as undisputed facts, allegations which were explicitly denied by the Defendants in their Answer to the Third Amended Complaint. *Compare* E.R. at 84-114 *with* E.R. at 75-82. In fact, "Plaintiff's Statement of Undisputed Facts" almost mirrors Rayphand's Third Amended Complaint. *Compare*

[51] *See* E.R. at 21-71.

[52] *See* E.R. at 74-82.

[53] *See* E.R. at 84-114

[54] *See* E.R. at 178-243bb. This portion of the Excerpts of Record contains a page 243, 243a, 243b and so on up to, and including, 243bb.

[55] *See* E.R. at 263-270. As might be expected of an affidavit from an adverse party, this affidavit is not very useful to Rayphand for the purposes of her motion for summary judgment.

E.R. at 84-114 *with* E.R. at 21-71. Rayphand served this statement on the Defendants, who did not respond to it for quite some time. *See* E.R. at 244. Rayphand cites Governor Tenorio's failure to respond to the statement as an admission of the facts contained therein. *See* E.R. at 118. "Plaintiff's Statement of Undisputed Facts" seems to have its genesis in Rayphand's misunderstanding of the discovery ordered by the trial court. *See* E. R. 319-22. While, during a hearing on the issue, there was discussion between the parties concerning the filing of documents detailing the disputed and undisputed facts, *see* Supplemental Excerpts of Record [hereinafter S.E.R.] at 156-66, at no time did the trial court order either party to file (or respond to the filing of) such statements. *See id*. The trial court, by a written order dated June 8, 1995, clearly stated the discovery that was to follow:

> Prior to any resumption of discovery, Plaintiff will review Defendants' Answer to determine what factual issues remain to be investigated regarding each of Plaintiff's causes of action. For each such factual issue, *Plaintiff will submit a request for admission to Defendant*. Defendant will respond to each such request for admission within seven days of its service. Subsequent discovery shall be limited to those matters which were not admitted by Defendants, with the aim of presenting the remaining issues in this case on motions for summary judgment at the earliest practical time.

S.E.R. at 167-68 (emphasis added).

¶94 "Plaintiff's Statement of Undisputed Facts" is most certainly not a request for admission, for it is devoid of any

> request for the admission, for the purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that related to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.

Com. R. Civ. P. 36(a). Therefore, Governor Tenorio's failure to respond to it is of no legal effect, and in no way constitutes an admission of the truth of the statements in the "Statement of Undisupted Facts." *See id*. ("Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, ... the party to whom the request is directed serves upon the party requesting the admission a written answer"). Simply put, the "Statement of Undisputed Facts" primarily contains mere allegations, and in no way demonstrates that the facts material to Rayphand's claims are undisputed.

¶95 Rayphand's motion for summary judgment contained exhibits which Rayphand contends support her position. These exhibits included, among other things, documents purportedly authored by Governor Tenorio, various memoranda purportedly authored by various government officials to Governor Tenorio, a check purportedly drawn from a government account with the Bank of Guam, and various newspaper articles. *See generally* E.R. at 178-243bb. These documents were not authenticated. *See id*. As such, it is improper to rely on them for the purposes of summary judgment, for a motion for summary judgment must be based on admissible evidence. *See* Commonwealth Rule of Civil Procedure 56(e). *See also Campbell v. Potter*, No. 02-3211, 2003 U.S. App. LEXIS 4413, at *2 (7th Cir. March 11, 2003) (citation omitted) ("[S]ummary judgment would still be appropriate because almost none of Campbell's allegations are supported by admissible evidence."); *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988) ("It is well settled that only admissible evidence may be considered by the trial court in ruling on a motion for summary judgment").

¶96 The admissible evidence before the trial court shows that summary judgment was improperly granted. For example, as to the Sixth cause of action, there is no admissible evidence that Governor Tenorio spent any money that was "reprogrammed from the MVB budget for the purpose of providing 'Official Representation,' 'Professional Services,' or 'building Improvements.'" *See* E.R. at 54. As to the Thirteenth cause of action, there is no evidence as to the amount by which the budget was actually overspent.[56] These material facts remain in dispute; as such, summary judgment was improvidently granted.

CONCLUSION

¶97 Rayphand has standing to maintain this action. Public funds which are not expended pursuant to law are not spent for a "public purpose." The expenditure of public funds in a manner not in accordance with the law is a breach of a public official's fiduciary duty. The trial court did not err when it determined that the remaining causes of action were not nonjusticiable political questions. Public Law 9-23 did not moot this case. The trial court erred in part when it determined that Governor Tenorio was not entitled to qualified immunity on any of the causes of action. The trial court did not err in denying Froilan C. Tenorio's motion to intervene to set aside the judgment because of lack of personal service. The trial court erroneously granted summary judgment on Rayphand's behalf.

¶98 As summary judgment was improvidently granted, the remaining issues on appeal are not ripe for adjudication. The judgment of the trial court is REVERSED and this case is REMANDED to the trial court for proceedings consistent with this opinion. Rayphand

[56] The fact that we highlighted these two issues as being in dispute should, in no way, be construed as a determination that they are the only two disputed material issues.

is hereby ORDERED TO SHOW CAUSE why she should not be sanctioned for the numerous violations of the Commonwealth Rules of Appellate Procedure in her briefs to this Court in this appeal.

SO ORDERED this 23rd day of July 2003.

/s/_____
JOHN A. MANGLONA, ASSOCIATE JUSTICE

/s/__
ROBERT C. NARAJA, JUSTICE PRO TEMPORE

/s/_____
STEVEN S. UNPINGCO, JUSTICE PRO TEMPORE