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

HOMAYAN KABIR,
Plaintiff-Appellee,

v.

CNMI PUBLIC SCHOOL SYSTEM,
Defendant,

and

JONAS BARCINAS,
Defendant-Appellant.

SUPREME COURT NO. 2009-SCC-0037-CQU
NINTH CIRCUIT NO. 08-16152

Cite as: 2009 MP 19

Decided December 31, 2009

David Lochabay, Office of the Attorney General, Saipan, Commonwealth of the Northern Mariana Islands, for the Defendant-Appellant.
Joseph E. Horey, O'Connor Berman Dotts & Banes, Saipan, Commonwealth of the Northern Mariana Islands, for the Plaintiff-Appellee.
BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; JOHN A. MANGLONA, Associate Justice

PER CURIAM:

¶ 1 The United States Court of Appeals for the Ninth Circuit has certified two questions of CNMI law to this Court pursuant to Rule 5 of the Commonwealth Rules of Appellate Procedure. NMI R. App. P. 5.[1] Both questions involve the interpretation and application of the Commonwealth Employees Liability Reform and Tort Compensation Act of 2006 ("CELRTCA"), PL 15-22. In its request for certification the Court of Appeals states that no controlling Commonwealth precedent exists to resolve the issues, and that "[t]he answer to the certified questions will be determinative of this appeal." The Court of Appeals states that "[r]esolution of the CNMI law issues involved in this litigation will have a substantial effect on CNMI law and the citizens of the Commonwealth, not only on the questions presented by this case but in future actions concerning Commonwealth employee liability." We have been asked to address the following questions:

> 1. Does the Commonwealth Employees' Liability Reform and Tort Compensation Act of 2006 ("CELRTCA"), 2006 N. Mar. I. Pub. L. 15-22, cover employees accused of misconduct when the CNMI Attorney General certifies that the alleged misconduct did not take place at all? That is, does CNMI law follow the Supreme Court's decision in *Osborn v. Haley*, 549 U.S. 225 (2007)?

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[1] In its entirety NMI R. App. P. 5 provides:

> (a) A federal court may certify to this Court a question or proposition of law concerning a local law of the Commonwealth of the Northern Mariana Islands where the local law has not been clearly determined, and it is necessary or desirable to ascertain the local law in order to dispose of the federal court's proceeding. The certificate submitted shall contain a statement of the nature of the case and the facts on which the question or proposition of law arises. Only questions or propositions of law may be certified, and they must be distinct and definite. The clerk of the court from which the case originates must certify the record and transmit it to this Court.
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> (b) When a case is certified, the clerk will notify the respective parties and docket the case. Counsel shall then enter their appearances. After docketing, the certificate shall be submitted to the Court for a preliminary examination to determine whether the case shall be briefed, and/or set for argument. No brief may be filed prior to the preliminary examination of the certificate.
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> (c) If the Court orders that the case be briefed or set for argument, the parties shall be notified and permitted to file briefs. Any portion of the record to which the parties wish to direct the Court's particular attention shall be appended to the brief. The fact that any part of the record has not been appended shall not prevent the parties or the Court from relying on it. The parties shall comply with these rules in the filing of briefs.
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> (d) The costs of the certification shall be equally borne by the parties. If the Government of the Commonwealth of the Northern Mariana Islands is a party to the case, the costs shall be divided by all parties, including the government. However, the government shall not be required to pay its share of the costs.

2. Does CELRTCA cover employees accused of sexual assault and battery, a tort traditionally understood to occur outside the scope of employment?

¶2 As to question one, we hold that the CNMI Attorney General may issue scope-of-employment certification under CELRTCA based on the factual determination that the alleged tortious conduct did not occur. That is, CNMI law follows the United States Supreme Court's decision in *Osborn v. Haley*. As to question two, we hold that CELRTCA covers government employees sued for negligent or wrongful conduct arising from actions taken within the scope of employment – including intentional torts – but that under CNMI law, intentional torts will ordinarily fall outside the scope of employment.

I

Factual Background

¶3 The two certified questions before this Court arise from a federal action filed by Homayan Kabir, a security guard at a public elementary school on Saipan, against the Commonwealth Public School System and Jonas Barcinas, the principal of Dandan Elementary School. In 2007, Kabir filed a charge with the Equal Employment Opportunity Commission ("EEOC") based on allegations that during his employment as a security guard at Dandan Elementary, the principal of the school – Jonas Barcinas – engaged in acts of sexual harassment towards Kabir, including multiple episodes where Barcinas grabbed and kissed him against his will. Kabir further alleged that as a result of his failure to acquiesce to the sexual advances he was threatened with termination, and his contract was eventually terminated. On November 9, 2007, after receiving a "right-to-sue" letter from the EEOC, Kabir filed suit in the United States District Court for the Northern Mariana Islands alleging various violations of federal law, including violations of the Civil Rights Act (42 U.S.C. § 2000) and federal constitutional violations under 42 U.S.C. § 1983. Kabir also named Barcinas as defendant in his individual capacity for common law assault and battery.

¶4 In response to Kabir's suit, the CNMI Attorney General, representing Barcinas, filed a motion to substitute the Commonwealth as the sole defendant against Kabir's sexual assault claim. The basis for the motion was CELRTCA, which provides Commonwealth employees with absolute immunity for negligent or wrongful acts undertaken within the scope of employment. *See* 7 CMC § 2210(a). Under CELRTCA, employee immunity attaches – and automatic substitution of the Commonwealth as defendant in the employee's place is triggered – when the Attorney General files with the court a certificate that "the defendant employee was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose." *Id*. In this case, the Attorney General's motion for substitution was accompanied by

certification that "Barcinas was acting within the scope of his employment as principal of Dandan Elementary School at the time of the alleged incident giving rise to the claims of plaintiff in this action." The initial certification stated no basis for the determination. The Attorney General subsequently submitted a second declaration, stating that "[t]he investigation by my office of these alleged events concluded that the events did not in fact occur, and that was, and is, the basis for the Certification."

¶5 At the hearing to consider the motion to substitute, the Attorney General represented to the District Court that after the Commonwealth substituted for Barcinas, the government would move to dismiss the assault and battery claims on the basis of 7 CMC § 2204(b), which exempts the government from liability for various intentional torts, specifically including assault and battery. The district court denied the Attorney General's motion for substitution. However, the denial was not based upon a factual review of the certification itself. Rather, the district court's holding was based on the legal conclusion that CELRTCA did not apply to suits against Commonwealth employees for intentional torts because § 2204 of the Government Liability Act provides for governmental immunity in cases of assault and battery. The court found that if the government was permitted to replace Barcinas as defendant – only to then claim immunity under 7 CMC § 2204 – the substitution would "frustrate[] the very essence of what the law is about." The denial of substitution was appealed to the Ninth Circuit Court of Appeals[2] which subsequently certified the above two questions of CNMI law to this Court.

II

Jurisdiction

¶6 Kabir, the Plaintiff-Appellee, has called into question our constitutional authority to accept and answer unsettled questions of Commonwealth law certified by the federal courts. Kabir argues that we lack jurisdiction to entertain certified questions because the Commonwealth Constitution does not expressly grant this Court such authority. Although Kabir does not specifically ask this Court to find NMI R. App. P. 5 unconstitutional, his position implicitly raises the specter of unconstitutionality. Because our authority to hear certified questions raises important issues concerning the jurisdiction of this Court (as well as the constitutional validity of NMI R. App. P. 5), we first address the basis for our jurisdiction before addressing the certified questions.

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[2] In *Osborn*, 549 U.S. 225, the United States Supreme Court held that the district court's denial of an Attorney General's Westfall Act certification and substitution is amenable to immediate appellate review. *See also*, *Mitchell v. Forsyth*, 472 U.S. 511, 525-27 (1985) (holding that a district court's rejection of a defendant's qualified immunity plea is immediately appealable under *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541 (1949), because suit immunity "is effectively lost if a case is erroneously permitted to go to trial" against the immune official).

¶7 We have accepted certified questions pursuant to the procedures set forth in Rule 5 on three previous occasions. *United States v. Borja*, 2003 MP 8; *Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki*, 1999 MP 20; *Sonoda v. Cabrera*, 1997 MP 5.[3] We agree with Kabir

[3] None of these cases address the rationale behind the adoption of our certified question rule. Given the Commonwealth's state-like status within the United States court system, we take the time to do so here. *See* 48 U.S.C. § 1824(a) ("The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands . . . shall be governed by the laws of the United States pertaining to the relations between the courts of the United States . . . and the courts of the several States . . . . ").

Like the laws of the several states, federal courts are required to apply CNMI law in two scenarios. The first scenario arises when a party files suit in federal court asserting diversity jurisdiction. *See* 48 U.S.C. § 1822(a) ("The District Court for the Northern Mariana Islands shall have the jurisdiction of a District Court of the United States, including, but not limited to, diversity jurisdiction provided for in section 1332 of title 28, United States Code . . . ."); *see also*, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (requiring federal courts to apply state law, as expounded by the state courts, in the disposition of diversity cases). The second scenario, and the one present in this case, is where the party files suit in federal court asserting federal question jurisdiction and bootstraps a state law claim through the district court's supplemental jurisdiction. 28 U.S.C. § 1367. Under both scenarios, the federal court must ascertain and apply state substantive law.

Where the relevant state law is clear, the process is not particularly problematic. However, where there are no state court decisions on point – such as in the case presently before the Court – the federal court is forced to choose between (1) guessing what the State Supreme Court would hold and risk issuing a decision which may later prove to be out of harmony with state decisions, or (2) abstaining from issuing a decision on the State law issue. The federal courts have found neither option attractive. One federal judge, commenting on the undesirability of the first choice compared a federal judge's duty in a diversity case to that of a soothsayer, stating:

> Such contemporary predictions are just as chancy a business as the divination of dreams that heathen kings of ancient biblical lands so often called upon their counselors to interpret in the stories of the Old Testament. Like them, in taking on the task, we hope that our prophecy will find favor in the eyes of the authority that may one day brand it true or false.

Yohannon v. Keene Corp., 924 F.2d 1255, 1264 (3d Cir. 1991).

Abstention has proven no more attractive – requiring substantial cost and delay to the litigants who are forced to leave the federal court to initiate a full round of state litigation, only to return to federal court. As an alternative, beginning with *Clay v. Sun Ins. Office Ltd*., 363 U.S. 207 (1960), federal courts began to utilize – and states began to adopt – certification procedures, in which the federal courts could submit questions of unsettled state law to a given state's highest court. Without going into a detailed history of the evolution of certification in American jurisprudence, it is enough to say that certification has been met with all around praise, including praise from the United States Supreme Court and the American Law Institute. *See Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (noting that certification "does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism"); *Nat'l Educ. Ass'n v. Lee County Bd. of Pub. Instruction*, 467 F.2d 447, 449 (5th Cir. 1972) (stating that certification "minimiz[es] or eliminate[es] entirely the confusion, uncertainty and juridicial friction inherent in a system of Federalism that frequently forces Federal Judges to assume – often with extreme reluctance – a decisional rule that properly belongs to their brethren on the State bench").

The benefits of certification include: assuring that state law (or Commonwealth law in this case) will be applied uniformly and in accordance with the interpretations given by each state's high court; state courts will have the benefit of having the final say on matters of state law; and the federal courts can avoid the difficult task of attempting to divine how a state court would rule on a matter of state law. Given these benefits, we promulgated NMI R. App. P. 5 in 1992.

that our authority to accept and answer certified questions from the federal courts does not derive from Rule 5 itself.[4] The Commonwealth Rules of Appellate Procedure were promulgated by this Court and accepted by the CNMI legislature in 1992.[5] Rule 5 sets forth the conditions under which this Court will accept certified questions from the federal courts and the procedures to be followed by both the federal courts and the litigants during the certified question process. However, Rule 1(a) of the Appellate Rules specifically states that "[n]othing in these rules shall be construed to limit or extend the lawfully established appellate jurisdiction of this court."[6]

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[4] Kabir points out that in two of the three previous cases in which this Court accepted certified questions, the stated basis for our jurisdiction was Rule 5. *See Borja*, 2003 MP 8 ¶ 1; *Sonoda*, 1997 MP 5 ¶ 1. In *Bank of Saipan*, we indicated that our jurisdiction was based on Rule 5 and Article IV, Section 3 of the Commonwealth Constitution. 1999 MP 20 ¶ 4. Although we find constitutional and statutory support for our ultimate holding – that we have jurisdiction to entertain certified questions – to the extent that the above-cited cases predicated jurisdiction on Rule 5 alone, those cases misstated the basis for jurisdiction. Nothing in this Court's ruling today should be construed to disrupt the substantive holdings of the above cases. To clarify our holding, this Court possessed jurisdiction to answer the certified questions in *Sonoda*, *Bank of Saipan*, and *Borja*; it was the *stated basis* for jurisdiction in those cases – not the assertion of jurisdiction itself – that was misplaced.

[5] At the time the Rules of Appellate Procedure were adopted, this Court had the authority to promulgate court rules – subject to approval by the legislature – pursuant to 1 CMC § 3403, which provides:

> (a) The Chief justice may propose rules governing appeals from the Superior Court, judicial ethics, admission to practice before the Commonwealth judiciary and governance of the members of the bar of the Commonwealth, fees, and other proper matters of judicial administration of the Commonwealth courts.
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> ...
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> (b) All proposed rules shall be submitted promptly by the Chief Justice to the President of the Senate and the Speaker of the House of Representatives, and shall become effective 60 days following submission unless disapproved by a majority of the members of either house of the legislature.

The Court's rulemaking power now derives from Article IV of the Commonwealth Constitution, which was amended in 1997 and established this Court as a constitutional entity. Article IV, Section 9, provides:

> The Chief justice of the Commonwealth may propose rules governing civil and criminal procedure, judicial ethics, admission to and governance of the bar of the Commonwealth, and other matters of judicial administration. A proposed rule shall be submitted to the legislature and shall become effective sixty (60) days after submission unless disapproved by a majority of the members of either house of the legislature.

[6] The Notes accompanying Rule 5 provide: "This rule is new. It is to allow a federal court to certify to this Court a local law question, and to provide the procedure for such certification." To the extent that the above comment is ambiguous or is amenable to the interpretation that Rule 5 provides a source of jurisdiction for this Court to entertain certified questions, we now make clear that it does not. As our holding on this issue makes clear, our authority to hear certified questions derives from the Covenant, our constitution, and Commonwealth Code §§ 3101-02.

Thus, our jurisdiction over certified questions must be found outside of the Rules of Appellate Procedure.

A *Sovereignty*

¶8 Our jurisdictional analysis begins with the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, (48 U.S.C. § 1801 note, [hereinafter "Covenant"]), which governs the relationship between the Commonwealth and the United States and "together with those provisions of the Constitution, treaties and laws of the United States applicable to the Northern Mariana Islands, will be the supreme law of the Northern Mariana Islands." Covenant, art. I, § 102. Section 403 of the Covenant (codified at 48 U.S.C. § 1824(a)) provides:

> The relations between the courts established by the Constitution or laws of the United States and the courts of the Northern Mariana Islands with respect to appeals, certiorari, removal of causes, the issuance of writs of habeas corpus *and other matters or proceedings will be governed by the laws of the United States pertaining to the relations between the courts of the United States and the courts of the several States in such matters and proceedings . . . .*

(emphasis added).

¶9 We read § 403 of the Covenant to mean that, once established, the Commonwealth Supreme Court will share the same status as a State high court for the purposes of its relationship to, and its position within, the United States court system. The logical outgrowth of this proposition, and one that is consistent with 48 U.S.C. § 1822(a), is that like the law of the several States, federal courts are required to apply CNMI law in two scenarios: (1) where the District Court for the Northern Mariana Islands asserts diversity jurisdiction pursuant to 28 U.S.C. § 1332, and (2) where a party files suit in the district court asserting federal question jurisdiction and bootstraps a state law claim through the court's supplemental jurisdiction under 28 U.S.C. § 1367. The present case arises under the second scenario.

¶10 We agree with Kabir's statement that the Commonwealth (as a political entity) has a unique relationship with the United States. We also agree that principles of federalism do not apply to the Commonwealth in the same way as they do to the several States. However, we do not agree with Kabir's conclusion that this unique relationship somehow diminishes our sovereign right to act as the final arbiter of CNMI law. *See* Covenant, art. II, § 203(d); *Castro v. Hotel Nikko Saipan*, 96 F.3d 1259, 1261 (9th Cir. 1996) ("The CNMI Supreme Court is, 'of course,' the 'ultimate expositor of local Northern Mariana law.'") (quoting *Ferreira v. Borja*, 1 F.3d 960, 962 (9th Cir. 1993)). As we stated in *Wabol v. Villacrusis*, 1 NMI 34, 40 (1989), "[t]he

Covenant is a permanent, binding, and solemn agreement entered into *between two sovereign peoples*." (emphasis added). Thus, the Commonwealth's relationship with the United States, rather than diminishing our autonomy (as compared to the States), makes it all the more important.

¶11 Both the Ohio and Oklahoma Supreme Courts have grounded their authority to accept and answer certified questions on the basis of sovereignty. *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077 (Ohio 1991); *Bonner v. Oklahoma Rock Corp.*, 863 P.2d 1176 (Okla. 1993). In *Scott*, the Ohio Supreme Court addressed the issue of whether it had exceeded the scope of its constitutionally limited jurisdiction by adopting a court rule providing for the acceptance of certified questions. The Ohio Supreme Court held:

> In our view, [the] power [to decide certified questions] exists by virtue of Ohio's very existence as a state in our federal system . . . . Since federal law recognizes Ohio's sovereignty by making Ohio law applicable in federal courts, the state has the power to exercise and the responsibility to protect that sovereignty. Therefore, if answering certified questions serves to further the state's interests and preserve the state's sovereignty, the appropriate branch of state government – this court – may constitutionally answer them.

577 N.E.2d at 1079-80.

¶12 While we decline to adopt the Ohio Supreme Court's reasoning carte blanche,[7] given our unique relationship with the United States, we find that the sovereignty analysis applies with even greater force in the CNMI than in the state context. The CNMI legislature made clear in 1989 with the enactment of Public Law 6-25 (the "Commonwealth Judicial Reorganization Act of 1989"), which withdrew the appellate jurisdiction formally vested in the federal District Court and vested that jurisdiction in this Court, that the purpose of the law was to "*retain full sovereignty over the investiture of jurisdiction in the courts which construe the laws of the Commonwealth*." PL 6-25, § 2 (emphasis added). When a federal court decides unsettled issues of Commonwealth law, the Commonwealth's sovereignty is threatened. As one federal judge put it: "When federal judges make state law – and we do, by whatever euphemism one chooses to call it – judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function." Dolores K. Sloviter, *A Federal*

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[7] In *Scott*, the Ohio Supreme Court reasoned that a "jurisdictional analysis is irrelevant to [our certification rule's] constitutionality, for a court does not exercise jurisdiction by answering a certified question." 577 N.E.2d at 1079. While we adopt the Ohio court's sovereignty language, we disagree with the proposition that the jurisdictional analysis is inapplicable. In other words, we find that in answering certified questions from the federal courts we are doing so based on our constitutional and statutorily bestowed jurisdiction.

Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1687 (1992).

¶13 Rule 5 of the Rules of Appellate Procedure is premised upon the ability of the Commonwealth Supreme Court to determine by its decision what the local law of the Commonwealth is. The certified questions presently before this Court seek answers in the decisional law of the Commonwealth. As the Washington Supreme Court stated in *In re Elliott*, 446 P.2d 347, 354 (Wash. 1968), "decisional law may be the interpretation of statute or the formulation of a common law rule[,] [but] [w]hatever the subject matter, it is a subject matter capable of being dealt with by a court rendering a decision, *i.e.*, exercising judicial power." To the extent that the federal courts must apply Commonwealth law, we have the statutory and constitutional authority to assert our sovereignty by saying what that law is. Thus, picking up on the language from the Ohio Supreme Court, we hold that since the Covenant – and federal law (*see* 48 U.S.C. § 1824(a)) – recognize the Commonwealth's sovereignty by making CNMI law applicable in federal courts, the Commonwealth has the power to exercise and the responsibility to protect that sovereignty. Therefore, we hold, that if answering the certified questions serves to further the Commonwealth's interests and preserve the Commonwealth's sovereignty, the appropriate branch of the Commonwealth government – this Court – may constitutionally answer them.

B. *Constitutional and Statutory Analysis*

¶14 Our jurisdictional analysis does not rest solely on our relationship with the United States court system. We also find textual support for asserting jurisdiction over certified questions in Article IV of our constitution and sections 3101-3102 of the Commonwealth Code, which statutorily established this Court and endowed it with jurisdiction. We begin with the fundamental rule of constitutional interpretation that a state constitution is an instrument of limitation and not of grant; that all power not expressly, or by necessary implication, limited by a state constitution inheres in the people of that state either through the legislature as the law making branch of government or through the judiciary as the branch of government that interprets the law. *See Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735, 742-43 (Fla. 1961). Thus, the first question of our textual analysis is whether our constitution expressly – or by necessary implication – prohibits this Court from answering certified questions. Ordinarily we would begin with the language of our constitution as it presently stands. However, Article IV of our constitution, which in its current state governs the judicial branch, was amended in 1997. Since this Court promulgated the Rules of Appellate Procedure in 1992, we must look back to the state

of our jurisdiction at the time Rule 5 was adopted to determine whether the promulgation of that rule was within our jurisdictional authority.

¶15 Prior to 1997, Article IV, section 3 of our constitution vested in the CNMI legislature the authority to establish a Commonwealth appellate court.[8] Pursuant to its constitutional authority, in 1989, the legislature passed Public Law 6-25, which established this Court. *See* 1 CMC §§ 3101-08. Section 3101 of the Commonwealth Code, entitled "Establishment of the Supreme Court," provides: "There is hereby established, in the judicial branch of the Commonwealth government, the Supreme Court of the Commonwealth of the Northern Mariana Islands." Section 3102 of the Commonwealth Code, entitled "Jurisdiction," provides, in its entirety:

> (a) The Supreme Court has appellate jurisdiction over judgments and orders of the Superior Court of the Commonwealth.
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> (b) The Supreme Court has original but not exclusive jurisdiction to issue writs of mandamus, certiorari, prohibition, habeas corpus, *and all other writs or orders necessary and appropriate to the full exercise of its appellate and supervisory jurisdiction*.
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> (c) The Supreme Court shall have appellate jurisdiction over attorney disciplinary matters.

(emphasis added).

¶16 It was against this legislative backdrop that this Court promulgated the Rules of Appellate Procedure in 1992. Finally, in 1997, the CNMI legislature amended Article IV of the Commonwealth Constitution. *See* Section 2 of House Legislative Initiative 10-3, HS1, HD1 (1997). The purpose of the amendment was to establish the judiciary as a constitutional entity, co-equal with, and independent of the executive and legislative branches of government. House Legislative Initiative 10-3, § 1 ("The current Article IV does not provide constitutional status for the present structure of the courts reorganized pursuant of Public Law 6-25. The Legislature further recognizes that the judicial branch should be established in the Constitution to assure its independence from the executive and legislative branches."). Nothing in the amendment purports

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[8] This provision was in accord with section 203(d) of the Covenant, which provides:

> The *judicial power* of the Northern Mariana Islands will be vested in such courts as the Constitution or laws of the Northern Marian Islands may provide. The Constitution or laws of the Northern Mariana Islands may vest in such courts *jurisdiction* over all causes in the Northern Mariana Islands over which any court established by the Constitution or laws of the United States does not have exclusive jurisdiction.

(emphasis added).

to limit the jurisdiction of this Court. Indeed, Article IV, section 1, as amended, provides that "[t]he judicial power of the Commonwealth shall be vested in a judiciary." Article IV, section 3, as amended, describes the jurisdiction of the Supreme Court and mirrors 1 CMC § 3102 in all material aspects, with the additional provision that "*[t]he supreme court shall have all inherent powers*, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth." NMI Const. art. IV, § 3 (emphasis added). Furthermore, section 3 of House Legislative Initiative 10-3 contained the following continuity of judicial matters provision: "Upon the effective date of Article IV, as amended, . . . all laws, regulations, and rules affecting the judiciary shall continue to exist and operate as if established pursuant to this Article IV, and shall, unless clearly inconsistent, be read to be consistent with Article IV, as amended." Thus, this Court's jurisdiction, as provided in 1 CMC § 3102, remains undisturbed.

¶17 Kabir contends that since neither the constitution nor the Commonwealth Code specifically provide for this Court's jurisdiction over certified questions from the federal courts, that we lack the jurisdiction to entertain such questions. Yet Kabir cites no reported cases that have adopted this restrictive view of constitutional interpretation.[9] Indeed, we have found that the majority of jurisdictions take the opposite view – that "in the absence of a constitutional provision expressly or by necessary implication limiting the jurisdiction of the Supreme Court to those matters expressly conferred upon it . . . [or] expressly conferring upon another court jurisdiction to exercise the judicial power [with respect to certification] . . . , such power may be granted to this court . . . ." *See, e.g.*, *Sunshine Mining Co. v. Allendale Mutual Ins. Co*., 666 P.2d 1144, 1147 (Idaho 1983) (quoting *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735, 742-43 (Fla. 1961)); *In re Elliott*, 446 P.2d 347 (Wash. 1968); *In re Richards*, 223 A.2d 827 (Me. 1966). The majority view holds that unlike the Federal Constitution – which is an instrument of enumerated powers – state constitutions are not grants of power, but limitations upon the branches of state government. *Sun*

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[9] The Missouri Supreme Court has held, in a series of unreported memoranda, that the jurisdiction provided for it under its certification statute went beyond that constitutionally permitted under the state constitution. *See Grantham v. Missouri Dep't of Corrections*, 1990 WL 602159 (Mo. July 13, 1990). Counsel relies on the above cited case for the proposition that any power not specifically mentioned in a state's constitution is withheld. Two points should be made concerning the Missouri Supreme Court's holding in *Grantham*. First, it is an unpublished opinion and should not have been cited to this Court under Rule 51(C) of the Commonwealth Rules of Appellate Procedure, which prohibits the citation of unpublished opinions, decisions, and orders. Second, although this Court certainly respects the right of the Missouri Supreme Court to interpret its state constitution as it sees fit, the court's restrictive theory of constitutional interpretation and its ultimate holding on the jurisdiction issue seem to be in the extreme minority. In fact, this Court was unable to find any other jurisdiction supporting the Missouri Supreme Court's position.

Ins. Office, Ltd., 13 So.2d at 741-42. In other words, all powers not expressly limited by a state constitution inhere in the people of that state and "[i]t is a fundamental principle of constitutional law that each department of government . . . 'has without any express grant, the inherent right to accomplish all *objects naturally within the orbit of that department*, not expressly limited by the fact of the existence of a similar power elsewhere or the express limitations in the constitution.'" *Id*. (quoting 1 Andrews' American Law (2d Ed.) Sec. 182, p. 22). We agree with the majority view and construe Article IV, section 3 of the NMI Constitution and 1 CMC § 3102 as limiting rather than granting our jurisdiction, *i.e*., all powers not expressly or by natural implication limited by the NMI Constitution, and that are within the natural orbit of the Commonwealth Supreme Court's judicial function, remain with the Court.[10]

¶18 The one reported case that Kabir cites comes from the Utah Supreme Court, which held its certification rule unconstitutional in *Holden v. N L Industries, Inc*., 629 P.2d 428 (Utah 1981), *superseded by statute*, Judicial Article Revision, S.J.R. 1, 1984 Utah Laws 2d S.S. 268, 269, *as recognized in In re West Side Prop. Assocs*., 13 P.3d 168, 170 (Utah 2000). We find the Utah

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[10] Kabir argues that the existence of Article IV, section 11 of the NMI Constitution, entitled "Certified Legal Questions," implicitly exhibits the legislative intent to limit our jurisdiction to the particular type of certified question contemplated by that section. We disagree. While it is a well-settled rule of constitutional interpretation in the CNMI that "[f]or 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 NMI 122, 161 (1991), *rev'd*, 31 F.3d 756 (9th Cir. 1994), we do not believe that the legislature intended to limit our ability to answer unsettled questions of CNMI law certified by the federal courts through NMI Const. art. IV, § 11.

We base this conclusion on two considerations. First, Article IV, section 11 deals with disputes that "arise[] between or among Commonwealth officials who are elected by the people or appointed by the governor regarding the exercise of their powers . . . ." This is a very narrow class of legal questions – questions concerning disputes among our elected or appointed officials – and does not concern the determination of CNMI law in general. The inclusion of section 11 makes further sense when viewed in light of the purpose underlying the amendment of Article IV, which was to make the judiciary a co-equal branch of government and to further establish a system of checks and balances among the branches of the CNMI government. Second, Article IV, section 1 endows the Supreme Court with the "judicial power." Questions submitted by elected or appointed officials concerning their powers or responsibilities traditionally fall outside the scope of what most courts would consider the "judicial function," either because they concern political questions or because the are advisory in nature. Thus, without the express constitutional authority to act outside our judicial function, this Court would not have the authority to address at least some of the questions – advisory in nature – that are contemplated by Article IV, section 11. We further note that the State of Maine has a similar constitutional provision to NMI Const. art. IV, § 11, and when faced with the issue of whether the provision derogated from the Maine Supreme Court's judicial power to hear certified questions, the court held that the provision did not effect its ability to answer questions of unsettled state law certified by the federal courts. *In re Richards*, 223 A.2d 827, 829 (Me. 1966).

We conclude that although Article IV, section 11 is entitled "Certified Legal Questions," the provision deals with a very unique and narrow class of questions, and the power of this Court to assert jurisdiction over and answer unsettled questions of CNMI law submitted by the federal courts would not have logically been considered at the same time.

Supreme Court's holding instructive, and ultimately supports our finding of jurisdiction. In *Holden*, the court examined Article VIII, section 4, of the Utah Constitution,[11] which at the time of the court's decision was comparable to 1 CMC § 3102 and Article IV, section 3 of our own constitution. The critical language in the Utah constitution provided that "[i]n other cases the Supreme Court *shall have appellate jurisdiction only* . . . ." Utah Const. art. 8, § 4 (emphasis added). As the Utah Supreme Court recognized in *Holden*, "[t]he comparable provision in most state constitutions omits the word *only*." 629 P.2d at 430. The court continued its analysis, stating, "[i]n the absence of that negative, the constitutional conferral of appellate jurisdiction would be susceptible to the construction that the court's jurisdiction could be enlarged by an exercise of legislative or judicial power, by law or by court rule." *Id*. Unlike the Utah constitution, neither Article IV, section 3 of our constitution nor 1 CMC § 3102 limit this Court's jurisdiction to *appellate jurisdiction only*. Indeed, the applicable provision of 1 CMC § 3102 vests this Court with jurisdiction over "all other writs or orders necessary and appropriate to the full exercise of its *appellate and supervisory jurisdiction*," and Article IV, section 3 (as amended in 1997) provides that this Court "shall have all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth." Thus, the *Holden* rationale does not persuade us that Rule 5 of the Commonwealth Rules of Appellate Procedure is unconstitutional.

¶19 We also note that 49 states have adopted certification procedures either through court rule or statute,[12] and the District of Columbia,[13] Puerto Rico,[14] and Guam[15] have done likewise.

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[11] Prior to its amendment, Utah Const. art. 8, § 4 provided:

> The Supreme Court shall have original jurisdiction to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus. Each of the justices shall have power to issue writs of habeas corpus, to any part of the State, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the Supreme Court or before any district court or judge thereof in the State. *In other cases the Supreme Court shall have appellate jurisdiction only*, and power to issue writs necessary and proper for the exercise of that jurisdiction. (Emphasis added).

[12] North Carolina is the only state left to enact a certification procedure. *See* Rebecca A. Cochran, *Federal Court Certification of Questions of State Law to State Courts: A Theoretical and Empirical Study*, 29 J. Legis. 157, 159 n.13 (2003) (identifying Arkansas, New Jersey, and North Carolina as the only states that had note adopted certification procedures as of 2002). Arkansas and New Jersey have since adopted a court rule providing for certification procedures. *See* Ark. Sup. Ct. R. 6-8; N.J. R. App. P. 2:12A-1 to A-8. It should also be noted that although the Missouri legislature has enacted a certification statute, in an unreported opinion the Missouri Supreme Court held that answering certified questions would be unconstitutional. *Grantham v. Mo. Dep't of Corr*., 1990 WL 602159 (Mo. July 13, 1990).

[13] D.C. Code § 11-723 (2001); D.C. Ct. App. R. 22.

Where the authority of the state high court to entertain certified questions has been challenged and litigated, the court's power has been upheld in every reported case but one,[16] and in the majority of those cases the authority has been held to derive from the court's inherent judicial power to render decisions reflecting the law of the state in which the court sits. *See, e.g.*, *Sun Ins. Office, Ltd. v. Clay*, 133 So.2d 735 (Fla. 1961); *In re Richards*, 223 A.2d 827 (Me. 1966); *Irion v. Glens Falls Ins. Co*., 461 P.2d 199 (Mont. 1969); *In re Elliott*, 446 P.2d 347 (Wash. 1968); *Sunshine Mining Co. v. Allendale Mutual Ins. Co*., 666 P.2d 1144 (Idaho 1983).

¶20 In *In re Elliott*, the Washington Supreme Court faced the issue of whether its certification statute extended the court's jurisdiction beyond the parameters of the state constitution. 446 P.2d at 350. Like Article IV, section 3 of the NMI Constitution, the Washington constitution provided that "[t]he [Washington] supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. *Id*. at 351; s*ee also* Wash. Const. art. IV, § 4. Relying on its inherent powers, the court stated:

> So patent is the power of a court to render an opinion in response to a certified question that New Hampshire has adopted the practice by court rule, not waiting for the expression of legislative approval of the idea . . . .
>
> This court, under its rule-making power . . . [citation omitted] could do as the Supreme Court of New Hampshire has done. It could also accept a certified question and respond to it even if there were no implementing statute or rule. It is within the inherent power of the court as the judicial body authorized by the constitution to render decisions respecting the law of this state.

In re Elliott, 446 P.2d at 358.

¶21 Like the supreme courts of Washington (*In re Elliott*, 446 P.2d 347), Florida (*Sun Insurance Office, Ltd*., 133 So.2d 735), and Idaho (*Sunshine Mining Co*., 666 P.2d 1144), the Maine Supreme Court derived its authority to entertain certified questions from its inherent judicial power. *See In re Richards*, 223 A.2d 827 (Me. 1966). In *In re Richards*, the Maine

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[14] P.R. Laws Ann. tit. 4, § 24s(f) (2003); P.R. Sup. Ct. R. 23.

[15] Guam R. App. P. 20(b).

[16] *Holden v. N L Industries, Inc*., 629 P.2d 428 (Utah 1981), *superseded by statute*, Judicial Article Revision, S.J.R. 1, 1984 Utah Laws 2d S.S. 268, 269, *as recognized in In re West Side Prop. Assocs*., 13 P.3d 168, 170 (Utah 2000) (holding that the Utah Supreme Court lacked jurisdiction under the state constitution to entertain certified questions).

Supreme Court stated that "[n]o specific or precise definition of 'judicial power' is found in the constitution or laws of the State; but the phrase is commonly employed to designate that department of government which it was intended should interpret and administer the laws and decide private disputes between or concerning persons." *Id*. at 829 (internal quotations omitted). The court ultimately went on to hold that "our participation in the certification procedure will constitute a valid exercise of 'judicial power.'" *Id*. at 832.

¶22 The case law from the several States is replete with descriptions of the "judicial power," and the United States Supreme Court itself has invoked the judicial power to justify its supervisory jurisdiction over inferior courts. *See*, e.g., *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991) ("It has long been understood that '[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with a Court, because they are necessary to the exercise of all others.'") (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). This Court too has recognized and invoked its inherent judicial power. *See Atalig v. Commonwealth Superior Court*, 2008 MP 19. From our reading and review of the cases, both within and outside our jurisdiction on the subject of inherent judicial power, we find that answering certified questions is an exercise of the judicial function commensurate with our position as the high court of the Commonwealth. As the Ninth Circuit has stated on multiple occasions, "The CNMI Supreme Court is . . . the ultimate expositor of local Northern Mariana law." *Castro v. Hotel Nikko Saipan*, 96 F.3d 1259, 1261 (9th Cir. 1996) (internal quotations omitted); *Ferreira v. Borja*, 1 F.3d 960, 962 (9th Cir. 1993). The judicial power has been defined as the power "to declare the law and define the rights of the parties under it." *People v. Bird*, 300 P. 23, 26 (Cal. 1931). "It is the power to hear and determine controversies between adverse parties and questions in litigation." *Id*. Perhaps most importantly for the purposes of this case, it has been held that the interpretation of a statute by a state's highest court is the quintessential exercise of the judicial power. *See Bodinson Mfg. Co. v. California Employment Comm*., 109 P.2d 935, 939 (Cal. 1941).

¶23 At the time Rule 5 of the Rules of Appellate Procedure was adopted this Court derived its authority to entertain certified questions from section 403 of the Covenant, which makes CNMI law applicable in the federal courts and sections 3101-3102 of the Commonwealth Code, which created this Court and endowed it with broad jurisdiction over "all other writs or orders necessary and appropriate to the full exercise of its appellate and supervisory jurisdiction." 1 CMC § 3102(b). This language is much broader than the limiting language found in the Utah constitution and we find encompasses this Court's authority to interpret CNMI law, including questions of law that come to us through certified questions from the federal courts.

¶24 Given the absence of limiting language in our constitution, and in light of the rule of constitutional construction that all powers not expressly withheld inhere to the people of the state – either through the legislature as the law making branch of government or through the judiciary as the branch of government that interprets the law – we hold that the Commonwealth Supreme Court possesses all inherent powers to accomplish all objects naturally within the sphere of its governmental duties. In this case, those powers include interpreting NMI law and making binding decisions over parties bound by the laws of our jurisdiction. We exercised this inherent power in adopting NMI R. App. P. 5 in 1992. This is not to say that Rule 5 acts as the source of our jurisdiction to entertain certified questions. The Appellate Rules specifically state that "these rules do not expand our jurisdiction." NMI R. App. P. 1(a). Rather than acting as a source of our jurisdiction, Rule 5 acts as a procedural mechanism – validly promulgated through this Court's preexisting jurisdictional authority – for the federal courts to submit unsettled questions of CNMI law at issue in their courts.

III

Certified Questions

¶25 In 2006, the CNMI legislature enacted the Commonwealth Employees Liability Reform and Tort Compensation Act ("CELRTCA"). PL 15-22 (codified at 7 CMC §§ 2201-2210). As its name indicates, CELRTCA is modeled after the Federal Employees Liability Reform and Tort Compensation Act of 1988, commonly known as the Westfall Act, and both statutes accord government employees absolute immunity from common law tort claims arising out of acts undertaken during the course of their official duties. The Westfall Act's stated purpose was to "protect Federal employees from personal liability for common law torts committed within the scope of their employment, while providing persons injured by the common law torts of Federal employees with an appropriate remedy against the United States." Pub. L. No. 100-694, § 2(b). In the words of the U.S. Supreme Court, the purpose of the Westfall Act "is to relieve covered employees from the cost and effort of defending the lawsuit, and to place those burdens on the Government's shoulders [alone]." *Osborn v. Haley*, 549 U.S. 225, 252 (2007). As a means to achieve this purpose, the Westfall Act provides federal employees with immunity from ordinary tort suits if the complained of conduct arises out of acts performed within the scope of the defendant employee's employment. 28 U.S.C. § 2679(d)(1). Finding the federal statutory scheme for cutting government employee litigation costs attractive, the CNMI legislature enacted

CELRTCA – adopting almost verbatim the language of the Westfall Act.[17] In enacting CELRTCA, the CNMI legislature specifically referenced the Westfall Act, stating "[t]hese proposed amendments to the Commonwealth Government Liability Act would accomplish the same purpose for the Commonwealth." In other words, the purpose of CELRTCA, like its federal counterpart, is to eliminate litigation costs incurred by Commonwealth employees for allegedly tortious actions undertaken within the scope of employment. P.L. 15-22, § 2.

¶26 When a Commonwealth employee is sued for wrongful or negligent conduct, CELRTCA, like the Westfall Act, empowers the Attorney General to certify that the employee "was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose." 7 CMC § 2210 (28 U.S.C. § 2679 in the federal context). Under the Westfall Act, the scope of employment determination is governed by the rules of respondeat superior of the state in which the wrongful conduct occurred, *Doggett v. United States*, 875 F.2d 684, 686 (9th Cir. 1989), and under CELRTCA, the scope-of-employment determination is governed by the respondeat superior law of the CNMI. *See Castro v. Hotel Nikko Saipan, Inc*., 4 NMI 268 (1995). Under both statutes, upon the Attorney General's certification, the employee is dismissed from the action, and the government is substituted as the defendant in place of the government employee. 7 CMC § 2210(a) (28 U.S.C. § 2679(d)(1) in the federal context). Once the government has been substituted as the defendant in place of the employee, the litigation is thereafter governed by the Government Liability Act under CELRTCA (or the Tort Claims Act in federal actions). 7 CMC § 2210(c) ("Upon certification, any action or proceeding shall proceed in the same manner as any other action against the Commonwealth and shall be subject to the limitations and exceptions applicable to those actions.") (28 U.S.C. § 2679(d)(4) in the federal context).

¶27 Given the atypical posture of the present proceeding in which an order has been issued by the District Court and that order is now on appeal at the Ninth Circuit Court of Appeals, before proceeding, we address a preliminary matter of particular importance. This Court is not reviewing the decision of the District Court. We have neither been asked by the Court of Appeals, nor do we possess jurisdiction to review the District Court's decision. That is the province of the federal Court of Appeals. While the second certified question necessarily implicates the District Court's legal conclusion, we only refer to the court's decision inasmuch as it provides context for our own answer. As a related matter, Kabir contends that the second

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[17] *See* Appendix: Excerpts From The Commonwealth Employees Liability Reform and Tort Compensation Act of 2006, 7 CMC §§ 2208, 2210; Appendix: Excerpts From The Westfall Act, 28 U.S.C. § 2679.

certified question should logically be addressed first and that if this Court were to adopt the reasoning of the District Court, our answer to the second question would be dispositive of the first. This contention may be true if (1) we agreed with the District Court's interpretation of CNMI law, and (2) we were reviewing the District Court's decision as an appellate court. Neither proposition is true. Rule 5 of the Commonwealth Rules of Appellate Procedure requires certified questions to be "distinct and definite." NMI R. App. P. 5(a). We find that the Court of Appeal's questions are distinct, that neither is dispositive of the other, and we answer them in the order they have been presented.

A. *Reviewability of Scope-of-Employment Certification*

¶28 When a Commonwealth employee is sued for a wrongful or negligent act, CELRTCA empowers the CNMI Attorney General to certify that the employee "was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose . . . ." 7 CMC § 2210(a). Once certification is given, the claim "shall be deemed an action against the Commonwealth." *Id*. If the original action was one for negligence, then the government is simply substituted as the defendant and the suit proceeds under the Government Liability Act. 7 CMC § 2210(c). If however, an exception to the Government Liability Act shields the Commonwealth from suit, the plaintiff may be left without a tort action against any party. *See* Part C, *infra*; *see also*, *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 420 (1995) (interpreting the Westfall Act). Thus, in certain circumstances involving intentional torts, the CNMI Attorney General's scope-of-employment certification would be dispositive of the plaintiff's suit. The question we address here is whether the CNMI Attorney General's scope-of-employment certification is judicially reviewable. Although we have not been asked by the Court of Appeals to specifically address this question, the answer is critical to our interpretation of CELRTCA, and in turn, to our answers to both certified questions. We also note that given our answers to the certified questions, the case may ultimately be remanded to the District Court to make further factual findings. Given this awkward state of procedural affairs, for the reasons set forth below, we first hold that the CNMI Attorney General's scope-of-employment certification under CELRTCA is judicially reviewable by the trial court.

¶29 Like the Westfall Act, CELRTCA is silent on the issue of whether the Attorney General's scope-of-employment certification is judicially reviewable.[18] In *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417 (1995), addressing this very issue, the United States Supreme Court held

[18] Both statutes provide that if the Attorney General refuses to certify scope of employment that "the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his[] office or employment." 7 CMC § 2210(b); 28 U.S.C. § 2679(d)(3).

that scope-of-employment certifications are judicially reviewable. In that case, the plaintiffs brought a negligence action against a special agent of the United States Drug Enforcement Administration in his individual capacity, for injuries and property damage caused by an automobile accident. *Id*. at 421. The accident occurred in Colombia and the plaintiffs alleged that at the time of the accident the special agent was intoxicated. *Id*. The U.S. Attorney General certified that the allegedly negligent federal employee was acting within the scope of his employment at the time of the episode in suit. *Id*. at 420. Like the Commonwealth Government Liability Act, the Federal Tort Claims Act contains certain exceptions to its general waiver of immunity. *See* 7 CMC § 2204 and 28 U.S.C. § 2680. Specifically, § 2680(k) of the Federal Tort Claims Act provides that the government shall not be liable for "[a]ny claim arising in a foreign country." Since the accident occurred in Colombia, if the government had properly been substituted as the sole defendant under the Westfall Act, then the government could assert immunity and the plaintiffs would be left without a remedy. The Supreme Court summarized the predicament as follows: "in this case, substitution of the United States would cause the demise of the action: [Plaintiffs'] claims 'arose in a foreign country,' and thus fell within an exception to the [Federal Tort Claims Act] waiver of the United States' sovereign immunity . . . . Nor would the immunity of the United States allow [the plaintiffs] to bring [the government employee] back into the action." *Id*. at 422 (citations omitted).

¶30 The Supreme Court in *Lamagno* based its holding that the Attorney General's scope-of-employment certification was reviewable on two considerations. First, the Court expressed concern for the apparent conflict of interest involved with the Attorney General's certification in cases where the government retains immunity. As the Court noted, in the cases where the government retains immunity and the Attorney General issues certification, the Attorney General, in effect "sits as an unreviewable 'judge in her own cause'; she can block [the plaintiff's] way to a tort action in court, at no cost to the federal treasury, while avoiding litigation in which the United States has no incentive to engage, and incidentally enhancing the morale – or at least sparing the purse – of the federal employees." *Id*. at 429. Put simply, when the Attorney General issues certification in cases where the government retains immunity, he not only ends the case for the government employee, he also ends the case for the government as well; the case is over – period. The Court did not see this problem as insubstantial, indicating that the argument for unreviewability implicated, and undermined, the underlying principles of a democratic form of government. *Id*. at 428 ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . .")

(quoting The Federalist No. 10, p. 79 (C. Rossiter ed. 1961) (internal quotation marks omitted). The Court then went on to hold that as a matter of statutory construction, judicial review "will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id*. at 424 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)).

¶31 We share the concern that the CNMI Attorney General's scope-of-employment certification power under § 2210 of CELRTCA creates an inherent conflict of interest in cases where the Commonwealth retains immunity. The problem is even more acute in the CNMI where government employees are more likely to work together on a daily basis and know one another. Furthermore, like the United States Supreme Court, as a matter of statutory construction, we will not lightly infer legislative intent to strip judicial review without statutory language indicating that such was the purpose of the legislature. Thus, as a matter of statutory construction and due to the Attorney General's inherent conflict of interest in the situation present in this case, we hold that the Attorney General's scope-of-employment certification under 7 CMC § 2210 is subject to judicial review.[19]

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[19] In the only CNMI case interpreting CELRTCA, the Commonwealth Superior Court assumed that the CNMI Attorney General's scope-of-employment certification under 7 CMC § 2210 is judicially reviewable and even adopted a procedural framework for reviewing such certifications. *Owens v. Saccomanno*, Civ. No. 04-0288E (NMI Super. Ct. Sept. 28, 2006) (Order Setting Procedural Guidelines for Judicial Review of Attorney General Certification Under PL 15-22). In its order, the superior court sets forth the following law governing certification review:

> The Attorney General's certification is subject to de novo review in the trial court. *Green v. Hall*, 8 F.3d 695, 698 (9th Cir. 1993) ("The Attorney General's decision regarding scope of employment certification is subject to de novo review in both the district court and on appeal."). The trial court should apply respondeat superior principles of state law when reviewing the certification. *McLachlan v. Bell*, 261 F.3d 908, 911 (9th Cir. 2001). The party seeking review of the certification bears the initial burden of proof and must present evidence sufficient to disprove certification by a preponderance of the evidence. *Green*, 8 F.3d at 698. The Attorney General's certification is prima facie evidence that the employee was acting within the scope of his employment. *Billings v. United States*, 57 F.3d 797, 800 (9th Cir. 1995). The trial court is authorized, but not required, to hold a hearing to resolve disputed factual issues. *Pelletier v. Fed. Home Loan Bank*, 968 F.2d 865, 874 (9th Cir. 1992). A hearing should not be held where certification, pleadings, affidavits, and any supporting documentary evidence do not reveal any disputed issues of material fact as to scope of employment. *Gutierrez de Martinez v. Drug Enforcement Admin.*, 111 F.3d 1148, 1155 (4th Cir. 1997).

B. *The CNMI Attorney General May Issue Scope-of-Employment Certification under CELRTCA Based on the Factual Determination that the Alleged Tortious Conduct Did Not Occur*

¶32 The first question of law submitted by the Court of Appeals asks whether "[CELRTCA] cover[s] employees accused of misconduct when the CNMI Attorney General certifies that the alleged misconduct did not take place at all[.] That is, does CNMI law follow the Supreme Court's decision in *Osborn v. Haley*, 549 U.S. 225 (2007)?" The short answer is "yes."

¶33 The above question is a matter of statutory interpretation, and like all matters of statutory interpretation, our analysis begins with the language of the statutory text. *Commonwealth v. Taisacan*, 1999 MP 8 ¶ 6 ("A basic rule of statutory interpretation is that courts must first look at the language of the statute . . . .") Section 2210(a) of CELRTCA provides that in order to trigger employee immunity and government substitution, the CNMI Attorney General must certify that the defendant government employee "was acting within the scope of his/her office or employment *at the time of the incident out of which the claim arose*." 7 CMC § 2210(a) (emphasis added). The Westfall Act contains an identical provision with the exception that it omits the gender neutral "his/her" when referring to government employees. 28 U.S.C. § 2679(d)(1). Read naturally, the italicized language seems to assume some kind of incident. Given this facially valid reading, the minority Federal Circuit view prior to the Supreme Court's holding in *Osborn*, was that in making scope-of-employment certifications under the Westfall Act, the Attorney General must assume an incident and could not base certification on the factual determination that the alleged incident never occurred. *See Wood v. United States*, 995 F.2d 1122 (1st Cir. 1993). In *Wood*, the First Circuit flushed out the issue by positing the following scenario: "Suppose a plaintiff claims that a federal employee committed acts clearly outside the scope of employment, as here, where the plaintiff has alleged sexual harassment amounting to 'assault and battery.' Can the Attorney General certify that there simply was no such event?" 995 F.2d at 1123. As the First Circuit stated in *Wood*, "[t]he legal question is important, for, where a plaintiff alleges a serious intentional tort, say assault or rape, . . . the answer will affect the plaintiff's right to a jury trial. A 'yes' answer means that the Attorney General . . . will decide whether or not the alleged assault occurred. A 'no' answer reserves the basic factual issues for jury, in effect, maintaining the plaintiff's Seventh Amendment right to a trial by jury in 'Suits at common law.'" *Id*. Based on this concern, the First Circuit held that in deciding whether to issue scope-of-employment certification under the Westfall Act, the Attorney General must presume that the alleged incident took place. *Id*. at 1129. In other words, under the First Circuit's reading of the statute, the Attorney General could not issue certification if the government employee denied the incident.

¶34 In *Osborn v. Haley*, 549 U.S. 225 (2007), the United States Supreme Court addressed the issue, and contrary to the First Circuit's holding in *Wood*, the Court held that "Westfall Act certification is proper when a federal officer charged with misconduct asserts, and the Government determines, that the incident or episode in suit never occurred." *Id*. at 247. The Court's holding in *Osborn* was guided by two principles. First, that the interpretation adopted by the First Circuit would produce absurd results where the government employee denies any wrongdoing and would ultimately run counter to the purpose of the statute. *Id*. at 248. Second, the danger indentified by the First Circuit – that certification in cases where the defendant denied wrongdoing would place the fact finding responsibilities traditionally reserved to juries in the hands of the Attorney General alone – was alleviated by the fact that certification is judicially reviewable under *Lamagno*. *Id*. at 252. That is, if the trial court is concerned that the Attorney General's scope-of-employment certification (based on the government employee's denial of the incident) might leave an injured plaintiff without a remedy – such as the District Court in the present case – then the trial court is free to review the Attorney General's certification. Given the similarity of the statutory language and the congruent purposes of both statutes, we find the Supreme Court's interpretation of the Westfall Act persuasive and using similar reasoning we reach a similar result.

¶35 Section 2210(a) of CELRTCA allows the CNMI Attorney General to issue certification upon the finding "that the defendant employee was acting within the scope of his/her office or employment *at the time of the incident out of which the claim arose*." Kabir asks this Court to interpret the italicized language as requiring the Attorney General to assume for the purposes of certification that an incident did in fact occur. While this argument has a certain facial appeal, we are guided by the rule of statutory construction that "[a] court should avoid interpretations of a statutory provision which would defy common sense [or] lead to absurd results. *Commonwealth Ports Auth. V. Hakubotan Saipan Enterprises*, 2 NMI 212, 224 (1991). Under Kabir's interpretation, if the defendant employee denies the alleged tortious incident ever occurred, the Attorney General would be prohibited from issuing certification. We decline to adopt this interpretation. To illustrate, suppose that Bus Driver A, who works for the CNMI Public School System, has too much to drink one afternoon at lunch.[20] Further suppose that while dropping off the school children that afternoon the driver negligently collides with another vehicle, seriously injuring the driver of that car and some of the school children. If the injured parties sue the bus driver and the bus driver admits to the Attorney General that he was negligently driving while on

[20] For this hypothetical we assume that the bus driver is a government employee within the meaning of 7 CMC § 2210.

school business, under 7 CMC § 2210, the Attorney General would certify that the bus driver was acting within the scope of his employment at the time of the incident, the Commonwealth would be substituted as defendant, and the bus driver would be immune from suit. Now suppose, in a completely unrelated case, that Bus Driver B, who also works for the CNMI Public School System, is sued for allegedly sexually assaulting one of the school children on the bus during the bus driver's regular route. Further assume that Bus Driver B is factually innocent and denies that the event ever happened. Under Kabir's interpretation of CELRTCA, Bus Driver A – who admitted to wrongdoing – would receive immunity, while Bus Driver B – who is factually innocent – would be forced to incur the litigation costs of defending himself. We refuse to sanction this absurd result.

¶36 As the Supreme Court stated in *Osborn*, "it would make scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself when he denies wrongdoing." 549 U.S. at 248. "[I]t is illogical to assume that Congress intended to protect guilty employees but desert innocent ones." *Heuton v. Anderson*, 75 F.3d 357, 360 (8th Cir. 1996). CELRTCA applies to claims for "negligent or wrongful" acts, which encompasses intentional torts, undertaken by government employees within the scope of their employment. *See* 7 CMC § 2208(b)(1). We expect, and the legislature must have anticipated, that in some of those cases the government employee would deny wrongdoing. We hold that the CNMI legislature did not, through the enactment of CELRTCA, command that innocent government employees be left outside of the certification/immunity provisions contained in 7 CMC § 2210.

¶37 We recognize that by authorizing scope-of-employment certification in 7 CMC § 2210, the CNMI legislature created a structure by which immunity-related issues would be decided at the earliest opportunity saving litigation costs for the parties on both sides, including the government. However, like the Supreme Court in *Osborn*, we profess concern over any law that takes factual determinations away from the jury. *See* 549 U.S. at 251-52 ("Tugging against our reading of the Westfall Act, we recognize, is a 'who decides' concern."). This problem is particularly acute in situations such as the case now before the Court where the plaintiff has alleged a tort for which the government retains immunity because the Attorney General's certification (based on the finding that the incident never occurred) essentially decides the case on the merits and functionally bars the plaintiff from seeking any relief.[21] "This is not a small

[21] Speaking to the frequency with which this particular problem arises in federal court, the Court in *Osborn* stated:

> The overlap of certification validity and the merits of the plaintiff's claim, evident here, is uncommon. It is unlikely to occur when the

objection, for the issue that goes to the heart of the merits, as well as to the validity of the certificate, will likely turn on the credibility of [the plaintiff and the defendant], and credibility may be well suited for jury resolution." *Osborn*, 549 U.S. at 251-52 (internal quotation marks omitted). But, like the Court in *Osborn*, we find that this problem is ameliorated by our holding today that the Attorney General's scope-of-employment decision is judicially reviewable.

¶38 Thus, in answer to the first question submitted by the Court of Appeals, we hold that under 7 CMC § 2210(a), the CNMI Attorney General may issue scope-of-employment certification based on the factual conclusion that the alleged incident did not occur. This holding is subject to the caveat that, like federal law, under CELRTCA the Attorney General's certification is subject to judicial review.

C. *CELRTCA Covers Government Employees Sued for Negligent or Wrongful Conduct Arising From Actions Taken Within the Scope of Employment – Including Intentional Torts – But Under CNMI Law, Intentional Torts Will Ordinarily Fall Outside the Scope of Employment*

¶39 The second question of law submitted by the Court of Appeals asks: "Does CELRTCA cover employees accused of sexual assault and battery, a tort traditionally understood to occur outside the scope of employment?" We read this question as encompassing two related, but separable, questions.[22] First, whether the District Court was correct in its legal conclusion that CELRTCA scope-of-employment certification is only available in claims involving negligence because 7 CMC § 2204 provides government immunity for claims of assault and battery. In other words, the first sub-question is whether the CNMI Attorney General can issue scope-of-employment certification (which results in the substitution of the government as the sole defendant) only when the Government Liability Act in fact provides a remedy for the alleged tortious conduct. In the second part of the second certified question we address the substantive law governing "scope of employment" in the CNMI. For the reasons discussed below, we hold

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> plaintiff alleges negligent conduct . . . . And even when the plaintiff alleges an intentional tort, it may be possible to resolve the scope-of-employment question without deciding the merits of the claim. If a plaintiff charges a federal employee with sexual assault, for example, upon determining that there was sexual contact, a district court could find that the employee acted outside the scope of his duties, leaving the question whether the contact was consensual for jury resolution.

549 U.S. at 252 n. 15.

[22] Although this Court has not had occasion to address the question, other jurisdictions have held, and we now follow suit in holding that when appropriate, we are empowered to exercise our discretion to reframe the certified questions before us so as to provide the guidance actually sought. *See Shorts v. Bartholomew*, 278 S.W.3d 268 (Tenn. 2009) (citing 17A Wright, et al., Federal Practice and Procedure, Jurisdiction 3d § 4248 n. 67 and accompanying text (Westlaw 2009)).

that CELRTCA scope-of-employment certification is not limited to negligence claims. We further hold that the scope-of-employment determination under 7 CMC § 2210 is governed by the common law as expressed in the Restatement of Agency. *See Castro v. Hotel Nikko Saipan, Inc.*, 4 NMI 268 (1995) ("In the absence of contrary statutory or customary law, this Court applies the common law as expressed in the Restatements.") (citing 7 CMC § 3401).

1. *CELRTCA is Not Limited to Negligence Claims*

¶40 The District Court's legal conclusion that 7 CMC § 2210 does not apply to intentional torts misinterprets the interplay between the Government Liability Act and CELRTCA. The Government Liability Act provides that "[t]he Commonwealth government shall be liable in tort for damages arising from the negligent acts of employees of the Commonwealth acting within the scope of their office or employment." 7 CMC § 2202(a). In other words, § 2202 creates government liability if there is (1) "damages" (2) "arising from" (3) "the negligent acts of [Commonwealth] employees" (4) acting within the scope of their office or employment. The Government Liability Act also establishes government immunity for certain claims.[23] Section 2204 provides that "[t]he government is not liable for…. (b) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 7 CMC § 2204(b). This statutory scheme, both creating and limiting government liability, tracks the Federal Tort Claims Act.[24]

¶41 When the CNMI legislature enacted CELRTCA, it in effect created a type of respondeat superior immunity for government employees that roughly tracks the Commonwealth's immunity under the Government Liability Act. The key provisions of CELRTCA are §§ 2208 and 2210.

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[23] It is unsettled whether the Commonwealth enjoys sovereign immunity under the Eleventh Amendment of the U.S. Constitution. Section 501 of the Covenant, which enumerates specific provisions of the U.S. Constitution applicable within the Commonwealth, does not mention the Eleventh Amendment. Based on this omission, the Ninth Circuit has held that the Commonwealth cannot invoke Eleventh Amendment sovereign immunity in federal court for claims arising from federal law. *See Fleming v. Department of Pub. Safety*, 837 F.2d 401, 406 (9th Cir. 1988). While we disagree with the holding in *Fleming*, particularly given the U.S. Supreme Court's holding in *Alden v. Maine*, 527 U.S. 706 (1999) that sovereign immunity derives not from the Eleventh Amendment but from the existence of each state as a sovereign entity in the federal system, our interpretation of CELRTCA is not premised on the notion that the Commonwealth enjoys sovereign immunity. Although we assume that the Commonwealth does enjoy sovereign immunity, (*see Sablan v. Tenorio*, 4 NMI 351, 359 n. 12 (1996)), we need not specifically address the issue for the purposes of this opinion because the Government Liability Act statutorily creates and limits governmental immunity.

[24] *Compare* 7 CMC § 2202 *with* 28 U.S.C. § 1346(b) (creating government liability "for injury … caused by the negligent or wrongful act or omission of any employee … while acting within the scope of his office or employment") *and* 7 CMC § 2204 *with* 28 U.S.C. § 2680 (providing that the provisions of section 1346(b) "shall not apply to … (h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights").

Section 2208 provides that "[t]he remedy against the Commonwealth provided for by this Title for injury … arising or resulting from the negligent or wrongful act or omission of any employee of the Commonwealth while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages." 7 CMC § 2208. Section 2210 provides in relevant part that:

> [1] Upon certification by the Attorney General that the defendant employee was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose,
>
> [2] any civil action … shall be deemed an action against the Commonwealth and the Commonwealth shall be substituted as the party defendant[,] … [and]
>
> …
>
> [3] Upon certification, any action or proceeding shall proceed in the same manner as any other action against the Commonwealth and shall be subject to the limitations and exceptions applicable to those actions.

7 CMC § 2210(a), (c).

¶42 However, like the federal scheme, the Commonwealth's liability under the Government Liability Act is not perfectly congruent with the government employee's immunity under CELRTCA. *See Wood*, 995 F.2d at 1126. The Government Liability Act contains exceptions and limitations that CELRTCA does not; key amongst them is the exception for assault and battery. 7 CMC § 2204. In other words, there is a statutory gap. It is conceivable, but not probable, that a Commonwealth employee could commit an intentional tort within the scope of his or her employment, receive certification from the Attorney General, and the injured party would then be barred from recovery under 7 CMC §§ 2210(c) and 2204. We do not find that this statutory gap was an oversight on the part of Congress in enacting the Westfall Act or on the part of the CNMI legislature when it adopted CELRTCA. First, 7 CMC § 2210(c) makes clear that once certification issues and the government is substituted, the suit "shall proceed in the same manner as any other action against the Commonwealth," which includes government immunity for intentional torts. Second, as discussed below, it would be a rare occasion – and likely not the occasion in this case, though we do not pass judgment on the limited facts before us – that a government employee commits an intentional tort that is within the scope of his or her employment. If the intentional tort is committed outside the scope of employment, then

CELRTCA certification is not proper and the injured party may sue the government employee in his or her individual capacity.

¶43 The legislature made perfectly clear that CELRTCA applies to "negligent *or wrongful*" conduct – which includes intentional torts – but, the tortious conduct (whether negligent or intentional) must be within the scope of employment in order for certification to be proper. *See e.g.*, *Lee v. United States*, 171 F. Supp. 2d 566 (M.D. N.C. 2001) (holding alleged assaults by government employees as wrongful conduct within the scope of employment for purposes of the Westfall Act); *Coleman v. United States*, 91 F.3d 820 (6th Cir. 1996) (holding harassment by government employee as wrongful conduct within the scope of employment for purposes of the Westfall Act). For the above reasons we hold that CELRTCA is not limited to negligence claims, but whatever the nature of the tortious conduct at issue, it must be "within the scope of employment" for certification to be proper. Our interpretation comports with the United States Supreme Court's interpretation of the interplay between the Federal Tort Claims Act and the Westfall Act. *See United States v. Smith*, 499 U.S. 160 (1991) (holding that "[t]he 'limitations and exceptions' language in [the Westfall Act] persuades us that Congress recognized that the required substitution of the United States as the defendant in tort suits filed against Government employees would sometimes foreclose a tort plaintiff's recovery altogether").

2. *CNMI Law Governing Scope of Employment*

¶44 The second certified question asserts that "sexual assault and battery," is "a tort traditionally understood to occur outside the scope of employment." Although scope of employment is determined on a case-by-case basis, as a general matter, the Court of Appeal's assertion holds true under Commonwealth law. In an effort to fully answer the certified questions, and in recognition that Commonwealth law has not fully addressed the issue, we set forth the law applicable to the scope-of-employment determination here.

¶45 Under the Westfall Act, the scope-of-employment determination is governed by the rules of respondeat superior of the state in which the wrongful conduct occurred. *Doggett v. United States*, 875 F.2d 684, 686 (9th Cir. 1989). In the CNMI, scope of employment is governed by the Restatement of Agency. *See* 7 CMC § 3401; *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 55 (1993) ("In the Commonwealth, the rules of the common law as expressed in the Restatements of the Law as approved by the American Law Institute serve as the applicable rules of decision, in the absence of written or local customary law to the contrary."). Section 7.07 of the Restatement (Third) of Agency provides:

> (1) An employer is subject to vicarious liability for a tort committed by its employee acting within the scope of employment.

> (2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

¶46 Although § 7.07 of the Restatement (Third) of Agency does not specifically mention intentional torts, courts have set forth the following factors to determine whether an employee's intentional tort falls within the scope of employment:

> (1) the conduct was similar to that which the employee was hired to perform;
>
> (2) the action occurred substantially within the authorized spatial and temporal limits of employment;
>
> (3) the action was in furtherance of the employer's business; and
>
> (4) the conduct, though unauthorized, was expectable in view of the employee's duties.

See e.g., *Coleman v. United States*, 91 F.3d 820, 823-24 (6th Cir. 1996) (applying Kentucky law); *Wong-Leong v. Hawaiian Independent Refinery, Inc.*, 879 P.2d 538 (Haw. 1994); *Randolph v. Budget Rent-A-Car*, 97 F.3d 319 (9th Cir. 1996) (applying California law); *Spencer v. Assurance Co. of America*, 39 F.3d 1146 (11th Cir. 1994) (applying Florida law).

¶47 Finally, we note that the majority view holds that intentional and criminal actions, such as sexual assaults are not "within the scope of employment" because they "are generally not due to the employee's desire to benefit, serve, or further the employer's interest and are not committed in furtherance of an employer's business." *See Andrews v. United States*, 732 F.2d 366 (4th Cir. 1984) (applying South Carolina law); *Doe v. Samaritan Counseling Center*, 791 P.2d 344 (Alaska 1990); *Mountain v. Southern Bell Tel. & Tel. Co.*, 421 S.E.2d 284 (1992); *But see, Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (applying Washington law and holding a mental health care counselor was acting within the scope of his employment at the time he wrongfully engaged a patient in a sexual relationship).

¶48 Based on the principles set forth above, although we make no factual determinations concerning the present case, we hold that barring unusual circumstances, sexual assault and battery is not within the scope of employment under CNMI law.

III

Conclusion

¶49 For the above stated reasons, we hold that this Court has jurisdiction to entertain certified questions from the federal courts and provide the following answers to the Court of Appeals certified questions:

As to question one, we hold that the CNMI Attorney General may issue scope-of-employment certification under CELRTCA based on the factual determination that the alleged tortious conduct did not occur subject to the caveat that certification is subject to judicial review. That is, CNMI law follows the U.S. Supreme Court's decision in *Osborn v. Haley*, 549 U.S. 225 (2007).

As to question two, we hold that CELRTCA covers government employees sued for negligent or wrongful conduct arising from actions taken within the scope of employment – including intentional torts – but under CNMI law, intentional torts will ordinarily fall outside the scope of employment.

SO ORDERED this 31st day of December 2009.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice

Appendix: Excerpts From The Commonwealth Employees Liability Reform and Tort Compensation Act of 2006, 7 CMC §§ 2208, 2209, 2210.

§ 2208. Exclusiveness of Remedy.

(a) The authority of any Commonwealth agency to sue or be sued in its own name shall not be construed to authorize suits against such agency or its employees on claims which are cognizable under this Title and the remedies provided by this Title in such cases shall be exclusive for claims against all branches of the Commonwealth government.

(b) (1) The remedy against the Commonwealth provided for by this Title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Commonwealth while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages, by reason of the same subject matter, against the employee whose act or omission gave rise to the claim, or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employees estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend to or apply to a civil action against an employee of the Commonwealth which:

(A) Is brought for a violation of the Constitution(s) of the United States or the Commonwealth, or

(B) Is brought for a violation of a statute of the Commonwealth or the United States under which such action against an individual is otherwise authorized.

§ 2209. Representation by Attorney General.

The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Commonwealth or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver, within 5 days of receiving service of process or other court documentation of suit, all papers, including the summons, the pleadings, or other materials received, to the head of the department where the employee is employed, if so employed, or to the office of the Attorney General, if not employed. Said department heads shall promptly furnish copies of said papers to the office of the Attorney General. In the sole discretion of the Attorney General, outside counsel may be employed for the purposes of this Act as may be appropriate.

§ 2210. Certification by Attorney General; Rule-making Authority.

(a) Upon certification by the Attorney General that the defendant employee was acting within the scope of his/her office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a court against an employee shall be deemed an action against the Commonwealth and the Commonwealth shall be substituted as the party defendant, if the Commonwealth was not already a defendant in the suit. An order dismissing the employee from the suit shall be entered.

(b) In the event the Attorney General has refused to certify scope of office or employment, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his/her office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding against the

Commonwealth, and the Commonwealth shall be substituted as the party defendant. A copy of the petition shall be served upon the Commonwealth.

(c) Upon certification, any action or proceeding shall proceed in the same manner as any other action against the Commonwealth and shall be subject to the limitations and exceptions applicable to those actions.

(d) Whenever an action or proceeding in which the Commonwealth is substituted as the party defendant is dismissed for failure to first present a claim pursuant to the requirements of this title, such a claim shall be deemed to be timely presented under this title if:

(1) The claim would have been timely had it been filed on the date the underlying civil action was commenced, and

(2) The claim is presented to the Attorney General within 60 days after dismissal of the civil action.

(e) Rule-making Authority. The Office of the Attorney General may promulgate needed rules and regulations to implement the intent of this Act.

Appendix: Excerpts From The Westfall Act, 28 U.S.C. § 2679.

§ 2679

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title [28 U.S.C. § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

(b)(1) The remedy against the United States provided by section 1346(b) and 2672 of this title for injury or loss of property, or personal injury or death arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim or against the estate of such employee. Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee or the employee's estate is precluded without regard to when the act or omission occurred.

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government – (A) which is brought for a violation of the Constitution of the United States, or (B) which is brought for a violation of a statute of the United States under which such action against an individual is otherwise authorized.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action nor proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d)(1) Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court

shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.

…

(3) In the event that the Attorney General has refused to certify scope of office or employment under this section, the employee may at any time before trial petition the court to find and certify that the employee was acting within the scope of his office or employment. Upon such certification by the court, such action or proceeding shall be deemed to be an action or proceeding brought against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant. A copy of the petition shall be served upon the United States in accordance with the provisions of Rule 4(d)(4) of the Federal Rules of Civil Procedure. In the event the petition is filed in a civil action or proceeding pending in a State court, the action or proceeding may be removed without bond by the Attorney General to the district court of the United States for the district and division embracing the place in which it is pending. If, in considering the petition, the district court determines tht the employee was not acting within the scope of his office or employment, the action or proceeding shall be remanded to the State court.

(4) Upon certification, any action or proceeding subject to paragraph (1), (2), or (3) shall proceed in the same manner as any action against the United States filed pursuant to section 1346(b) of this title and shall be subject to the limitations and exceptions applicable to those actions.

(5) Whenever an action or proceeding in which the United States is substituted as the party defendant under this subsection is dismissed for failure first to present a claim pursuant to section 2675(a) of this title, such a claim shall be deemed to be timely presented under section 2401(b) of this title if –

(A) the claim would have been timely had it been filed on the date of the underlying civil action was commended,

(B) the claim is presented to the appropriate Federal agency within 60 days after dismissal of the civil action.