IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

MAUJ EDMOND, *et al.*, Plaintiffs-Appellees v. MARSHALL ISLANDS MARINE RESOURCES AUTHORITY, Defendant-Appellant.	Supreme Court No. 2021-00406 **OPINION**

BEFORE: CADRA, C.J.; SEABRIGHT, A.J.,[1] and SEEBORG, A.J.,[2]

SEEBORG, A.J., with whom CADRA, C.J., and SEABRIGHT, A.J. Concur:

I. INTRODUCTION

A nighttime maritime collision between a boat owned by Defendant Marshall Islands Marine Resources Authority ("MIMRA") and a boat owned by Defendant Wotje Atoll Local Government ("WALGOV") resulted in the death of a passenger, Diavon Edmond. Edmond's surviving personal representatives brought a wrongful death action before the High Court, arguing that Edmond's death was caused by the negligence of the boats' pilots and owners. The High Court agreed, finding both MIMRA and WALGOV liable for damages, over the Defendants' objection that they were exempt from liability due to the Government Liability Act of 1980 ("GLA"), 3 MIRC Chp. 10. On appeal, MIMRA challenges two key determinations underlying the High Court's decision: (1) MIMRA is not part of the "Government" as defined in the GLA and therefore not entitled to the liability limitations contained therein, and (2) the

[1] Hon. J. Michael Seabright, District Judge, United States District Court, District of Hawaii, sitting as RMI Supreme Court Associate Justice by designation of the Cabinet.
[2] Hon. Richard Seeborg, Chief Judge, United States District Court, Northern District of California, sitting as RMI Supreme Court Associate Justice by designation of the Cabinet.

GLA's liability limitation is an affirmative defense that MIMRA waived. Because we agree that GLA's liability limitation is an affirmative defense that was waived, we need not reach the statutory interpretation question and do not opine on whether MIMRA was entitled to the GLA's liability protections. Accordingly, the High Court's decision is affirmed.

II. BACKGROUND

A. The Collision

The facts of the case are not disputed.[3] On December 27, 2014, two small fishing boats collided in the Wotje Atoll lagoon. One boat was owned by MIMRA,[4] a statutory corporation, which had taken possession of the vessel from the Overseas Fisheries Cooperation Foundation of Japan, according to the terms of a Memorandum of Understanding. *See* August 17, 2020 Judgment For Liability ("Judgment For Liability") at 2-3.

At the time of the collision, one of the boat's passengers was Diavon Edmond. He was not wearing a personal flotation device, and neither fishing boat was operating with lights. Both are violations of the Marshall Islands Domestic Watercraft Regulations. *See* Domestic Watercraft Regulations, Appendix A, §§ 3(1)(d), (f). As a result of the collision, Edmond was knocked into the water, eventually drowning as a result of the injuries sustained to his head and neck.

B. High Court Proceedings & Judgment

On December 9, 2016, Plaintiffs brought a wrongful death action before the High Court, arguing that Edmond's death was caused by the negligence of the boats' pilots and owners, due to the failures in ensuring pilots with requisite small water craft licenses, as well as proper operational equipment, aboard both boats. The High Court agreed with Plaintiffs and issued its judgment across two opinions.

On August 17, 2020, the High Court issued its first opinion in the matter, which found

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[3] The Parties filed a June 2, 2020 Stipulation of Parties as to Facts and Exhibits.

[4] MIMRA had entrusted the boat's key to the WALGOV Mayor, who had given the key to Defendant Kotak, a police officer employed by WALGOV. Though the boat was being operated by a non-MIMRA employee at the time of the collision, the High Court found that MIMRA was nonetheless liable under theories of negligent entrustment. *See* Judgment for Liability at 11-14.

that Plaintiffs proved cognizable theories of negligence and that Defendants were liable for damages resulting from the death of Edmond. *See generally* Judgment For Liability. Notably, as WALGOV had admitted liability in its Answer to the Complaint, the High Court's opinion focused on MIMRA's involvement. The High Court found that Defendants were liable due to: (1) negligence and negligence *per se* owing to the boats' failure to have proper operational running lights and personal flotation devices, *id.* at 10-11; as well as (2) negligent entrustment of the boat to another, *id.* at 14; and (3) negligent maintenance of the boat. *Id.* at 15. The High Court did not entertain MIMRA's affirmative defense that Edmond had boarded the boat voluntarily and therefore assumed the risk, finding that Edmond did not board MIMRA's boat, and that assumption of the risk was not a defense against negligence *per se*.

On January 22, 2021, the High Court issued a final judgment setting the damages after having heard argument from the parties, finding WALGOV and MIMRA jointly and severally liable to the Plaintiffs for $203,901 plus fees. *See* Final Judgment for Liability and Damages ("Final Judgment"). Defendants[5] had argued that their liability for damages was limited by the GLA, which provides in Section 1005(1) that "[t]he Government shall not be liable for more than (a) $25,000 in any action for wrongful death; [or] (b) $50,000 in any other tort action . . . ." The High Court found, nonetheless, that MIMRA did not fall within the meaning of "Government" for the purposes of the GLA, relying on two primary considerations: first, the legislative history of the GLA demonstrated that the Nitijela knew how to, but chose not to, write the statute to extend coverage to public corporations like MIMRA; and second, several textual differences in the Constitution and other statutes demonstrated that public corporations and statutory authorities were treated differently from departments and offices of the Government.

III. LEGAL STANDARD

All questions of law are subject to *de novo* review, whereas factual findings are disturbed only if such findings are clearly erroneous. *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225-26 (1991).

[5] This included not only MIMRA and WALGOV, but also the Republic of the Marshall Islands. *See* Final Judgment at 2.

Both of the main questions raised in this appeal—whether MIMRA is part of the Government, as defined in the GLA, and whether the GLA liability limitation constitutes an affirmative defense that MIMRA waived—are questions of law which are properly subject to *de novo* review.

IV. DISCUSSION

A. Timeline of Argument[6]

To analyze the arguments about waiver, we begin with a detailed review of the timeline of the Parties' filings. Plaintiffs filed their wrongful death suit on December 9, 2016. MIMRA filed its Answer on February 7, 2017, asserting various affirmative defenses but, notably, not the GLA liability limitation. WALGOV filed its Answer on March 28, 2017, asserting no affirmative defenses.

It was only on November 15, 2019, nearly three years after the Complaint was first filed, that the GLA was ever mentioned. WALGOV—not MIMRA—claimed for the first time, in an answering brief on liability and damages, that its liability for Edmond's death was limited by the provisions of the GLA. In its own brief filed that day, MIMRA did not claim any limitation of damages under the GLA.[7] Trial occurred on June 9, 2020.[8] In fact, it was not until July 15, 2020—during post-trial briefing and more than three years after its first responsive pleading—that MIMRA raised, for the first time, the limitation provisions of the GLA.

The High Court issued its Judgment For Liability on August 17, 2020, finding MIMRA and WALGOV liable to Plaintiffs, and set the matter for a hearing on damages. Then on January 22, 2021, in its Final Judgment, the High Court found that the GLA limitation did not apply to

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[6] The majority of the dates in this section are taken from the Record on Appeal ("ROA"), filed March 31, 2021, except in a few instances, as explained in the footnotes below.

[7] Although the ROA does not have a record of the answering briefs on November 15, 2019, this date was in the High Court's opinion, *see* Final Judgment at 7, repeated in Appellee's Answering Brief and uncontested in Appellant's Reply Brief. Moreover, this date is consistent with the over two-year gap between items 27 and 28 in the ROA (Plaintiff's Motion for Summary Judgment Regarding Liability and Memorandum in Support on July 13, 2018 and the Order Setting Trial Date on November 29, 2020, respectively).

[8] That the trial was a one-day trial on June 9, 2020 is an inference from the ROA, which notes an Order Continuing Trial until June 9, 2020, *see* ROA, item 30, as well as an Order for Post Trial Briefing on June 9, 2020. *See* ROA, item 32.

MIMRA or WALGOV, and moreover, that MIMRA had waived any applicable limitation by failing to assert it as an affirmative defense in a timely manner.

B. GLA as a Waivable Defense

In its Final Judgment, the High Court found that any limitation on tort liability from the GLA was an affirmative defense that was required to be pled in Appellant's first responsive pleading, pursuant to Marshall Islands Rule of Civil Procedure ("MIRCP") 8(c), which requires parties, "[i]n responding to a pleading . . . [to] affirmatively state any avoidance or affirmative defense." Because MIMRA failed to raise the argument in its first responsive pleading—and indeed, failed to raise it prior to *post-trial* briefings—the High Court deemed the argument waived.[9] *See* Final Judgment at 7 (citing 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1278 (3d ed. 2012) ("It is a frequently stated proposition of *virtually universal acceptance* by the federal courts that a failure to plead an affirmative defense as required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense and its exclusion from the case.") (emphasis added)).

On appeal, Appellant presents three arguments that the High Court's waiver decision was in error: (1) liability limitations are not enumerated in MIRCP 8(c)(1) as categories of affirmative defenses that are required to be pled and therefore are not subject to the pleading requirement; (2) conceptually, the GLA limitation relates only to the avoidance of damages, not liability and therefore was only relevant at the damages stage of proceedings, rather than the liability stage; and (3) the liability limitation under the GLA amounts to an argument that the court lacks subject matter jurisdiction, which can be raised at any time.

Appellant's arguments fail to persuade. First, the argument that liability limitations are not specifically detailed in the list of avoidances or affirmative defenses required by MIRCP 8(c)(1) ignores the rule's structure. The rule itself recites only a non-exhaustive list, set off by the word "including." *See Jones v. Bock*, 549 U.S. 199, 212 (2007) (noting that the analogous

[9] The High Court also noted that although it "waited for the defendants to move to amend their answers to assert the GLA defense," the defendants did not do so. Final Judgment at 8.

"[Federal] Rule [of Civil Procedure] 8(c) identifies a nonexhaustive list of affirmative defenses that must be pleaded in response"). As a result, the mere absence of "liability limitations" or a similar synonym from the enumerated list in MIRCP 8(c) is, contrary to Appellant's argument, not dispositive of the question.

Second, Appellant's attempt to elevate the liability limitation to a prerequisite for subject matter jurisdiction misses the mark. Appellant argues that the GLA's liability limitations "prescribe[] essential parameters and limitations on claims against the government to protect the public interest and public funds," Appellant's Reply Brief at 4, and cites to caselaw concerning the Federal Tort Claims Act (FTCA) to support the argument that the limitation is jurisdictional. *See id.* at 3 ("In the U.S. federal system, a court lacks subject matter jurisdiction to hear cases brought outside the limits of the Federal Tort Claims Act. The 9th Circuit has specifically held that a dismissal for violating the requirements of the FTCA is for want of subject matter jurisdiction, not for failure to state a claim.").

We have in the past, however, distinguished the very analogies to the FTCA that Appellant tries to draw. By default, the United States government enjoys sovereign immunity and ordinarily cannot be sued. The FTCA waives this default sovereign immunity, "thus requiring the Courts to strictly construe its provisions, and hold them to be jurisdictional"; but this is "not [the] situation" for the Marshall Islands. *ENOS and ENOS v. RMI*, 1 MILR (Rev.) 63, 64 (1987). As Appellant itself acknowledges, the RMI Government is *not* immune from suit, due to the sovereign immunity waiver found in Article I of the RMI Constitution. *See* Appellant's Reply Brief at 3-4 (citing RMI Const. Art. I, Sec. 4(3) ("[T]he Government of the Republic and any local government shall not be immune from suit in respect of their own actions or those of their agents; but no property or other assets of the Government of the Republic or of any local government shall be seized or attached to satisfy any judgment."). Against this backdrop, the GLA "did not grant a right to sue but, to the contrary, severely limited the pre-existing right held under the Constitution." *ENOS*, 1 MILR (Rev.) at 65 (emphasis in original). "As a result, any

reliance on the jurisdictional standards of the FTCA is misplaced; the two Acts rest upon entirely different footing." *Id.*

Even assuming *arguendo* that caselaw analyzing the FTCA's limitations on liability would be illuminating to our inquiry, the weight of the law on the issue tips against Appellant. Though U.S. courts are split with respect to whether or not statutory liability caps are affirmative defenses that are subject to waiver if not timely pled, the Ninth Circuit is alone in having found that limitations of liability are not waivable affirmative defenses. The majority of the Circuits that have contended with the issue have found the opposite. As the Supreme Court noted, the Ninth Circuit's holding that [the FTCA] "is a mere limitation of liability, rather than an avoidance or an affirmative defense" "conflicts with the decisions of . . . other Courts of Appeals." *Taylor v. United States*, 485 U.S. 992, 992–93 (1988) (White, J., dissenting from denial of certiorari) (citing *Ingraham v. United States*, 808 F.2d 1075, 1078-1079 (5th Cir. 1987) (holding that an identical statutory limitation on damages is an affirmative defense that is waived under the Federal Rules by failure to plead it in a timely manner) and *Jakobsen v. Massachusetts Port Authority*, 520 F.2d 810, 813 (1st Cir. 1975) (holding that a statutory limitation on liability is an affirmative defense under Rule 8(c))[10]; *see also Bentley v. Cleveland Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600, 604-05 (10th Cir. 1994) (disagreeing with the argument that the Oklahoma Governmental Tort Claims Act was "not an affirmative defense, but . . . a jurisdictional matter that can be raised any time" and finding that "counsel . . . waived any limit on its liability afforded by that statute"); *Kennedy v. City of Cleveland*, 797 F.2d 297, 300 (6th Cir. 1986) ("[I]mmunity, whether qualified or absolute, is an affirmative defense which must be affirmatively pleaded; it is not a doctrine of jurisdictional nature that deprives a court of the power to adjudicate a claim. Since immunity must be affirmatively pleaded, it follows that failure to do so can work a waiver of the defense.") (internal citations omitted). The majority

[10] Both *Ingraham* and *Jakobsen*, moreover, "ruled that any such statute is deemed to be waived when the application of the statute is not raised during the trial but instead is raised for the first time after the trial, on appeal." *Taylor*, 485 U.S. at 993 (White, J., dissenting from denial of certiorari).

approach followed by the First, Fifth, Sixth, and Tenth Circuits therefore treats statutory liability limitations as waivable defenses, thus counseling an affirmance of the High Court's conclusion.

Yet even under the Ninth Circuit's minority approach, the prejudice to Appellees arising from the delay in raising the GLA argument would be sufficient for Appellant's argument to falter. The 9th Circuit's *Taylor* opinion acknowledged—as have all the Circuits in their respective opinions—that "application of [the statutory liability limitation] may in some instances require resolution of factual issues. In such cases, plaintiffs may be prejudiced if defendants do not raise [it] prior to judgment." *Taylor v. United States*, 821 F.2d 1428, 1433 (9th Cir. 1987). Prejudice to the other party is a test for when the liability limitation is so untimely as to be waived. *See Patsystems (NA) LLC v. Trend Exch., Inc.*, 695 F. App'x 206, 208–09 (9th Cir. 2017) (declining to find waiver because "[t]here could not have been any surprise or prejudice" to the other party, given that the issue was raised "'at a pragmatically sufficient time'"); *see also Bentley*, 41 F.3d at 605 ("Permitting the [Defendant] to raise this issue at this stage of the proceedings would be extremely unfair to [Plaintiff], who may have been able to prove some exception to the damage cap at trial if he had notice of the defense. Thus, assuming the [statute] applied to this action, counsel for the [Defendant] waived any limit on its liability afforded by that statute *by failing to raise the issue in its answer, the Pre-Trial Order, or at trial*.") (emphasis added).

In this case, MIMRA's delay in raising the GLA argument was significant. As Appellees noted and MIMRA itself acknowledges, not only did MIMRA fail to raise the argument in its Answer, three months after the Complaint; and fail again when its co-defendant WALGOV raised the very same defense in its brief on liability and damages; but MIMRA only surfaced the argument in "post-trial briefing" "more than three years after its first responsive pleading." Appellees' Answering Brief at 2; *see also* Appellant's Reply Brief at 4 ("[T]he High Court first addressed the issue of whether Defendants were liable for plaintiff's injury. The second part of the proceeding, when the Court considered the amount of damages, the GLA was raised."). This certainly impacted Appellees' ability to contend with the argument. Even with notice of the

argument when it had been articulated by WALGOV, several of the issues regarding the applicability of the GLA are MIMRA-specific, requiring analysis of the Marshall Islands Marine Resources Act 1997 ("MIMRA Act"). That inquiry involves facts and arguments that Appellees did not have the opportunity to address earlier, for which discovery may have been beneficial. Appellant's proffered justification—that the High Court's bifurcation of liability and damages thereby permitted Appellant to raise the defense after trial and during the damages determination—is unsupported by caselaw and contrary to the importance of fair notice articulated in the cases. Even if we were to adopt the minority approach, the equities here still do not favor MIMRA.

As a result of the strictures of MIRCP 8(c), the majority approach with respect to construing statutory liability limitations as waivable defenses—particularly if not pleaded before trial—and the spirit of providing the opposing party with proper notice, we uphold the High Court's determination that MIMRA waived its GLA defense.

C. MIMRA as Part of the "Government"

As waiver constitutes both an independent and sufficient basis for upholding the High Court's decision, we need not reach the question of whether MIMRA is encompassed in "Government" under the text of the GLA, except to note that recent changes to the law seriously narrow the scope of that question. In 2021, the Government Liability Act was amended to include Section 1002, which explicitly states "[i]n this Chapter, the word 'Government' means any national or local government branch, agency, commission, board, authority, or government wholly or partially owned or controlled corporation thereunder." Government Liability (Amendment) Act, 2021, Sec. 102. While we do not opine here on whether MIMRA is part of the Government, the added provision arguably would cover entities like MIMRA and WALGOV.

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V. CONCLUSION

Based on the foregoing, the High Court's finding that Appellant MIMRA is liable to the Appellees for damages is AFFIRMED.

Dated: February 26, 2023

/s/ Daniel N. Cadra
Daniel N. Cadra
Chief Justice

Dated: February 26, 2023

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

Dated: February 26, 2023

/s/ Richard Seeborg
Richard Seeborg
Associate Justice