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IN THE SUPERIOR COURT

OF THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

WEI HUA PENG, individually and as personal representative of TIEBAO HAUNG, deceased, and LANGYUE HUANG, **Plaintiffs,** **vs.** **COMMONWEALTH GOVERNMENT DEPARTMENT OF HEALTH, COMMONWEALTH HEALTH CENTER, NASSER CHAHMIRZADI.** **Defendants.**	**Civil Action No. 06-0050** **ORDER GRANTING DEFENDANTS' 12(b)(6) MOTIONS TO DISMISS**

I. INTRODUCTION

THIS MATTER came for hearing on November 9, 2006 at 1:30 p.m. to address Defendants' Motion to Dismiss. Counsel Robert Torres appeared for Defendant Dr. Ada. Counsel Gregory Baka appeared for Defendant Dr. Chahmirzadi. Attorney General David Lochabay appeared on behalf of the Commonwealth Defendants, Department of Health and Commonwealth Health Center. Counsel Matthew Smith appeared on behalf of Plaintiffs. Having considered the oral and written submissions of the parties and the applicable law, this Court is prepared to issue its ruling.

II. FACTUAL AND PROCEDURAL BACKGROUND

This case arises from incidents surrounding the birth and death of Tiebao Huang (referred to in the complaint and this opinion as "Baby Huang"). Baby Huang was originally intended to be delivered by vaginal, however complications during labor necessitated birth by caesarean section. Baby Huang was born on February 18, 2004. Baby Huang died ten days later on February 28, 2004.

Plaintiffs brought suit against the above-captioned defendants, alleging causes of action sounding in negligence and gross negligence. Dr. Ada, one of the original Defendants, and the doctor who was the pediatrician for Baby Huang after the birth, was dismissed from Plaintiffs' suit because Plaintiffs failed to establish a sufficient professional relationship between Dr. Ada and Plaintiffs before the alleged injuries and negligence occurred.

Dr. Chahmirzadi, now seeks dismissal from all causes of action on two bases. First, Dr. Chahmirzadi argues that Public Law 15-22 requires his dismissal from Plaintiffs' negligence cause of action upon certification from the Attorney General that Chahmirzadi was acting within the scope of his employment with the Commonwealth when the events giving rise to the lawsuit occurred. Secondly, Dr. Chahmirzadi and the government Defendants claim that Plaintiffs' "gross negligence" cause of action must be dismissed because the Commonwealth does not recognize separate cause of action for gross negligence.

Plaintiffs do not vigorously dispute the application of PL 15-22 to this case. However, Plaintiffs argue that the Commonwealth does recognize the action of "gross negligence" and consequently Dr. Chahmirzadi should remain a defendant because the gross negligence is excepted from PL 15-22 mandatory dismissal of personal negligence suits against commonwealth employees upon certification. Alternatively, Plaintiffs request that should the Court not recognize the "gross negligence" cause of action, that the Court nevertheless allow the allegations in the complaint, which allege more than ordinary negligence, to remain in the complaint.

III. DISCUSSION

Defendants' Motion to Dismiss is grounded in Com. R. Civ. 12(b)(6), which allows for the dismissal of claims for which the recognized law provides no relief. A motion to dismiss is therefore solely aimed at attacking the pleadings.

Since Com. R. Civ. P. 8 requires only a "short and plain statement of the claim showing that the pleader is entitled to relief," there is "a powerful presumption against rejecting pleadings for failure to state a claim." *Auster Oil & Gas, Inc. v. Stream*, 764 F.2d 381, 386 (5th Cir. 1985). Consequently, a motion to dismiss for failure to state a claim upon which relief can be granted will succeed only if from the complaint it appears beyond doubt that plaintiffs can prove *no* set of facts in support of their claim that would entitle them to relief. *Morley v. Walker*, 175 F.3d 756, 759 (9th Cir. 1999) (*emphasis added*). The burden is upon the movants to establish beyond doubt that the Plaintiff's action is one upon which the law recognizes no relief. . All allegations of material fact are taken as true and construed in the light most favorable to the non-moving party. The Court in examining the pleadings will assume all *well-plead* facts are true and draw reasonable inferences to determine whether they support a legitimate cause of action. See *Cepeda v. Hefner*, 3 N.M.I. 121, 127-78 (1992); *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990)*; Enesco Corp. v. Price/Costco, Inc.*, 146 F.3d 1083, 1085 (9th Cir. 1998). In reviewing the sufficiency of the complaint, the "issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974). "[I]t may appear on the face of the pleadings that recovery is very remote and unlikely but that is not the test." *Id*.

Defendants' motions to dismiss raise several distinct issues, which this Court must address and resolve to determine whether Plaintiff's complaint states facts sufficient for a court of competent jurisdiction to grant relief:

1. Whether PL 15-22 requires dismissal of Plaintiffs' negligence cause of action against

Defendant Dr. Chahmirzadi, when the Attorney General has certified in writing that Dr. Chahmirzadi was acting within the scope and course of his employment when the events giving rise to this action occurred?

2. Whether the Commonwealth of the Northern Mariana Islands recognizes a separate action in tort for "gross negligence"?

3. Whether the Commonwealth recognizes an independent tort action for wilful and wanton misconduct?

A. Plaintiff's Ordinary Negligence Allegations Against Dr. Chahmirzadi are Subject to Immediate Dismissal Pursuant to PL 15-22.

Public Law 15-22 repeals the Public Employee Legal Defense and Indemnification Act (PELDIA) codified as 7 CMC §§ 2301-07 in its entirety. Public Law 15-22 also mandates the dismissal of Commonwealth employees from negligence lawsuits upon certification by the Attorney General to the Court that the Commonwealth Employees were acting within the scope of their employment when the acts or omissions complained of in the lawsuit occurred. After certification and dismissal, the CNMI is substituted as Defendant, if not already named, in the employee's place.

Here, Plaintiff's complaint alleges ordinary negligence against all Defendants. Dr. Chahmirzadi has provided certification from the Attorney General he was acting within the scope of his employment as a physician at CHC at the time of the incident giving rise to the claims of Plaintiffs in this action. Plaintiffs have not contested the validity of such certification and the Court finds no patent reason to question its validity. Consequently, in accordance with the law set forth in PL 15-22, Dr. Chahmirzadi's request for dismissal from Plaintiff's ordinary negligence cause of action is **GRANTED**.

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B. Plaintiff's Cause of Action for "Gross Negligence" is Not Recognized in the CNMI.

No CNMI statute authorizes a distinct cause of action for actions in "gross negligence" . Furthermore, there exists no record of any CNMI court ever recognizing "gross negligence" as a cause of action apart from ordinary negligence. Because whether the CNMI should recognize a "gross negligence" cause of action is a question of first impression for which CNMI statute, precedent or traditional law provides any resolution, the Court must look to the common law of the several states as it is published in the Restatement. *See* 7 CMC § 3401; *see also Castro v. Hotel Nikko Saipan, Inc.*, 4 N.M.I. 268 (1995), *appeal dismissed*, 96 F.3d 1259 (9th Cir. 1996).

Unfortunately for Plaintiffs, the Restatement simply does not recognize the separate tort of "gross negligence". *See* RESTATEMENT (SECOND) OF TORTS §§ 281-309 (1965). The Restatement recognizes damages stemming from negligent conduct of another, without commentary on the degree and offers a separate cause of action for conduct entitled "Reckless Disregard of Safety"—recklessness to the first-year law student.. *See* RESTATEMENT (SECOND) OF TORTS § 500. (1965). Although, the existence and recognition of "gross negligence" as a separate cause of action in other U.S. jurisdictions is more than plain myth. *See Cowan v. Hospice Support Care, Inc.*, 268 Va. 482, 603 S.E.2d 916 (Va., 2004) (finding that there are "three levels of negligence" including ordinary negligence, gross negligence, and willful and wanton negligence). This Court, however, is restricted in its research to look no further than the Restatement by section 3401's unambiguous direction, and actions for "gross negligence" are conspicuously absent from the pages of the Restatement.

Further, the Court finds Government's policy arguments against adopting an independent cause of action for gross negligence in the Commonwealth highly persuasive. First, the term "gross negligence" invites unwieldy speculation regarding its scope of conduct, making it awkward and impractical. The United States Supreme Court offered perhaps the most succinct and amusing description of the problems attendant with attempting to legally define "gross negligence:"

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It is insisted, however, that where there is "gross negligence" the jury can properly give exemplary damages. There are many cases to this effect. The difficulty is, that they do not define the term with any accuracy; and if it be made the criterion by which to determine the liability of the carrier beyond the limit of indemnity, it would seem that a precise meaning should be given to it. This the courts have been embarrassed in doing, and this court has expressed its disapprobation of these attempts to fix the degrees of negligence by legal definitions. In *The Steamboat New World v. King* (16 How. 474), Mr. Justice Curtis, in speaking of the three degrees of negligence, says, ...

> It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed, or capable of being so. One degree thus described not only may be confounded with another, but it is quite impracticable exactly how to distinguish them. Their signification necessarily varies according to circumstances; to whose influence the courts have been forced to yield, until there are so many real exceptions, that the rules themselves can scarcely be said to have a general operation. If the law furnishes no definition of the terms 'gross negligence' or 'ordinary negligence' which can be applied in practice, but leaves it to the jury to determine in each case what the duty was, and what omissions amount to a breach of it, it would seem that imperfect and confessedly unsuccessful attempts to define that duty had better be abandoned.

Some of the highest English courts have come to the conclusion that there is no intelligible distinction between ordinary and gross negligence Redf. On Car., sect 376, Lord Cranworth, in *Wilson v. Brett* (11 J. & W. 113), said that gross negligence is ordinary negligence with a vituperative epithet; and the Exchequer Chamber took the same view of the subject. *Beal v. South Devon Railway Co.*, 3 H. & C. 327. In the Common Pleas, *Gril v. General Iron Screw Collier Co.* (Law Reps., C.P. 1, 1855-66) was heard on appeal. One of the points raised was the supposed misdirection of the Lord Chief Justice who tried the case, because he had made no distinction between gross and ordinary negligence. Justice Wiles, in deciding the point, after stating his agreement with the dictum of Lord Cranworth said, - - -

> Confusion has arisen from regarding 'negligence' as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use. "Gross' is a word of description, and not of definition; and it would have been only introducing a source of confusion to use the expression 'gross negligence' instead of the equivalent, - - a want of due care and skill....

Milwaukee and St. Paul Railway Company v. APMS, et al., 91 U.S. 489, 1 Otto 489, 23 L.Ed. 374 (1875).

Virginia courts define"gross negligence" as conduct which not only falls below the imposed standard of care but conduct which would "shock fair-minded persons, although demonstrating something less than willful recklessness", but such a definition does little more than inject more

subjectivity into proper objective analysis; for the question remains what conduct is shocking enough to set it distinctly apart from 'ordinary negligence' yet falls distinctly short of reckless disregard? *See Cowan*, 268 Va. 487. Bright-line, simple rules are more appropriate to a Commonwealth which still has yet to create a self-sustaining and coherent body of precedential authority. Such simple rules are adequately provided for in the Restatement and this Court will not supplant the prudence of the legislature that the Commonwealth supplement its own laws with that of the Restatement rather than be swept away by the vast and multifarious semantic debate in the several U.S. jurisdictions

As such, this Court holds that no independent cause of action for gross negligence exists in the Commonwealth. Because no independent cause of action for gross negligence exists in the CNMI, Plaintiff's count of gross negligence against each of the defendants cannot sustain a claim upon which relief can be granted. Consequently Defendants' motion to dismiss Plaintiffs' counts of 'gross negligence" is **GRANTED**

C. Neither PL 15-22 nor PELDIA Bar Recovery Against Commonwealth Employees For Willful and Wanton Misconduct or Reckless Disregard

Plaintiffs alternatively requested that if the Court refused to recognize an independent action of "gross negligence" in the Commonwealth, that it nevertheless keep intact Plaintiffs' claims of misconduct which exceeds ordinary negligence. In support of their request, Plaintiffs cited to 3 CMC § 2261, which is part of the Medical Practice Act passed in 1983. This particular section limited the Commonwealth government's representation and indemnification of health care professionals employed by the Commonwealth. Specifically, subsection (b) provided that the Commonwealth would not indemnify an employee where the healthcare professional was determined to be "guilty of willful or wanton misconduct." 3 CMC § 2261(b).

Defendants' opposed Plaintiffs' reliance on this section because they claim it was impliedly repealed via the passage of the Public Employee Legal Defense and Indemnification Act of 1986 (PELDIA). 7 CMC § 2301 et seq. In spite of Defendants' rather exhaustive and artful analysis of how

PELDIA's passage impliedly repealed section 2261, the Court does not need to reach this issue to determine whether an independent cause of action exists to support claims of wanton or willful misconduct. Such an independent cause of action exists in the Restatement as Reckless Disregard of Safety. *See* RESTATEMENT (SECOND) OF TORTS § 500. (1965) ("**Special Note:** The conduct described in this Section is often called 'wanton or wilful misconduct' both in statutes and judicial opinions...."). However, Plaintiffs' complaint in its present condition alleges no such thing and is dismissed with the exception of the counts of ordinary negligence against the Commonwealth defendants. Nevertheless, Plaintiffs have leave to amend their complaint.

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III. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss Defendant Dr. Chahmirzadi from Plaintiffs' complaint of negligence is **GRANTED**.

Furthermore, Defendants Motion to Dismiss Plaintiffs' counts of "gross negligence" against all Defendants is **GRANTED.**

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SO ORDERED this 18th day of January, 2007.

/s/

David A. Wiseman, Associate Judge