IN THE SUPREME COURT OF GUAM

QUAN XING HE aka QUIONG, HE XIN,
Plaintiff-Appellant/Cross-Appellee,

v.

GOVERNMENT OF GUAM, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., and DOE DEFENDANTS 1-100,
Defendants-Appellees/Cross-Appellant.

Supreme Court Case No.: CVA07-019
Superior Court Case No.: CV0631-02

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 6, 2009
Hagåtña, Guam

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BEFORE: ROBERT J. TORRES, Chief Justice; F. PHILIP CARBULLIDO, Associate Justice; KATHERINE A. MARAMAN, Associate Justice.

TORRES, C.J.:

[1] Plaintiff-Appellant Quan Xing He ("Quan") appeals from a final judgment awarding him $48,000.00 against the Government of Guam ("GovGuam") for injuries sustained while he was a federal detainee in the custody of the Guam Department of Corrections. Quan argues that the trial court erred in failing to award him damages for medical expenses and future pain and suffering, and in determining that National Union Fire Insurance Co. of Pittsburgh, PA ("National Union"), the insurer of the vehicle from which Quan fell, was not liable to either Quan or GovGuam. National Union cross-appeals from the trial court's denial of its motion for summary judgment.

[2] For the reasons set forth below, we reverse in part and affirm in part the judgment of the Superior Court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[3] Quan is a Chinese citizen who was arrested by the United States Immigration and Naturalization Service ("INS") while attempting to enter Guam. He was held at the Guam Department of Corrections ("DOC") pursuant to a contract with INS and/or the United States Marshals Service. On May 17, 1999, Quan and other Chinese detainees were sent on a work detail to waterblast some buildings that were going to be used for the South Pacific Games ("SPG"), which Guam was hosting that year. After completion of the waterblasting, Quan and the other detainees, as well as the waterblasting equipment, were transported on the bed of a flatbed truck. The bed of the truck had no rails. To keep from falling off the truck while it was in motion, the detainees were instructed to hold onto the waterblasting equipment. As the driver

sped[1] around a curve, both Quan and the waterblasting equipment were thrown from the truck. Quan sustained serious injuries, including a broken jaw, a dislocated left hip, and an ankle injury. He required multiple surgeries to fix his femur, and his jaw was clamped shut.

[4] The SPG was organized by the South Pacific Games Commission ("SPGC"), an entity created by Public Law 22-113, under the authority of the Office of the Governor for the purpose of hosting the Games. Various GovGuam agencies detailed some of their staff to provide assistance in preparation for the Games. The Guam Power Authority ("GPA") was one such agency. Frank Ulloa, supervisor of GPA's Motor Vehicles Pool, was detailed full time to the SPGC. He was appointed as one of several "Vice Mayors" of the SPG Athletes Village, the facilities used to house athletes coming to Guam for the Games. Ulloa was allowed the use of the flatbed truck involved in the injuries. The truck was owned by GPA and was insured by National Union. There was no documentation of the transfer of the truck to Ulloa or documentation of the permitted or restricted uses of the vehicle. However, GPA had a standard operating procedure which provided that only GPA employees with chauffeur's licenses were authorized to operate GPA vehicles.

[5] At the time of the accident, the truck was being driven by Ralph Sablan, then age 21. Sablan was a participant in the Agency for Human Resources Development ("AHRD") program, which is a GovGuam agency that trains and assigns workers to be employed in various government work. Sablan was placed under the supervision of the SPGC to assist in the SPG preparations. Ulloa, Sablan's immediate supervisor, directed Sablan to use the flatbed truck,

[1] The driver admitted to police that he had been driving at a speed of 25 miles per hour. The posted speed limit was 5 miles per hour.

although Sablan did not possess a chauffeur's license.[2] On the day of the accident, Sablan was entrusted with the task of supervising the detainees, as DOC did not provide guards or other personnel to supervise the detainees at the work detail. Sablan admitted to speeding at the time of the accident, and he was cited for speeding and for failure to properly secure his load by the police officers who arrived at the scene.

[6] On October 31, 2000, Quan filed a claim with the Attorney General ("AG") against the Government of Guam pursuant to the Government Claims Act, 5 GCA § 6101 *et seq.*

[7] On December 18, 2001, Quan filed an action in the District Court against GovGuam and the United States, alleging negligence on the part of INS and DOC. Quan later amended his complaint in the District Court action to name National Union as a defendant, asserting that he was entitled to maintain a direct action against National Union as the driver of the vehicle was National Union's insured. Thereafter, National Union filed a motion for summary judgment claiming that both the driver of the truck and National Union were immune from suit due to the expiration of the statute of limitations.

[8] Subsequently, Quan filed an action in the Superior Court against GovGuam and National Union, but did not immediately serve a complaint on either defendant.

[9] Quan then filed a Second Amended Complaint in the District Court action. The Complaint alleged that the driver of the truck was employed by AHRD and the Guam Airport Authority ("GAA"), and that GovGuam was therefore liable and National Union was the insurer of GovGuam.

[10] Thereafter, Quan filed a Third Amended Complaint in the District Court action, which was stipulated to by the parties. The Complaint alleged that the driver was actually employed by

[2] There was no evidence presented at trial as to whether Ulloa was aware that Sablan did not possess a chauffeur's license. However, Ulloa was aware that Sablan was not employed by GPA.

the SPGC. This amendment followed a deposition of the driver in which it was discovered that the driver erroneously thought that he was employed by the GAA because he reported to work at the airport and was issued an airport badge, when in fact he was actually employed by the SPGC.

[11] The District Court eventually dismissed the action against GovGuam and National Union, on the basis that under the Organic Act of Guam, GovGuam had agreed to be sued only in the Superior Court, not the District Court.

[12] Nearly two years after filing the Complaint in the Superior Court, the Complaint was served on the defendants GovGuam and National Union. National Union filed an Answer denying that GovGuam was liable for the injuries and denying that it insured GovGuam. GovGuam filed an Answer and a Cross-Claim against National Union, denying liability and asserting that it was insured by National Union.

[13] The Complaint in the Superior Court was later amended to make allegations similar to those in the Third Amended Complaint in the District Court action (i.e., that the driver of the truck was employed by the SPGC).

[14] National Union also filed a Motion for Summary Judgment, asserting that neither GovGuam nor National Union was liable because Quan had failed to comply with the notice provisions of the Claims Act before filing suit in Superior Court. The trial court denied the motion.

[15] A bench trial was held in the Superior Court from May 23-31, 2006. In its Findings of Fact and Conclusions of Law, the trial court awarded Quan $36,000.00 in general damages against GovGuam. The judge found that Quan "has suffered from past, and will suffer in the future, from pain and discomfort as his bones continue to heal for which he should be properly compensated." Appellant's Excerpts of Record ("Appellant's ER") at 75 (Finds. Fact & Concl.

L., Oct. 31, 2006). However, in calculating damages, the trial court only awarded damages for pain and suffering incurred during the first five years since the accident, 1999-2004. In other words, the court did not award Quan for any pain and suffering he had in the two years preceding the trial and for any period of time after trial. Furthermore, the trial court determined that National Union was not liable to either Quan or GovGuam because the driver of the truck was not a "permissive user" as defined under National Union's policy with GPA.

[16] Various motions were filed asking the trial court to amend its Findings of Fact and Conclusions of Law. In its Amended Findings of Fact and Conclusions of Law, the trial court reaffirmed its decision not to award any damages for medical expenses and future pain and suffering. The court did, however, increase the damage award to $48,000.00 to cover Quan's pain and suffering up to the time of trial. It also reaffirmed its finding that National Union was not liable because the driver of the insured vehicle was not a permissive user.

[17] Between July 9, 2007, and August 16, 2007, a series of letters were sent between Quan's counsel and GovGuam. The letters settled Quan's claim against GovGuam for $58,000.00, in exchange for GovGuam's assignment of its rights against National Union to Quan. The settlement agreement also included a covenant that Quan would not execute any judgment entered against GovGuam.

[18] On August 30, 2007, the trial court entered its Judgment in favor of Quan and against GovGuam in the amount of $48,000.00, and in favor of National Union against Quan and GovGuam.

[19] Quan timely filed a Notice of Appeal. National Union timely filed a Notice of Cross-Appeal as to the trial court's denial of its summary judgment motion.

[20] National Union filed a Motion to Dismiss Quan's appeal, arguing that the appeal was moot due to the settlement with GovGuam. This court denied National Union's Motion to Dismiss, finding that the effect of the settlement turned on the interpretation of the insurance policy, which would be addressed in the normal appeal process.

II. JURISDICTION

[21] This court has jurisdiction over this appeal from a final judgment. 48 U.S.C.A. § 1424-1(a)(2) (Westlaw current through Pub.L. 111-115 (2009)); 7 GCA §§ 3107(b), 3108(a) (2005).

III. STANDARD OF REVIEW

[22] We review the trial court's denial of a summary judgment motion *de novo*. *Quichocho v. Macy's Dep't Stores, Inc.*, 2008 Guam 9 ¶ 13 (citing *Villanueva ex rel. United States v. Commercial Sanitation Sys., Inc.*, 2005 Guam 8 ¶ 9). The interpretation of a statute is reviewed *de novo*. *Mendiola v. Bell*, 2009 Guam 15 ¶¶ 11, 17 (citing *Quichocho*, 2008 Guam 9 ¶ 13). We review a trial court's findings of fact for clear error. *Id.* (citing *Yang v. Hong*, 1998 Guam 9 ¶ 4). A trial court's conclusions of law are reviewed *de novo*. *Id.* (citing *Craftworld Interior, Inc. v. King Enters.*, 2000 Guam 17 ¶ 6).

[23] The question of whether the driver of the truck was a permissive user under the insurance policy's omnibus clause is one of law reviewed *de novo*. *See id.* (reviewing questions of law *de novo*).

[24] The measure of damages is a mixed question of law and fact warranting *de novo* review. *See Fargo Pac., Inc. v. Korando Corp.*, 2006 Guam 22 ¶ 20.

IV. DISCUSSION

A. Compliance with Government Claims Act

[25] On cross-appeal, National Union appeals the trial court's denial of its motion for summary judgment on the issue of Quan's compliance with the Government Claims Act ("Claims Act").[3] Summary judgment would have been proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show[ed] that there [was] no genuine issue as to any material fact and that the moving party [was] entitled to a judgment as a matter of law." Guam R. Civ. P. 56(c).

[26] The Organic Act of Guam provides that GovGuam may only be sued in tort "with the consent of the legislature evidenced by enacted law," thereby giving GovGuam sovereign immunity. 48 U.S.C.A. § 1421a (Westlaw current through Pub.L. 111-115 (2009)). The legislature has chosen, by way of 5 GCA § 6101 *et seq.* (the Government Claims Act), to grant a limited waiver of sovereign immunity subject to numerous conditions. Title 5 GCA § 6105 provides, in relevant part:

> Pursuant to Section 3 of the Organic Act of Guam, the Government of Guam hereby waives immunity from suit, but only as hereinafter provided:
>
> . . .
>
> (b) *for claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam*, even though occurring in an activity to which private persons do not engage. . . .

5 GCA § 6105 (2005) (emphasis added). Thus, Quan was allowed to sue GovGuam so long as he complied with the conditions set forth in the Claims Act.

[27] One such condition is the filing of a written claim before suit is filed. 5 GCA § 6106 (2005). Among other requirements, the claim must contain a "concise statement of the facts

[3] The trial court denied National Union's motion for summary judgment on the grounds that the Claims Act applies to the entire government of Guam, including GPA which is an agency of the government, and that Quan did not discover the identity of the agencies involved until after he filed a claim. The trial court also rejected National Union's argument that Quan's claim for negligent operation of a vehicle was barred because he failed to allege that theory of recovery in his written claim.

upon which the claim is made, including the time, place and other circumstances and the department or agency or fund of the government of Guam that is concerned." 5 GCA § 6201(c) (2005). A lawsuit upon such claim can be commenced in the Superior Court only upon rejection of the claim or six months' lapse without a decision. 5 GCA § 6208 (2005).

[28] Quan contends, and the trial court concluded, that the claim filed here satisfied the requirements of the Claims Act. However, National Union asserts that the claim was deficient because its subsection 6201(c) statement of facts failed to name GPA, SPGC, or National Union as potential tortfeasors,[4] and because it alleged facts that suggested a cause of action based on DOC's breach of its duty to keep Quan safe from harm, not one based on negligent entrustment and operation of a motor vehicle, which were the bases for Quan's subsequent lawsuit against GovGuam. Quan's claim stated, in relevant part:

> c. Concise statement of the facts for claim – While on morning work duty under the care, custody and control of the DOC on May 17, 1999, Mr. [Quan] was directed to ride on the bed of a flat bed truck with various equipment on it. The equipment included a compressor, tubes and a hose. The compressor had been tied onto the bed of the truck with only a thin rope. Mr. [Quan] and several other men on the bed of that truck had to hold on to the compressor to keep from falling off the truck as it was travelling. While returning back to the DOC (we are unaware of the time when and location where this happened, but the record of this incident with the DOC should contain such information), the driver of the truck sped around a curve. The compressor broke loose and pushed Mr. [Quan] off of the truck. His leg had gotten tangled in it. Both he and compressor came crashing to the ground. He was unconscious. He had blood flowing from his mouth. He was hospitalized for about 21 days. His major injuries include a jaw fracture, left hip fracture and possible left ankle fracture. He has permanent brain damage and substantial cognitive deficits as a result of his injuries. He has suffered with constant headaches, blackouts, dizzy spells and ringing in his ear. His jaw is still sore and his teeth are loose. He has had left leg pain and used crutches. Occasionally, he has moderate to severe low back pain. He has right ankle pain (we suspect that the doctor may have said possible left ankle fracture when he meant the right). He has had right sternum pain.

[4] Quan served the written claim on the AG and asserted the claim against GovGuam.

> He has had a marked change in personality and mentality. He continues to suffer from his injuries.

Appellee's Excerpts of Record ("Appellee's ER") at 24 (Mot. Summ. J., July 15, 2004).

[29] National Union relies on the *Ciesiolka* line of cases to support its argument that in order to maintain a successful claim against GovGuam, a claimant must strictly comply with all the statutory requirements of the Claims Act. In *Ciesiolka v. San Nicolas*, the District Court of Guam Appellate Division addressed the issue of whether there was sufficient information in the plaintiff's written claim against the government to support a claim for negligent retention in the lawsuit that followed the claim. No. CV-90-00076A, 1991 WL 336902, at *1 (D. Guam App. Div. 1991). Ciesiolka alleged that he was beaten by a police officer while he was detained for questioning at the police station. *Id.* Ciesiolka filed a claim with the AG's office for injuries sustained as a result of the alleged assault. *Id.* Ciesiolka's subsection 6201(c) statement of facts upon which the claim was based provided:

> While being interrogated at Pedro's Plaza, Officer J.A. San Nicolas punched me in the face several times without provocation. The officer has admitted the assault to Internal Affairs.

Id. (alteration to original).

[30] After the AG's office denied Ciesiolka's claim, he filed suit in the Superior Court. *Id.* at *2. The complaint alleged assault on the part of San Nicolas and negligent supervision and retention of San Nicolas on the part of GovGuam, a named defendant to the lawsuit. *Id.* The Superior Court granted the AG's motion to dismiss the complaint on the basis that the negligent retention claim had not been presented as required by the Claims Act. *Id.*

[31] The District Court Appellate Division affirmed the trial court's decision. *Id.* at *3. The court adopted the test purportedly used by the court in *City of San Jose v. Super. Ct. of Santa*

Clara County, 525 P.2d 701 (Cal. 1974), superseded by statute on other grounds, to determine whether a claim complies with the notice requirements under the claims act: "is there sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit?" *Id.* at *2. Applying this test to Ciesiolka's claim, the court found that:

> the information supplied by the claimant would not give the authorities sufficient information to adequately investigate a claim of negligent retention. Facts constituting battery cannot support a claim of negligent retention. The claimant failed to "entirely" comply with the required procedures of the Claims Act.

Id.

[32] In 2001, this court affirmed the *Ciesiolka* requirement of strict compliance with the Claims Act in *Pacific Rock Corp. v. Department of Education.* 2001 Guam 21 ("*Pacific Rock II*"). The court found that Pacific Rock Corporation ("PRC") had failed to comply with the Act's requirement of waiting at least six months after filing the claim before instituting a lawsuit.[5] *Id.* ¶ 52. However, the court found that PRC cured its premature filing when it filed a Supplemental Complaint in Superior Court ten months later. *Id.* The court thus held that PRC's claim complied with the Act and the trial court had jurisdiction over the case. *Id.*

[33] After reviewing *Ciesiolka*, we find that there is a fundamental misnomer in the case that seems to have been overlooked by this court in *Pacific Rock II* and by National Union in the present case. The test adopted by the *Ciesiolka* court and later affirmed by this court in *Pacific Rock II* is actually one of substantial compliance, not strict compliance. The *Ciesiolka* court misinterpreted *City of San Jose*, which actually read:

> In determining the quantity of information required in a class claim . . . we note the cases gauging sufficiency of claims must be divided into two groups.

[5] Instead, the lawsuit was filed two weeks after the claim was filed and prior to any response from the AG.

> The first treats claims where there has been some compliance with all the required elements – but compliance has been defective. In these cases the test of 'substantial compliance' controls: *Is there sufficient information disclosed on the face of the filed claim to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit?*
>
> In the second group of cases the courts have been less lenient. Here, claims were successfully challenged for failure to comply entirely with a particular statutory requirement. In determining the sufficiency of such claims the more liberal test of substantial compliance has not been applied – the courts recognizing '(s)ubstantial compliance cannot be predicated upon no compliance.'
>
> From these two groups *we conclude that to gauge the sufficiency of a particular claim, two tests shall be applied: Is there some compliance with all of the statutory requirements; and, if so, is this compliance sufficient to constitute substantial compliance?*

City of San Jose, 525 P.2d at 707 (emphases added) (internal citations omitted).

[34] Contrary to the *Ciesiolka* court's interpretation, *City of San Jose* did not adopt a "strict compliance" test; rather, it adopted a two-part test that requires both strict and substantial compliance. *See id.* First, the court must determine whether the claimant has complied to some extent with every statutory requirement. *Id.* If so, the court then determines whether such compliance is sufficient to constitute substantial compliance. *Id.* The only "strict" part of this test is the requirement of having to comply (to some degree) with every statutory requirement, because there cannot be substantial compliance if there is no compliance at all; if one required element is omitted, then the court cannot determine whether the claimant has substantially complied with that requirement.[6] *See id.*

[6] Although decided in 1974, *City of San Jose* is still followed in California today. *See, e.g.*, *County of Los Angeles v. Super. Ct.*, 71 Cal. Rptr. 3d 485, 491 (Ct. App. 2008); *Westcon Constr. Corp. v. County of Sacramento*, 61 Cal. Rptr. 3d 89, 101 (Ct. App. 2007); *Schaefer Dixon Assocs. v. Santa Ana Watershed Project Auth.*, 55 Cal. Rptr. 2d 698, 703-04 (Ct. App. 1996).

[35] We adopt the two-part test in *City of San Jose* and hold that in order to maintain a suit against the government, there must be some compliance with all of the requirements under the Claims Act, and the compliance must be sufficient to constitute substantial compliance.

[36] Applying *City of San Jose*'s test to the case at hand, we find that Quan substantially complied with the Claims Act. Reviewing Quan's claim, it is clear that there is at least *some* compliance with every requirement under section 6201. *See* Appellee's ER at 24-25 (Written Claim, Oct. 31, 2000). None of the requirements were left unaddressed. Thus, his claim satisfies the first part of the test. The only question that remains is whether his compliance is sufficient to constitute substantial compliance, i.e., whether there is sufficient information disclosed on the face of the filed claim to reasonably enable the government to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit. *See City of San Jose*, 525 P.2d at 707.

[37] Although Quan's claim did not identify all of the government entities involved in the incident and did not explicitly name the causes of action that he would have brought should he later decide to file suit, it did disclose sufficient information to have reasonably enabled the AG to make an adequate investigation to ascertain the identities of those involved, and to determine that GovGuam was potentially vicariously liable for the negligent operation of a government vehicle by one of its employees. Quan may have named only the DOC in his claim because as a detainee who spoke little to no English at the time of the incident, there was little chance that he knew where he was being sent on a work detail, for whom he was working, and the names of the individuals and their employer-agencies involved at the worksite and the scene of the accident. The information on the claim would have enabled the AG to learn these details through a

standard investigation – most easily by gathering any reports from DOC or the Guam Police Department ("GPD").

[38] Indeed, the Claims Act places an affirmative duty on the part of GovGuam to investigate claims. 5 GCA § 6203 (2005). Section 6203 states: "The Claims Officer shall cause each claim received by him to be investigated to determine its merits." *Id.* Furthermore, "[i]n making his investigation, the Claims Officer . . . shall have the authority . . . to require the production of any books, records or documents that may be material or relative as evidence in connection with the claim. 5 GCA § 6204 (2005).

[39] The record shows that any failure on the part of Quan to comply with the Claims Act was not for want of trying. On February 11, 2000, eight months before Quan filed his written claim with the AG, Quan's counsel sent a letter to DOC requesting any information, documents and reports in the possession of the DOC regarding the incident. *See* Appellant's Supplemental Excerpts of Record ("Appellant's SER") at 43 (Letter, Feb. 11, 2000). The record also contains an internal memorandum addressed to Quan's counsel from an investigator which states:

> Despite hours of research today, 02 11 00 Guam, by Officer Joe Balbas at the Headquarters of the Guam Highway Patrol, he could not find any report regarding the May 17, 1999 accident involving our client. Their files do not show this particular incident. Officer Balbas has surmised that the incident could have not been reported or if at all reported, it could have been done at a later [sic]. He called the Department of Corrections and spoke to a certain Ron Avidado to provide him any info about the accident, especially the report number, if they have any. Mr. Avidado will do the research of their file and to get back to Officer Balbas on Monday, February 14, 2000. Officer Balbas advised me to contact him after lunch on February 14, 2000.
>
> Per GMH, the medical reports for Mr. [Quan] will be available for pick up within the coming week. Per Julie, Secretary of Dr. Bollinger, the medical report will be available at the earliest on next Friday, February 18, because Dr. Bollinger is off-island.

> I already sent the request to DOC and INS re any and all documents relating to the accident during which our client was injured on May 17, 1999. I will follow this through within the coming week.

Appellant's SER at 45 (Mem., Feb. 11, 2000).

[40] Despite multiple requests for these reports, at the time of filing the written claim with the AG on October 31, 2000, Quan had yet to receive any documentation from either DOC or GPD regarding the accident. Presumably in order to comply with the time limitations of the Claims Act, Quan filed his written claim with the AG despite having few details as to the particular individuals and entities involved in the incident. In his claim, Quan asked the AG to "acknowledge receipt of this claim and advise us of any further information you need to deem the claim as a proper one. We are trying to comply with the laws of Guam in filing this claim. If there is any matter that we have inadvertently omitted, please advise us by November 7, 2000." Appellee's ER at 25 (Written Claim, Oct. 31, 2000). However, it was not until February 27, 2002, when GovGuam filed a "Prediscovery Disclosure" in the District Court action, that the identities of the individuals and the requested reports were disclosed to Quan. In that disclosure, it was revealed that:

> Ralph W. Sablan was employed at the Guam International Airport and assigned to the South Pacific Games (SPG) athletes village. He was employed through the Agency for Human Resources Development (AHRD). He was the driver of the vehicle upon which the Plaintiff was riding.

Appellant's SER at 49 (Prediscovery Disclosure, Feb. 27, 2002). The police report attached to the disclosure revealed that the truck was owned by GPA.[7]

[7] It appears that the reason GPD was unable to find the accident report at the time it was requested by Quan was that the report identified Quan solely by his detainee number. Quan was unaware that the reports prepared by GPD and by GPA's safety inspector, John Aflague, following the accident identified him simply as "INS # 061." *See* Appellant's SER at 53 (Prediscovery Disclosure); Appellee's Supplemental Excerpts of Record ("Appellee's SER") at 79 (Mem., May 19, 1999).

[41] The purpose of the Claims Act is to provide the government with sufficient information to enable it to adequately investigate claims. *See Life v. County of Los Angeles*, 278 Cal. Rptr. 196, 199 (Ct. App. 1991). The Act should not be used as a trap for the unwary when its purpose has been satisfied. *Id.* From the record, it appears that Quan was diligent in his attempts to comply with all of the requirements of the Claims Act, and that his claim provided GovGuam with sufficient information to investigate the merits of the claim and ascertain the identities of those involved. Because Quan's claim substantially complied with the Claims Act, we affirm the trial court's denial of National Union's motion for summary judgment.

B. Effect of Settlement Agreement

[42] Between July 9, 2007, and August 16, 2007, after trial and issuance of the trial court's Findings of Fact and Conclusions of Law, but prior to the trial court's entry of judgment, a series of letters were sent between Quan's counsel and GovGuam. The letters settled Quan's claim against GovGuam for $58,000.00. The settlement agreement also included a covenant that Quan would not execute on any judgment against GovGuam, and an assignment to Quan of GovGuam's rights against National Union. On August 30, 2007, the trial court entered its Judgment in favor of Quan and against GovGuam in the amount of $48,000.00, and in favor of National Union on the issue of its liability to indemnify GovGuam.

[43] The insurance policy in this case provides that "[t]he company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of . . . bodily injury . . . ." Appellee's ER at 28 (Comp. Auto. Liab. Ins. Policy). The primary issue that arises from this settlement agreement is the effect, if any, of the covenant not to execute on GovGuam's legal obligation to pay Quan for any damages that resulted from the accident and of

the language of the policy requiring National Union to pay only for damages which the insured shall become legally obligated to pay.

[44] National Union contends that the settlement between Quan and GovGuam renders the issue of National Union's liability and the amount of such liability moot, or in any case, that National Union cannot be found liable for more than $58,000.00. Furthermore, National Union argues that any assignment of GovGuam's rights under the insurance policy to Quan is faulty because GovGuam failed to comply with its obligations under the policy, e.g., its obligation to immediately notify National Union when an accident involving an insured vehicle occurs, its obligation to turn over the defense of the case to National Union, and its obligation to involve National Union in any settlement negotiations.

[45] In response, Quan contends that under the settlement agreement, he did not release any of his claims against GovGuam, and, thus, he still has them. Quan makes the distinction between a release of claims and a covenant not to execute on any judgment, as discussed in his July 9, 2007, letter to William Bischoff, Assistant AG. Quan contends that a covenant not to execute allows Quan to retain any claims he may have against any and all of the defendants; the only thing he has waived is his right to seek *payment* of any judgment from GovGuam. Furthermore, Quan argues that GovGuam's failure to comply with the terms of the insurance policy is irrelevant in light of National Union's continuing denial of any liability under the contract.

[46] There are two lines of authority on whether an insurer may be liable to an injured party when the insured, before judgment, enters into an agreement not to execute. *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 529 (Iowa 1995). The first line of authority reasons that a covenant not to execute "is merely a contract, and not a release, such that the underlying tort liability remains and a breach of contract action lies if the injured party seeks to collect his judgment.

Thus, the tortfeasor is still 'legally obligated' to the injured party, and the insurer still must make good on its contractual promise to pay." *Id.*

[47] The second line of authority reasons that because an insured protected by a covenant not to execute has no compelling obligation to pay any sum to the injured party, the insurance policy imposes no obligation on the insurer. *Id.* at 529-30. "Some of the courts following this line of authority are primarily concerned about possible collusion between the insured and the injured party assignee." *Id.* at 530 (citing *Freeman v. Schmidt Real Estate & Ins., Inc.*, 755 F.2d 135, 138-39 (8th Cir. 1985); *Steil v. Fla. Physicians' Ins. Reciprocal*, 448 So. 2d 589, 592 (Fla. Dist. Ct. App. 1984)).[8]

[48] A majority of jurisdictions ascribe to the first line of authority, treating a covenant not to execute as a contract and not as a release of liability on the part of the insured. Justin A. Harris, *Judicial Approaches to Stipulated Judgments, Assignments of Rights, and Covenants Not to Execute in Insurance Litigation*, 47 Drake L. Rev. 853, 858 & n.22 (1999) (collecting cases).[9] The insured remains liable in tort and the insurer is still obligated to indemnify its insured. *Id.*

[49] The National Union insurance policy fails to define "legally obligated to pay." Where an insurance policy does not define a term, courts view this as an ambiguity and construe it in favor of the insured and against the insurer as drafter of the language. *See, e.g., Baxley v. Nationwide*

[8] In the present case, there is little threat of collusion between Quan and GovGuam. They entered into the settlement agreement after a full trial on the merits. Although they reached the agreement before final judgment had been entered, the amount of the settlement reflected the amount that had been reached by the trial court in its Findings of Fact and Conclusions of Law (i.e., $48,000.00), with the addition of $10,000.00 for Quan's attorney's fees. Furthermore, the settlement agreement did not include any agreement to enter a stipulated judgment against National Union; instead, Quan was simply relying on the appeal process to find liability on the part of National Union.

[9] Because there was a full trial on the merits, and because the settlement agreement between Quan and GovGuam reflected the amount of damages determined at trial, the agreement would probably pass muster in any of the jurisdictions discussed in Harris's law review article. Indeed, the fear in Texas regarding the use of this procedure seems not to be in the covenant not to execute and the assignment of rights, but in the stipulated judgment. *See State Farm Fire & Cas. Co. v. Gandy*, 925 S.W.2d 696, 714 (Tex. 1996) (where use of this procedure follows adversarial trial, thereby eliminating problem of objectively evaluating plaintiff's claim, court need not worry about possibilities of fraud or collusion).

Mut. Ins. Co., 430 S.E.2d 895, 899 (N.C. 1993); *Red Giant*, 528 N.W.2d at 533 ("Our interpretation of the 'legally obligated to pay' language in the policy is consistent with insurance policy rules of construction. The policy does not define 'legally obligated to pay.' At best, this language is ambiguous. Because it is ambiguous, we construe it in favor of the insured."); *see also* 2 Eric Mills Holmes & Mark S. Rhodes, *Holmes's Appleman on Insurance 2d* § 6.1 (1996) (where policy language is found to be ambiguous, all courts unanimously hold that insurance contracts must be liberally interpreted in favor of insured, wherever possible, and strictly construed against insurer in order to afford protection which insured was endeavoring to secure when applying for insurance); Holmes & Rhodes, *Holmes's Appleman on Insurance 2d* § 5.4 (insurance policy should be so construed as to effectuate the purpose of indemnification against loss, rather than to defeat it).[10]

[50] Because we find that the term "legally obligated to pay" is not clear on its face or defined by the National Union insurance policy, we construe the ambiguity in favor of the insured. Therefore, we adopt the construction of the settlement agreement followed by a majority of jurisdictions, which treats the covenant not to execute as a contract and not as a release of liability on the part of the insured.[11] *See* Harris, 47 Drake L. Rev. at 858 & n.22; *cf.* Holmes & Rhodes, *Holmes's Appleman on Insurance 2d* § 6.1 (very fact that a number of courts have reached conflicting conclusions as to meaning of a certain provision is frequently considered evidence of ambiguity).

[10] *See also* Restatement (Second) of Contracts § 206 (1981) ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.").

[11] The majority rule is also more consistent with Guam's direct action and mandatory insurance statutes, which reflect a policy of protecting the rights of injured parties and the general public. *See* 22 GCA § 18305 (2005) (direct action); 16 GCA § 19101 *et seq.* (2005) (mandatory insurance).

[51] The covenant not to execute in the settlement agreement did not, therefore, release GovGuam from its liability as a tortfeasor in the lawsuit. GovGuam is liable for any judgment entered against it, including the judgment of $48,000.00 and any subsequent judgment that may arise as a result of this appeal. Thereby, GovGuam is still "legally obligated to pay" damages as a result of the accident. The covenant not to execute did not relieve GovGuam of its legal liability; it simply gives GovGuam a defense in contract in the event that Quan attempts to collect any judgment against it.

[52] The settlement agreement did not cap the amount of damages that can be found against GovGuam because the covenant not to execute on the judgment is not a release of GovGuam's liability for the injuries. Assuming that GovGuam has complied with the terms of the policy, National Union must indemnify GovGuam – or, in this case, Quan as assignee of GovGuam's rights against National Union – for the judgment of $48,000.00, plus any additional amount determined as a result of this appeal.

[53] Notwithstanding our finding that the settlement agreement did not cap damages, it must still be determined whether Quan and GovGuam were warranted in entering into the settlement agreement in the first place, in light of the insurance policy's explicit prohibition against these types of settlements without notice to the insurer. Specifically, the policy states that it does not apply "to liability assumed by the insured under any contract or agreement." Appellee's ER at 28 (Comp. Auto. Liab. Ins. Policy). On the face of the insurance agreement, the settlement agreement between GovGuam and Quan was prohibited under the terms the policy. However, despite this standard exclusion, an insured is entitled to enter into such settlement agreements with a third-party claimant where the insurer has refused to defend the insured against the

claim.[12] *See, e.g., Pruyn v. Agric. Ins. Co.*, 42 Cal. Rptr. 2d 295, 304-05 (Ct. App. 1995); 44 Am. Jur. 2d *Insurance* § 1410 (2009) ("[A]n insurer's wrongful refusal to defend relieves the insured from his or her contract obligation not to settle, and the insured is at liberty to make a reasonable settlement or compromise without losing his or her right to recover on the policy.").

[54] Quan argues that GovGuam did not breach its duty to cooperate when it entered into a settlement agreement with him because, at that point, National Union had already breached its duty to defend GovGuam as an insured under the policy. *See He v. Gov't of Guam*, CVA07-019 (Mot. Dismiss Appeal at Ex. A1 (Oct. 25, 2007)) ("We also believe that since National Union has never agreed to either defend and/or indemnify GovGuam, GovGuam is free to enter into this settlement with us without prejudicing its rights against National Union."). Meanwhile, National Union argues that it had indeed provided a defense to GovGuam,[13] and that, in any case, it was not obligated to defend GovGuam because GovGuam had breached its duties under the policy to provide timely notice of the incident and claim and to tender defense of the case to National Union. Although these questions were raised in National Union's motion for summary judgment below, they were not addressed by the trial court. Because the record is insufficient to resolve these issues for the first time on appeal, we express no opinion as to these matters. *See Guam Imaging Consultants, Inc. v. Guam Mem'l Hosp. Auth.*, 2004 Guam 15 ¶ 18 (quoting *Bank of Guam v. Reidy*, 2001 Guam 14 ¶ 31) ("Where the trial court has erroneously failed to exercise its discretion, an appellate court may either remand or, if the record is sufficiently developed, decide

[12] The insurance policy provides that National Union "shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury . . . even if any of the allegations of the suit are groundless, false or fraudulent . . . ." Appellee's ER at 28 (Comp. Auto. Liab. Ins. Policy).

[13] *See* Appellee's Br. at 19 (Dec. 17, 2008) ("The fact is that NATIONAL UNION defended the Government of Guam far more vigorously and diligently than it defended itself. That it was in its own self interest to do so makes no difference as that is virtually always the case where both the insurer and the insured would benefit from a determination of no liability.").

the issue itself."). The issues of whether GovGuam or National Union breached their respective duties under the policy and whether GovGuam was free to enter into the settlement agreement with Quan are hereby remanded to the trial court for decision in the first instance.[14]

C. Permissive User

[55] Quan appeals the trial court's finding that Ralph Sablan, the driver of the flatbed truck at the time of the accident, was not a "permissive user" under the National Union insurance policy, as well as its determination based on that finding that National Union was not liable for Quan's injuries and damages. The trial court found that Sablan was not a permissive user under the policy's omnibus clause because his use of the truck was beyond the scope of the permission granted by GPA to the original permittee, Frank Ulloa.

[56] "An automobile insurance company has a general responsibility to provide coverage for people who may not be named insureds in the written policy, but fall under the coverage provided for in the policy." *Mitchell v. Allstate Ins. Co.*, 244 S.W.3d 59, 61 (Ky. 2008) (citing 46 C.J.S. *Insurance* § 4045 (1993)). "This responsibility is usually satisfied through the language of the policy's omnibus clause which extends insurance protection to persons other than the named insured." *Id.* at 61-62 (citing 46 C.J.S. *Insurance* § 1045 (1993)). In the present case, the omnibus clause is found in subsection II of the insurance policy, and provides, in relevant part:

[14] The issue of whether National Union is also responsible for the $10,000.00 difference between the settlement amount of $58,000.00 and the judgment of $48,000.00 is not before this court because there has been no finding that National Union breached its duty to defend GovGuam. An insurer who breaches its duty to defend its insured assumes the risk that the plaintiff and insured will enter into a settlement agreement, and such insurers have been held liable to indemnify insureds for reasonable settlement amounts. *See Pruyn*, 42 Cal. Rptr. 2d at 303-05 (insurer who wrongfully fails to defend insured will be bound by insured's settlement with third-party claimant, provided that such settlement is not unreasonable and is free from fraud or collusion); 44 Am. Jur. 2d *Insurance* § 1410 (in order to bind insurer, settlement must be reasonable and entered in good faith). Should the trial court find that such a breach occurred, the court should decide whether the additional $10,000.00 to cover Quan's attorney's fees was reasonable and entered in good faith.

II. PERSONS INSURED

Each of the following is an insured under this insurance to the extent set forth below:

> (a) the named insured;
>
> . . .
>
> (c) any other person while using an owned automobile or a hired automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission . . .
>
> (d) any other person or organization but only with respect to his or its liability because of acts or omissions of an insured under (a), (b) or (c) above.

Appellee's ER at 28 (Comp. Auto. Liab. Ins. Policy).

[57] The main purpose of an insurance policy's omnibus clause is to maximize the availability of insurance proceeds for the benefit of the general public. *Mitchell*, 244 S.W.3d at 62 (citing 46 C.J.S. *Insurance* § 1045). Generally, an individual is afforded omnibus clause protection if the person driving the insured vehicle had permission to operate the vehicle. *Id.* (citing *Vezolles v. Home Indem. Co., New York*, 38 F. Supp. 455, 459 (W.D. Ky. 1941) ("The main purpose of the clause is to substitute the operator of the car for the owner of the car while the car is being operated with the permission of the owner."). Such permission can be either express or implied. *Id.* (citing *Maryland Cas. Co. v. Hassell*, 426 S.W.2d 133, 134-35 (Ky. 1967)); *see also Barton v. U.S. Agencies Cas. Ins. Co.*, 948 So. 2d 1267, 1271 (La. Ct. App. 2007) (citing *Perkins v. McDow*, 615 So. 2d 312 (La. 1993). "'Implied permission' arises from a course of conduct by the named insured involving acquiescence in, or lack of objection to, the use of the vehicle." *Barton*, 948 So. 2d at 1271 (citing *Manzella v. Doe*, 664 So. 2d 398 (1995)).

[58] Sometimes an individual has initial express or implied permission to operate a vehicle, but arguably exceeds the scope of the permission granted. *Mitchell*, 244 S.W.3d at 62. In these

situations, the court must determine whether such a violation is egregious enough to justify denying coverage despite the omnibus clause. *Id.*; *see also* Lee R. Russ in consultation with Thomas F. Segalla, 8 *Couch on Insurance* § 112:65 (3d ed. 2009) (where original borrower of insured vehicle permits another to use vehicle, factual determination must be made as to whether initial grant of permission was broad enough to include implied grant of authority to lend vehicle to another person, and, thus, render second permittee an insured under omnibus clause).

[59] The courts have not agreed as to the legal theory to be applied in determining when a deviation from the purpose and use for which permission is granted will preclude coverage under an omnibus clause. In this regard, three rules have commonly been adopted. *E.g.*, *Mitchell*, 244 S.W.3d at 62; *State Farm Mut. Auto. Ins. Co. v. Ragatz*, 571 N.W.2d 155, 159 (S.D. 1997). The harshest rule is the "strict construction" rule which holds that coverage only exists if the use of the vehicle was one intended by the parties. *Mitchell*, 244 S.W.3d at 62; *U.S. Fire Ins. Co. v. Macloskie*, 465 S.E.2d 759, 763 (S.C. Ct. App. 1995). "Under this rule, generally, any deviation, no matter how slight, will defeat liability under the coverage of the omnibus clause." 7 Am. Jur. 2d *Automobile Insurance* § 234 (2009) (citing *Lloyds Am. v. Tinkelpaugh*, 88 P.2d 356 (Okla. 1939)); *accord Ragatz*, 571 N.W.2d at 159 ("[T]he slightest deviation . . . will preclude coverage under the omnibus clause."). Omnibus protection is granted where the vehicle was "used for a purpose reasonably within the scope of the permission given, during the time limits expressed, and within the geographical limits contemplated." *Mitchell*, 244 S.W.3d at 62 (citing *Hawley v. Indem. Ins. Co. of N. Am.*, 126 S.E.2d 161 (N.C. 1962)); *accord Ragatz*, 571 N.W.2d at 159.

[60] The intermediate rule is the "moderate" or "minor deviation" rule. *Mitchell*, 244 S.W.3d at 62; 7 Am. Jur. 2d *Automobile Insurance* § 236 (2009). Under this rule, coverage is extended under an omnibus clause even though the borrower has deviated from the scope of the permitted

use of the vehicle, as long as the deviation is slight and inconsequential, but not if it is gross, substantial, or major. *Mitchell*, 244 S.W.3d at 62; 7 Am. Jur. 2d *Automobile Insurance* § 236 (citing *James v. Aetna Life & Cas.*, 546 P.2d 1146 (Ariz. Ct. App. 1976)). Conversely, coverage is defeated by proof that the deviation from the scope of permission was material. *Ragatz*, 571 N.W.2d at 160; 7 Am. Jur. 2d *Automobile Insurance* § 236 (citing *O'Neill v. Long*, 54 P.3d 109 (Okla. 2002)). "A deviation is material if it is alien or foreign to the original permitted objective or operation." *Ragatz*, 571 N.W.2d at 160 (citation and internal quotation marks omitted).

[61] The third rule is the "initial permission" or "liberal" rule which allows for coverage even if the use of the vehicle was not contemplated by the parties or was outside any limitations placed upon the initial grant of permission. *Mitchell*, 244 S.W.3d at 62 (citing 46 C.J.S. *Insurance* § 1053 (1993)). Under this rule, once permission to use an insured vehicle is granted, any subsequent use of the vehicle by the borrower – short of conversion or theft – would be covered by the policy. *Id.* (citing 7 Am. Jur. 2d *Automobile Insurance* § 235 (2007)). Any subsequent deviation from the character or scope of the use does not require express permission from the insured, even if the change involves the initial borrower allowing a third party to use the vehicle. *Id.* (citing 7 Am. Jur. 2d *Automobile Insurance* § 235). Only the first "use" must be with permission; later deviations are immaterial and will not defeat coverage under the omnibus clause. *Ragatz*, 571 N.W.2d at 160; 7 Am. Jur. 2d *Automobile Insurance* § 235 (citing *Barry v. Tanner*, 547 N.W.2d 730 (Neb. 1996)). Coverage would even extend to a person who was specifically prohibited by the insured from using the vehicle, so long as that person obtained consent from the original borrower. *Mitchell*, 244 S.W.3d at 62 (citing 7 Am. Jur. 2d *Automobile Insurance* § 235).

[62] Quan urges this court to adopt the initial permission rule. The courts that have adopted that rule have done so on the basis that such a rule best accomplishes the public policy goals behind their respective motor vehicle insurance laws. In *Mitchell*, the leading case for the initial permission rule, the Supreme Court of Kentucky abandoned its use of the "minor deviation" rule, finding that the initial permission rule best satisfied the goal behind Kentucky's Motor Vehicle Reparations Act of providing victims the right to compensation for their injuries.[15] 244 S.W.3d at 64-65. The court also believed that the initial permission rule would remove any incentive on the part of an owner of a borrowed vehicle to unconsciously color his testimony in order to avoid potential personal liability, and would further the goal of speeding up the process of compensation "because determining the scope of permission granted to the vehicle operator will no longer be as complex, or litigation prone, as it was under the minor deviation rule." *Id.* at 64.

[63] "[S]everal other jurisdictions have found multiple benefits and justifications in adopting an 'initial permission' rule under their statutory schemes." *Id.* (citing *Norton v. Lewis*, 623 So. 2d 874, 875 (La. 1993) ("The primary justification for the 'initial permission' rule is that it effectively furthers the state's policy of compensating and protecting innocent accident victims from financial disaster. Moreover, its application serves to discourage collusion between lender and lendee in order to escape liability and to greatly reduce a most costly type of litigation."); *U.S. Fid. & Guar. Co. v. Fisher*, 494 P.2d 549, 551-52 (Nev. 1972) (stating that the "initial permission" rule not only reduces litigation, but allows for the wrongfully injured to have financially responsible people to look toward for damages); *Universal Underwriters Ins. Co. v.*

[15] Like Kentucky, Guam has a mandatory insurance statute, 16 GCA § 19101 *et seq.* Under that statute, "[e]ach owner of a motor vehicle which is required to be registered in Guam shall maintain the insurance required by this Chapter." 16 GCA § 19102. The purpose of this legislation is "to guarantee adequate protection for victims of car accidents who are injured in Guam or who are injured while riding in motor vehicles which are operated in Guam." 16 GCA § 19101.

Taylor, 408 S.E.2d 358, 364 (W.Va. 1991) ("We think that the 'initial permission' rule best effectuates the legislative policy of providing certain and maximum coverage, and is consistent with the language of the standard omnibus clause automobile liability insurance policies.")).

[64] This court has yet to adopt one of the three permissive user rules. The sole Guam case cited by National Union to support its contention that this court is inclined to adopt the "strict" rule is *O'Mara v. Hechanova*, 2001 Guam 13. That case, however, is easily distinguishable from the one at hand. In *O'Mara*, this court found that the owner of the vehicle and her insurer were not liable for the negligence of the driver of the vehicle (under Guam's Imputed Negligence statute) where the plaintiff failed to present any evidence at trial tending to prove that the driver had either express or implied consent to use the vehicle. *Id.* ¶ 14. Although in her response to interrogatories the owner had admitted to giving permission to the driver to use the vehicle, this evidence was not presented at trial and was not part of the record before the jury. *Id.* ¶ 9. In the present case, Quan presented evidence at trial and proved that Sablan was given permission by Ulloa to drive the flatbed truck. The only question was whether Sablan's use of the truck was within the scope of the permission given to Ulloa by GPA, i.e., whether Sablan at the time of the accident was driving the truck "with the permission of the named insured," GPA. *See* Appellee's ER at 28 (Comp. Auto. Liab. Ins. Policy).

[65] We find that the trial court erred in concluding that Sablan was not a permissive user of the insured vehicle and that GovGuam was not an insured under the policy's omnibus clause. At the outset, we reject the strict construction rule of permissive use because such a rule does not serve the purposes of our legislature's intent to protect innocent victims of motor vehicle accidents. *See* 16 GCA § 19101 (2005). We are not, however, required to choose between either

the initial permission or minor deviation rule at this time because under the circumstances of this case, Sablan was a permissive user under either of the two rules.

[66] Under the minor deviation rule, Sablan's use of the truck was arguably only a slight deviation from GPA's grant of permission, because Sablan's use of the vehicle was consistent with the purpose behind GPA's lending of the vehicle (i.e., to be used in preparation for the SPG). *See Ragatz*, 571 N.W.2d at 160 (deviation is material if inconsistent with original permitted objective). Although Sablan did not possess a chauffeur's license, according to Jesse Palican, Special Projects Coordinator for GPA and "Mayor" of the Athletes Village, "[d]ue to the lack of workers [to assist in preparing for the SPG], anyone use[d] the flatbed." Appellee's SER at 79 (Mem.). However, Sablan did not get permission to drive the truck from just anyone; he was given permission by Ulloa, the supervisor of GPA's Motor Vehicles Pool and a Vice-Mayor of the Athletes Village. Other than the standard operating procedure of requiring an operator of a GPA vehicle to possess a chauffeur's license, Ulloa and the SPGC were given almost unfettered use of the vehicle for the purposes of the preparations for the Games. Sablan's use of the truck to transport waterblasting equipment, at the direction of Ulloa, was merely a minor deviation from GPA's grant of permission.

[67] Under the initial permission rule, Sablan was a permissive user under the omnibus clause because he obtained consent to use the truck from Ulloa, the initial borrower. Even a person who was specifically prohibited from using the truck by GPA can be covered by the omnibus policy under the initial permission rule if that person obtained consent from the initial borrower. *See Mitchell*, 244 S.W.2d at 62. Although Sablan's lack of a chauffeur's license violated GPA's standard operating procedure, he was still a permissive user under the clause.

[68] As a permissive user of GPA's vehicle, Sablan is an insured under section II(c) of the omnibus clause. Consequently, GovGuam is an insured under section II(d) of the policy because, as Sablan's employer, GovGuam is vicariously liable for his torts that occur within the scope of his employment. *See* 5 GCA § 6105(b) ("[T]he Government of Guam hereby waives immunity from suit . . . for claims in tort, arising from the negligent acts of its employees acting for and at the direction of the government of Guam."). Therefore, National Union had a duty to indemnify GovGuam. The trial court's finding to the contrary is hereby reversed. National Union's ultimate liability, however, is subject to the trial court's determination on remand as to the issues of whether or not GovGuam or National Union complied with their respective duties under the policy as discussed in Section IV. B. above.

D. Damages

1. Future pain and suffering

[69] Quan appeals the trial court's failure to award him general damages for future pain and suffering, inconsistent with its finding that he would suffer from pain in the future.

[70] In its initial Findings of Fact and Conclusions of Law ("Findings"), the trial court found that Quan "has suffered from past, and will suffer in the future, from pain and discomfort as his bones continue to heal for which he should be properly compensated." Appellant's ER at 75 (Finds. Fact & Concl. L.). However, in calculating damages, the trial court counted only the first five years since the accident, 1999-2004. In other words, the court did not award Quan for any pain and suffering he had in the two years preceding the trial and for any period of time after trial.

[71] Quan moved the trial court to amend its Findings to include a damage award for his future pain and suffering. During the hearing on the motion, the following exchange took place:

> [Counsel for Quan]: The only dollars I'm asking the Court for, based on the Court's indication that he will suffer in the future, are future general damages. To say that he will suffer in the future and not award him anything as far as general damages . . . . When I saw that this Court had found that he had future pain and suffering –
>
> THE COURT: Well, my future was from the date he got injured to the future of five years. That was the Court's limitation of its future. You're asking the Court to go at least from 2004, maybe 2006 when we went to trial, and maybe a little bit more than that is what you're asking the Court. And –
>
> [Counsel for Quan]: Yeah. I had construed the Court's finding differently. I admit, Your Honor, I thought the Court had believed that Mr. [Quan] would continue to suffer into the future.
>
> THE COURT: No. The Court looked at the time of the injury and then from that injury he was to suffer some future damages. And I apologize if it's not written well enough for you to understand my position. The fact that I was very limited in what I awarded should have been clear that there is not much future in terms of injury that this Court could see beyond the five years that I gave him from time of his injury. That is what the Court is clarifying; time of injury, suffering from that point for about five years beyond that.

Transcript at 42-43 (Bench Trial, Nov. 21, 2007).

[72] In its Decision and Order regarding Quan's motion, the court stated:

> Nonetheless, the Court did find in its Findings of Fact and Conclusions of Law that Mr. [Quan] suffered pain at the time of trial, but only awarded him general damages for such pain and suffering for five years following the accident. The accident occurred on May 17, 1999, and the bench trial was on May 23, 2006. The Court awarded Mr. [Quan] six thousand dollars ($6,000.00) per year for years 2000 through 2004. Therefore, the Court now awards Mr. [Quan] a total of twelve thousand dollars ($12,000.00) for pain and suffering endured in 2005 and 2006.

Appellant's ER at 150 (Dec. & Order, April 19, 2007).

[73] However, in the trial court's Amended Findings of Fact and Conclusions of Law ("Amended Findings"), the language regarding future pain and suffering was not amended, so it still read: "The Court finds Plaintiff has suffered from past, and will suffer in the future, from

pain and discomfort due to his severe injuries." Appellant's ER at 167 (Amended Finds. Fact & Concl. L., April 19, 2007). The court, however, did increase the damage award to $48,000.00, consistent with its Decision and Order, awarding damages for Quan's pain and suffering up to the time of trial.

[74] Quan argues on appeal that the trial court erred in not making an award for every element of damages it found. However, based on the transcript of the motion hearing and the Decision and Order stemming from that hearing, it is apparent that the trial court did not believe that Quan had proven future pain and suffering, and its damage award reflects its contention that "future" meant the time since the accident, not the time after trial. Nevertheless, because the language of the Amended Findings failed to remedy the confusion, this issue is remanded to the trial court for clarification of its ruling regarding the issue of pain and suffering.

2. Medical expenses

[75] At trial, Quan presented evidence that he incurred as a result of the accident medical expenses in the amount of $22,588.31. However, the trial court declined to award Quan for any of his medical expenses because the evidence showed that those expenses had already been paid by the United States, the defendant in the still pending District Court action. Quan argues that the payment by the United States did not count against GovGuam's liability because the United States is a collateral source under the collateral source doctrine.

[76] The Restatement (Second) of Torts describes the collateral source doctrine as follows:

> **Effect of Payments Made to Injured Party.**
>
> (1) A payment made by a tortfeasor or by a person acting for him to a person whom he has injured is credited against his tort liability, as are payments made by another who is, or believes he is, subject to the same tort liability.

> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Restatement (Second) of Torts § 920A (1979).

[77] According to Quan, the federal government paid his medical expenses not because it believed it was subject to tort liability, as under section 920A(1), but because the United States was under a contractual obligation to pay for the expenses. Thus, Quan contends, a credit against GovGuam's liability would be precluded under section 920A(2).

[78] The record shows that the United States was indeed under a contractual obligation to pay GovGuam for the medical expenses of federal detainees at DOC.[16] Article III of the Intergovernmental Service Agreement ("IGA") between the United States and GovGuam covered the issue of medical expenses:

> 1. The Local Government [GovGuam] agrees to provide federal prisoners with the same level of medical care and services provided to local prisoners, including the transportation and security for prisoners requiring removal from the facility for emergency medical services. *All costs associated with hospital or health care services provided outside the facility will be paid directly by the Federal Government.* In the event the Local Government has a contract with a medical facility/physician or receives discounted rates, the federal prisoners shall be charged the same rate as local prisoners.

[16] The United States is authorized to enter into such agreements with DOC pursuant to 18 U.S.C. § 4002, which provides:

> For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.
>
> Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.
>
> The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such purposes.

18 U.S.C.A. § 4002 (Westlaw 2009).

. . .

5. Federal prisoners will not be charged and are not required to pay their own medical expenses. Theses expenses will be paid by the Federal Government.

Appellant's ER at 86 (Intergovernmental Service Agreement ("IGA"), March 10, 1999).

[79] In addition to the IGA, Quan provides a letter from the United States Attorney to Quan's counsel indicating the federal government's denial of its liability as a tortfeasor in the accident. The letter, dated January 26, 2001, states:

> Attached is the contract to house federal detainees in the Guam Department of Corrections. The Immigration & Naturalization Service participates in this arrangement.
>
> Specifically, with regard to Quan Xing He, my information is that no action on the part of a federal employee was involved with the circumstances of his injury. As such, the federal government has no liability and a lawsuit for injury cannot properly be brought against the United States.
>
> Please let me know if we can be of assistance in providing foundational information for a suit against the entities potentially responsible for the injuries.

Appellant's ER at 82 (Letter, Jan. 26, 2001).

[80] Despite the U.S. Attorney's declaration that the federal government had no liability for the injuries, the federal government proceeded to pay for Quan's medical expenses. Quan contends that the denial of liability proves that the United States paid because of its obligations under the IGA, not because it believed itself to be a tortfeasor. Thus, Quan argues, the payments on Quan's medical expenses were from a collateral source.

[81] In opposition, National Union argues that because the United States is a named defendant in the pending action in the District Court, it is not a collateral source. National Union contends that Quan cannot simultaneously sue the United States and allege that it is not a tortfeasor under the collateral source doctrine.

[82] We reject National Union's argument. We find that the fact that the United States is a named defendant for the same injuries in a pending District Court action has no bearing on whether or not the United States' payment of Quan's medical expenses should be deemed a collateral source. Instead, we are persuaded by Quan's argument that the United States paid his medical expenses not because it believed itself to be a tortfeasor, but because of its contractual obligations to pay such expenses pursuant to the IGA between the United States and DOC.

[83] The United States' denial of liability in its January 26, 2001, letter has support in Supreme Court caselaw. In *Logue v. United States*, the Supreme Court held that in view of the fact that the United States had no authority to control the activities of county prison employees, who were entrusted with the care and custody of federal detainees under a contract with the United States, the county was an independent contractor of the United States, and not employees of a federal agency, within the meaning of the Federal Tort Claims Act exemption from liability for injury caused by employees of a contractor with the United States.[17] 412 U.S. 521, 529-32 (1973); *accord Bethae v. United States*, 465 F. Supp. 2d 575, 580-81 (D. S.C. 2006).

[84] Under the *Logue* test, if the United States had no authority to control the activities of DOC employees, DOC would have been an independent contractor of the United States, which would preclude Quan from recovering damages from the United States for his injuries under the Federal Tort Claims Act.[18] Payment of Quan's medical expenses by the United States would therefore be from a collateral source and not from a tortfeasor or potential tortfeasor, so that Quan would be entitled to recover medical expenses from National Union, the insurer of

[17] According to 28 U.S.C. § 2671, "Federal agency . . . does not include any contractor with the United States." 28 U.S.C.A. § 2671 (Westlaw 2009).

[18] While we recognize that the issue of the United States' liability is not one for this court to decide, we find that such a discussion is relevant in order to resolve the collateral source issue.

GovGuam. However, the record is unclear as to whether or not the United States had authority to control the activities of DOC employees while they were entrusted with the care and custody of federal detainees under the IGA of March 10, 1999. Accordingly, we remand this issue to the trial court. Should the trial court find that the United States had no authority to control the activities of DOC employees, Quan should be entitled to recover damages against GovGuam and National Union as GovGuam's insurer for all medical expenses incurred as a result of his injuries and proven at trial, subject to any policy limits and to the trial court's determination on remand of the issues of whether or not GovGuam or National Union breached their respective duties under the policy as discussed in Section IV. B. above.

V. CONCLUSION

[85] For the foregoing reasons, the case is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for findings consistent with this opinion.

Original Signed By: F. Philip Carbullido
F. PHILIP CARBULLIDO
Associate Justice

Original Signed By: Katherine A. Maraman
KATHERINE A. MARAMAN
Associate Justice

Original Signed By: Robert J. Torres
ROBERT J. TORRES
Chief Justice