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SUPREME COURT
OF GUAM

IN THE SUPREME COURT OF GUAM

ODILIA BAUTISTA,
Plaintiff-Appellee,

and

**JOSEPH A. GUTHRIE, on behalf of themselves
and all those similarly situated,**
Plaintiff-Appellant,

v.

**JOE T. SAN AGUSTIN, WILFRED P. LEON GUERRERO, ANTOLINA S.
LEON GUERRERO, GERARD A. CRUZ, ANTHONY C. BLAZ, DAVID M.
O'BRIEN, and KATHERINE T.E. TAITANO, in their capacities as Trustees
of the Government of Guam Retirement Fund Board of Trustees,
Defendants-Appellees.**

Supreme Court Case No.: CVA14-017
Superior Court Case No.: CV1848-01

OPINION

Cite as: 2015 Guam 23

Appeal from the Superior Court of Guam
Argued and submitted on February 20, 2015
Hagåtña, Guam

Appearing for Plaintiff-Appellant:

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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 Joseph A. Guthrie appeals the trial court’s decision denying him attorney’s fees under the common fund doctrine against the Defined Benefit Plan of the Government of Guam Retirement Fund. On appeal, this court *sua sponte* raised the issue of whether the doctrine of sovereign immunity bars Guthrie’s lawsuit. For the reasons set forth below, we dismiss the case for lack of subject matter jurisdiction.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Initial Underlying Action

[2] Plaintiff Odilia Bautista and Plaintiff-Appellant Joseph A. Guthrie, members of the Defined Benefit Plan, filed a complaint in the underlying action against Defendant-Appellee Board of Trustees (“the Board”) of the Government of Guam Retirement Fund (“the Retirement Fund”). They claimed that the Guam Legislature had enacted statutes that provided for payments of supplemental annuity and Cost of Living Allowance benefits to a limited class of retirees from the Retirement Fund’s Defined Benefit Plan, and that the Board breached its fiduciary duty by voting to issue those payments. They sought (1) a declaration that the statutes were not binding upon the Retirement Fund without proper funding, (2) an injunction restraining and enjoining the Board from making such payments, and (3) an order for the Board to recapture all payments already made and to return such funds to the Retirement Fund.

[3] In 2003, the trial court issued a Decision and Order (“the 2003 Order”) granting the Board summary judgment and finding that:

[T]he Board of Trustees of the Retirement Fund must follow their fiduciary duties as set forth in the Organic Act of Guam. The Board must treat the [Retirement Fund] in a manner that will not impair the government's ability to provide permanent, disability, and survivor benefits to [Defined Benefit] Plan members. The Board of Trustees is hereby ordered to:

1. refuse to pay new benefits if unfunded or underfunded pursuant to actuarial standards;
2. challenge legislation amending the [Defined Benefit] Plan that would increase benefit levels, expand minimum eligibility requirements, reduce or delay funding of contributions, otherwise impair the ability of the government to provide retirement, disability, and survivor benefits to members and beneficiaries;
3. determine, in its reasonable discretion, the priority for payment of benefits among the various classes of beneficiaries under circumstances of unfunded or underfunded employer contributions; and
4. decline to process retirement, disability, or survivor benefit applications related to employment at agencies which have not made employer contributions at the statutory contribution rate (this includes unfunded, underfunded, and late contributions).

Record on Appeal ("RA"), tab 95 at 13-14 (Dec. & Order, Feb. 18, 2003). The matter stayed dormant for eight years until, in 2011, Guthrie filed two separate motions seeking to enforce the 2003 Order.

B. Guthrie's 2011 Motions to Enforce the 2003 Order

[4] In 2011, Guthrie filed his original Motion for Enforcement Order requesting, among other things, that the Board be ordered to advocate a particular position before the Legislature concerning pending bond legislation and the Fund be reimbursed the contributions not made to the Retirement Fund during FY 2011 together with penalties and lost investment returns due thereon from the proceeds of the bond being considered.

[5] A few months later, Guthrie filed a Supplemental Motion for Enforcement Order ("the Supplemental Motion") moving for the court to grant the request for relief made in his earlier Motion for Enforcement Order. Shortly thereafter, the trial court issued an Order to Show

Cause, to “afford[] [the Board] an opportunity to show that they had complied with [the 2003 Order], by acting in accordance with their fiduciary duties.” RA, tab 142 at 1-2 (Order Show Cause, Dec. 16, 2011). The trial court held a hearing on the Order to Show Cause. The Board claims that it explained “various actions they had taken to ensure . . . how the Fund would be repaid the delayed contributions” Appellee’s Br. at 17 (Sept. 22, 2014). The minutes only indicate a “status hearing in 6 months based on PDN possible release in June” and “Speaker and Chairman to give court progress report on next hearing. March 19, 2012 at 3:00 p.m.” RA, tab 152 (Mins., Jan. 12, 2012).

[6] In March 2012, the trial court denied Guthrie’s Motion for an Enforcement Order. The trial court held that “the Board [had] complied with its obligations prescribed by Guam law and this Court’s Order.” RA, tab 153 at 5 (Dec. & Order Mot. Enforcement, Mar. 13, 2012). The court explained:

At the hearing on the Order to Show Cause, the Board indicated that the Fund is next in line to be repaid from the government’s next general obligation bond. The Board indicated that bond funds would likely be released in June and that ensuring payment of those funds is a top priority of the Board. In the meantime, the Board asserts that the Fund continues to make all required benefit payments to its members and that all interest payments owed to the Fund are current. In order to ensure payment to the Fund out of the next bond issue, the Board shall appoint a representative to be present at any discussions between the Governor and Legislature in which priority of payments regarding the next general obligation bond will be discussed.

Id.

[7] Public Law 31-196 was subsequently enacted to allow up to “[\$26.4 million] for payments owed to the [Retirement Fund] for [DOE] and [GMHA] principal and interest pursuant to Public Law 28-38, as amended by Public Law 31-74” as a third priority payment in the first bond series; and “no less than [\$25.1 million] for payments owed to the [Retirement Fund] for [DOE] and [GMHA], and the [Bailout Agreement] principal and interest pursuant to Public law

28-38, as amended by Public Law 31-74, such that sums owed to the [Retirement Fund] by the government of Guam pursuant to Public Law 28-38, as amended, *shall* be extinguished in its entirety” in the second bond series. Guam Pub. L. 31-196:5-6 (Mar. 28, 2012).

[8] Guthrie then filed a Motion for Attorney’s Fees. In the accompanying Memorandum of Points and Authorities, Guthrie argued that he should be awarded attorney’s fees under the common fund doctrine. Guthrie argued that the issuance of the Order to Show Cause indicated that he was the prevailing party, or in the alternative, the trial court should consider awarding him attorneys’ fees because his Motion for Enforcement Order was a “catalyst precipitating the Board [to seek] payment of the \$6.8 M from the proceeds of the \$343 M bond.” RA, tab 170 at 2-13 (Mem. P. & A., Mar. 30, 2012).

[9] The trial court subsequently held a status hearing. The minutes indicated that the Governor “signed [the] bond bill,” and that a board member attended in support of the bill. RA, tab 173 (Mins., Apr. 2, 2012).

[10] In June 2012, pursuant to 5 GCA § 1512.3, the Retirement Fund received full reimbursement of all delayed contributions under the Bailout Agreement as well as full payment of P.L. 28-38 funds.

[11] Nearly a year later, the trial court filed a Decision and Order denying Guthrie attorney’s fees. The trial court found that Guthrie could not recover attorney’s fees under the common fund theory. The trial court also found that Guthrie should not be entitled to attorney’s fees under a catalyst theory. RA, tab 193 at 9-10 (Dec. & Order, May 31, 2013). Finally, the trial court stated that Guthrie was not entitled to attorney’s fees because he was acting *pro se*.

[12] Guthrie filed a Motion for Reconsideration of the trial court’s Decision and Order. The trial court denied Guthrie’s Motion for Reconsideration, explaining that Guthrie “ha[d] brought

to the Court's attention no material matter not already considered." RA, tab 214 at 4 (Dec. & Order Mot. Reconsideration of Decision Denying Pl.'s Mot., May 12, 2014).

[13] Guthrie filed a notice of appeal.

[14] After the parties' briefs were filed in this case, this court issued an Order *sua sponte* requesting the parties to submit supplemental briefs on the limited issue of whether the doctrine of sovereign immunity bars Guthrie's recovery of attorney's fees under the common fund doctrine against the Retirement Fund under the Defined Benefit Plan.

II. JURISDICTION

[15] This court has jurisdiction over an appeal from a final judgment of the Superior Court pursuant to 48 U.S.C.A. § 1424-1(a)(2) (Westlaw through Pub. L. 114-25 (2015)) and 7 GCA §§ 3107 and 3108(a) (2005).

[16] The doctrine of "[s]overeign immunity implicates a court's subject matter jurisdiction." *Sumitomo Constr., Co. v. Gov't of Guam*, 2001 Guam 23 ¶ 22 (citing *Wood v. Guam Power Auth.*, 2000 Guam 18 ¶ 10). Thus, "the defense of sovereign immunity can be raised at any time, either by a party or by the court." *Id.* (citing *Pac. Drilling, Inc. v. Marianas Drilling, Inc.*, Civ. No. 85-0016A, 1985 WL 56585, at *3 (D. Guam App. Div. Sept. 27, 1985)). The failure of the government to raise the defense does not constitute a waiver. *Id.* If sovereign immunity applies, the court lacks subject matter jurisdiction, and the action is barred. *Pac. Rock Corp. v. Perez*, 2005 Guam 15 ¶ 24.

III. STANDARD OF REVIEW

[17] "A question involving waiver of sovereign immunity is reviewed *de novo*." *Town House Dep't Stores, Inc. v. Dep't of Educ.*, 2012 Guam 25 ¶ 11 (citing *Sumitomo*, 2001 Guam 23 ¶ 7). The trial court did not address the issue of sovereign immunity. However, because the issue of

whether sovereign immunity bars Guthrie's suit is reviewed *de novo*, this court may make that determination for itself.

IV. ANALYSIS

A. Applicability of Sovereign Immunity

[18] “The Government of Guam enjoys broad sovereign immunity.” *Guam Fed’n of Teachers ex rel. Rector v. Perez*, 2005 Guam 25 ¶ 18 (citing *Sumitomo*, 2001 Guam 23 ¶ 8). Through the Organic Act of Guam, “Congress has provided a specific mechanism by which sovereign immunity may be waived.” *Sumitomo*, 2001 Guam 23 ¶ 8 (citing 48 U.S.C.A. § 1421a (1987)).

Section 1421a of the Organic Act provides:

The government of Guam shall have the powers set forth in this chapter, shall have power to sue by such name, and, *with the consent of the legislature evidenced by enacted law, may be sued* upon any contract entered into with respect to, or any tort committed incident to, the exercise by the government of Guam of any of its lawful powers.

48 U.S.C.A. § 1421a (emphasis added). Thus, in order for a suit to be maintained against the Government of Guam and any of its instrumentalities or agencies, sovereign immunity must be expressly waived by duly enacted legislation. *Guam Police Dep’t v. Superior Court of Guam*, 2011 Guam 8 ¶ 7; *Sumitomo*, 2001 Guam 23 ¶ 9; *see also Pac. Rock. Corp. v. Dep’t of Educ.*, 2001 Guam 21 ¶ 20 (indicating that sovereign immunity extends to the Government of Guam’s instrumentalities).

[19] Moreover, this court has held:

While sovereign immunity from suits applies to the “sovereign,” suits against government officers may properly be considered suits against the sovereign under certain circumstances. A judgment against a state official in his or her official capacity runs against the state and its treasury. A suit against an officer constitutes a suit against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect would be to restrain the Government from acting, or to *compel it to act*.

Guam Fed'n of Teachers, 2005 Guam 25 ¶ 19 (citations and internal quotation marks omitted).

[20] The Retirement Fund is an agency of the Government of Guam, and sovereign immunity applies to the Retirement Fund.¹ See 5 GCA § 6102 (listing the Retirement Fund in its list of autonomous agencies); see also *Guam Police Dep't*, 2011 Guam 8 ¶ 7 (finding that the Guam Police Department, as an agency of the Government of Guam, has the right to invoke sovereign immunity as a defense to suit). Moreover, members of the Board were sued as officials of the Retirement Fund in their official capacities. RA, tab 36 at 1-2 (First Am. Compl., Dec. 4, 2001). As such, sovereign immunity applies to the Board.

[21] In the following sections, we discuss potential sources of a waiver of sovereign immunity and potential instances in which sovereign immunity may not apply.

B. Waiver of Sovereign Immunity by Express Statute

[22] Sovereign immunity can be waived only by duly enacted legislation, and absent such legislation, the Government of Guam cannot be sued. *Guam Police Dep't*, 2011 Guam 8 ¶ 7; *Sumitomo*, 2001 Guam 23 ¶ 9; *Pac. Rock. Corp. v. Dep't of Educ.*, 2001 Guam 21 ¶ 20. We consider two potential sources of a statutory waiver of sovereign immunity: (1) The Government Claims Act, and (2) statutes that grant the right to sue and be sued.

1. The Government Claims Act

[23] Through the Government Claims Act, the Guam Legislature has provided a waiver of sovereign immunity “for certain governmental actions that are contractual in nature or that sound in tort.” *Guam Police Dep't*, 2011 Guam 8 ¶ 8 (citing 5 GCA §§ 6101-6404).

¹ The Government Claims Act further underscores our conclusion that sovereign immunity applies to the Retirement Fund. The Government Claims Act deals with the waiver of sovereign immunity for suits involving contractual issues or certain types of torts. 5 GCA §§ 6101-6404 (2005). However, the statute expressly excludes the Retirement Fund from the provisions of the Chapter. 5 GCA § 6104. If the Retirement Fund did not have sovereign immunity in the first place, there would have been no need for the Legislature to provide for this exclusion. Thus, sovereign immunity applies to the Retirement Fund.

[24] Specifically, the Government Claims Act provides that sovereign immunity is waived “for all expenses incurred in reliance upon a contract to which the Government of Guam is a party” and “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(a)-(b) (2005).

[25] Guthrie’s claim for attorney’s fees involves neither contractual issues nor claims in tort. Thus, the Government Claims Act is inapplicable in determining whether sovereign immunity is waived in this case.

[26] Furthermore, 5 GCA § 6104 explicitly exempts claims pertaining to the Retirement Fund from the provisions of the Government Claims Act. 5 GCA § 6104 (2005) (“This chapter shall not apply to any claim pertaining to any tax refund, the Workers Compensation Law, or the Government of Guam Retirement Fund.”); *see also Perez v. Guam Hous. & Urban Renewal Auth. (“GHURA”)*, 2000 Guam 33 ¶ 11 n.1.

[27] Therefore, the Retirement Fund’s sovereign immunity is not waived by the Government Claims Act.

2. “Right to Sue and be Sued”

[28] The Guam Legislature can waive the sovereign immunity of a public entity by granting it the “right to sue and be sued.” *See GHURA*, 2000 Guam 33 ¶ 11 (“Whether GHURA enjoys sovereign immunity is not at issue because the Legislature granted this agency the right to sue and be sued in its enabling legislation.”); *see also Guam Econ. Dev. Agency v. Island Equip. Co.*, 1998 Guam 7 ¶ 8.

[29] Title 4, Chapter 8 of the Guam Code Annotated, which governs the Retirement Fund, establishes four different programs: the Defined Benefit Plan, the Defined Contribution

Retirement System, the Deferred Compensation Program, and the Welfare Benefit Plans. 4 GCA §§ 8101-8407 (2005). Within the statutory scheme, the Guam Legislature has granted the right to sue and be sued, thus waiving sovereign immunity, for suits involving three of the four programs:

1. The Board of Trustees created pursuant to Article 1 of Chapter 8 of this Title shall administer the Government of Guam Defined Contribution Retirement System. The board may *sue and be sued*, contract and be contracted with and conduct all the business of the defined contribution system in the name of the Government of Guam Defined Contribution Retirement System. 4 GCA § 8204 (emphasis added).
2. The Board of Trustees created pursuant to Article 1 of Chapter 8 of this Title shall administer the Government of Guam Deferred Compensation Program. The Board may *sue and be sued*, contract and be contracted with, and conduct all the business of the Deferred Compensation Program in the name of the Government of Guam. 4 GCA § 8304 (emphasis added).
3. The Board of Trustees created pursuant to Article 1 of Chapter 8 of this Title, and authorized under Article 2 of Chapter 8 of this Title, shall administer the welfare benefit plans for members of the Government of Guam Defined Contribution Retirement System. The board may *sue and be sued*, contract and be contracted with and conduct all the business of the welfare benefit plans. 4 GCA § 8404 (emphasis added).

However, Article 1 of Title 4, Chapter 8, which establishes the Defined Benefit Plan, does not contain language granting the Board the “right to sue and be sued” in conducting the business of the Defined Benefit Plan. *See generally* 4 GCA §§ 8101-8173 (2005).

[30] This court’s opinion in *Sumitomo Construction, Co., Ltd. v. Government of Guam*, 2001 Guam 23, is enlightening in determining whether to find a waiver of sovereign immunity for lawsuits involving the Defined Benefit Plan. In *Sumitomo*, this court considered the issue of whether to find an implied statutory waiver of immunity against post-judgment interests for a breach of a procurement contract. *See Sumitomo*, 2001 Guam 23 ¶¶ 22-27. We found that “[w]hile there exists a statutory waiver of immunity against prejudgment interest for judgments

entered for the breach of a procurement contract, there is no similar express statutory waiver of immunity against post-judgment interest in either the Claims Act or the Procurement Law.” *Id.* ¶ 23. We held that “[u]nlike the waiver of immunity against prejudgment interest, the Legislature has not similarly consented to liability for post-judgment interest. The Legislature’s silence on this issue is determinative in light of the rule of statutory construction that waivers of immunity are to be strictly construed in favor of the sovereign.” *Id.* ¶ 25 (citing *Library of Cong. v. Shaw*, 478 U.S. 310, 318-19 (1986)). Because the power to waive immunity lies solely with the Legislature, “courts lack the authority to find an implied waiver of immunity even in the face of strong public policy favoring such a finding.” *Id.* ¶ 26.

[31] Applying *Sumitomo* to the case at hand, the Legislature has provided express statutory language waiving sovereign immunity for lawsuits pertaining to the Defined Contribution Retirement System, the Deferred Compensation Program, and the Welfare Benefit Plans. *See* 4 GCA §§ 8204, 8304, 8404. On the other hand, by refraining from including express language granting the “right to sue and be sued,” the Legislature has not waived sovereign immunity for lawsuits pertaining to the Defined Benefit Plan. *See generally* 4 GCA §§ 8101-8173.

[32] Guthrie bases his common fund doctrine claim on the assumption that he benefited members of the Defined Benefit Plan and seeks attorney’s fees from bond proceeds which were designated for and transferred to the Defined Benefit Plan. Because no statutory waiver of sovereign immunity exists for the Retirement Fund under the Defined Benefit Plan, this court lacks jurisdiction to hear this appeal.

C. Sovereign Immunity May Not Apply Where the Government is Acting in a Proprietary Function, as Opposed to a Governmental Function

[33] Guthrie argues that the Board’s action of recovering money owed to the Retirement Fund pursuant to P.L. 31-74 was a proprietary function, rather than a governmental function, because

of the Board's statutory duty to manage the Retirement Fund in the interest of the members of the Retirement Fund, as opposed to the general public. See Appellant's Supplemental Br. at 8-9 (Oct. 23, 2014) (citing 4 GCA § 8139.1(b) (2013)). Guthrie contends that the Fund is therefore not shielded by sovereign immunity in this matter. *Id.*

[34] Sovereign immunity may not apply in situations where the government is "acting in a proprietary function, as opposed to a governmental function." *Guam Police Dep't*, 2011 Guam 8 ¶ 13. "Proprietary functions are those 'conducted in [the government's] private capacity, for the benefit only of those within its corporate limits, and not as an arm of the government.'" *Id.* (quoting *Galveston Indep. Sch. Dist. v. Clear Lake Rehab. Hosp., L.L.C.*, 324 S.W.3d 802, 807 (Tex. App. 2010)). Proprietary functions are "exercised when an enterprise is commercial in character or is usually carried on by private individuals or is for the profit, benefit, or advantage of the governmental unit conducting the activity." *Id.* (quoting *Newman Mem'l Hosp. v. Walton Constr. Co.*, 149 P.3d 525, 535-36 (Kan. Ct. App. 2007)). Alternatively, governmental functions are those "undertaken 'in the performance of purely governmental matters solely for the public benefit.'" *Id.* (quoting *Clear Lake*, 324 S.W.3d at 807). Governmental functions are those "performed for the general public with respect to the common welfare for which no compensation or particular benefit is received." *Id.* (quoting *Newman Mem'l Hosp.*, 149 P.3d at 535-36).

[35] In the case *In re Camacho*, this court understood the difficulty of applying the governmental/proprietary distinction.² 2006 Guam 5 ¶ 47 ("Despite the application of the

² The *Camacho* court did note some clear-cut examples:

There exist some well-settled examples of governmental functions, such as those pertaining to the creation and enforcement of police regulations, the prevention of crime, and the preservation of public health. Furthermore, certain functions are generally viewed as proprietary, such as, the construction and maintenance of municipal water and light plants, . . . the constructions and

governmental/proprietary test by many courts, the distinction has received much criticism and has been regarded as difficult, if not impossible, to apply.”). “The governmental/proprietary test does not consist of a single criterion. Rather it is a collection of rules, each of which dictates that the presence of a certain factor will cause an activity of a public entity to be either ‘public’ or ‘private’ in nature.” *Id.* (quoting Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental Proprietary Maze*, 75 Iowa L. Rev. 277 (1990)).

[36] This court has not yet ruled on the issue of whether actions taken by the Retirement Fund are proprietary or governmental in nature. However, other jurisdictions have ruled that similar actions are governmental functions.

[37] Consider *Williams v. Houston Firemen’s Relief & Retirement Fund*, 121 S.W.3d 415 (Tex. App. 2003), which involved a statutorily created retirement fund for firefighters in Houston, Texas. The Texas Court of Appeals ruled that the retirement fund’s duties were governmental functions, stating:

The administration of the [firefighters’ retirement fund] and the promulgation and interpretation of the guidelines for its administration are thus expressly “enjoined” on the [city of Houston] by statute; and these powers are given to the [firefighters’ retirement fund] as part of the sovereignty of the state, by legislative authority, to be exercised by the board of trustees and the [city of Houston] for the general benefit of all who fall within the scope of the statute. They are thus governmental functions.

Williams, 121 S.W.3d at 438.

[38] In *Kansas Public Employees Retirement System v. Reimer & Koger Associates, Inc.*, the Kansas Supreme Court dealt with the issue of whether the investment activity of the Kansas

operation of garages and parking facilities for motor vehicles, and generally the management of property owned by the municipality.

2006 Guam 5 ¶ 43 (footnotes, citations, and internal quotation marks omitted) (citing 15 McQuillin §§ 53.30, 53.30.10 (3d ed. 1987)).

Public Employees Retirement System (“KPERS”) was a governmental function or a proprietary function. 941 P.2d 1321, 1328 (Kan. 1997). The Kansas Supreme Court explained that if it viewed each of KPERS’s investment actions and decisions separately as only a commercial transaction, it could find the acts to be proprietary in nature. *Id.* at 1341. However, the court adopted a broader perspective regarding the issue:

[I]t is more realistic to determine that the investment of KPERS funds is necessary to promote the public welfare generally and to satisfy the contractual and taxation obligations of the State of Kansas, the school districts, the municipalities, and the other governmental entities to their employees. This view indicates KPERS’s investment activities are governmental in nature.

Id. Accordingly, the Kansas Supreme Court held that the investment actions of KPERS were governmental functions. *Id.* at 1341.

[39] Similarly, the Michigan Court of Appeals ruled that the investment of Michigan retirement systems’ funds is a governmental function mandated by the Michigan Constitution and various statutes. *Colton v. State Treasurer*, 521 N.W.2d 620, 621 (Mich. Ct. App. 1994). Accordingly, the court held that the proprietary function exception to sovereign immunity did not apply. *Id.*

[40] Finally, in *Commonwealth v. Dauphin County*, the Pennsylvania Supreme Court determined that the State Employees’ Retirement System was a governmental function. 6 A.2d 870, 873 (Pa. 1939). The Pennsylvania Supreme Court emphasized the importance that the state places on securing and retaining the highest grade of employees to perform its work and that the implementation of a retirement system for public employees tends to make employees happier and more secure and satisfied in their employment, thus furthering efficiency. *Id.* The court stated:

[The Retirement System] certainly is not a private enterprise. It has not been developed to make the State employees a better class of citizens than other

employees. It has been established because the economic policy of the State is that the State will thereby secure a better class of employees, and in the economic evolution can we say that this is not a public purpose? We think not.

Id. (citations omitted). Accordingly, the court held that the performance of the state's obligation to compensate and protect its servants, as by the enactment of the State Employees' Retirement Act, is a governmental, rather than a proprietary function. *Id.*

[41] Likewise, this court finds that the actions taken by the Retirement Fund in this case are governmental functions, rather than proprietary functions. First, like that of the firefighters' retirement fund in *Williams*, the administration of the Defined Benefit Plan is expressly enjoined by statute. *See Williams*, 121 S.W.3d 415; 4 GCA § 8101 (2005) (describing the purpose of the retirement fund); 4 GCA § 8138(a) (2005) ("The general administration and the responsibility for the proper operation of the Fund . . . shall be vested in a Board of Trustees."); *see generally* 4 GCA §§ 8101-8407. Moreover, these powers are given to the Board by legislative authority to be exercised for the general benefit of all members who fall within the scope of the statute. *See* 4 GCA § 8101 ("The purpose of the Fund is to provide retirement annuities and other benefits for the employees of the government of Guam . . .").

[42] Second, it is reasonable to conclude that the Board's actions to recover the bond funds pursuant to P.L. 31-74 parallel the "investment actions" discussed by the Kansas Supreme Court and the Michigan Court of Appeals. *See Kansas Pub. Emp. Ret. Sys.*, 941 P.2d at 1341; *Colton*, 521 N.W.2d at 621. The recovery of bond funds is necessary for the Board to satisfy its fiduciary obligations to Government of Guam employees and to promote the public welfare generally.

[43] Finally, as in Pennsylvania, the Retirement Fund carries a public purpose in promoting the efficiency of government. *See* 4 GCA § 8101 ("The purpose of the Fund is to provide

retirement annuities and other benefits for the employees of the government of Guam . . . with the objective of encouraging qualified personnel to enter and remain in the service of the Government, thus effecting economy and efficiency in the administration of the Government.”). Thus, the performance of the Government of Guam’s obligation to compensate and protect its servants through the administration of the Retirement Fund is a governmental, rather than a proprietary function.

[44] Because the Retirement Fund’s actions are governmental functions, rather than proprietary functions, sovereign immunity shields the Retirement Fund from this lawsuit. There are other reasons why sovereign immunity may not apply in a particular case, which we must analyze to determine if they are applicable here.

D. Sovereign Immunity May Not Apply in Rare Cases Where Justice Demands Relief

[45] Sovereign immunity may not apply in cases where justice demands relief in equity. *Guam Police Dep’t*, 2011 Guam 8 ¶ 15. Specifically, sovereign immunity may be abrogated “in cases that involve a factual question of whether or not sovereign immunity has been statutorily waived based upon the commencement of a cause of action and the running of a statute of limitations.” *Id.* “Equity requires that a party be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period.” *Id.* (quoting *Atwater Elementary Sch. Dist. v. Cal. Dep’t of Gen. Servs.*, 158 P.3d 794, 797 (Cal. 2007)) (internal quotation marks omitted). In order to successfully demonstrate that the theory of equitable estoppel prevents the Government from invoking sovereign immunity, a claimant must prove inducement. *Id.* ¶ 16.

[46] There are no allegations or evidence that the Retirement Fund induced Guthrie into forbearing from bringing his lawsuit. Accordingly, equitable estoppel does not prevent the Retirement Fund from invoking sovereign immunity.

E. Public Funds

[47] Guthrie asserts that sovereign immunity only shields public funds. Appellant's Supplemental Br. at 9. He argues that because the Retirement Fund's assets are held in trust by the Board for the benefit of members of the Defined Benefit Plan, the assets are not public funds and the Retirement Fund is not protected by the doctrine of sovereign immunity. *Id.* at 10-11.

[48] In support of his argument, Guthrie relies on *Pensioners Protective Ass'n v. Davis*, 150 P.2d 974 (Colo. 1944), a decision from the Colorado Supreme Court. *See* Appellant's Supplemental Br. at 9-10 (citing *Davis*, 150 P.2d at 974). In *Davis*, the State Board of Public Welfare, in administering the pension fund, diverted surplus funds from the pension fund into other funds pursuant to statute. 150 P.2d at 974-75. The statute was found unconstitutional, and as a result of the litigation, the plaintiffs were responsible for the return of approximately \$400,000.00 to the pension fund. *Id.* at 975. After being denied by the trial court, the plaintiffs sought attorney's fees and costs on appeal. *Id.* at 974-75. The Colorado Supreme Court ruled that "state sovereignty" did not bar the recovery of attorney's fees:

Here, in marked contrast, there is a fund, wholly special, and of constitutional origin. It is administered by a board, statutorially [sic] denominated as 'trustee' thereof, in which relation, as we held in the *Davis* case, it is subject to judicial control and direction. The fund is not dependent upon legislative appropriation. The state, in its sovereign capacity, has, and can have, no interest therein. No relief against the state, as such, was sought originally, nor does the petition under consideration involve spoliation of the sovereign or inroads in, or forays, on, any state fund. The moneys involved are not public funds. They stand segregated for a special and designated use. The term "public funds" means funds belonging to the state. The term does not apply to special funds, which are collected or

voluntarily contributed, for the sole benefit of the contributors, and of which the state is merely the custodian.

Id. at 976 (citations and internal quotation marks omitted). Thus, attorney's fees and costs were not denied on the ground that it was violative of state sovereignty, since the pension fund was not a "public fund" belonging to the state. *Id.*

[49] In contrast, federal courts have held that the doctrine of sovereign immunity applies to cases where the government does not have an actual interest in the funds in question, but is in possession of the money. For instance in *Kalodner v. Abraham*, an attorney sought "an award of fees under the common fund doctrine for helping third parties recover money from a government-created escrow account held in the United States Treasury." 310 F.3d 767, 768 (D.C. Cir. 2002). The court held that sovereign immunity barred the lawsuit because "the *sine qua non* of federal sovereign immunity is the federal government's *possession* of the money in question. The government need not have an actual interest in the funds in order to invoke the defense." *Id.* at 770 (citing *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654 (1947)).

[50] Similarly, in *Okoro v. Callaghan*, the Seventh Circuit held that "[a] suit for restitution is subject to the defense of sovereign immunity when relief would require disbursement of money from the treasury, even if the government is merely an escrow agent holding funds owned by the plaintiff." 324 F.3d 488, 491 (7th Cir. 2003) (citations omitted).

[51] Finally, in *Harger v. Department of Labor*, the Ninth Circuit held that sovereign immunity was not waived in a case in which the plaintiff sued governmental entities for money in its possession. 569 F.3d 898, 903-06 (9th Cir. 2009). The federal circuit cases suggest that regardless of whether money is "public funds," the doctrine of sovereign immunity protects the government, so long as the government is in *possession* of the money.

[52] This court disagrees with the majority opinion in *Davis* and declines to adopt the holding of that case. We need not decide whether the government must have an actual interest in the property in order for sovereign immunity to apply. Instead, sovereign immunity applies as long as the government is in possession of the property. The policy behind sovereign immunity is driven, not only by the protection of public funds, but also by the efficient and uninterrupted administration of government functions.

V. CONCLUSION

[53] We find that sovereign immunity protects the Retirement Fund and hold that no statutory waiver of sovereign immunity exists for the Retirement Fund under the Defined Benefit Plan. Accordingly, this court lacks subject matter jurisdiction to hear this appeal, and the appeal is **DISMISSED**.

Original Signed: **F. Philip Carbullido**
By

Original Signed: **Katherine A. Maraman**
By

F. PHILIP CARBULLIDO
Associate Justice

KATHERINE A. MARAMAN
Associate Justice

Original Signed: **Robert J. Torres**
By

ROBERT J. TORRES
Chief Justice

I do hereby certify that the foregoing is a full true and correct copy of the original on file in the office of the clerk of the Supreme Court of Guam.

AUG 04 2015
By **AARON T. QUITUGUA**
Deputy Clerk
Supreme Court of Guam